

Searching for Order in Chaos: A Pluralist Critique of Global Constitutionalism.

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Abstract

It is clear today that the problems faced by the international community are truly ‘global’ in scale and require collective action well beyond the level of the nation-state. As a result of this, many contemporary scholars have turned to the idea of global constitutionalism as a potential panacea to these global issues, seeking to extrapolate the benefits of the constitution into the international system in order to harness globalisations more beneficial qualities while ameliorating its more dangerous traits. This thesis will address these ‘global constitutionalist’ arguments with a particular focus on global pluralism. It will suggest that the ‘mainstream’ global constitutionalist arguments are likely to fail in their mission of attaining the benefits of constitutionalism at the international level for two key reasons. Firstly, the visions of global constitutionalism offered by these global constitutionalists tend to be ‘partial’ in nature and underplay the importance of constitutionalism as a holistic phenomenon comprised of a symbiosis of normative and empirical characteristics, which, if unbound, fail to legitimate and control government in the desired fashion. Secondly, such visions fail to sufficiently account for the specific nature of global legal pluralism, which is driven in part by processes of fragmentation, undermining the potentiality for any form of coherent global constitutionalism which could span the entirety of the international system. Nonetheless, in the face of these hurdles, it will be argued that the international system might still possess certain structural elements that can render a modest form of ‘constitutional pluralism’. Consequently, although critical of more utopian notions of global constitutionalism because of insufficient engagement with the full spectrum nature of ‘constitutionalism’ as well as insufficient engagement with global pluralism, this thesis will suggest that constitutionalism might still have value as a useful tool for evaluating and improving governance in the global sphere.

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Introduction

It is clear today we exist in a world that has transcended the self-containment of the sovereign state. Globalisation means that in almost every sector, from the economy to the environment, interactions increasingly cross borders, meaning it is no longer possible for the state alone to regulate all activity within its own territory.¹ This has meant, in practice, that the fundamental rights and lives of individuals can be affected by the activities of entities anywhere across the globe. From global terrorism to climate change to the global financial crisis, many of the great challenges of our time transcend state boundaries and, increasingly, require states and other global entities to work together to find common ground.²

While the increased porosity of state boundaries has undoubtedly created and exacerbated problems of a global nature, it has also had positive effects in engendering a stronger commitment to our common humanity, leading to a vibrant discourse on global human rights.³ The global outcry against the horrors perpetrated by the Nazis during the Second World War created the perception that certain fundamental human rights transcended state boundaries and the protection of these rights was not just the responsibility of states, but of the international community as

¹ Smith, Gordon, and Moisés Naím. *Altered States: Globalization, Sovereignty, and Governance*. Idrac, 2000, pg.23. Fischer-Lescano, Andreas, and Gunther Teubner. "Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law." *Mich. J. Int'l L.* 25, 2003: 999. Peters, Anne. "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures." *Leiden Journal of International Law* 19.3, 2006: 579-610.

² Joerges, Christian, Inger-Johanne Sand, and Gunther Teubner, eds. *Transnational Governance and Constitutionalism*. Bloomsbury Publishing, 2004. Teubner, Gunther. *Constitutional Fragments: Societal Constitutionalism and Globalization*. Oxford University Press, 2012.

³ Risse-Kappen, Thomas, Stephen C. Ropp, and Kathryn Sikkink, eds. *The Power of Human Rights: International Norms and Domestic Change*. Vol. 66. Cambridge University Press, 1999. Steiner, Henry J., Philip Alston, and Ryan Goodman. *International Human Rights in Context: Law, Politics, Morals: Text and Materials*. Oxford University Press, USA, 2008.

a whole.⁴ This outcry birthed a global human rights discourse, which manifests in international organisations, states, non-governmental organisations (NGOs) and at every level of international society.

While the creation of a system that might ameliorate the dangerous and dialectal qualities of globalisation while also protecting fundamental, global human rights was undoubtedly stymied by the realpolitik of the Cold War, the decline of the Soviet Union and the victory of the 'liberal' west renewed hope that such a system could be constructed by the international community. Such a utopian vision of global government would be based not on age-old conceptions of balance of power and realism, but instead on a more utopian vision of international law, based on rule of law and human rights. Scholarly champions of such a vision included David Held, Christian Tomuschat, and Bruno Simma, who suggested that international relations and law might become disciplined within a wider normative and legal framework, where the transnational problems posed by globalisation would be regulated by robust international institutions which would ensure rule of law in the international system and protect basic individual rights at a global level.⁵

Emerging from this more utopian vision of global governance, the field of global constitutionalism emerged as an increasingly important school of thought within both international law and international relations. Scholars such as Bardo Fassbender, Erika De Wet, Anne Peters, and Ronald St. John Macdonald sought to extrapolate the benefits of constitutionalism into the international system as a

⁴ De Wet, Erika. "The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law." *European Journal of International Law* 15.1, 2004: 97-121.

⁵ Held, David. *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*. Stanford University Press, 1995. Simma, Bruno, et al., eds. *The Charter of the United Nations: A Commentary*. Vol. 1. Oxford: Oxford University Press, 2002. Tomuschat, Christian. *International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*. Martinus Nijhoff, 1999.

potential panacea to the many problems caused by unregulated and uncontrolled globalisation.⁶ Such scholars were hopeful that a renewed focus on global governance and international institutionalism might allow for key features of constitutionalism to emerge in the international system, focusing particularly on the creation and strengthening of robust institutions including the United Nations (UN) which could serve to define and enforce an emerging global constitution. In doing so, they hoped to bind together the many disparate and often conflicting forces in the international system in much the same way as the state constitution had done for the pre-modern state.

Looking at the condition of the contemporary global system, however, it is hard to argue that such visions of a harmonious and well-disciplined global order have come to pass. Tremendous humanitarian crises continue to rock the world. For example, appalling violence in Syria, Yemen, Burma, and in a number of African countries has created vast flows of displaced people desperately seeking sanctuary in safer countries.⁷ The United Nations and international community have often appeared impotent and deadlocked in the face of such problems, often more focused on geopolitical considerations than the general well-being of the international system. At the same time, exponential globalisation has led to the exacerbation of truly globalised problems such as transnational terror, cyber-crime, and the exploitation of people, particularly in developing countries, by multinational

⁶ De Wet, Erika. "The International Constitutional Order." *International & Comparative Law Quarterly* 55.1 2006: 51-76. Peters, Anne. "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures." *Leiden Journal of International Law* 19.3, 2006: 579-610. MacDonald, Ronald St John. "The International Community as a Legal Community." *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*. Leiden: Brill, 2005. Fassbender, Bardo. "The United Nations Charter as Constitution of the International Community." *Colum. J. Transnat'l L.* 36, 1998: 529.

⁷ Loring, Ariel, and Vaidehi Ramanathan. "Global Refugee Crisis." *Handbook of Writing, Literacies, and Education in Digital Cultures*, 2017.

corporations.⁸ Once again, the international community has not sufficiently coordinated and co-operated to combat such problems, allowing them to grow in both scope and magnitude. Thus, the more utopian, well-ordered global governance envisioned in the immediate aftermath of the Cold War does not appear to have come to pass.

Against this backdrop, this thesis will assess whether extrapolating the idea of constitutionalism to the international level might provide a suitable panacea for the problems identified above. To do so, it will seek to identify the core traits of constitutionalism before assessing whether such traits might be identified or established within the international system. At the most fundamental level, it will suggest that mainstream or 'liberal' visions of global constitutionalism which seek to identify or advocate a single global constitution are flawed both 'internally', on their own terms, and 'externally' when placed within the context of the broader international legal and political system. The 'internal' critique of the global constitutionalist argument will demonstrate that such visions fail because the institutional candidates posited as potential global constitutions (broadly the UN and WTO) at best only offer 'partial' visions of constitutionalism, which fail to include vital components of constitutionalism, such as separation of powers and representative democracy, and would thus fail to extrapolate the real benefits of constitutionalism into the international system.

Secondly, such visions fail to take into account the nature of 'global' legal pluralism, in which the disordered and fragmented nature of the global legal system does not lend itself well to overarching processes of constitutionalism because of the

⁸ Teubner, Gunther. "The Anonymous Matrix: Human Rights Violations by Private Transnational Actors." *The Modern Law Review* 69.3, 2006: 327-346. Stone, Diane, and Stella Ladi. "Global Public Policy and Transnational Administration." *Public Administration* 93.4, 2015: 839-855.

emergence of ‘autonomous’ legal orders within it, and the resulting conflict between these orders. However, this thesis will suggest that if constitutionalism is reimagined in a more modest, pluralistic way, it may well still have use as a heuristic device for better understanding and improving future forms of global governance.

However, before moving forward, it is useful to situate the argument within contemporary scholarship as well as to set out the research purposes of the thesis, since these are necessary to provide a framework on which the remainder of the thesis can stand. To do so, this introduction will be split into three parts. The first of these will offer some key background information, outline basic theories involved in the study, and define terms that will be fundamental to the forthcoming debate on global constitutionalism. The second part will outline the research questions, purposes and methods; in essence, outlining what the thesis aims to investigate, why, and how. Finally, the third part of this introduction will offer chapter summaries for the thesis, thus outlining both the content of what is covered within this thesis as well as the logic of how the content and arguments link together in relation to the main research question: **In a globalising world, to what extent can the benefits of constitutionalism be extrapolated to the global level as a solution to the collective action problems faced by the international community?** In doing this, the aim of this introduction is to provide a firm foundation on which the rest of this thesis builds.

1. Background

Globalisation has been front and centre in many of the most important debates on international law and international relations, and has thus opened up new frontiers of research and practice which have impacted substantially on the study of constitutionalism beyond the state. Three phenomena stand out in particular as

linking the debates on globalisation and global constitutionalism. Firstly, the increased porosity of state borders has led to what is described by Anne Peters as ‘deconstitutionalisation’, where state constitutions are unable to regulate the totality of affairs within their borders as a result of transnational influences, in turn raising questions as to whether a ‘compensatory constitutionalism’ in the international system might be necessary and beneficial.⁹ Secondly, and relatedly, prominent international institutions such as the United Nations and World Trade Organisation seek to regulate the governmental functions that have migrated from the domestic to the international sphere, leading scholars to argue that these important organisations might play a role in any emerging form of global constitutionalism.¹⁰ Finally, an emerging ‘global consciousness’ has led to an influential discourse on post-state justice, and thus the emergence of the global human rights agenda. This agenda can be seen prominently in scholarship and indeed in many multilateral treaties and declarations, notably in the UN Declaration of Human Rights, the International Covenant on Civil and Political Rights, Convention on the Rights of the Child, and many others.¹¹ As a result, scholars have argued that some of the legitimating features of constitutionalism, such as the limitation of power through law, might be utilised to help protect this global layer of human rights.

Globalisation refers to a ‘process by which national and regional economies, societies, and cultures have become integrated through the global network of trade,

⁹ Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures.” *Leiden Journal of International Law* 19.3, 2006: 579-610.

¹⁰ Fassbender, Bardo. “The United Nations Charter as Constitution of the International Community.” *Colum. J. Transnat’l L.* 36, 1998: 529. Trachtman, Joel P. “The Constitutions of the WTO.” *European Journal of International Law* 17.3, 2006: 623-646.

¹¹ Wotipka, Christine Min, and Kiyoteru Tsutsui. “Global Human Rights and State Sovereignty: State Ratification of International Human Rights Treaties, 1965–2001.” *Sociological Forum*. Vol. 23. No. 4. Blackwell Publishing Ltd, 2008.

communication, immigration, and transportation'.¹² This move towards globalisation has created both considerable opportunities and problems for the state, as boundaries become increasingly porous and the influence of non-state forces and actors continues to grow. Such forces include global financial markets, transnational criminal organisations, non-state armed groups, transnational advocacy networks, and many others.¹³ The benefits and dangers of globalisation are fiercely contested both within scholarship and between states and actors in the international system. Nonetheless, one thing is clear: Processes of exponential globalisation significantly reduce the capacity of the constitutional state to regulate activity within its own borders.¹⁴

In response, actors in the international system have increasingly turned towards global governance and international law to positively channel the productive powers of globalisation, attempting to limit the more destructive potentialities inherent within it. The result of this has been the emergence of many international institutions and organisations with varying degrees of prominence and influence. At a global level, organisations such as the United Nations and the World Trade Organisation attempt to govern the biggest global issues relating to global security and the global economy.¹⁵ At the same time, many smaller organisations exist to attempt to regulate a sub-field of the globalised international system. Examples of these organisations include, but are certainly not limited to, the Basel Committee on Banking Supervision, International Atomic Agency, and the

¹² Financial Times Lexicon: <http://lexicon.ft.com/Term?term=globalisation> – Accessed 12th Sept 2015.

¹³ Teubner, Gunther. *Constitutionalizing Polycontextuality* Social and Legal Studies, 19. 2010.

¹⁴ Peters, Anne. "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures." *Leiden Journal of International Law* 19.3. 2006: 579-610.

¹⁵ White, Nigel D. *The Law of International Organisations*. Vol. 1. Manchester University Press, 1996.

International Whaling Commission.¹⁶ These organisations increasingly play a role in the internal affairs of states, as well as possessing a substantial degree of control over outcomes in the international system.

At the same time, globalisation has led to an increasing perception that justice and human rights transcend state boundaries. Human rights, which were once broadly considered only within the remit of states, are now increasingly perceived as underwriting a global condition of moral and legal obligation.¹⁷ Beginning with the signing of the United Nations Declaration on Human Rights, an increasing number of important treaties and bodies have been created with the express intention of ensuring and enforcing human rights.¹⁸ Enormous reams of scholarship on human rights at a global level have also come into being to help explain this phenomenon and its meaning for human coexistence. The emergence of international criminal law as a discipline also highlighted for the first time that heads of states and others who committed severe crimes against universal human rights could be brought to justice at a global criminal level. Thus, importance was placed not just on the moral and legal obligations of the state, but also on the individual as a subject and object of international law.

These phenomena have cumulatively played a substantial role in breaking down age-old orthodoxies about the nature of international relations and international law. Such developments have thus helped to move the discourse away from the traditional *grundnorms* of state consent and state sovereignty within

¹⁶ Berman, Paul Schiff. *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*. Cambridge University Press, 2012.

¹⁷ See, for example Simma, Bruno, and Philip Alston. "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles." *Aust. YBIL* 12, 1988: 82.

¹⁸ Wotipka, Christine Min, and Kiyoteru Tsutsui. "Global Human Rights and State Sovereignty: State Ratification of International Human Rights Treaties, 1965–2001." *Sociological Forum*. Vol. 23. No. 4. Blackwell Publishing Ltd, 2008.

international law towards a post-state order in which non-state actors and individuals play a substantial role in affecting outcomes in the international system.¹⁹ It is against this backdrop that the concept of global constitutionalism emerged in earnest as an important part of international legal and political discourse. In response to these emerging background conditions, global constitutionalists seek to channel the potentially destructive forces unleashed by unrestrained globalisation by subjecting these forces to the rules of a constitution.²⁰ In other words, the aim of most global constitutionalists is to use theoretical and practical attributes of constitutionalism to legally and politically harness the beneficial qualities of a globalised world at the same time mitigating globalisation's more dangerous and dialectical attributes.

Nevertheless, it is important to note that global constitutionalism is not solely an idea born in the contemporary age, as modern global constitutionalism has roots in the scholarship of many past political and legal philosophers. For example, Cicero's early conceptions of a 'world order', which understood international relations through the lens of natural law substantially informed the ways in which later theories on global constitutionalism and, more broadly, political theory developed.²¹ The early-modern scholarship of Hugo Grotius, which conceived of international relations being governed through a 'common law among nations', informed on the 'basis of a broad moral consensus'²² further laid the groundwork for

¹⁹ Simma, Bruno, and Andreas L. Paulus. "The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View." *The American Journal of International Law* 93.2, 1999: 302-316.

²⁰ Peters, Anne. "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures." *Leiden Journal of International Law* 19.03, 2006: 579-610.

²¹ Cicero, Marcus Tullius. *Cicero: On the Commonwealth and on the Laws*. Cambridge University Press, 2017.

²² Grotius, Hugo, and Jean Barbeyrac. *The Rights of War and Peace, in Three Books: Wherein are Explained, the Law of Nature and Nations, and the Principal Points Relating to Government*. The Lawbook Exchange, Ltd., 1738.

conceptions of international constitutionalism based on a common framework of rights founded within a robust international legal system. The enlightenment scholarship of Emer De Vattel further theorised a European political and legal order based on the conception of sovereign equality, one in which laws and institutions based on this premise might create some form of proto-constitutionalist order.²³

While a number of scholars laid the philosophical groundwork for the emergence of global constitutionalism, the most expansive articulation of early global constitutionalism can be found in the political philosophy of Immanuel Kant, particularly in his seminal works of political philosophy, *Perpetual Peace* and the *Metaphysics of Morals*. In these works, Kant provides an outline for a ‘pacifist federation’ of states based on a form of constitutional organisation, which could ensure peace between nations as well as enforcing a basic level of cosmopolitan public rights.²⁴ Following on from this Kantian tradition, Alfred Verdross is often considered to be the true precursor to the modern constitutionalist argument. For example, Verdross argued that there was ‘constitutional law’ above and beyond the state in the norms of public international law, and that such a reading was crucial to understanding international law, identifying a ‘hierarchy of norms’ within international legal conduct that created the foundation for international constitutional law.²⁵

Thus the intellectual roots of international constitutionalism date back to at least the Enlightenment period, and such concepts were developed in the inter-war period, particularly by Verdross. However, scholarship on global constitutionalism

²³ De Vattel, Emmerich. “The Law of Nations or the Principles of Natural Law.” *Washington, DC: Carnegie Institution of Washington Carnegie Institution of Washington*, 1758.

²⁴ Brown. Garrett Wallace. *Grounding Cosmopolitanism: From Kant to the Idea of a Cosmopolitan Constitution*. Edinburgh: Edinburgh University Press, 2009.

²⁵ Verdross, Alfred. *Die Verfassung der Völkerrechtsgemeinschaft*. J. Springer, 1926.

only became a significant part of international legal discourse after the Second World War and in the light of the ‘institutionalisation’ of international law through the UN and the Bretton Woods institutions. In particular, the creation of the UN system can be seen as a catalyst for global constitutionalist thought. The entrenchment of particular norms within the UN Charter and wider system which have often been interpreted as having superior character over ordinary international law, as well as the creation of nascent institutional structures to enforce these norms led to the emergence of what might be termed the mainstream of global constitutionalism.²⁶ Such scholars include Christian Tomuschat, Erika De Wet, Anne Peters, Ronald St. John Macdonald, and Brun Otto Byrde.²⁷ While the particulars of such scholarship of course differ, certain core trends can be identified. In general, such scholars seek to identify ‘higher-law’ norms in the international system, which they then seek to entrench through strong institutional mechanisms. Christine Schwöbel and Jan Klabbers describe such scholars as belonging to the ‘Liberal’ school of global constitutionalism because of their focus on particular tenants of both ‘liberal legalism’ and ‘classical liberalism’, including a strong focus on individual human rights, limiting the exercise of public power through the rule of law, and the creation strong institutions to maintain that order.²⁸

²⁶ Vidmar, Jure. “Norm Conflicts and Hierarchy in International Law.” De Wet, Erika, and Jure Vidmar, eds. *Hierarchy in International Law: The Place of Human Rights*. OUP Oxford, 2012.

²⁷ Tomuschat, Christian. *International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*. Martinus Nijhoff, 1999. De Wet, Erika. “The International Constitutional Order.” *International & Comparative Law Quarterly* 55.1, 2006: 51-76. Bryde, Brun-Otto. “International Democratic Constitutionalism.” *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* 103, Martinus Nijhoff, 2005. Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures.” *Leiden Journal of International Law* 19.3. 2006: 579-610. MacDonald, Ronald St John. “The International Community as a Legal Community.” *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*. Martinus Nijhoff, 2005, pg. 863.

²⁸ Schwöbel, Christine EJ. *Global Constitutionalism in International Legal Perspective*. Vol. 4. Martinus Nijhoff Publishers, 2011, pp.49, 56, 74. Klabbers, Jan. “Setting the Scene,” in Klabbers, Jan, Anne Peters, and Geir Ulfstein. *The Constitutionalization of International Law*. Oxford University Press, 2009, pp.12-13.

The work of such scholars, of course, differs substantially in the particulars, but trends can be identified regarding normative entrenchment and institutionalisation. Verdross and Simma, for example, envisioned an international system set up much like a domestic constitution, with the UN organs providing an executive, legislative, and judiciary while *Jus Cogens* norms of public international law offering the normative framework under which these institutions would govern the international system.²⁹ Jürgen Habermas advocated for a multi-level constitution with a reformed UN playing the role as guardian of the global constitution and in particular focusing on core higher law norms relating to fundamental human rights and global security.³⁰ Christian Tomuschat also envisioned a global order based on the most fundamental norms of international law and enforced through the general strengthening of supranational institutions.³¹ Erika De Wet argues that an ‘international constitutional order’ exists which ‘comprises the fundamental norms of international law with *Jus Cogens* at its apex and with the UN providing the ‘key institutional linking factor’ to manifest these norms in substantive form.³² Other scholars, including Bardo Fassbender and Ronald St. John Macdonald, go further, suggesting that as the UN entrenches these fundamental norms into the international system as well as providing a system for their enforcement, it is not merely a part, but *is* the global constitution in itself.³³

²⁹ Verdross, Alfred, and Bruno Simma. *Universelles Völkerrecht*. Duncker & Humblot, 1984.

³⁰ Habermas, Jürgen. *The Divided West*. Polity, 2006.

³¹ Tomuschat, Christian. *International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*. Martinus Nijhoff, 1999.

³² De Wet, Erika. “The International Constitutional Order.” *International & Comparative Law Quarterly* 55.1 2006: 51-76, pg. 54.

³³ Fassbender, Bardo. “The United Nations Charter as constitution of the international community.” *Colum. J. Transnat’l L.* 36, 1998: 529. Ronald St. John Macdonald, *The International Community as a Legal Community* in Ronald St. John Macdonald and Donald M. Johnston ed., *Towards World Constitutionalism – Issues in the Legal Ordering of the World Community*, Martinus Nijhoff.

Other scholars, such as Anne Peters and Angelika Emmerich Fritzsche, while less convinced of the actual existence of a global constitution, nonetheless advocate the creation of such a global constitution through the strengthening of international norms and institutions, to ‘constitutionalise’ the international system.³⁴ Although important differences exist between global constitutionalists, most scholars of global constitutionalism share the view that extrapolating certain benefits of domestic constitutionalism (most notably ‘higher law’ norms, international institutions to enforce these norms, and courts to ensure they are upheld) into the international system is the most effective way to deal with global disorder and to ensure global human rights. This basic global constitutional perspective might best be considered as representing the ‘mainstream’ of thought on global constitutionalism, with its main aim to advocate the transposition of legal norms to the global level and entrench in a robust institutional structure to make global governance more effective, efficient, and just.

This traditional model of global constitutionalism has of course come under critique from a number of scholars who question its core premises. Much of this critique is premised on scepticism as to whether such an order would be constitutionally legitimate, focusing particularly on the absence of proper ‘power-limiting’ mechanisms within such an international order, as well as the absence of democratic decision making. Such scholars, including Rainer Wahl, Garrett Brown, Petra Dobner, and Thomas Giegerich, argue that traditional visions of global constitutionalism insufficiently take into consideration these required legitimating

³⁴ Emmerich-Fritzsche, Angelika. *Vom Völkerrecht zum Weltrecht*. Duncker & Humblot, 2007. ‘Short Summary in English’. Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures.” *Leiden Journal of International Law* 19.3. 2006: 579-610.

components of constitutionalism.³⁵ These scholars are often concerned with substantially reforming the international legal system to better represent wider global society as a prior condition for the creation of any kind of global constitutionalism to avoid this global constitutionalism simply reinforcing hegemonic or unfair practices in the international system. In doing so, they critique existing international organisations such as the UN and WTO for holding power over facets of the international system without sufficient accountability, an argument which often clashes with the law and institution-focused constitutionalism of scholars such as Erika De Wet and Bardo Fassbender.

Adding to these internal critiques of global constitutionalism, other scholars criticise mainstream visions of global constitutionalism on the grounds that they do not sufficiently take into account the ‘pluralistic’ nature of the international system. Such scholars as Gunther Teubner, Nico Krisch, and Neil Walker suggest that traditional views on global constitutionalism fail to take into account the decentred, pluralistic nature of the international system, and that any vision of global constitutionalism must take into account the vast number of independent regimes, sub-regimes, and societal orders which exist in the international system.³⁶ They note, respectively, the phenomenon of pluralism and associated phenomena of fragmentation and privatisation as re-organising the international system into a truly

³⁵ Dobner, Petra “More Law Less Democracy.” *The Twilight of Constitutionalism*, Dobner and Loughlin (eds) Oxford University Press, 2010. Wahl, Rainer “In Defence of Constitution.” *The Twilight of Constitutionalism*, Dobner and Loughlin (eds), Oxford University Press, 2010. Giegerich, Thomas. “The Is and Ought of International Constitutionalism: How Far Have We Come on Habermas’s Road to a Well-Considered Constitutionalization of International Law?” *German LJ* 10, 2009: 31. Brown, Garrett Wallace. “The Constitutionalization of What?” *Global Constitutionalism* 1.2, 2012: 201-228.

³⁶ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010. Walker, Neil. “The Idea of Constitutional Pluralism.” *The Modern Law Review* 65.3, 2002: 317-359. Teubner, Gunther. “Fragmented Foundations” in Dobner and Loughlin (eds) *The Twilight of Constitutionalism*, Oxford University Press. 2010.

post-state constellation, holding that any form of global constitutionalism must reflect this form of radical global reordering.

As the brief sketch above suggests, there is considerable scholarship on global constitutionalism, and this has emerged as a means in which problems of global co-operation/cohabitation might be addressed in the contemporary international system. Although this dissertation will explore these ideas in greater depth in the following chapters, it was important to provide here a basic thumbnail sketch of global constitutionalism writ large since it will help to provide background for explanation of how this thesis is organised conceptually, methodologically, and in terms of logical structure. With this in mind, the following section will now outline the conceptual and methodological aspects of the thesis, as well as defending why this research is necessary and why further research in this area is important.

2. Research Purposes

The primary purpose of this thesis will be to answer the question:

In a globalising world, to what extent can the benefits of constitutionalism be extrapolated to the global level as a solution to the collective action problems faced by the international community?

Despite the vast dynamism and positive potentialities within globalisation that might help to build a better world, it is also undeniable that the process has caused tremendous, world-spanning problems. As Gunther Teubner states, ‘the rise of transnational terror groups, the global financial crisis, and increasing human rights violations by multinational corporations, among others, all have the capacity to seriously challenge the security and stability of the global order’.³⁷ What is also true is that these problems cannot be answered by any one state alone. At the same time,

³⁷ Teubner, Gunther. “*Constitutionalising Polycontextuality*”, *Social and Legal Studies*, 19, p.1.

the idea that certain 'global' human rights transcend state boundaries and should be protected by the international community has taken on increasing salience and eminence within both political and academic discourse. In the wake of these two important developments, the search for more effective and just systems of global governance and government has taken on considerable urgency.

In response to this need for more effective and just global governance, the concept of global constitutionalism has become an important part of discourse within both international law and international relations. As we have seen, advocates of such a philosophy believe that constitutionalism might be extrapolated into the international legal and political systems to provide this more effective and just form of global governance, particularly given serious and sustained failures of global co-operation to tackle many of these issues. Constitutionalism is seen as an important tool for enhancing the capacity of the international system to deal with collective action problems as a result of its considerable success at the domestic level in both bringing together disparate orders under a single, unified system of norms and laws and in protecting individual rights against potential abuses of government power.³⁸ If such solutions could be applied effectively at a global level, it is not implausible that a radical transformation might occur which could enormously benefit the international system by both controlling the more dangerous elements of globalisation while simultaneously strengthening the 'global' level of human rights protections. Given both the scale of contemporary global problems and the potential value of this more effective, constitutional global system, a better understanding of

³⁸ See, for example Peters, Anne. "The Merits of Global constitutionalism." *Indiana Journal of Global Legal Studies* 16.2, 2009: 397-411. Peters, Anne. "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures." *Leiden Journal of International Law* 19.3. 2006: 579-610. Also Schwobel, Christine. "The Appeal of the Project of Global Constitutionalism to Public International Lawyers." *German LJ* 13 (2012): 1, pp.6-15, into which Schwobel outlines in some depth the normative goals of the global constitutionalism project.

the debate and value of global constitutionalism in solving these collective action problems is clearly important to wider debates on global government.

This thesis, through critically analysing and testing the core precepts of constitutionalism against the empirical realities of the international system, will assess the utility of global constitutionalism as a mechanism for solving these problems in the international system. Although not officially demarcated so within the thesis, this critical analysis might be divided into three main tranches, each of which builds on the next to offer a more holistic analysis of the global constitutionalism debate.

The first two chapters focus on building a definition of and framework for constitutionalism by outlining both its key normative and empirical traits. Chapters 3 and 4 then offer an ‘internal’ critique of key visions of global constitutionalism by testing the key proposed ‘candidates’ for global constitutionalism, and the related, more partialised vision of international ‘constitutionalisation’, against the empirical and normative traits of constitutionalism espoused in the first two chapters. Chapters 5 and 6 move on to the ‘external’ critique of global constitutionalism by testing comprehensive visions of global constitutionalism against the pluralist realities of the global system. Ultimately, this analysis will suggest that mainstream visions of global constitutionalism are unsuccessful at both the internal and external levels. At the ‘internal level’, such visions fail as the core ‘candidates’ offered as the basis for a global constitutionalism, in particular the WTO and the UN, do not possess the full range of requisite and required constitutional characteristics, and the more partial visions they do offer are insufficient to realise the benefits of constitutionalism to which they aspire. At an ‘external’ level, visions of global constitutionalism are substantially undermined by the nature of global legal

pluralism, which is, to a great extent, defined by the general dispersal and decentralisation or ‘fragmentation’ of legal authority resulting in a system which is ultimately chaotic and prone to conflict. Nonetheless, in the face of these hurdles, it will be argued in the final chapter that the international system might still possess certain structural elements that can render a modest form of ‘constitutional pluralism’. These potential elements can be particularly strengthened if the behaviour of powerful actors in the international system accommodates for such an emergence. Consequently, although critical of more utopian notions of global constitutionalism because of insufficient engagement with global pluralism, this thesis will ultimately argue that there is still important heuristic value for assessing developments in the international system within a global constitutionalist approach, and that by doing so it is possible to accept the limiting factors of pluralism without also wholeheartedly surrendering a normative commitment to global legal reform.

Clearly, considerable research has been done on global constitutionalism and this thesis is not the first substantive piece of work assessing the field or critiquing particular scholars within it. For example, scholars such as Christine Schwöbel, Rainer Wahl, Garrett Brown, and Jan Klabbbers touch upon many of the critiques of global constitutionalism that are made in this thesis, in particular the problems with conflating more partial processes of constitutionalisation or legalisation with the more fully fledged idea of constitutionalism.³⁹ However, much of this work is exploratory and does not build a comprehensive methodological and definitional

³⁹ Klabbbers, Jan. “Constitutionalism Lite.” *Int’l Org. L. Rev.* 1, 2004: 31. Schwöbel, Christine EJ. *Global Constitutionalism in International Legal Perspective*. Vol. 4. Martinus Nijhoff Publishers, 2011. Brown, Garrett Wallace. “The Constitutionalization of What?” *Global Constitutionalism* 1.2, 2012: 201-228. Wahl, Rainer “In Defence of Constitution.” *The Twilight of Constitutionalism*, Dobner and Loughlin (eds), Oxford University Press, 2010. Wahl, Rainer “In Defence of Constitution.” *The Twilight of Constitutionalism*, Dobner and Loughlin (eds), Oxford University Press, 2010.

framework to test the empirical assumptions made by core advocates of global constitutionalism. By setting out a rigorous, theoretical, and empirical framework for constitutionalism, and then testing it against the potentially ‘constitutional’ actors that have been identified in the international system, I believe my monograph builds upon the work of these scholars by offering a more methodologically comprehensive critique of many of the core assumptions made by global constitutionalists.

Important monographs have been published offering more comprehensive discussions on the idea of global constitutionalism and constitutionalisation. Two in particular stand out, Christine Schwöbel’s ‘Global Constitutionalism in International Legal Perspective’, published in 2011, and Aoife O’Donoghue’s ‘Constitutionalism in Global Constitutionalisation’, published in 2014.⁴⁰ These works broadly focus on a better understanding of the theoretical aspects and limitations of the debates on global constitutionalism and constitutionalisation more widely. For example, O’Donoghue focuses on ‘the character of global constitutionalisation theories and their relationship with constitutionalism, by ‘comparing and critiquing the various approaches to global constitutionalisation theories to establish their present state and their relationship to constitutionalism’.⁴¹ Schwöbel seeks to ‘critically examine public international law contributions to the debate on global constitutionalism’, highlighting problems within the theoretical assumptions behind the main, public international law-based approaches to global constitutionalism.⁴²

⁴⁰ O’Donoghue, Aoife. *Constitutionalism in Global constitutionalisation*. Cambridge University Press, 2014. Schwöbel, Christine EJ. *Global Constitutionalism in International Legal Perspective*. Vol. 4. Martinus Nijhoff Publishers, 2011.

⁴¹ O’Donoghue, Aoife. *Constitutionalism in Global Constitutionalisation*. Cambridge University Press, 2014, pg.7

⁴² Schwöbel, Christine EJ. *Global Constitutionalism in International Legal Perspective*. Vol. 4. Martinus Nijhoff Publishers, 2011, pg.1.

Thus, as substantive, theory-focused contributions already exist in the field, this thesis seeks to make an original contribution to the debate by taking a slightly different approach to the analysis of global constitutionalism. Rather than focusing on the theoretical aspects of the debate, this thesis rather seeks to assess the value of global constitutionalism/ constitutionalisation as a practical tool for solving problems in the international system, an area of research which is less developed and would benefit from a more comprehensive, methodologically rigorous approach to study. It is thus in the ‘to what extent’ aspect of the main research question, seeking to measure the value of constitutionalism as an actual, empirical tool for solving problems in the international system, that this thesis hopes to make a small contribution to the wider debate on global constitutionalism.

As well as the above contribution, this thesis also seeks to contribute to debates on both global legal pluralism and its relationship with global constitutionalism, building on the work of three key theorists: Neil Walker, Nico Krisch, and Gunther Teubner.⁴³ As regards Teubner, this thesis seeks to build upon his work on fragmentation and regime-conflicts by tying it more closely to wider debates on global constitutionalism by looking more deeply at empirical case studies regarding this ‘fragmentation’ of international law and practically demonstrating the impact of this phenomena on the wider debate on global constitutionalism. With regard to Nico Krisch, this thesis both seeks to support and build on some of his assertions regarding the difficulties of global constitutionalism, but also, in the final chapter, to provide something of a challenge to his view of an inherently antagonistic relationship between global pluralism and constitutionalism by placing it against some of the theoretical work of Neil Walker. Supporting Walker, the

⁴³ *Supra* note 36.

thesis will seek to build on his work by identifying where the ‘constituent power’ required for any form of constitutional pluralism might be found as well as within which areas of the international system such a constitutional pluralism might comfortably sit. In doing so it will seek to open up new spaces of interdisciplinary research between the topics of global pluralism and global constitutionalism.

Having outlined the research purposes and original contribution of this thesis, which answers the question of *why* this particular piece of research will be undertaken, I will now look at the *how* this research will be undertaken in terms of method and research focus to ensure a tight and exacting focus which remains focused on answering the core research question and thus providing an original contribution to the literature.

3. Research Focus/Method

Giving the tight and exacting focus of this thesis, which seeks to assess theoretical concepts against the empirical realities of the international system, I employ a primarily discursive and critical approach, which first sets out in logical steps the key purposes and goals of constitutionalism, before assessing these concepts against the empirical realities of the international system. Whilst founded on the theoretical concept of constitutionalism, aspects of this analysis are described as ‘empirical’, since they are premised on the testing of specific criteria against the observable, real world organisations and structures in the international system in order to draw conclusions.⁴⁴ To rigorously assess the utility of global constitutionalism as a mechanism for better regulating the international system, a sound set of definitional parameters for the idea of constitutionalism itself is,

⁴⁴ Penn State Guidelines ‘What is Empirical Research’ -<http://guides.libraries.psu.edu/emp> – Accessed 15th Jan 2018.

therefore, of course necessary to provide the framework against which prospective global candidates could stand.

Thus, the first methodological step in this thesis was the construction of such a rigorous definition, which required answering the question ‘what is constitutionalism’ to identify core characteristics that could be taken forward to the wider analysis on global constitutionalism. To identify these core characteristics, a thorough study of the three most influential modern constitutions, the British, French, and American constitutions, was undertaken looking both at the philosophical antecedents of these constitutional orders and their empirical structure. Given the vast plethora of constitutions in the world, these constitutions were selected because of their huge historical influence, which has meant their methods and structures have provided the source material and structural inspiration for many other important constitutions around the globe. While other important definitions and concepts will be discussed in-text, given the importance of this definition to the thesis, I will outline the definition of constitutionalism reached here below as well as the empirical components required for the operation of such a system. This will be done for brevity and easy reader access.

Accordingly, *constitutionalism* requires the ‘establishment of a legitimate and comprehensive framework for the exercise of public power’.⁴⁵ The legitimacy of the constitution relies on two core characteristics: Limiting the exercise of political or public power through the rule of law, as well as ultimately relocating the locus of sovereignty away from the government and into the people. In order for such a constitutional order to operate in practice, two core empirical characteristics

⁴⁵ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pg. 64.

are essential. Firstly, the three core functions of government – the legislative, executive, and judicial – must be separated. Secondly, the ‘constituent power’ of the people must be actively channelled through some form of representative democracy. Importantly, the various normative and empirical components of constitutionalism must work as a symbiotic whole to achieve the ‘legitimate and comprehensive’ framework for public power that constitutionalism aspires to. As well as this, the constitution must be ‘comprehensive’ in that, ultimately, no ‘extra constitutional’ authority that does not derive its legitimacy or right to govern from the constitutional system can exist.⁴⁶

The terms ‘constitution’ and constitutionalism have been used in a vast number of ways in international discourse, literature, and practice. To maintain methodological and analytical focus, this thesis concentrates on visions of global constitutionalism that maintain an identifiable link with the domestic ‘source’ of constitutionalism, on which the above definitions are based. Thus, this thesis focuses on visions of global constitutionalism, which, at least to some extent, seek to extrapolate or borrow from this source. The focus on mainstream visions or ‘liberal visions’ of global constitutionalism in Chapter 3, or the ‘constitutionalisation’ thesis in Chapter 4, is thus a result of the explicit attempt of such visions to extrapolate particular aspects of constitutionalism into the international system (such as rule of law, charters, political institutions, courts or democracy) to replicate the benefits. Remaining within this particular framework ensures focus on the core research question. As a result, this thesis does not address particular contemporary visions of ‘global constitutionalism’ such as that of

⁴⁶ The construction of this definition is spread over two chapters and that research is referenced extensively. Therefore, here, I have only provided a reference to the definition itself, which is directly taken from Nico Krisch’s work.

Riccardo Prandini or particular aspects of Gunther Teubner's work which seek to fundamentally 'break' from these core traits and redefine constitutionalism in some form of systems-theoretic or 'societal', model which focuses on societal self-constitution rather than the key empirical themes derived from domestic constitutionalism outlined in Chapters 1 and 2.⁴⁷ While such research is undoubtedly interesting and topical, it is beyond the methodological and empirical scope of this thesis, and addressing it would not contribute significantly to answering the core research question.

The empirical analysis of global constitutionalism takes as its key institutional 'objects of study', the UN, the World Trade Organisation, and to a lesser degree, the Bretton Woods institutions. In terms of the first two, the reason for their inclusion is relatively clear. These organisations are the ones most often cited in visions of global constitutionalism that seek to extrapolate the benefits of constitutionalism into the international legal system as the result of both their global reach and possess of certain 'constitutional' characteristics such as charters and courts. By analysing such organisations within the conceptual framework for constitutionalism developed in the first two chapters of the thesis, I produce an exegetical argument which challenges mainstream visions of global constitutionalism on their own terms, thus remaining methodologically consistent and focused. In terms of the Bretton Woods institutions, while less frequently cited

⁴⁷ In Particular, See *Constitutional Fragments: Societal Constitutionalism and Globalization*. Oxford University Press, 2012, pp. 55-60, in which Teubner explicitly rejects the possibility of any kind of 'symbiotic' constitutionalism in the international system based on the structural coupling of normative and empirical characteristics that I describe in chapters 1 and 2 of the thesis to create a framework for the idea of constitutionalism as being essentially implausible and unreachable, and instead seeks to entirely 'respecify' the constitutional concept for the functionally differentiated international system. In doing so, Teubner clearly steps outside the methodological and conceptual boundaries of this thesis and its outlined purposes. Also, Prandini, Riccardo "The Morphogenesis of Constitutionalism". *Twilight of Constitutionalism*, Oxford University Press, 2010, offers another, similar vision of 'societal' constitutionalism divorced from the fundamental ideas I argue and demonstrate to be necessary to constitutionalism.

in global constitutionalist literature, they are addressed as something of both a preface and broader support to the wider argument about the ‘constitutionalisation’ of particular economic norms into the international system, and therefore worthy of inclusion in the wider debate.

If constructing a definition of constitutionalism was the primary methodological move required to provide a broader framework for this analysis, then the idea of *legal pluralism* which dominates the final analytical section of the thesis was of almost equal importance. As I will iterate, *legal pluralism* at its core relates to the ‘existence of multiple legal orders within one social field’.⁴⁸ However, given substantial and unresolved debate about what constitutes a ‘legal order’, a more catchall definition of *legal pluralism* outlining the specific nature of these orders is more difficult. To overcome this limitation, legal pluralism was analysed in terms of its direct relationship with *constitutionalism*, in which it was demonstrated that the co-existence of the two potentially opposing forces was premised on the *autonomy* of these plural orders being *recognised* and incorporated by the constitutional system. Offering this dialectical analysis of the relationship between *legal pluralism* and *constitutionalism* ensures methodological rigour for the critical analysis of the relationship between *global legal pluralism* and global constitutionalism.

As the globalisation-related problems identified in the core research purposes of the thesis include not only ‘inter-state’ problems, but also wider problems relating to the impact of non-state actors, the analysis of ‘global legal pluralism’ seeks to cast a wide research net, addressing not simply traditional ‘inter-state’ legal orders, but also the host of more informal and quasi-legal orders, in

⁴⁸ Merry, Sally Engle. “Legal Pluralism”. *Law & Society Review* 22.5, 1988: 869-896, p.870.

particular the emerging *lex mercatoria* of transnational finance and transnational corporations which impact on the international system more broadly. The case studies utilised (The GMO conflict, the conflict between the CBD and TRIPS, and the effect of transnational corporations) are chosen to give the widest possible understanding of the many ways in which the radical decentralisation and fragmentation of international law impacts on any concepts of a holistic global constitution, both at the level of ‘inter-state’, as well as post-state global orders.

As iterated above, this thesis seeks to maintain a tight focus on the specific research question regarding global constitutionalism’s utility as a problem solving mechanism. Therefore, discussion of other aspects of global governance are only addressed where pertinent to this debate or where their exclusion might undermine or weaken the contribution of the thesis. However, the absence of one particular framework from this analysis, that of world government, requires further justification as a result of some of the potential links and similarities between ideas of global constitutionalism and world government. World government scholars, while in themselves hugely diverse in views, are united in the idea of the creation of a common political authority for all mankind. Such a philosophy is concerned, in a globalised world, with solving common problems through the verticalisation of institutional power in the international system into some form of global government.⁴⁹

In a similar way to global constitutionalism, the aims of world government advocates, and the way in which they see such a global government, vary widely. For example, Campbell Craig and Louis Pojman offer an almost Hobbesian vision

⁴⁹ Cabrera, Luis. “World Government: Renewed Debate, Persistent Challenges.” *European Journal of International Relations* 16.3, 2010: 511-530.

of world government, where the only way to attain security in the face of massive threats such as nuclear weapons and transnational mass terrorism is with a strongly empowered global government ‘sword at the ready’ to mitigate pressing issues of global security.⁵⁰ Other visions, such as that of Deudney, argue for a ‘federalised’ form of world government where semi-autonomous states exist within a higher overarching structure.⁵¹ Held, Archibugi, and Falk, seeking to better legitimise global governance, call for greater democracy, which might be manifested in some form of world parliament.⁵² Certain other scholars, such as Frankman and Marchetti, go further yet, and argue for a fully-fledged world state as the only way in which the truly transnational problems of today can be combated.⁵³

It is clear that many of the concepts discussed within ‘world government literature’, particularly in terms of the centralisation of global governance, and the creation of wider structures also have pertinence to the debate on global constitutionalism, and thus the question of whether a world government would be normatively desirable, or indeed whether we are moving towards one, may also be relevant to similar questions regarding global constitutionalism. Indeed, the work of Habermas might be thought of as building a bridge between these two disciplines.⁵⁴

However, despite these potential parallels, this thesis will not address the question of world government, primarily for reasons of methodology and focus. As I

⁵⁰ Craig, Campbell. ‘The Resurgent Idea of World Government’, *Ethics & International Affairs* 22 (2) 2008: 133-42. Pojman, Louis, 2006. *Terrorism, Human Rights, and the Case for World Government*. Lanham: Rowman & Littlefield.

⁵¹ Deudney, Daniel H. *Bounding Power: Republican Security Theory from the Polis to the Global Village*. Princeton: Princeton University Press. 2007.

⁵² Held, David. *Global Covenant: The Social Democratic Alternative to the Washington Consensus*. Cambridge: Polity. 2004. Falk, Richard, and Saul Mendlovitz, eds. 1966. *The Strategy of World Order*, Volumes I-IV. New York: World Law Fund. Archibugi, Daniele. ‘Cosmopolitan Democracy and its Critics: A Review’, *European Journal of International Relations* 10 (3): 437-73. 2004.

⁵³ Frankman, Myron J. *World Democratic Federalism: Peace and Justice Indivisible*. Houndmills: Palgrave Macmillan. 2004. Marchetti, Raffaele. *Global Democracy, For and Against: Ethical Theory, Institutional Design, and Social Struggles*. London: Routledge 2008.

⁵⁴ See, for example Habermas, Jürgen: *The Postnational Constellation: Political Essays*. 2001.

stated above, ‘constitutionalism’ has definitive normative and empirical characteristics which form the methodological basis for this analysis. World ‘government’, on the other hand, is a vastly diverse debate on its own accord, and there is certainly no set idea of what would constitute such a world government, or what characteristics would be required to call a supranational institution a world government. To incorporate the question of world government into my analysis, it would be necessary to define what such a term could or would mean, what characteristics would be required for this ‘world government’, and indeed whether such a government would be desirable or whether such a system would possess suitable characteristics as a container for global constitutionalism. Such research may indeed be valuable in the future to build interdisciplinary bridges between the two ideas. However, these questions will not be addressed in this thesis, as to attempt to address such empirically and theoretically dense questions, many of which are not directly pertinent to the key research question of this thesis, would create methodological problems by seeking to measure developments in the international system against *two* different empirical and theoretical frameworks, one based on ‘constitutionalism’, and the other based on whatever conception of world government was constructed in the thesis. Doing so would result in neither question being treated with the theoretical and empirical rigour required for a comprehensive and methodologically sound thesis. To address world government within the paradigm of global constitutionalism with the required rigour, the inter-relationship between these two concepts would have to form the primary basis for analysis. As the core research question of this thesis focuses specifically on the characteristics of constitutionalism and its value in the global system, the question of world government will not be addressed herein.

Having outlined above the research focus and methodology of the thesis, I will now go on to offer a set of chapter summaries to help guide the reader better through the thesis.

4. Chapter Summaries

Chapter 1, Entitled '*What is Constitutionalism?*', seeks to identify the core characteristics of constitutionalism with the intention of providing a definition of the concept which can be taken forward for later analysis on global constitutionalism. This chapter primarily uses historical narrative to tease out these core characteristics. It begins by demonstrating that constitutionalism, in fact, has antecedents in antiquity, focusing particularly on the work of Aristotle and Cicero. Moving on from these scholars, it will suggest that the core characteristic of pre-constitutional government in the late medieval and early modern period was the 'absolute' character of the sovereign's power, and it was this core quality that early constitutionalists in France and the United States such as Montesquieu, Paine, and Rousseau sought to unbind and replace with 'legitimate' government, thus creating rightful rule in the wake of tyranny. It will go on to suggest that to produce this new and legitimate government, a constitution was required to fulfil two key functions. Firstly, it was required to limit the exercise of public power through the creation of a strong 'higher-law' structure which bounds the exercise of politics within a strong and durable rule of law framework. Importantly, this must be done comprehensively to ensure the coherence and legitimacy of the overarching order. Secondly, government must rest on the 'consent of the governed' through some form of popular sovereignty as the right to fundamental right to rule must lie with the people, not the government. Thus, this chapter will define constitutionalism as requiring the establishment of a 'legitimate and comprehensive framework for the

exercise of public power'. After doing so, it will briefly go on to look at British constitutionalism, demonstrating that, despite some rather superficial differences, at a core level it too was concerned with the limitation of the exercise of political power through a strong rule of law framework and also with popular sovereignty exercise through the core constitutional principle of parliamentary sovereignty.

The second chapter of this thesis, entitled '*Forging the Constitution*': *The Empirical Characteristics of the Constitution*', will look at the empirical characteristics required for constitutionalism to establish a 'legitimate and comprehensive framework for the exercise of public power'. It will do so to further strengthen the analytical framework for later analysis on global constitutionalism. This chapter will suggest that constitutionalism requires two core empirical characteristics. The first is a 'separation of powers' between executive, legislative, and judicial order to ensure that no organ of government can exercise power arbitrarily and rule of law is followed. To make this claim, it will first focus on the work of the Baron Montesquieu who was the progenitor of the modern idea of separation of powers and demonstrated that there was not merely a requirement for the *functions* of government to be separated, but that within a constitutional system, each 'function' of government in terms of legislative, executive, and judiciary must fundamentally be exercised by a different organ and personnel. It will then go on to look at the British, French, and American constitutionalism, as, despite differences, the separation of powers between these three organs is core to the practice of modern constitutionalism. The chapter will then turn to the second core characteristic of constitutionalism, that the popular sovereignty of the people must ultimately be channelled through some form of 'constituent power'. Through a focus on the work of Abbe Sieyes and Martin Loughlin, and with references to

important constitutional states, it will suggest that ultimately this power must be channelled through some form of representative democracy.

The third chapter, entitled simply '*Global Constitutionalism*', will seek to introduce and analyse mainstream or 'liberal' visions of global constitutionalism which seek to identify, posit, or advocate the existence of a single global constitution in the international system. It will begin by introducing some of the background conditions for global constitutionalism, demonstrating that domestic deconstitutionalisation and the emergence of a global human rights discourse have been the two major forces behind global constitutionalism. Moving on from this, it will offer an overview of some of the most important global constitutionalists who subscribe to a 'liberal' vision of global constitutionalism. It will suggest that, despite differences, certain core similarities can be identified between these scholars in their vision of global constitutionalism. Namely, such scholars focus on the identification of certain higher law norms and principles in the international system which would then find their substantive and institutional home in the UN, thus ensuring that exercise of power within the international system is constrained by a rule of law framework. This chapter will then analyse such visions.

It will suggest, through looking at norms entrenched in the UN as well as the increasing recognition of Jus Cogens, that some sort of normative hierarchy might be identifiable within the international system. Ultimately, however, it will submit that such visions are limited at the institutional level, since the UN is not a suitable vehicle for the global constitution as a result of the absence of a genuine 'separation of powers' and the dominance of the Security Council. It will demonstrate through an assessment of Security Council history and practice that no clear limits exist on the conduct of the council either legally or institutionally, meaning the council can

exercise power selectively and arbitrarily. As a result, the UN is unlikely to provide the requisite rule of law framework required for genuine constitutionalism. Finally, it will suggest that, on top of this, it is almost impossible to identify any genuine and active ‘constituent power’ within the UN system, further weakening its claim as a global constitution.

The fourth chapter, entitled ‘*The Constitutionalisation Thesis*’ will seek to address Anne Peters ‘constitutionalisation thesis’, which suggests that ‘domestic deconstitutionalisation could and should be compensated for by the constitutionalisation of international law’.⁵⁵ Importantly, this constitutionalisation process could refer to specific international organisations and not the global system as a whole, and generally refers to a specifically legal process of verticalisation. This chapter will suggest that, as a result of the inherently conservative nature of constitutionalisation, caution must be taken when making such claims as such a process could lead otherwise to the entrenchment of ‘negative’ pathways in the international system. It will suggest this by looking at one of the prime candidates for constitutionalisation, the ‘liberal’ global economic order. Through looking at the practice of both the IMF and WTO, it will suggest that ultimately, both organisations have a structural bias towards a particular neoliberal vision for the global economy that favours specific powerful interests in the international system and disadvantaging others. Thus, it will argue that ‘constitutionalisation’ cannot be considered an inherent good, and processes must be assessed individually on their respective merits.

⁵⁵ Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures.” *Leiden Journal of International Law* 19.3. 2006: 579-610 pg. p580.

The fifth chapter, entitled ‘*Constitutionalism and Legal Pluralism*’ will – with a view to a wider analysis of the relationship between global constitutionalism and global legal pluralism – seek to offer an analysis of the concept of legal pluralism as well as its relationship with constitutionalism. It will begin with a brief history of legal pluralism. This history will chart the phenomenon of legal pluralism, demonstrating its development from ‘raw, unregulated’ form that existed in medieval times to a more disciplined form under the modern state. It will suggest that while legal pluralism continues to exist in the modern state, ‘plural orders’ operating within the state no longer possess full autonomy and must exist subject to the wider legal order, making them, as Sally Falk Moore describes, ‘semi-autonomous’.⁵⁶ Regarding definitions, it will suggest that although legal pluralism certainly has to do with the ‘existence of more than one legal order within the same social space’, the wide range of definitions around legal order and law itself make the utility of any overarching definition questionable. It will then look at how constitutionalism as a holistic, comprehensive philosophy dealt with the potential problem of pluralism. It will suggest that constitutionalism utilises two key strategies to ensure that pluralism does not affect the cohesive whole of the order, these being ‘federalism’ and ‘consociationalism’.⁵⁷ I will ultimately conclude that pluralism can exist alongside constitutionalism as long as the orders are only semi-autonomous and therefore do not have the capacity to threaten the overarching integrity of the constitutional system.

The sixth chapter, entitled ‘*Global Constitutionalism and Global Legal Pluralism*’ will address the relationship between global legal pluralism and any

⁵⁶ Moore, Sally Falk. “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study.” *Law & Society Review* 7.4, 1973: 719-746.

⁵⁷ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010.

potential form of global constitutionalism. It will begin by looking more deeply at the concept of global legal pluralism itself. It will suggest that global legal pluralism comprises a vast plethora of different orders, which have emerged as the result of the increasing governance demands of globalisation. It will suggest that as a result of these vast demands, globalisation has led to a broad degree of decentralisation and fragmentation in which different orders increasingly seek autonomy from any wider system, with some more tethered to more traditional 'inter-state' visions of international law and some increasingly existing in a truly globalised world. As a result, this chapter will suggest that this ill-disciplined global legal pluralism little resembles its counterpart within constitutional domestic systems. This chapter will suggest that global legal pluralism would be very difficult to reconcile with an overarching vision of global constitutionalism as the 'fragmentation' of the international legal system is premised on fundamental 'rationality conflicts' between orders each seeking dominance for their own legal regime.⁵⁸ I will demonstrate this through first looking at two conflicts between the World Trade Organisation and the Convention for Biological Diversity, demonstrating that in the event of such conflicts, sheer material power is often the determining factor in their resolution. Further, I will demonstrate that the existence of 'multinational' corporations which broadly exist outside the ambit of international law and whose rationality is almost purely profit based further undermines the potentiality of a 'comprehensive' global constitutionalism. I will therefore argue that, in its current manifestation, it is extremely difficult to reconcile global legal pluralism and the idea of a global constitution.

⁵⁸ Fischer-Lescano, Andreas, and Gunther Teubner. "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law." *Mich. J. Int'l L.* 25, 2003: 999.

The final chapter will assess whether discussion on global constitutionalism might still be of value, despite the substantial hurdles posed in previous chapters. It will begin by looking at whether sufficient shifts might occur in the international system to allow for the emergence of a global constitution. It will suggest that such shifts are unlikely as a result of the absence of any genuine ‘societal’ sphere to allow for the emergence of a global constituent power, as well as a lack of any identifiable trends towards one. Secondly, it will suggest that the level of global co-operation by major powers required to engender any form of global constitutionalism is unlikely as a result of these powers joining with broader global organisations only when it is specifically in their material interest to do so. In particular, I will look at the approach taken by the United States to broader international organisations to substantiate this claim. Moving on from this, I will consider whether constitutionalism might still have value as a heuristic tool in international scholarship and practice despite these hurdles. The chapter will, focusing on the work of Neil Walker, suggest that in a globalised world, constitutionalism might still have value if imagined in a more modest, pluralistic sense. The emergence of global communities in the form of global social movements and non-governmental organisations might offer an avenue to ‘source’ the constituent power required to legitimise this more modest vision of constitutionalism in areas where broad global agreement can be found. In particular, the increased participation of local communities and affected individuals within global health governance, specifically through the implementation of Sustainable Development Goals (SDGs), might offer one path for this more modest form of global constitutionalism. Thus, although the possibility of an overarching global constitutionalism seems fairly remote, the

prospect for a certain modest constitutional pluralism means that the idea itself remains pertinent as a heuristic tool for improving global governance.

Chapter 1: What is Constitutionalism?

The purpose of this thesis is to assess the prospects for global constitutionalism in the contemporary international system. Before that task can be undertaken, considerable grounding is required to provide a substantive framework for this analysis. To understand the debates surrounding global constitutionalism, it is critical to first understand the key theoretical tool behind the idea, which is, of course, constitutionalism itself. To understand constitutionalism at this deeper level, this analysis will be split into two chapters. The first chapter will consider the core purposes of constitutionalism in terms of both *how it differed from* previous forms of government and, importantly, *what it sought to achieve*. This chapter will thus outline the purposes of constitutionalism, and in doing so provide a definition for constitutionalism that will be used for the remainder of the thesis. The second chapter will look at the specific institutional and empirical characteristics required within a polity for the purposes of constitutionalism to be broadly met. In so doing, these two chapters will cumulatively provide a holistic framework on which the rest of the thesis can operate.

The first chapter will seek to use historical narrative to outline the core purposes and commonalities in the philosophy of constitutionalism with the intention of providing a definition for use in the latter parts of the thesis. It will argue that, ultimately, the aim of constitutionalism is to provide and create a ‘legitimate and comprehensive framework for the exercise of public power.’⁵⁹ To make this argument, this chapter will be divided into two main parts. The first will address the historical and philosophical background and forms of governance that

⁵⁹ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pg. 64.

predated constitutionalism and provided some of its antecedents, while the second will focus on constitutionalism itself and its core characteristics.

The first part of the chapter will begin by looking at how more ancient scholars in antiquity provided some of the intellectual roots for constitutionalism. This section will begin by looking at the work of Aristotle, demonstrating how Aristotle's seminal work *Politics* provided some of the philosophical foundations for constitutionalism, in particular by highlighting the requirement for law to bind government and, in some sense, to make power impersonal and premised on the 'general wisdom of men'.⁶⁰ This section will then go on to look at the work of Cicero, who introduced other important constitutional ideas, in particular the idea that a system of laws regulating government could be set out in one document, an important precursor to the idea of a written constitution.⁶¹

Moving on from the more ancient scholars, the chapter will then consider the rise of the sovereign state and the key emergent form of government in the form of the unfettered sovereign prince.⁶² It will demonstrate that, partially as a result of the emergence of a 'divine right of kings' doctrine, the 'sovereignty' of the prince within the pre-constitutional period was broadly seen to be unfettered by earthly constraints.⁶³ The chapter will develop upon this paradigm by looking at the work of Jean Bodin and Thomas Hobbes, the core philosophical advocates of such a view.⁶⁴

⁶⁰ Aristotle (H. Rackham, trans.), *Politics*, London, Heinemann, 1967, book 4.

⁶¹ Cicero, *De Legibus* (On the Laws), Book 3, at *Natural Laws, Natural Rights, and the American Constitution* - <http://www.nlnrac.org/classical/cicero/documents/de-legibus> - accessed 24th December 2017.

⁶² Grimm, Dieter. *The Achievement of Constitutionalism in Twilight of Constitutionalism*, Oxford University Press, 2010. Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010. Bodin, Jean. *The Six Bookes of a Commonweal*. Trans. Richard Knolles. Ed. Kenneth Douglas McRae. Cambridge: Harvard University Press, 1962.

⁶³ Ibid.

⁶⁴ The two core texts here are Hobbes, Thomas. *Leviathan*. A&C Black, 2006, and Bodin, Jean. *The Six Books of a Commonweal: A facsimile reprint of the English translation of 1606, corrected and*

It will demonstrate how these scholars supported the predominant view of an absolute form of sovereignty on the grounds that the security of the state and continued existence of civil society rely on the sovereign prince having no earthly superior. This section will thus demonstrate that, prior to the emergence of constitutionalism, the core aspect of sovereignty was its absolute nature.

After offering this historical outline, this chapter will then move on to its second part, which will focus on constitutionalism and how it differed from this previous form of government. It will begin by looking at the two pre-eminent scholarly influences of the French and American revolutions, respectively Jean-Jacques Rousseau and Thomas Paine.⁶⁵ It will demonstrate that the core objectives of these scholars, and thus of early constitutionalism, was to unbind the old, unfettered aspect of sovereignty and bind it within a new sphere of legitimation, thus creating rightful rule in the wake of tyranny.⁶⁶ The section will go on to suggest that to attain this new, constitutional legitimacy, two core qualities are required.

Firstly, the exercise of public or political power must be constrained by a strong and durable rule of law framework. To do so, a ‘higher law’ legal framework must exist to bind the political process within a common normative framework.⁶⁷ As this section will demonstrate, this limiting framework can be clearly perceived in both US and French constitutionalism. Importantly, as will be demonstrated, this framework must be comprehensive, as extra-constitutional authority could

supplemented in the light of a new comparison with the French and Latin texts. Harvard University Press, 1962. Obviously, many different editions and translations exist of these works.

⁶⁵ Rousseau, Jean Jacque. *The Social Contract*, 1762 – Archives of the University College, Cork – https://www.ucc.ie/archive/hdsp/Rousseau_contrat-social.pdf

⁶⁶ Grimm, Dieter. *The Achievement of Constitutionalism in Twilight of Constitutionalism*, Oxford University Press, 2010.

⁶⁷ Klabbers, Jan, Anne Peters, and Geir Ulfstein. *The Constitutionalization of International Law*. Oxford University Press, 2009, pp.9-10. Waldron, Jeremy. *Liberal Rights: Collected Papers 1981-1991*. Cambridge University Press, 1993.

undermine a constitution's claim to form the fundamental basis for public power.⁶⁸

Moving on, this section will demonstrate that the second core component of constitutionalism rests on the idea that the ultimate right to rule must lie not with the government, but ultimately with the consent of the governed, a claim this chapter will support with reference to core scholars of revolutionary constitutionalism.⁶⁹ Resultantly, it will define constitutionalism as requiring and creating a 'comprehensive and legitimate framework for the exercise of public power', a definition that will be taken forward for the rest of the thesis.

Finally, this chapter will briefly address the question of British constitutionalism. It will suggest, through looking at the core parliamentary acts that form the British constitution, that though clear differences of process and structure exist between British and revolutionary constitutionalism, many similarities can be observed. Through this analysis, it will support AV Dicey's claim that the core values of British constitutionalism are parliamentary (or popular) sovereignty, and the rule of law.⁷⁰ This section of the chapter will thus suggest that although British constitutionalism differs substantially from the French and American versions in process and structure, the norms underpinning it bear substantial similarity with regard to the ultimate principles to the effect that the exercise of public power must ultimately be constrained by a strong rule of law framework and premised on the consent of the governed.

Before beginning this analysis, however, some caveats must be highlighted.

The first is that the purpose of this chapter is not to provide an exhaustive history of

⁶⁸ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pg.41.

⁶⁹ Paine, Thomas. *Common Sense*. Broadview Press, 2004, Rousseau, Jean Jacques, *The Social Contract*, 1762 – Archives of the University College, Cork – https://www.ucc.ie/archive/hdsp/Rousseau_contrat-social.pdf

⁷⁰ Dicey, Albert Venn. *The Law of the Constitution*. Vol. 1. OUP Oxford, 2013.

constitutionalism and its many twists, turns, divides, and nuances. Rather, it is to draw out common normative and institutional themes that can be applied to a wider debate on global constitutionalism. Thus, while in the course of this analysis there will inevitably be discussion of the different historical forms that constitutionalism has taken, the focus of this chapter will be on drawing on trends of commonality between them to provide the main thesis' framework. Therefore, the great number of divisions in constitutional literature between different forms of constitutionalism, including republican, democratic, political, and liberal-legal will not be a core focus of this chapter.⁷¹ Secondly, in the course of the analysis, this thesis will focus on three key constitutional orders, namely the constitutions of the United States, France, and the United Kingdom. Historically, these have had the most significant influence on both the empirical emergence of constitutionalism itself as well as by far the greatest impact on scholarship.⁷² In particular, the United States and France, as paradigmatic of the philosophy of constitutionalism, will take centre stage. As the scope of this overall analysis of both the tenants and practices of constitutionalism is limited to two chapters, other constitutional orders will only be referred to peripherally and when to do so enhances a particular argument being made by the relevant chapter. With these caveats in mind, this chapter will now turn to its first section, which will firstly look at how constitutionalism both emerged from, and differed from, forms of government that came before.

1. The antecedents of constitutionalism: Ancient and Medieval Thought

⁷¹ For further study on these divides, the following are instructive: Bellamy, Richard. *Political constitutionalism: A republican defence of the constitutionality of democracy*, 2007. Walen, Alec. "Judicial review in review: A four-part defense of legal constitutionalism. A review essay on Political Constitutionalism." *International Journal of Constitutional Law* 7.2, 2009: 329-354. Goldoni, Marco. "Two Internal Critiques of Political Constitutionalism." *International Journal of Constitutional Law* 10.4, 2012. 926-949.

⁷² Billias, George Athan. *American Constitutionalism Heard Round the World, 1776-1989: A Global Perspective*. NYU Press, 2009, pp.5-10. Friedrich, Carl Joachim. "Constitutional Government and Democracy. Theory and Practice in Europe and America.", 1941.

1.1 The Ancients: Aristotle and Cicero

The importance of constitutionalism as a tool for governance in the modern world cannot be overstated. As Dieter Grimm states ‘for a relatively recent innovation in the history of political institutions, constitutionalism has rapidly expanded into the single, universal model for the organisation of legitimate political power’.⁷³ In terms of the ordering of the modern state, the rapid onset of constitutionalism ranks clearly as the most important structural and normative change since the Treaty of Westphalia.⁷⁴ The ideas inherent within constitutional parlance – such as rule of law, democracy, and the protection of individual rights and liberty – are at the centre of our political and legal discourse. Indeed, of 192 existing states, 167 claim to have a constitution, and even those who frequently do not adhere to its precepts still feel the need to claim to the outside world that they do.⁷⁵

Nonetheless, despite the importance of the concept, much confusion and disagreement has existed over precisely what constitutionalism entails and requires, and how it differs from previous forms of government. The purpose of this chapter will be to answer those questions, demonstrating a clear thread of commonality within the philosophy of constitutionalism, despite divergences in how the concept should be realised empirically and institutionally. I will suggest that, at its core, constitutionalism sought to ‘comprehensively legitimate the exercise of public power’. To do so, it had to create a similarly comprehensive legal and political

⁷³ Grimm, Dieter. *The Achievement of Constitutionalism in Twilight of Constitutionalism*, Oxford University Press, 2010, pg.3. Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University.

⁷⁴Grimm, Ibid, above.

⁷⁵ Ibid.

framework for that exercise.⁷⁶ I will now look at the emergence of the philosophy of constitutionalism, and how it sought to alter previous arrangements of government.

While the idea of constitutionalism as a holistic philosophy of legitimate government is fundamentally tied to Enlightenment philosophy and the concurrent constitutional revolutions, a more ancient idea of the constitution undoubtedly can be perceived in works of antiquity, particularly those of Aristotle and Cicero. For such scholars, the idea was used to present beneficial structures for what they perceived to be ‘just’ forms of government.

Aristotle, for example, dealt with the topic of legitimate political rule extensively in his series of seminal works on political theory. Aristotle conceived that the best political entity or ‘polity’, was one where a ‘fundamental relationship exists between laws and men, where it is the consent of the men that gives manner to the laws’⁷⁷. Ideal justice within such a system ‘could not be obtained in the absence of a free and equal association of citizens’.⁷⁸ Aristotle believed that the exact structure of government should be based on the sum of the general wisdom, which should provide more virtue than the despotism of one.⁷⁹ Given the ‘un-ideal’ condition of the Greek city-states, Aristotle perceived the best constitution as a ‘mixed government’ which would be ‘something of a combination between democracy, oligarchy, and aristocracy’.⁸⁰ This government should comprise of, preferably, a large middle class, as those who find themselves in moderation of fortune would be most likely to follow the diktats of reason. This class would then

⁷⁶ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pg.64.

⁷⁷ Aristotle (H. Rackham, trans.), *Politics*, London, Heinemann, 1967.1275a.

⁷⁸ Aristotle (H. Rackham, trans.), *Politics*, London, Heinemann, 1967. 1252a, 1255b, 1277b.

⁷⁹ Aristotle (H. Rackham, trans.), *Politics*, London, Heinemann, 1967.

⁸⁰ *Ibid*, pp. 1295b4–6.

be responsible for the creation of laws.⁸¹ As these laws would be the ‘diktats of reason of the general sum of men’, they should be followed by virtue of these qualities, which Aristotle clearly considered to be the most important in determining governance.⁸² Thus, Aristotle’s early scholarship, in terms of his attempt to reconcile authoritative government with right government, and to make power at least somewhat impersonal, provided an important philosophical cornerstone for later constitutionalists.

Alongside Aristotle, the work of Cicero has been largely considered important in the library of ancient constitutional texts. Similarly to Aristotle, Cicero began with the precept that man had in him ‘a divine spark’, which manifested itself in the ‘ability, unlike the beasts, to reason’.⁸³ Given the presence of this divine spark, much like Aristotle, Cicero believed the structure of government must be created according to the diktats of this reason.⁸⁴ Unlike Aristotle, who was somewhat vague on the actual legal and political structures required for this state, Cicero was far more explicit in laying down how his prospective ideal Roman constitution should look.⁸⁵ This may well be the result of a considerably more advanced legal culture in the Rome of his time.⁸⁶ Cicero sought not to overthrow the current Roman administration, but rather to amend it through the creation of stronger legal and institutional precedents for its governance, ‘harking back to the glory days of Rome’, and thus preserving and renewing its government.⁸⁷ However,

⁸¹ Ibid.

⁸² Aristotle’s *Political Theory* in Stanford Encyclopaedia of Philosophy, 1998 – <https://plato.stanford.edu/entries/aristotle-politics/> – Accessed 8th December 2017.

⁸³ Cicero, *De Legibus* (On the Laws), Book 1, at *Natural Laws, Natural Rights, and the American Constitution*- <http://www.nlncrac.org/classical/cicero/documents/de-legibus> – Accessed 7th December 2017.

⁸⁴ Ibid.

⁸⁵ Paulson, Lex. *A Painted Republic: The Constitutional Innovations of Cicero’s De Legibus*. Ethics & Politics XVI, 2014, 2, pp. 307-340.

⁸⁶ Ibid.

⁸⁷ Ibid, p.309.

in some ways, Cicero's contributions were quite striking. Most importantly, he appeared to propose a 'written constitution' for the Roman Republic, which would enunciate the various key laws and governmental structures.⁸⁸ In this written constitution, Cicero outlined the powers he would advocate to the various organs of government, including the 'Senate, Judiciary, Magistrates, and Popular Assembly'.⁸⁹ 'Constitutional' innovations offered by Cicero included a directly elected senate, a semi-secret ballot, and new rights of judicial appeal.⁹⁰ Cicero thus sought to reinforce and strengthen the force of law as the key component of governance as well as entrench it into a single written document. Cicero was seeking to strengthen the contemporary 'empirical' constitution of Rome through a greater recourse to the letter of the law.⁹¹ As Paulsen states, the contributions of Cicero to later ideas of constitutionalism have been greatly underestimated, as the core idea of 'entrenching' particularly important laws into a written, overarching legal document certainly do find their origins here.⁹²

Thus, many of the core ideas of constitutionalism, in particular the idea that the power of government and political power must be at least at some level subservient to, and controlled by, the wider law, existed in antiquity. However, these early scholars differed from the later advocates of constitutionalism in that they did not seek to create an entirely new, foundational basis for all future forms of government, or a new source of legitimacy for rulers to exercise power over the ruled. Rather, they sought to adapt and improve existing forms of government

⁸⁸ Ibid. pp.309-312.

⁸⁹ Cicero, *De Legibus* (On the Laws), Book 3, at *Natural Laws, Natural Rights, and the American Constitution*- <http://www.nlnrac.org/classical/cicero/documents/de-legibus>

⁹⁰ Paulson, Lex. *A Painted Republic: The Constitutional Innovations of Cicero's De Legibus*. *Ethics & Politics* XVI, 2014, 2, pp. 307-340, p.312.

⁹¹ Ibid, pp.312-320.

⁹² Ibid. Also, Keyes, Clinton Walker. "Original elements in Cicero's Ideal Constitution." *The American Journal of Philology* 42.4, 1921: 309-323.

within their respective polities by applying some of what we now describe as constitutional principles. Nonetheless, these ancient scholars had substantial influence on many of the key scholarly and political advocates of constitutionalism that arose in the enlightenment.

1.2. The Rise of the Sovereign Prince

After the collapse of the Roman Empire, the ‘early’ Middle Ages, comprising the period between around 500AD and 1200AD, produced a relative dearth of effective governance philosophy, and, indeed, many scholars suggest that, in fact, considerable regression occurred with regard to the philosophy of government and politics.⁹³ As I will discuss in much greater detail in Chapter 5, feudal systems of governance in this era were broadly pluralistic, uncoordinated, and lacking in central authority.⁹⁴ Various claims of authority were made by kings, nobles, barons, and the church, with no definitive way of pinpointing exactly where legal, or indeed political authority, lay.⁹⁵ The absence of any form of centralised power made it difficult to discuss key constitutional themes, most notably the nature and legitimacy of sovereignty, as it was unclear where such a power could lie.⁹⁶

It was during the late medieval period and lasting until the mid-17th century that a new form of centralised authority emerged. Kingdoms had previously existed more as loosely connected confederations of regions, governed from multiple, sometimes conflicting, sources.⁹⁷ However, during the 400-year period between 1200 and 1600, these fragmented kingdoms underwent a process whereby they

⁹³ Hodges, Richard. *Dark Age Economics: Origins of Towns and Trade, AD 600-1000*. Bristol Classical Press, 1989.

⁹⁴ Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30, 2008: 375, p.377.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Pennington, Kenneth. *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition*. Univ of California Press, 1993. See Chapter 1.

coalesced into more or less unified entities under a broadly centralised ‘sovereign’.⁹⁸ This process of centralisation moved with different speeds in different countries. The ‘Kingdom of England’ was perhaps the first to fully emerge in this manner. As Oman argues, by the end of the reign of Edward III, the Kingdom of England can clearly be identified as an integrated, centralised kingdom where primacy lay with the monarch.⁹⁹ The similarly centralised Kingdom of France can be identified approximately from the end of The Hundred Years War, after the French victory, and restoration of the House of Valois to the throne.¹⁰⁰ In Spain, the unification of the Houses of Aragon and Castile symbolised the emergence of a unified Kingdom of Spain under a centralised monarchic government.¹⁰¹ Several important treaties, including the treaties of Augsburg, and, most importantly, the Treaty of Westphalia entrenched these sovereign, territorial states (or kingdoms) as the primary mode for social and political organisation in Europe.¹⁰²

Synonymously with the rise of these integrated ‘kingdoms’, forms of government gradually shifted from the more decentralised feudalistic system into a centralised system where all political and legal authority ultimately derived from the monarch.¹⁰³ Primary justifications for this unfettered authority lay, most frequently, in some idea of the ‘divine right of kings’.¹⁰⁴ According to such a philosophy, a king has both absolute sovereign power over his subjects and ‘no earthly superior’, his

⁹⁸ Ibid.

⁹⁹ Oman, Charles. *A History of England*. Jovian Press, 2017. See Chapter 2.

¹⁰⁰ Peter Shervey Lewis, *Later Medieval France: The Polity*, 1968. Minerva Atkinson, Alice: *A Brief History of the Hundred Years War*.

¹⁰¹ O’Callaghan, Joseph F. *A History of Medieval Spain*. Cornell University Press, 2013.

¹⁰² Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30, 2008: 375, p.385.

¹⁰³ Ibid, p.380.

¹⁰⁴ Burgess, Glenn. “The Divine Right of Kings Reconsidered.” *The English Historical Review* 107.425, 1992: 837-861. Figgis, John Neville. *The Divine Right of Kings*. University Press, 1922.

power deriving directly from God Himself.¹⁰⁵ Bracton, for example, a key early medieval theorist described the king as ‘The vicar of God on earth’ with a ‘right to govern provided by no man, but by God himself’.¹⁰⁶ The theory that the king’s right to rule was premised in God’s law was not a particularly controversial one and was, to a large degree, accepted by both populations and theorists at the time. Logically, if the king was sovereign under God, then his rule was the law itself and simultaneously above it.¹⁰⁷ In congruence with the newly-conceived and more integrated nations, ideas of monarchic power being divinely ordained led to sovereignty being embedded in something that very much resembled royal absolutism.¹⁰⁸ According to Figgis, within such a system ‘monarchy is pure, the sovereignty being entirely vested in the king, whose power is incapable of legal limitation. All law is a mere concession of his will, and all constitutional forms and assemblies exist entirely at his pleasure. ... A mixed or limited monarchy is a contradiction in terms’.¹⁰⁹

The idea of the monarch as fundamentally both a law-maker and a law-giver, and thus possessing ‘the whole of sovereignty within one person’ can be clearly perceived from the reign of Elizabeth I, even though England had, at this time, an elected Parliament, and, most likely, the strongest and most active one in Europe.¹¹⁰ Nonetheless, as McIlwain points out, the influence of the monarch was predominant, and her absolute authority was accepted even by Parliament itself. He

¹⁰⁵ Ibid.

¹⁰⁶ Bracton: *De Legibus Et Consuetudinibus Angliæ* c.1250, Thorne Translation. Harvard School of Law, Bracton Online – <http://bracton.law.harvard.edu/Unframed/English/v2/305.htm> – Accessed 12th November 2017.

¹⁰⁷ Burgess, Glenn. “The Divine Right of Kings Reconsidered.” *The English Historical Review* 107.425, 1992: 837-861.

¹⁰⁸ Figgis, John Neville. *The Divine Right of Kings*. University Press, 1922.

¹⁰⁹ Ibid. pp.5-6.

¹¹⁰ McIlwain, Charles Howard. *Constitutionalism: Ancient and Modern*. The Lawbook Exchange, Ltd., 2017, p.109.

notes that in the 11 Parliaments that convened under Elizabeth, clear acknowledgement was given in each one that ‘government proper was not Parliament’s business’, but that of her majesty, who by her ‘divine grace’ was solely competent to ‘deal with affairs of the state and government’.¹¹¹ Thus, there was a clear hierarchal relationship between the monarch and Parliament within the Kingdom of England, at least until the restoration of the Stuart line under Charles II.¹¹²

This absolutist model can also be perceived in France and was indeed even more influential in the later part of the Middle Ages and the Early Modern period. The long reign of Louis XIV, who fashioned himself sun-king, is a good example of this. Louis dispensed with previously influential ministers and instead claimed his divine right to rule, consolidating his power across France and ruling by decree, furnished with his God-given authority.¹¹³ His famous remark ‘I am the state’, perhaps encapsulates best the perspective of absolute monarchy that predominated in this particular historical epoch.¹¹⁴

While the ‘Divine Right’ aspect of this form of monarchist absolutism undoubtedly played a substantial role in its formation and practice, the idea that a sovereign must be unlimited by earthly constraints was also supported by the most important political philosophers of the time as necessary for effective government.¹¹⁵ These scholars broadly saw the unlimited power of the sovereign as

¹¹¹ Ibid. p.111.

¹¹² Ibid, p.112.

¹¹³ Rowen, Herbert H. “L’Etat C’est a Moi”: Louis XIV and the State.” *French Historical Studies* 2.1, 1961: 83-98. Fox, Paul W, pp.83-84. “Louis XIV and the theories of absolutism and divine right.” *Canadian Journal of Economics and Political Science/Revue Canadienne de Economiques et Science Politique* 26.1, 1960: 128-142.

¹¹⁴ Rowen, Herbert H. “L’Etat C’est a Moi”: Louis XIV and the State.” *French Historical Studies* 2.1, 1961: 83-98.

¹¹⁵ Grimm, Dieter. “*The Achievement of Constitutionalism*”, in *The Twilight of Constitutionalism*, Oxford University Press, 2010, pp.6-7.

required to provide security for their citizens. Thus, to live lives free from arbitrary violence, citizens were required to give up their God-given liberty to the sovereign prince in some form of ‘social contract’.¹¹⁶ The two most emblematic and influential philosophers in this regard were Thomas Hobbes in England and Jean Bodin in France.¹¹⁷ The contributions they made to this absolutist idea of sovereignty will now be briefly outlined.

Thomas Hobbes’ requirement for an absolute sovereign begins with his assessment of the ‘natural state of man’.¹¹⁸ According to Hobbes, man in his natural state is brutish and concerned only with his own gratification.¹¹⁹ This inevitably will lead to humanity deteriorating into a natural state of war, meaning that lives would be ‘nasty, short, and brutish’ and people would consistently live in ‘fear of a violent death’.¹²⁰ Men ‘escape this state through the construction of civil society’.¹²¹ According to Hobbes, to construct this civil society and avoid this perpetual state of war, man must enter into a social contract or covenant, in which his liberty is sacrificed to a sovereign for the sake of his security.¹²² In this situation, ‘relations between men are rendered secure because there is, evident to all, a clear locus of sovereignty, i.e. overwhelming power, which resides in the person of the monarch’.¹²³ To maintain this security, there must be absolute inequality of strength between the sovereign and his subjects, to prevent the plunder of the weak by the

¹¹⁶ Hobbes, *Leviathan*, ed. with an introduction by C. B. Macpherson, Baltimore, 1968.

¹¹⁷ See note 63.

¹¹⁸ Hobbes, *Leviathan*, ed. with an introduction by C. B. Macpherson (Baltimore, 1968).

¹¹⁹ *Ibid*, Chapter 18, part 1.

¹²⁰ Hobbes, Thomas. *Leviathan*. A&C Black, 2006, p.112.

¹²¹ *Ibid*, p.137.

¹²² *Ibid*.

¹²³ Hurtgen, James. “Hobbes’s Theory of Sovereignty in *Leviathan*.” *Reason Papers* 5, 1979: 55-67, pg.58.

strong or the revolution of the powerless against the powerful.¹²⁴ The essence of a sovereign, Hobbes states, is

One Person, of whose Acts a great Multitude, by mutual Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defence. And he that carryeth this Person, is called Sovereign, and said to have Sovereign Power; and every one besides his Subject.¹²⁵

There are therefore no graduations in the Hobbesian conception of sovereignty, nor is his conception of a social convention or covenant an active one via which the population would have to actively consent to the sovereign's rule.¹²⁶ If the command of the sovereign needs to be inalienable to prevent the degradation of civil society, then the relationship between sovereign and subject must be absolute, meaning that qualifying restraints to 'legitimise' such a sovereign would undermine the requirement of absolute authority that such a sovereign would need.¹²⁷ Thus, the Hobbesian sovereign was an absolute one, an inherent quality required for any ruler to ensure the existence of a civil society and the avoidance of war and conflict.

A similar approach to sovereignty was taken on the other side of the channel by Jean Bodin. Bodin's theory of sovereignty was influenced by his time and location, particularly with his concerns that the Holy Roman Empire or the Papacy might try to exert overlordship or dominance over France.¹²⁸ Bodin was a

¹²⁴ Ibid, p.59.

¹²⁵ Hobbes, Thomas. *Leviathan*. A&C Black, 2006, p.151.

¹²⁶ Hobbes, Thomas. *Leviathan*. A&C Black, 2006. Hurtgen, James. "Hobbes's Theory of Sovereignty in Leviathan." *Reason Papers* 5, 1979: 55-67, pg.61. Shelton, George. *Morality and Sovereignty in the Philosophy of Hobbes*. Springer, 2016.

¹²⁷ Hurtgen, James. "Hobbes's Theory of Sovereignty in Leviathan." *Reason Papers* 5, 1979: 55-67. Shelton, George. *Morality and Sovereignty in the Philosophy of Hobbes*. Springer, 2016, pp.62-65.

¹²⁸ Bodin, Jean. *Bodin: On Sovereignty*. Cambridge University Press, 1992.

considerable influence on Hobbes, and was the first to utilise the term ‘sovereignty’ in the more modern sense. According to Bodin, sovereignty was ‘The most high, absolute, and perpetual power over the citizens and subjects of a commonwealth’.¹²⁹ For Bodin, the sovereign was not bound by civil or public laws as the ‘chief prerogative of a sovereign prince is not to be in any sort subject to the command of another’.¹³⁰ Further, the ‘first and chief marker of a sovereign prince was to give laws to all his subjects in general, and every one in particular without consent of any other greater, equal, or lesser than himself.’¹³¹ The sovereign is thus both the source of law and its executor. To undertake these roles, Bodin argued that the sovereign must possess four qualities to exercise the unfettered power required. Sovereignty must be, according to Bodin, ‘Inalienable, Perpetual, Unlimited, and Undelegated’.¹³² Any prescription on these crucial qualities, Bodin argued, would be ‘tantamount’ to the suicide of the commonwealth.¹³³ Given the continuous turmoil and conflict that had riven feudal France, Bodin’s core concerns, much like Hobbes’, were peace, order, and security; he believed these all-important goals could only be attained through the absolute form of sovereignty he advocated.

In congruence with the emergent doctrine of the Divine Right of Kings, the core purpose of the sovereign was seen as the physical security of citizens and the prevention of war. Thus, as we can see, concepts of sovereignty in the medieval period and the beginning of the early modern period focused on a rather absolute concept, where the sovereign’s authority was not premised on exterior legitimation

¹²⁹ Bodin, Jean. *The Six Bookes of a Commonweal*. Trans. Richard Knolles. Ed. Kenneth Douglas McRae. Cambridge: Harvard University Press, 1962, p.84.

¹³⁰ Bodin, Jean. *The Six Bookes of a Commonweal*. Trans. Richard Knolles. Ed. Kenneth Douglas McRae. Cambridge: Harvard University Press, 1962, p.91

¹³¹ *Ibid*, p.159.

¹³² Bodin, Jean. *The Six Bookes of a Commonweal*. Trans. Richard Knolles. Ed. Kenneth Douglas McRae. Cambridge: Harvard University Press, 1962.

¹³³ Bodin, Jean. *The Six Bookes of a Commonweal*. Trans. Richard Knolles. Ed. Kenneth Douglas McRae. Cambridge: Harvard University Press, 1962, pp. 80-90.

mechanisms, save divine will. Only through this medium, scholars of the time reasoned, could a civil society be allowed to emerge, and the security of the state ensured.

2. Constitutionalism: Core purposes and Characteristics

As we have seen from the previous section, the underlying norm of government in the medieval and early modern period was the uncontested and uncontestable authority of the sovereign. This was seen to be required both as God-given and as necessary for the security of the state. This section will now look at the core purposes of constitutionalism, and how it diverged from the previously dominant paradigm of sovereignty and sort to place it within a new framework for legitimation. I will argue that, fundamentally, constitutionalism sought to resituate sovereign power by creating a ‘legitimate and comprehensive’ framework for the exercise of public power.¹³⁴ The next chapter will show the institutional and empirical mechanisms ultimately required to allow for this framework to operate in practice.

2.1. New Sources of Sovereignty: Revolutionary Constitutionalism and the Unbinding of Absolute Sovereignty

It is undoubtedly the case that the philosophy of constitutionalism was intricately tied to the revolutionary philosophy of the Enlightenment, both at a philosophical and political level.¹³⁵ Although the English wars between Parliament and the King, notably the English Civil War of 1642 and the ‘Glorious Revolution’ undoubtedly shared certain characteristics with the later revolutionary wars in

¹³⁴ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pg.64.

¹³⁵ Grimm, Dieter. *The “Achievement of Constitutionalism” in Twilight of Constitutionalism*, Oxford University Press, 2010, pp.6-8. Keohane, Nannerl O. *Philosophy and the State in France: The Renaissance to the Enlightenment*. Princeton University Press, 2017.

America and France, it is in these later conflicts and their resolution that we can likely first identify the fully fledged philosophy of constitutionalism.¹³⁶ It is for this reason that our primary focus here will be on French and US constitutionalism, although some attention will also be paid to the British process both at the end of this part of the chapter and, substantially, in part 2 of the chapter, which looks in more detail at the empirical components of the constitution.

Both the French and American civil wars shared particular objectives which were inextricably linked to the philosophy of constitutionalism such as it emerged. Key among these was a fundamental dissatisfaction with the use of arbitrary, or unqualified, sovereignty by ruling powers.¹³⁷ In the case of the French Revolution, the severe economic hardship brought about by Louis XVI's excessive spending on wars, as well as his social policies which were seen to favour the rich and were extremely unpalatable to the working and lower middle class, were key.¹³⁸ As well as these societal factors, a number of influential Enlightenment thinkers were active in France, and the distribution of their work into the general populace helped to move people towards rejecting the untrammelled sovereignty embodied in the king and towards a new, constitutional form of government.

The most influential theorist who helped to both inspire the 'Constitutional Revolution' in France and shape its outcomes is most likely Jean-Jacques Rousseau.¹³⁹ The famous opening statement from *The Social Contract* to the effect

¹³⁶ Grimm, Dieter. "The Achievement of Constitutionalism" in *Twilight of Constitutionalism*, Oxford University Press, 2010, pp.6-8.

¹³⁷ Sartori, Giovanni. "Constitutionalism: A Preliminary Discussion." *American Political Science Review* 56.4, 1962: 853-864, pp.854-860. Elkin, Stephen L. "Constitutionalism: Old and New." *A New Constitutionalism. Designing Political Institutions for a Good Society*, Chicago, 1993: 32.

¹³⁸ McIlwain, Charles Howard. *Constitutionalism: Ancient and Modern*. The Lawbook Exchange, Ltd., 2017.

¹³⁹ Rogoff, Martin A. "A Comparison of Constitutionalism in France and the United States" *Me. L. Rev.* 49, 1997: 21, pg.50.

that ‘Man is born free but everywhere he is in chains’,¹⁴⁰ was a direct challenge both to the form of sovereign absolutism that existed in France and to the work of Bodin and his vision of sovereignty. For Rousseau, rather than being based in the prince, sovereignty instead ultimately lay with the people and could only be legitimised through some form of ‘social compact’.¹⁴¹ Legitimate political authority according to Rousseau comes from a social contract of all citizens, and is found in the ‘general will’.¹⁴² Rousseau argues that social order ought to be based on a social compact ‘in common under the supreme direction of the general will, and as one, we receive each member as an indivisible part of a whole.’ Resultantly, ‘the formation of society through agreement thus does not result in the loss of liberty as a whole, but in its extension and expansion’.¹⁴³ According to such a logic, the general will is considered not just unitary and inalienable, but fundamentally just.¹⁴⁴ Thus, it is only from this general will that virtuous and enlightened government can spring and, importantly, sovereignty be formed and legitimised. According to Rousseau, then, the source of legitimate power could not emanate from the ruler himself but must reside in the people.¹⁴⁵ As Rogoff suggests, Rousseau was ardently anti-monarchist and was the primary intellectual influence on the French Revolution and the fathers of the French Constitution.¹⁴⁶ Thus, as we can see, at the core of the revolutionary philosophy in France was a fundamental reimagining of legitimate sovereignty away

¹⁴⁰ Rousseau, Jean-Jacques, *The Social Contract*, 1762 – Archives of the University College, Cork – https://www.ucc.ie/archive/hdsp/Rousseau_contrat-social.pdf, pg.2.

¹⁴¹ Ibid, pp.5-14.

¹⁴² Ibid, p.18.

¹⁴³ Ibid, pp.37-42.

¹⁴⁴ Ibid, pp.18-25.

¹⁴⁵ Rousseau, Jean-Jacques, *The Social Contract*, 1762 – Archives of the University College, Cork – https://www.ucc.ie/archive/hdsp/Rousseau_contrat-social.pdf

¹⁴⁶ Rogoff, Martin A. “A Comparison of Constitutionalism in France and the United States” *Me. L. Rev.* 49, 1997: 21. The other two core French scholars, Montesqueiu and Sieyes, will be addressed in depth in the next part of this chapter which looks at the institutional and empirical components required in a constitution.

from an all-powerful ‘prince’ and towards a new legitimating locus located in the general will of the people.¹⁴⁷

In the United States, similar – although not identical – developments were occurring which culminated in the American War of Independence and the subsequent victory of the United States over the British colonisers. Unrest had existed in the 13 colonies for some time over the fact that the British were levying substantial taxes against the colony to pay for their massive national debt, despite the fact that the colonies had no elected representatives in the British Parliament.¹⁴⁸ The passage of the Stamp Act in 1765, followed by the Draconian and Intolerable Acts passed after the Boston Tea Party, rapidly moved the colonies of what would become the United States away from accepting the sovereignty of the British Crown and Parliament.¹⁴⁹ This created an overwhelming desire for self-rule and the removal of British power, which was seen as increasingly arbitrary, ultimately leading to the outbreak of war and a wholesale rejection of both monarchy and unchecked, unqualified, sovereign power.¹⁵⁰

Many of these American revolutionaries went on to become the founding fathers of the American Constitution. These scholars and statesmen – including John Adams, James Madison and many others – were influenced by a great number of European revolutionary constitutionalists. In particular, Baron Montesquieu heavily influenced the eventual institutional composition of the US constitutional order.¹⁵¹ However, it is perhaps in the seminal pamphlet ‘Common Sense’ by Thomas Paine,

¹⁴⁷ Ibid, p.51.

¹⁴⁸ Ibid, pp.34-35.

¹⁴⁹ Marston, Daniel. *The American Revolution 1774–1783*. Bloomsbury Publishing, 2014.

¹⁵⁰ Ibid. Rogoff, Martin A. “A Comparison of Constitutionalism in France and the United States” *Me. L. Rev.* 49, 1997: 21, pp.34-40.

¹⁵¹ Bergman, Matthew P. “Montesquieu’s Theory of Government and the Framing of the American Constitution.” *Pepp. L. Rev.* 18, 1990: 1, pp.19-26. De Montesquieu, Charles. *Montesquieu: The Spirit of the Laws*. Cambridge University Press, 1989.

often seen as the Father of the American Revolution, that we perhaps see the clearest articulation of the philosophical vision of the American Revolution.¹⁵²

Common Sense is a paean to liberty and an utter rejection of arbitrary, monarchic government.¹⁵³ Paine suggested that government could only be established under a democratic republic and with the ‘intention of granting unto man greater liberty, not tyranny’.¹⁵⁴ Paine relentlessly attacked colonial rule, and in particular the idea that power handed down ancestrally or through hereditary right had any divine source; rather, he suggested that kings such as William the Conqueror were ‘rascals and ravagers’, in whom ‘certainly nothing divine could be found’.¹⁵⁵ Further, he questioned the wisdom of whether a king, so far removed from the day-to-day existence of his followers, could reasonably be expected to rule them well.¹⁵⁶ Much like Rousseau in this respect, Paine saw the greatest virtue and true sovereignty in society and the general will, from whence he believed all virtuous and noble endeavours arose, and conversely saw government as fundamentally a necessary evil.¹⁵⁷ Thus, according to Paine

society is produced by our wants, and government by wickedness; the former promotes our happiness positively by uniting our affections, the latter negatively by restraining our vices. The one encourages intercourse; the other creates distinctions. The first is a patron, the last a punisher.¹⁵⁸

¹⁵² Paine, Thomas. *Common Sense*. Broadview Press, 2004. (See Introduction.)

¹⁵³ Ibid.

¹⁵⁴ Ibid, p.12.

¹⁵⁵ Ibid, p.7.

¹⁵⁶ Ibid, p.3.

¹⁵⁷ Ibid, pg.2.

¹⁵⁸ Paine, Thomas. *Common Sense*. Broadview Press, 2004.

This thorough rejection of arbitrary government and scepticism of government in general undoubtedly summed up the prevailing sentiment in the philosophy of the American War of Independence’.

2.2 Legitimacy and the Constitution 1: The Limitation of Power through Law

As we can see from the above section, the chief concern of the American and French revolutionaries was in unbinding the vertical and unconditional relationship between the sovereign and its subjects. The idea of political rule ‘unbound by law and ungoverned by rules’ was the key injustice that these revolutionaries sought to overthrow.¹⁵⁹ The philosophical architects of the revolutions sought not simply to replace one form of government with another, but instead to ‘establish a new political system that differed fundamentally from the one they had previously accused of being repressive and unjust’.¹⁶⁰

According to Grimm, to achieve this end, these foundational constitutionalists ‘sought to devise a plan of legitimate rule, with individuals governing on the basis of these pre-established conditions’.¹⁶¹ The concept of ‘legitimate rule’ or ‘legitimacy’ is crucial to understanding what constitutionalism sought to achieve.¹⁶² According to John Rawls, legitimacy refers to the rightful process via which public power can be exercised and is justified.¹⁶³ The reimagining and redefining of that sovereign right – from the prince to the constitution and constitutional order – is perhaps the defining feature of constitutionalism and was

¹⁵⁹ Grimm, Dieter. *The Achievement of Constitutionalism in Twilight of Constitutionalism*, Oxford University Press, 2010.

¹⁶⁰ Ibid, p.5.

¹⁶¹ Ibid.

¹⁶² Fallon Jr, Richard H. “Legitimacy and the Constitution.” *Harvard Law Review*, 2005: 1787-1853. Grimm, Dieter. *The Achievement of Constitutionalism in Twilight of Constitutionalism*, Oxford University Press, 2010.

¹⁶³ John Rawls, ‘Political Liberalism: Reply to Habermas’, in Rawls, *Political Liberalism*, paperback edn, New York: Columbia University Press, 1996, pp. 372–439, p.393.

the core objective of the foundational constitutionalists.¹⁶⁴ I will now demonstrate that to achieve, this, two core characteristics were required. First, power must be ‘comprehensively limited’ by the foundational laws and norms set down in the constitution, and, secondly, those claiming to govern under the constitutional system cannot claim to possess this power as an inherent right. Instead, it must ultimately lie with the people.¹⁶⁵

To allow for this legitimate government, sovereign power, previously unlimited in the person of the prince, needed to be both ‘limited and regulated’.¹⁶⁶ Instead of public power being exercised according to the whims and wishes of particular individuals who happened to possess it, public power could only be exercised within a framework of norms and laws which prevented this authority from being exercised arbitrarily and guaranteed the rights of citizens against any attempted exercise of such power.¹⁶⁷ From this perspective, ‘constitutionalism is the idea that the government both can and ought to be limited and its political, moral, and legal authority depend on the observation of these limits’.¹⁶⁸

In a practical sense, the first element of limiting this arbitrary use of power was to ensure that the practice of politics was constrained by a strong and durable rule of law framework.¹⁶⁹ This conception of the rule of law, which predates the

¹⁶⁴ Grimm, Dieter. *The Achievement of Constitutionalism in Twilight of Constitutionalism*, Oxford University Press, 2010, pp.7-8.

¹⁶⁵ See John Rawls *Political Liberalism [PL]*, New York: Columbia University Press. Paperback edition, 1996. For more on how sovereignty should transfer to the people. Sieyès, Emmanuel Joseph. *What is the Third Estate?* trans. SE Finer, introd. by Peter Campbell (New York, Washington, London, 1964, 51, 1789, and Rousseau, Jean-Jacques. *The Social Contract: & Discourses*. No. 660. JM Dent & Sons, 1920, are seminal early works.

¹⁶⁶ All major Enlightenment scholars saw this as key. See Paine, Thomas. *Common Sense*. Broadview Press, 2004. Rousseau, Jean Jacques, *The Social Contract*, 1762 – Archives of the University College, Cork- https://www.ucc.ie/archive/hdsp/Rousseau_contrat-social.pdf; De Montesquieu, Charles. *Montesquieu: The Spirit of the Laws*. Cambridge University Press, 1989, etc.

¹⁶⁷ Waluchow, W. *A Common Law Theory of Judicial Review*, Cambridge University Press, 2009.

¹⁶⁸ Ibid, pg.21.

¹⁶⁹ See, for example, Alexander Hamilton, Federalist 78 in which he argues why fundamental laws protected by the judiciary to regulate the executive and legislative are critical: <http://www.constitution.org/fed/federa78.htm> - Accessed 12th December 2017.

constitutional revolution, is premised on the idea that the letter of the law, rather than the government of the day, is supreme.¹⁷⁰ The American and French constitutionalists sought to expand on this concept embedding the new ‘constitutional law’ as an inalienable framework that sat above the ordinary legislative process and limited its capacity insofar as no new law could be created that contravened this constitution. Inherent in constitutionalism’s quest to limit and discipline government power is thus the concept of a body of ‘higher law’ that sets out the core principles, purposes, and rights embedded in the constitutional system, as well as clearly delineating both the powers and limitations of government.¹⁷¹ To do this, both the American Constitution and the first French Constitution (as well as all others that followed) set forth this vision in respective written and codified constitutions.¹⁷² The institutional method via which this was effectively achieved, the separation of powers, will be addressed in the next chapter. Here, I will highlight how these constitutions created the overarching ‘higher law’ structures which became the foundation stone for institutional practice within the broader constitutional system.

The idea of constitutions as fundamentally ‘higher law’ bodies created with the express purpose of limiting governmental power and protecting the liberty of individuals can clearly be seen in both the American and French constitutions. The US Constitution, in particular, seems to express the limitation of power and the

¹⁷⁰ Tamanaha, Brian Z. *On the Rule of Law: History, Politics, Theory*. Cambridge University Press, 2004, pp.1-6. O’Donnell, Guillermo A. “Why the Rule of Law Matters.” *Journal of Democracy* 15.4, 2004: 32-46.

¹⁷¹ Rogoff, Martin A. “A Comparison of Constitutionalism in France and the United States” *Me. L. Rev.* 49 1997: 21, pg.31.

¹⁷² While of course not all constitutions are written, with the notable example of the British constitution, the vast majority are. The written constitution allows the thematic vision of constitutionalism to be better understood in terms of setting out particular precepts that have broadly been inherent to the philosophy and practice.

protection of individual citizens' liberties and rights as its core purpose.¹⁷³ Indeed, the Seven Articles of the Constitution spell out in their entirety how the US should be governed, with the first three articles dealing with separation of powers and the final four dealing with states, federal government, and amendment, and ratification procedures.¹⁷⁴ The US Constitution also subsequently included a Bill of Rights, which are the fundamental rights of each citizen to be free of government interference.¹⁷⁵ These rights are enforceable at every level of the American judicial system, with the Supreme Court standing as an ultimate legal bulwark against abuse or derogation from the constitution by political actors in the executive or legislative.¹⁷⁶

Resultantly, in the American legal system, the constitution is the 'fundamental legal document, and all law must be evaluated against these standards'. The constitution is not one of several sources, but the 'undisputed, ultimate fount of the fundamental principles, values, and procedures according to which American society is constituted and function.'¹⁷⁷ The clear articulation of the division of powers, fundamental rights, and superior nature of the constitution all demonstrate the critical concept of the constitution as a body of higher law in which the limitation of government power is a key goal. As Rogoff argues, the enduring

¹⁷³ More detail on the institutional mechanisms and nature of the different organisations of the US, as well as the French, constitution will be set out in Chapter 2 during our discussion of separation of powers. The purpose here, as I have earlier iterated, is to outline core commonalities to give the reader a broad understanding of what constitutionalism entails.

¹⁷⁴ Constitution of the United States, ratified June 21, 1788-Accessed at <http://constitutionus.com/> - 12th December 2017.

¹⁷⁵ Jordan, Terry L. *The US Constitution: And Fascinating Facts about It*. Oak Hill Pub, 1999. Hall, Kermit L., William M. Wiecek, and Paul Finkelman. *American legal history*. Oxford University Press, 1996.

¹⁷⁶ Clark, Bradford R. "Separation of Powers as a Safeguard of Federalism." *Tex. L. Rev.* 79, 2000: 1321, pp.1328-1335. Sharp, Malcolm P. "The Classical American Doctrine of the Separation of Powers." *The University of Chicago Law Review* 2.3, 1935: 385-436.

¹⁷⁷ Rogoff, Martin A. "A Comparison of Constitutionalism in France and the United States" *Me. L. Rev.* 49, 1997: 21, pg.33.

elevation of the US constitution to the state of an almost ‘canonical’ text in the minds of American political and legal discourse even today demonstrates the sheer importance of limiting governmental power through law for US constitutionalism.¹⁷⁸ Given the relative clarity, persistence, and recognition of limitation of power inherent in all manifestations of the US Constitution, it is unnecessary to go into too much detail on the idea of power-limitation within it.¹⁷⁹ I will now look at the limitation of power within the French constitutional system, which, given its multiple iterations, must be teased out with greater care.

Although the French constitution differs from the US one in a great number of ways, in terms of institutional organisation and, indeed, of *how* governmental power is limited and balanced, the idea that fundamentally the constitution should somehow possess higher law status also finds clear expression in early French constitutional practice and thought.¹⁸⁰ In this regard, it is perhaps most pertinent to first look at constitutional practice and thought up until 1799, when the establishment of the consulate fundamentally brought all significant powers under Napoleon Bonaparte’s control.¹⁸¹ Montesquieu, who in 1748 argued clearly that ‘the limitation of power by law is necessary for the protection of political liberty’ is a key scholar in this regard.¹⁸² His doctrine of separation of powers, which we will come onto in detail in the next chapter, is founded in the belief that ‘to assume liberty, political power must be divided..... within the framework of inalienable

¹⁷⁸ Ibid, p.33.

¹⁷⁹ Rogoff, Martin A. “A Comparison of Constitutionalism in France and the United States” *Me. L. Rev.* 49, 1997: 21.

¹⁸⁰ Hill, Henry Bertram. “French Constitutionalism: Old Regime and Revolutionary.” *The Journal of Modern History* 21.3, 1949: 222-227, pp.223-226.

¹⁸¹ Hunt, Lynn. *Politics, Culture, and Class in the French Revolution: With a New Preface*. Vol. 1. Univ of California Press, 2004. McIlwain, Charles Howard. *Constitutionalism: Ancient and Modern*. The Lawbook Exchange, Ltd., 2017.

¹⁸² Montesquieu 1750 *The Spirit of Laws*, Translated 1752: Thomas Nugent, Batoche Books, 2001, p.113.

law'.¹⁸³ Alongside the elevation of the general will, the recourse to 'fundamental values', representing 'higher law norms' is a key aspect of French Constitutionalism.¹⁸⁴ In this regard, the Declaration of the Rights of Man in 1789 offers a set of 'higher norms' that limit the exercise of political power. Although a century-and-a-half of relative political turmoil resulted in a great number of written constitutions in France, the declaration has been incorporated as a pre-eminent text in all significant iterations of the French Constitution and is undoubtedly the normative foundation of French constitutionalism.¹⁸⁵ The declaration in the preamble states, after declaring the 'sacred and inalienable rights of man':

'This declaration, being constantly before all the members of the social body, shall remind them continually of their rights and duties; that the acts of the legislative power, as well as those of the executive power, may be compared at any moment with the objects and purposes of all political institutions and may thus be more respected, and, lastly, that the grievances of the citizens, based hereafter upon simple and incontestable principles, shall tend to the maintenance of the constitution and redound to the happiness of all.'¹⁸⁶

It is clear from this declaration that the limitation of political power by fundamental principles and laws is at the core of the French constitutional system and thought. Particular articles within the declaration also support the idea that

¹⁸³ Rogoff, Martin A. "A Comparison of Constitutionalism in France and the United States" *Me. L. Rev.* 49, 1997: 21. Also Montesquieu 1750 *The Spirit of Laws*, Translated 1752: Thomas Nugent, Batoche Books, 2001, p.113-117.

¹⁸⁴ Rogoff, Martin A. "A Comparison of Constitutionalism in France and the United States" *Me. L. Rev.* 49, 1997, pg.30: 21. Grimm, Dieter. *The Achievement of Constitutionalism in Twilight of Constitutionalism*, Oxford University Press, 2010.

¹⁸⁵ Rogoff, Martin A. "A Comparison of Constitutionalism in France and the United States" *Me. L. Rev.* 49, 1997, Jellinek, Georg. *The Declaration of the Rights of Man and of Citizens: A Contribution to Modern Constitutional History*. H. Holt, 1901.

¹⁸⁶ Declaration of the Rights of Man, Preamble, 1789. Avalon Law Project, Yale Law School – http://avalon.law.yale.edu/18th_century/rightsof.asp – Accessed 3rd December 2017.

limiting public power through law was a core objective of French constitutionalism. In particular, Article 16 clearly emphasises the importance of the ‘limiting’ power of law. It states: ‘a society in which observance of the law is not assured, nor the separation of powers defined, has no constitution at all.’¹⁸⁷ Thus, we can see in the Declaration of the Rights of Man, seen as the pre-eminent foundation of French constitutionalism, that the limitation of political power by law is of critical importance.

Given the relative political turmoil that transpired over the years following the French Revolution, it is difficult to pin down a specific ‘French Constitution’ from that period to draw conclusions from. However, it is reasonable to see that within most iterations of the early French constitutions prior to the rise of Napoleon, the idea of limitation of power spelled out in the Rights of Man remained a core component¹⁸⁸. The main purpose of the first French Constitution was to restrain the power of the king by placing all law-making authority in the hands of the legislature and by ensuring the creation of an independent judiciary to check the other branches and ensure they stayed within the parameters of the Declaration of The Rights of Man and other forms of law derived from the constitution.¹⁸⁹ There was a similar situation with the ‘Constitution of the Year III’, which founded the ‘Directory’ which went on to rule France before the rise of Napoleon. This constitution, which also began with the ‘Rights of Man’ declaration, also sought to limit political power by creating an elected judiciary free from political influence. It also sought to

¹⁸⁷ Declaration of the Rights of Man, Preamble, 1789. Avalon Law Project, Yale Law School – http://avalon.law.yale.edu/18th_century/rightsof.asp – Accessed 3rd December 2017.

¹⁸⁸ Rogoff, Martin A. “A Comparison of Constitutionalism in France and the United States” *Me. L. Rev.* 49, 1997, p.49.

¹⁸⁹ This is, of course, a very brief summary, because of the extensive nature of the Constitution of 1791. Chapters 2.3.3 to 2.3.5 deal with the separation and limitation of powers, and can be found here – https://en.wikisource.org/wiki/French_Constitution_of_1791 – Accessed 3rd December 2017.

enhance separation of powers and the rule of law by ensuring that the executive branch of the government in the form of the directory would not have any role in legislation or the execution of judicial functions.¹⁹⁰ Moreover, it clearly argued for the ‘higher purpose’ ‘superior’ nature of the constitution itself, placing it above ordinary legislation.¹⁹¹ Given the vast number of following French constitutions (15 in total), it is not possible to assess them all here, but it is reasonable to suggest that limitation of power through higher law norms and principles remained a key component in most.

We can see therefore that for a constitutional order to wield ‘legitimate’ political authority, that is, the right to exercise public or coercive power, political power must be bound within a strong and durable rule of law framework. For this to occur, the constitution must offer a ‘higher law’ framework in which the fundamental laws and norms of the polity are enunciated, from which all other forms of law and politics spring, and from which none can diverge. This ‘limitation of power’ aspect of constitutionalism is one of the two core aspects of its legitimisation.

Before moving on to discuss the other ‘legitimizing’ aspect required for constitutionalism, another important and critical feature of constitutionalism must be noted. As Krisch points out, not only do constitutions limit and divide all public power, but importantly, they also *grant* these powers.¹⁹² To maintain constitutional coherence and ensure that all public power is exercised within a legitimate framework, both the *granting* and *limiting* of power must be comprehensive.¹⁹³

¹⁹⁰ Again, this is very much a summary. The core aspects on separation of powers and rule of law can be found at Titles V, VI, and VIII, here- https://en.wikisource.org/wiki/Constitution_of_the_Year_III

¹⁹¹ As above, see Title I.

¹⁹² Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pp.60-62.

¹⁹³ *Ibid.*

As we have seen earlier, the purpose of constitutionalism was not simply to reform existing systems of government, but to replace them with a new, legitimate form of government. This was, as Krisch argues, a ‘comprehensive ambition to ground the entire system of government’¹⁹⁴ and not simply to shape it one way or another. Thomas Paine, writing in 1791 and with extensive knowledge of both US and French constitutional systems, argued that ‘a constitution is a thing antecedent to government, and the government is only a creature of the constitution’.¹⁹⁵ Forms and groundings for authority which had previously operated outside a constitutional framework, such as the divine right of kings or social contract theories that sacrificed security to a prince, could no longer exist within the constitutional polity.¹⁹⁶ Only through ensuring that *all* public power was exercised through constitutional mechanisms could the possibility of arbitrary power being exercised by man over man be defeated.¹⁹⁷ This requirement of comprehensiveness is critical both to the idea and to the empirical and legal foundations of constitutionalism. If a constitution is seen to be comprehensive, no extra-constitutional authority can reasonably exist, at least within the confines of the constitutional polity.¹⁹⁸ As we will explore in Chapter 5, this does not mean that other legal or political subsystems cannot operate within a broader constitutional order. However, all authority operating within the constitutional system must ultimately be circumscribed by the overarching constitutional system otherwise the constitution’s critical claim to form the basic order for society would be defeated.

¹⁹⁴ Ibid, p.60.

¹⁹⁵ Paine, Thomas, *Rights of Man*, Mineola, NY: Dover Thrift Editions, 1999, 33.

¹⁹⁶ Grimm, Dieter. *The Achievement of Constitutionalism in Twilight of Constitutionalism*, Oxford University Press, 2010, p.9.

¹⁹⁷ Waluchow, W. *A Common Law Theory of Judicial Review*, Cambridge University Press, 2009. Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010.

¹⁹⁸ Paine, Thomas, *Rights of Man*, Mineola, NY: Dover Thrift Editions, 1999.

2.3 Legitimacy and the Constitution 2: Popular Sovereignty and Constitutionalism.

As we can see from the above, for public power to be legitimately exercised within a constitutional system, power must be both comprehensively granted and limited. Doing so ensures that arbitrary power is not exercised in the public sphere. However, as I will demonstrate, the comprehensive limitation of power is only one of two core aspects of constitutional legitimacy. For ‘constitutionalism’ to fulfil its purposes of legitimate government, it must also fundamentally shift the source of sovereignty from the government to the governed.¹⁹⁹ While I will go into much greater detail in the following chapter on *how* this was achieved, it is necessary here to outline *why* such a radical move was necessary to create the legitimate government sought by constitutionalists.

The limitation of power by law is one key aspect of constitutionalism. The letter of the constitution preceded and created the government’s right to rule. The question, however, still remained as to ‘how this law, which emanated from the political process, could at the same time bind the process’.²⁰⁰ Ultimately, without older ideas such as the social contract or divine law, the content of the constitution was the product of political decisions, usually taken by a limited number of people through some form of constitutional convention.²⁰¹ In the absence of these ideas, the question of where the unquestionably positive law of the constitution, freed from divine providence, found its authority to govern over the multitude became

¹⁹⁹ See, for example Rousseau, Jean Jacque, *The Social Contract*, 1762 – Archives of the University College, Cork – https://www.ucc.ie/archive/hdsp/Rousseau_contrat-social.pdf, Grimm, Dieter. *The Achievement of Constitutionalism in Twilight of Constitutionalism*, Oxford University Press, 2010, pp.9-12.

²⁰⁰ Grimm, Dieter. *The Achievement of Constitutionalism in Twilight of Constitutionalism*, Oxford University Press, 2010, pg.9.

²⁰¹ Ibid. Also, Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pp.60-65.

enormously important.²⁰² The government, under the constitution, could not, as in the past, claim a master-subject relationship, as doing so would once again result in the subjection of citizens to arbitrary power.²⁰³ Ultimately, therefore, the conditions had to be created under which ‘reasonable people would be willing to submit themselves to a government exercising public power’.²⁰⁴

As Grimm argues, this problem could only be solved by offering a new source of legitimacy. This was done by the ‘division of the positive law of the constitution into two different bodies: ‘One that emanated from the government and bound the people (the positive law of the constitution) and one that emanated from the people and bound the government.’²⁰⁵ Thus, the legitimating principle that gave the constitutional government the right to exercise public power was to be found in the principle of ‘popular’ sovereignty.²⁰⁶ In this respect, the government was only the ‘custodian’ of the sovereignty bequeathed to it by both the rule of law embodied in the constitution, but also, and critically, by the people themselves.²⁰⁷ Given the equality and liberty that were the fundamental rights of all citizens within the constitutional order, ‘legitimacy could only be acquired by a government based on the consent of the governed’. For each citizen to share equally in the constitutional

²⁰² Gordon, Scott. *Controlling the State: Constitutionalism from Ancient Athens to Today*. 1999.

²⁰³ See for Example: Madison, Hamilton, and Jay *Federalist* 78. Also Gordon, Scott. *Controlling the State: Constitutionalism from Ancient Athens to Today*. Harvard University Press pp.223-285. 1999.

²⁰⁴ Grimm, Dieter. *The Achievement of Constitutionalism in Twilight of Constitutionalism*, Oxford University Press, 2010, pg.7.

²⁰⁵ Grimm, Dieter. *The Achievement of Constitutionalism in Twilight of Constitutionalism*, Oxford University Press, 2010.

²⁰⁶ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, p.60.

²⁰⁷ Kalyvas, Andreas. “Popular Sovereignty, Democracy, and the Constituent Power.” *Constellations* 12.2, 2005: 223-244. Chambers, Simone. “Democracy, Popular Sovereignty, and Constitutional Legitimacy.” *Constellations* 11.2, 2004: 153-173.

polity, sovereign authority must ultimately rest on the ‘people as a whole’ rather than solely on a structure and set of decisions taken by a few elites.²⁰⁸

The roots of this requirement can, of course, be seen in many of the foundational scholars, some of whom we have discussed earlier in this chapter. For Rousseau, as we saw, this legitimacy was founded in a ‘social compact’ premised on the general will.²⁰⁹ Unlike previous scholars such as Hobbes, the ‘general will’ for Rousseau lay not in the tacit acceptance of a ‘social contract’ with the prince, but in the active participation of the ‘free and equal’ citizens in the body politic, such that ultimate decision making could be said to take place among all citizens, not simply to those delegated that power.²¹⁰ Similarly, Thomas Paine refers repeatedly to the ‘great equality’ of the ‘body of men’ being the ultimate holders of authority, suggesting the ‘authority of the crown’ should be scattered among the people’.²¹¹ In terms of the actual founding fathers of both revolutions, the critical importance of this new sovereign locus is clear. In Federalist 78, the American constitutionalists described the power of the people as the ‘paramount power’, while Abbe Sieyes, who we will discuss in greater detail in the next section, distinguished between *pouvoir constituant* and *pouvoir constitué*.²¹² This entailed the difference between ‘constituted’ power in terms of the written constitution itself and ‘constituent power’, the ultimate, and sovereign power of the people which must be incorporated into any constitutional entity.²¹³

²⁰⁸ Grimm, Dieter. *The Achievement of Constitutionalism in Twilight of Constitutionalism*, Oxford University Press, 2010, pg.7.

²⁰⁹ Rousseau, Jean Jacques, *The Social Contract*, 1762 – Archives of the University College, Cork – https://www.ucc.ie/archive/hdsp/Rousseau_contrat-social.pdf, pg.10.

²¹⁰ Ibid, pp.26-28.

²¹¹ Paine, Thomas. *Common Sense*. Broadview Press, 2004, pg.14.

²¹² Sieyes, Abbe Emmanuel Joseph. *What is the Third Estate*, 1789, p.2. <http://pages.uoregon.edu/dluebke/301ModernEurope/Sieyes3dEstate.pdf>, Madison, Hamilton, and Jay Federalist 78, 1788.

²¹³ Loughlin, Martin. “The Concept of Constituent Power.” *European Journal of Political Theory* 13.2, 2014: 218-237.

The question of how this ‘popular’ and necessary form of sovereignty manifested in practice will be developed in the next chapter. However, before moving on to the next section one further point must be emphasised. As we have seen, constitutionalism has two core legitimising tenets. Firstly, the power of the sovereign must be limited through the creation of a strong and durable rule of law framework that comprehensively governs the use of public power within the polity. Secondly, the ultimate source of sovereignty cannot lie with the government, but must at some level lie with the people, as being based on the ‘consent of the governed’. As Walker argues, however, these two legitimising tenets are not independent of each other, but are rather ‘reflexive’ and ‘dialectical’, meaning they operate together in a ‘cluster concept’.²¹⁴ As the people or public, as bearers of the constituent power, cannot each be directly involved in the business of government, they must, through some mechanism, delegate that sovereign authority to some form of government.²¹⁵ The ‘constituted power’ through the constitutional structure then ensures this sovereign power is exercised through a framework that protects the rights and liberties of each individual, therefore ensuring tyranny cannot be imposed through sheer majoritarianism.²¹⁶ This relationship will be developed in the next chapter; however, as a point critical to constitutionalism, it is also worth highlighting here.

The purpose of the above was to attain a better understanding of the key ideas of constitutionalism and what it sought to achieve. We can see that, at its core,

²¹⁴ Walker, Neil. “*Beyond the Holistic Constitution*” in *The Twilight of Constitutionalism*, Oxford University Press, 2010, pg.299.

²¹⁵ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010. Grimm, Dieter. *The Achievement of Constitutionalism in Twilight of Constitutionalism*, Oxford University Press, 2010.

²¹⁶ Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012. Loughlin, Martin, and Neil Walker. *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. No. 342.

constitutionalism's key purpose was to legitimate the exercise of public power. To do so, it was required to unbind the arbitrary and broadly unchecked forms of sovereignty that had predominated beforehand and replace them with a concept which could be justly applied.²¹⁷ Thus, to exercise public power legitimately, the constitution must both limit the exercise of sovereign power through a strong and durable rule of law framework as well as ultimately transfer that sovereignty into the popular sphere.²¹⁸ Importantly, as we have also discussed, the constitution must do so comprehensively – no extra-constitutional authority can exist within a constitutional system without ultimately undermining the system itself.²¹⁹

It is from this above analysis that we can seek to draw out a broad definition of constitutionalism, which will be utilised through the remainder of the chapters on global constitutionalism. Based on the above, and with reference to the definition provided by Nico Krisch, I will suggest that the philosophy of constitutionalism requires the 'establishment of a legitimate and comprehensive framework for the exercise of public power'.²²⁰

The 'legitimizing' aspect of constitutionalism, as we have seen, is embedded both in the limitation of political power through law and in transferring the ultimate locus of sovereignty into the people themselves. We have also seen, critically, that such an order must be 'comprehensive', insofar as no extra-constitutional authority can exist within it without undermining its fundamental aims.

²¹⁷ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010. Grimm, Dieter. *The Achievement of Constitutionalism in Twilight of Constitutionalism*, Oxford University Press, 2010.

²¹⁸ Krisch, Ibid, pp.50-51.

²¹⁹ Ibid, pg.41.

²²⁰ My definition builds on what Krisch argues are the core purposes of constitutionalism in Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pg. 64. Krisch suggests constitutionalism's core objective is to create a 'comprehensive framework for the exercise of public power under the rule of law'.²²⁰ However, as my analysis incorporates 'rule of law', within the core idea of legitimacy, it is unnecessary to add that appendage every time I use this definition.

3. British Constitutionalism

It will not have been lost on the reader that the focus of this chapter, in terms of attaining a definition of constitutionalism, has been on two out of the three most influential founding constitutions, the French and the American. Indeed, it might be noticed that the third, the British Constitution, has been broadly absent from the above discussion, despite the considerable philosophical and practical impact of this form of constitutionalism.

The main reason for this is that, in many ways, the emergence of the British Constitution has been a more gradual process, much of which pre-dates the philosophy of ‘constitutionalism’ which emerged as a relatively unified doctrine relating to the ‘revolutionary’ constitutions of the enlightenment.²²¹ As we have seen from the above, although there were, of course, substantial differences between US and French constitutionalism, a clear thread of commonality can be identified in terms of the revolutionary precepts underlying them. The British constitution, emerging as it did from a longer process and with a rather greater degree of historical pedigree, did not and does not sufficiently conform to what one might describe as the de facto mode and norms of Enlightenment constitutionalism.²²² As a result, it is easier to draw out the core norms of constitutional philosophy and politics from the French and American visions. In particular, the absence of a ‘written’ or ‘codified’ document within the British Constitution makes it rather an outlier, with the vast majority of proceeding constitutions across the globe following

²²¹ McIlwain, Charles Howard. *Constitutionalism: Ancient and Modern*. The Lawbook Exchange, Ltd., 2017. King, Anthony. *The British Constitution*. Oxford University Press, USA, 2007.

²²² Himmelfarb, Gertrude. *The Roads to Modernity: The British, French, and American Enlightenments*. Random House, 2008. Friedrich, Carl Joachim. “Constitutional Government and Democracy; Theory and Practice in Europe and America. See introduction and Chapter 1.

the American and French model of a singular constitutional document.²²³ As a result of these differences, it would not be possible to interweave the British Constitution into this broader narrative because of the substantial differences between them, which might have created extensively thin or insufficiently rigorous parallels.

Nonetheless, certain important ideas which share some similarity with the norms of the revolutionary constitutionalists can certainly be identified in the history and practice of British constitutionalism. The idea of the ‘rule of law’, which undoubtedly serves as a core constitutional tenet, has ancient origins in England.²²⁴ Bracton, seen by many as the first to attempt to identify some form of empirical British Constitution, argued with reference to the Magna Carta that the “the king has a superior, namely, God. Also the law by which he was made king. Also his curia, namely, the earls and barons, because if he is without a bridle, that is without law, they ought to put the bridle on him”.²²⁵ Thus, Bracton’s implication was that the letter of the law had the potential to bind the king in spite of his potentially divine authority.²²⁶

However, despite the early iterations of a rule of law system by Bracton and others which normally referred to the Magna Carta, in reality, and often with reference to divine providence, the king stood above the law in many practical ways, at least until the end of the Tudor period. This has been demonstrated earlier with reference to the reign of Elizabeth I.²²⁷ The most important period in terms of the

²²³ Himmelfarb, Gertrude. *The Roads to Modernity: The British, French, and American Enlightenments*. Random House, 2008. Friedrich, Carl Joachim. “Constitutional Government and Democracy; Theory and Practice in Europe and America.” 1941.

²²⁴ Dicey, Albert Venn. *The Law of the Constitution*. Vol. 1. OUP Oxford, 2013. Bingham, Tom. *The Rule of Law*. Penguin UK, 2011, see Chapter 1.

²²⁵ De Bracton, Henry, and Samuel Edmund Thorne. *On the Laws and customs of England*. Vol. 3. Published in association with the Selden Society [by] the Belknap Press of Harvard University Press, 1977, pg.110.

²²⁶ Ibid.

²²⁷ McIlwain, Charles Howard. *Constitutionalism: Ancient and Modern*. The Lawbook Exchange, Ltd., 2017, p.113.

formation of British constitutionalism undoubtedly occurred during the reign of the Stuart kings and culminated in the Glorious Revolution and the Act of Settlement.²²⁸ This period entailed, as McIlwain argues, a ‘battle between law and will’, with Parliament and many prominent jurists on one side and the king on the other.²²⁹ The use of arbitrary power by the king, particularly with regard to taxation and to imprisonment without trial accelerated this battle, with Parliament and prominent jurists seeking to entrench the rule of law to limit the power of the king.²³⁰ Sir Edward Coke, Britain’s foremost jurist of the time, summed up the support for rule of law and distaste for the king’s measures when he presented the ‘Resolutions’, leading to the Habeas Corpus Act which stated

‘no freeman is to be committed or detained in prison, or otherwise restrained by command of the King or the Privy Council or any other, unless some lawful cause be shown ... the writ of *habeas corpus* cannot be denied, but should be granted to every man who is committed or detained in prison or otherwise restrained by the command of the King, the Privy Council or any other ... Any freeman so committed or detained in prison without cause being stated should be entitled to bail or be freed.’²³¹

The resolutions and other documents of the time clearly demonstrate that a core factor in the war that followed between Parliament and the king was the entrenchment of rule of law and an end to the arbitrary nature of the king’s

²²⁸ McIlwain, Charles Howard. *Constitutionalism: Ancient and Modern*. The Lawbook Exchange, Ltd., 2017, Chapter 4.

²²⁹ Ibid, Chapter 4.

²³⁰ Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012. McIlwain, Charles Howard. *Constitutionalism: Ancient and Modern*. The Lawbook Exchange, Ltd., 2017.

²³¹ Hostettler, John. *Sir Edward Coke: A Force for Freedom*. Barry Rose Law Publishers, 1997, p.129.

command.²³² The entrenchment of three important acts which immediately proceeded the civil war – the Petition of Rights, the Bill of Rights, and the Act of Settlement – form much of the core of British constitutionalism. These bills increasingly sought to limit the powers of the king and to entrench the rights and liberties of citizens into a rule of law framework.²³³ The Petition of Rights sets out the specific rights of subjects that the king is legally prohibited from infringing, in particular entrenching the principle of *habeas corpus* into law.²³⁴ Following the civil war, the Bill of Rights is perhaps the most important and clearest doctrine on the emergent British constitutionalism. The Bill of Rights clearly set forth the basic civil rights of citizens, including freedom of speech, freedom from arbitrary arrest, and the right to free elections.²³⁵ It also spelled out clearly that all acts of the monarchy must operate with the framework of a ‘rule of law’²³⁶ and the requirements for the crown to seek the consent of the people in Parliament, therefore setting the foundations for the idea of parliamentary sovereignty, broadly seen as the foundational principle of British constitutional government.²³⁷

AV Dicey thus suggests, with reference to these important acts, that the core principles of British constitutionalism are rule of law and parliamentary sovereignty.²³⁸ Rule of Law is embodied in the idea stipulated in the core constitutional acts that the law applies equally to all, and that all acts, including

²³² McIlwain, Charles Howard. *Constitutionalism: Ancient and Modern*. The Lawbook Exchange, Ltd., 2017.

²³³ Himmelfarb, Gertrude. *The Roads to Modernity: The British, French, and American Enlightenments*. Random House, 2008. Friedrich, Carl Joachim., p.45.

²³⁴ Petition of Rights, Constitution Society, 1628 – <http://www.constitution.org/eng/petright.htm>- Accessed 17th December 2017.

²³⁵ Bill of Rights, 1688- Government.co.uk- <https://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction> – Accessed 18th December 2017.

²³⁶ Ibid.

²³⁷ Dicey, Albert Venn. *The Law of the Constitution*. Vol. 1. OUP Oxford, 2013. Bingham, Tom. *The Rule of Law*. Penguin UK, 2011.

²³⁸ Ibid, p.144, 240.

those of the government, must ultimately cohere to fundamental norms and principles.²³⁹ The second aspect, parliamentary sovereignty, is, much like within the US and French constitutional systems, based on the idea of popular sovereignty – that, fundamentally, government can only exercise authority over equal citizens based upon the consent of the governed, and therefore anybody elected by the body of citizenry must ultimately be pre-eminent in the process of law-making.²⁴⁰

As we can see, while the emergence of the British Constitution was more gradual (and some argue still an on-going process), than the French and American and did not ultimately result in the creation of a single written document, important similarities can be observed. The desire to restrain an overpowerful sovereign from exercising arbitrary power and bind that sovereign within a rule of law framework, and the idea that ultimately sovereign authority must lie with the people, correlate considerably with the revolutionary form of constitutionalism focused on in the main part of this chapter.

The above chapter has thus demonstrated that, at its core, the idea of constitutionalism is premised ultimately on legitimating the use of public power and authority. From an assessment of the French and American models, it ultimately demonstrated that, in essence, constitutionalism sought to provide and create a ‘legitimate and comprehensive framework’ for the exercise of public power. Finally, it demonstrated that the British model, while differing substantially in process from the revolutionary constitutions, ultimately shared many of the same key features, in particular the importance of restraining public power through law and transferring ultimate sovereignty to the people through some form of popular sovereignty. Thus,

²³⁹ Ibid, see Chapter 13.

²⁴⁰ Ibid.

we can reasonably conclude that these features are key and necessary aspects of the broader philosophy of constitutionalism.

Conclusion

To provide a framework for future chapters on global constitutionalism, this chapter sought to identify the core characteristics of constitutionalism with the intention of creating a definition for the concept which can be utilised for the remainder of the thesis. To do so, it began by examining the historical antecedents for constitutionalism. It began this analysis by first looking at Aristotle and Cicero, as two core scholars of antiquity. It demonstrated how both authors offered some early iterations of ideas that would become core to ideas of constitutionalism. As we saw, Aristotle was among the first to consider the idea of making power impersonal by creating some form of mixed government that limited the capacity of the ruler to impose their power arbitrarily on the governed. Cicero, the product of a more advanced legal culture, was key in offering early ideas about how a legal system could be strengthened and was the first to suggest that fundamental law could be enunciated in one document, thus offering, in a sense, the first written constitution.

Given the relative dearth of scholarship and societal regression of the early Middle Ages, this analysis resumed within the late medieval period and with the creation and consolidation of the modern sovereign state. As we saw, the core feature of government in this period was the fundamentally unfettered power of the sovereign, who could have 'no earthly superior.' This was partially a result of the doctrine of Divine Right of Kings, and partially, as we witnessed from our analysis of Hobbes and Bodin, as a result of the belief that a state could only be secure under this form of royal or sovereign absolutism.

Having offered some historical background, this chapter then examined the core purposes of constitutionalism, and how it differed from forms of government that came before. As we saw from our analysis of Thomas Paine and Rousseau, the core objective of these early constitutionalists was to unbind the arbitrary nature of royal/sovereign absolutism that had predominated before and create a new, legitimate basis for the exercise of public power. To do this, two core characteristics were required. Firstly, the exercise of political or public power must be contained within a strong and durable rule of law framework to ensure it is not exercised arbitrarily. Our analysis of both American and French constitutionalism demonstrates, in diverse ways, the core importance of restraining public power through law. It is, as we also saw, imperative that this constitutional framework be 'comprehensive' to ensure that the constitution's basic order cannot be undermined by outside or 'extra constitutional' influences. Secondly, we saw that the ultimate source of sovereignty cannot rest with the government, but is premised on the consent of the governed through some form of popular sovereignty.

As the mainstay of the chapter focused on American and French constitutionalism, the final section sought to briefly address the question of British constitutionalism. It demonstrated that, despite considerable differences between the British model and those of the revolutionary constitutionalists, considerable core similarities do exist, as British constitutionalism is also ultimately founded on popular sovereignty and rule of law, as AV Dicey famously argued. Thus, we can perceive a core thread of commonality running through constitutional discourse in a more general sense.

This chapter sought to assess the core purposes of constitutionalism with the intention of providing a definition which can then be used in future chapters on

global constitutionalism. The following chapter will now scrutinise the actual empirical and institutional structures required for the legitimating framework of constitutionalism to operate with the end goal of outlining a core set of normative and institutional precepts for constitutionalism that will be used in the remainder of the thesis on global constitutionalism.

Chapter 2: The Empirical Constitution: Core Characteristics of Constitutionalism

Introduction

The previous chapter of set out, in some detail, the historical basis and core purposes of constitutionalism. After a discussion of the scholarly and historical precepts of constitutional thought, it demonstrated that constitutionalism requires the application of a legitimate and comprehensive framework for the exercise of public power. In doing so, it helped highlight both core shifts in political and legal thinking which paved the way for the emergence of modern constitutionalism, as well as the core theoretical components required for constitutionalism.

Nonetheless, as Wahl argues, a constitution is more than a set of theoretical precepts. For constitutionalism to achieve its core objectives of creating this legitimate and comprehensive framework, it requires certain empirical and institutional components.²⁴¹ The purpose of this chapter is to highlight these empirical and institutional components which are necessary for constitutionalism to achieve its objective of legitimate government. Such an analysis is necessary for later chapters on global constitutionalism which will focus not only on its theoretical, but also material properties, of potential global constitutions, and thus provide a further set of characteristics against which to assess various models of global constitutionalism. It will argue that to create this legitimate and comprehensive framework, the constitution must possess two core material characteristics. The first of these is that, to ensure that no organ of government can exercise power arbitrarily outside the constitutional framework, the institutions of

²⁴¹ Wahl, Rainer. "In Defence of Constitution." Dobner, Petra, and Martin Loughlin, eds. *The Twilight of Constitutionalism?* Oxford University Press, 2010, pp.221-222.

governmental power must be ‘separated’ into an executive, legislative, and judiciary.²⁴² Secondly, it will argue that the ‘constituent power’ of the people must be actively represented within any constitutional polity, and that, in practice, this requires some form of representative democracy.²⁴³

The first substantive section of this chapter will highlight the importance of the idea of ‘separation of powers’ within constitutionalism. It will begin by looking at the historical basis for separation of powers, demonstrating that, while certain related concepts such as ‘mixed government’ did emerge in the pre-Enlightenment period, it was through the work of Baron de Montesquieu that the modern, constitutional idea of separation of powers found its first substantive home.²⁴⁴ As the key theorist in this regard, I will use Montesquieu to highlight the most important aspects of the concept of the separation of powers, before going on to demonstrate how the conception has operated within modern constitutional polities.²⁴⁵ This section will thus demonstrate that, despite relatively substantial differences between core constitutional systems, the separation of powers remains critical to preventing the emergence of arbitrary power, a key goal of constitutionalism.

The second section of this chapter, building on work in the first chapter that emphasises the requirement for sovereignty to ‘ultimately lie with the people’, will

²⁴² Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012. Montesquieu 1750, *The Spirit of Laws*, Translated 1752: Thomas Nugent, Batoche Books, 2001. Wormuth, Francis Dunham. *The Origins of Modern Constitutionalism*. Harper, 1949.

²⁴³ Sieyes, Abbe Emmanuel Joseph. *What is the Third Estate?* 1789. *The French Revolution and Human Rights: A Brief Documentary History*, 1963. Paine, Thomas. *Rights of Man*. No. 718. Broadview Press, 2011. Lang “*A Constitutionalising Global Order: An Introduction*.” Lang and Wiener *Handbook for Global Constitution*, Forthcoming, 2017, p.16. Grimm, Dieter. “*The Achievement of Constitutionalism*”. *Twilight of Constitutionalism*, Oxford University Press, 2010, pp.8-9.

²⁴⁴ Montesquieu, 1750. *The Spirit of Laws*, Translated 1752: Thomas Nugent, Batoche Books, 2001, Chapter 11.

²⁴⁵ *Ibid.*

focus on the idea of ‘constituent power’, which involves the necessary participation of the ‘sovereign people’ as a whole within the constitutional polity.²⁴⁶ As Abbe Sieyes remains the progenitor of the concept of constituent power as well as its most important historical influence, I will begin by focusing on his idea of constituent power as ultimately lying with the ‘third estate’ in the form of the nation, and manifested through representative democracy.²⁴⁷ I will look more deeply at the concept and its operation, demonstrating that initial conceptions of popular sovereignty as the ‘general will’ eventually became bounded up within the broader constitutional system through the idea of representative democracy, and that channelling constituent power in this way is necessary for the smooth operation of a constitutional order.²⁴⁸ Finally, it will be suggested that, in fact, the relationship between the separation of powers and the requirement for some form of constituent power are, to some degree, symbiotic, mutually reinforcing the overarching legitimating frame that constitutionalism provides.

1. The Purposes of Constitutionalism.

As discussed in some detail in the previous chapter, constitutionalism set out not simply to reform existing forms of power, but rather to replace entirely pre-existing forms of government which were considered to be arbitrary and unjust with legitimate rule.²⁴⁹ The key purpose of this was to limit political power, protecting

²⁴⁶ Rousseau, Jean Jacques, *The Social Contract*, 1762 – Archives of the University College, Cork – https://www.ucc.ie/archive/hdsp/Rousseau_contrat-social.pdf, Sieyes, Abbe Emmanuel Joseph. *What is the Third Estate?* translated SE Finer, introduction by Peter Campbell (New York,) Washington, London, 1964. 51, 1789. Lindahl, H. K., Martin Loughlin, and Neil Walker. “Constituent Power and Reflexive Identity: Towards an ontology of collective selfhood.” *The Paradox of Constitutionalism*, 2007: 9-24.

²⁴⁷ Sieyès, Emmanuel Joseph. *What is the Third Estate?* translated SE Finer, introduction by Peter Campbell (New York, Washington, London 1964) 51, 1789.

²⁴⁸ Loughlin, Martin, and Neil Walker. *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. No. 342.4. Oxford University Press, 2007.

²⁴⁹ Paine, Thomas. *Rights of Man*. No. 718. Broadview Press, 2011, pg.33. Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA,

the rights of the individual from arbitrary acts of state power, and ensuring that acts of political power were governed within a stable, structured, and predictable framework. To achieve this, the constitution needed to establish a ‘legitimate and comprehensive framework for the exercise of public power under the rule of law’.²⁵⁰

A key aspect in creating such a framework lay in the fact that rather than dispersing or decentralising power, constitutional order required both the comprehensive limited and granting of power. Insofar as constitutionalism was required to comprehensively regulate the exercise of public and political power, it was necessary that the constitution became ‘the foundational source of authority for all other legal, political, and judicial acts within the realm’.²⁵¹ This comprehensive ambition was to ‘ground the entire system of government, not simply to shape it one way or the other’.²⁵² Thomas Paine described this ambition when he stated that ‘a constitution is a thing antecedent to a government and a government is only the creature of a constitution’.²⁵³ Thus, any exercise of governmental power could not be taken for granted as based on divine right or other interdependent foundations – its legitimacy was granted only through the constitution itself.²⁵⁴ Possessing these particular characteristics of supremacy allows the constitution to be the conduit through which all public power flows, thus allowing for the entirety of

2010, pg.41. Grimm, Dieter. “*The Achievement of Constitutionalism*” in *Twilight of Constitutionalism*, Oxford University Press, 2010, p.33.

²⁵⁰ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pg.64.

²⁵¹ Dunoff, Jeffrey L., and Joel P. Trachtman, eds. *Ruling the World: Constitutionalism, International Law, and Global Governance*. Cambridge University Press, 2009, p.69. Paine, Thomas, *Rights of Man*, Mineola, NY: Dover Thrift Editions, 1999, pp. 32-34. Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pg. 41.

²⁵² Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pg. 41. Grimm, Dieter. *The Achievement of Constitutionalism in Twilight of Constitutionalism*, Oxford University Press, 2010, pp.5-10.

²⁵³ Paine, Thomas, *Rights of Man*, Mineola, NY: Dover Thrift Editions, 1999, pg. 33.

²⁵⁴ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, 41. Paine, Thomas, *Rights of Man*, Mineola, NY: Dover Thrift Editions, 1999, pp.31-35. Grimm, Dieter. *The Achievement of Constitutionalism in Twilight of Constitutionalism*, Oxford University Press, 2010.

governmental practice to be without the primary bane against which constitutionalists railed – the exercise of arbitrary power.²⁵⁵ In creating such a system, constitutionalists sought, above all, to protect individual rights and to ‘allow individuals to interact with agents of government predictably and without fear’.²⁵⁶ To ensure the constitutional system could holistically offer the liberties, rights, and other qualities that it proposed, power needed to be both granted and comprehensively limited.

To offer this comprehensive form of government, constitutionalism required more than simply the existence of certain foundational norms and laws and the existence of a theoretical ‘general will’, to legitimise it.²⁵⁷ To comprehensively govern, like any other system of government, constitutions required complex empirical and institutional systems to both offer the normal functions of government and ensure broad compliance with constitutional norms.²⁵⁸ The manner in which government is constructed is thus extremely important to achieving the core aims of constitutionalism.

As Garrett Brown points out, the constitution, while limiting the exercise of power, also centralises it by placing all legal and political authority within one legal and normative structure.²⁵⁹ As the organs of government (cumulatively), are exercising the totality of constitutional power within a given polity, the risk of them exercising that power arbitrarily or without sufficient recourse to either the material

²⁵⁵ Grimm, Dieter. “*The Achievement of Constitutionalism*” in *Twilight of Constitutionalism*, Oxford University Press, 2010, p10.

²⁵⁶ *Ibid*, p.12.

²⁵⁷ Loughlin, Martin. “The Concept of Constituent Power.” *European Journal of Political Theory* 13.2, 2014: 218-237.

²⁵⁸ Wahl, Rainer. “In Defence of Constitution.” Dobner, Petra, and Martin Loughlin, eds. *The Twilight of Constitutionalism?* Oxford University Press, 2010, pp.233-237.

²⁵⁹ Brown, Garrett Wallace. “The Constitutionalization of What?” *Global Constitutionalism* 1.2, 2012: 201-228., pp.201-215.

constitution itself or the will of the people is considerable.²⁶⁰ As a result, particular empirical and institutional safeguards and systems must exist within the constitutional system, as well as active mechanisms that allow the sovereign people to participate in processes of government.²⁶¹

To achieve the ‘legitimate and comprehensive’ framework for the exercise of public power’, I will argue that systems of constitutional government require two key features. Firstly, to prevent any one organ of government exercising power arbitrarily and potentially abrogating the constitutional law itself, power must ultimately be ‘separated’ between executive, legislative, and judicial organs. Secondly, the vital ‘constituent power’ of the people must be recognised within the constitutional structure, which ultimately manifests through some form of representative democracy to provide the core legitimating link between the government and the governed.

2. The Separation of Powers

The previous section of this chapter, as well as the previous chapter, demonstrated that one of the key aspects of constitutionalism is the limitation of political power through a rule of law framework, with the fundamental norms and laws entrenched in the constitution providing the foundation for this limitation. However, as Rainer Wahl suggests, the mere existence of particular norms and laws are insufficient to ensure that those tasked with the exercise of power remain within the framework of that law.²⁶² If all empirical or practical power is placed within the

²⁶⁰ Ibid. Also, a key point in Montesquieu 1750 *The Spirit of Laws*, Translated 1752: Thomas Nugent, Batoche Books, 2001.

²⁶¹ Wahl, Rainer. “In Defence of Constitution.” Dobner, Petra, and Martin Loughlin, eds. *The Twilight of Constitutionalism?* Oxford University Press, 2010, pp.233-237.

²⁶² Wahl, Rainer. “In Defence of Constitution.” Dobner, Petra, and Martin Loughlin, eds. *The Twilight of Constitutionalism?* Oxford University Press, 2010, pp.221-223.

hands of one individual or organ of governance, then that individual or organ may well feel inclined to abuse that power for personal gain, ultimately undermining the very purposes of constitutionalism.²⁶³ As Montesquieu famously stated ‘constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go’.²⁶⁴ The primacy of constitutional law cannot be taken for granted or implemented in reality simply by edict, but instead must be based on important prerequisites embedded in the structure of government itself which provide the checks and balances vital to ensure that government operates within the letter of the constitutional provisions.

This section of the chapter will suggest that to avert this risk and ensure that government is exercised within the core confines and purposes of the constitution, a ‘separation’ of the core powers and purposes of government is required. At its core, separation of powers insists that to effectively limit political power, it is necessary to divide political authority between an executive, legislative, and judiciary, and that only through an effective ‘separation’ of these powers can ‘rule by law’ be replaced by ‘rule of law’.²⁶⁵ It will begin by offering a brief history of the concept, before looking in more detail at the ideas of Montesquieu, who is broadly considered to be the founding father of the modern conception.²⁶⁶ It will then demonstrate how these

²⁶³ Brown, Garrett Wallace. “The Constitutionalization of What?” *Global Constitutionalism* 1.2, 2012: 201-228, p.210-215.

²⁶⁴ Montesquieu. *The Spirit of Laws*, Chapter 11. Constitution Society. 1750. http://www.constitution.org/cm/sol_11.htm- Accessed 15th June 2017

²⁶⁵ Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012, p.12. Montesquieu 1750, *The Spirit of Laws*, Translated 1752: Thomas Nugent, Batoche Books, 2001. Katyal, Neal Kumar. “Internal separation of powers: checking today’s most dangerous branch from within.” *Yale LJ* 115 2005: 2314.

²⁶⁶ Shackleton, Robert. “Montesquieu, Bolingbroke, and the Separation of Powers.” *French Studies* 3.1, 1949: 25-38. Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012. This statement is not to deny the influence of John Locke’s ‘Two Treatise of Government’, which undoubtedly was an influential source regarding historical separation of powers. However, given the scope of this chapter is intended to set up the modern, tripartite vision of separation of powers with a view to analyse this vision against global constitutionalism, Montesquieu’s more delineated concept of separation of powers remains pre-eminent.

concepts became critical to the foundation of modern constitutionalism and, in turn, how such a separation of powers is a necessary component of any constitution that claims to limit arbitrary power and ensure the protection of individual rights.

The idea of separation of powers was not unique to the Enlightenment constitutionalists, having found roots in a number of more antiquated works. Its most ancient expression came perhaps in the works of Aristotle, who ‘divided political science into two parts: The ‘legislative science’, which was the concern of the law-giver, and politics’.²⁶⁷

Aristotle suggested there were three elements in every constitution that the good legislator must consider. These were, respectively, the ‘deliberative element, the element of the magistracies, and the judicial element’.²⁶⁸ Here we see the first elements of a coherent idea of separation of powers, in that Aristotle understood that excessive power in the hands of a single organ of government was undesirable.²⁶⁹ Much like Aristotle’s other earlier work that touched on constitutionalism, however, his ideas little resembled the clear idea of separation of powers into legislative, executive, and judicial branch such as we understand it today, as the ‘deliberative’ body was intended to be endowed with many of the characteristics which today we understand to belong to the executive and judicial aspects of the constitution.²⁷⁰

Cicero’s *Republic* also discussed the virtue of a separation between law between law and politics, emphasising that in his idealised republic, an effective sovereign would

²⁶⁷ Aristotle. *Politics*, Book 4. (Circa 350BC). MIT repository, Classics (Translation by Benjamin Jowett) – <http://classics.mit.edu/Aristotle/politics.4.four.html> Accessed 2nd Jan 2018. Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012, pg.23.

²⁶⁸ Aristotle. *Politics*, Book 4. (Circa 350BC). MIT repository, Classics (Translation by Benjamin Jowett) – <http://classics.mit.edu/Aristotle/politics.4.four.html> Accessed 2nd Jan 2018

²⁶⁹ Ibid. Vile Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012.

²⁷⁰ Ibid, pg. 24.

govern within a clearly demarcated ‘constitution of law’, thus ensuring a fairer and more just form of government.²⁷¹

Although the early Middle Ages produced a relative dearth of constitutional ideas, the contours of the idea of separation of powers continued to be filled out in the late medieval and renaissance periods. Marsilius of Padua was an influential figure in this regard. Marsilius went further than Aristotle or Cicero in distinguishing between the idea of the law and the ruler.²⁷² Marsilius stated that the legislative power ought to be a genuine power to make laws, that the ‘primary and proper efficient cause of the law.... Is the people, commanding or determining that something be done or omitted with regard to human civil acts, under a temporal pain or punishment’.²⁷³ He also stated that laws must ‘undergo addition, subtraction, complete change, interpretation or suspension insofar as the exigencies of time or place or other circumstances make any such action opportune for the common benefit’.²⁷⁴ While this distinction moved closer to the modern distinction between a legislator and ruler, such a distinction was still bounded within a more medieval conception of law in which the overall function of the government remained ‘judicial’, as it is intended to settle disputes and does not clearly allocate the competences or institutional structure of the ‘parts’ of the state he imagines.²⁷⁵ Marsilius’ key goal in separating the legislative and the executive was more to create efficient government rather than to ‘limit’ governmental and arbitrary power

²⁷¹ Cicero, Marcus Tullius. *The Republic: And, the Laws*. Oxford University Press, 1998.

²⁷²A Gewirth, Marsilius of Padua. *Defensor Pacis*, translated as *The Defender of Peace*, New York, 1951, Vol II. Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012.

²⁷³A Gewirth, Marsilius of Padua. *Defensor Pacis*, translated as *The Defender of Peace*, New York, 1951, Vol II. pg.45.

²⁷⁴ *Ibid*, pp.45-46.

²⁷⁵ *Ibid*.

in the manner such as modern day constitutionalism purports to achieve with the doctrine.²⁷⁶

Further substantive developments in the doctrine came during the English Civil War, in which substantially more consideration was given to the nature of governmental power, particularly regarding the nature of judges. Ireton, for example, argued that ‘the two great powers of the kingdom are divided between the Lords and the Commons, and it is probable that the judicial power was in the Lords principally, and legislative power in the Commons.’²⁷⁷ Similarly, Sadler argued for a threefold division of power when he discussed that it should be dispersed such: ‘Original Power to the Commons, Judicial to the Lords, and Executive to the King’.²⁷⁸ As a result of the contest between king and Parliament, the general idea that power should be divided into two or perhaps three powers had been developed to a substantial degree during the English Civil War.²⁷⁹

Finally, the influence of John Locke on early conceptions of separation of power is indisputable, and, indeed, was likely the most influential of the pre-Enlightenment scholars who discussed the concept of separation of powers. Locke identified the need for a ‘legislative, executive, and ‘federative’ function, where the legislative, as supreme power, would make laws, the ‘executive’ would carry out those law, and the ‘federative function’ which would be in charge of the external affairs of the state.²⁸⁰ However, Locke’s vision was, once again, premised more on a ‘mixed government’ vision of constitutionalism rather than full separation of

²⁷⁶ Ibid. Also, Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012, p.64.

²⁷⁷ Woodhouse, *ASP On the Putney Debates*, Puritanism and Liberty, 1950, p.119.

²⁷⁸ Sadler, John. *Rights of the Kingdom*. Kidgell, 1648.

²⁷⁹ Gwyn, William B. *The Meaning of the Separation of Powers: An Analysis of the Doctrine from Its Origin to the Adoption of the United States Constitution*. Vol. 9. Tulane University, 1965, p.133.

²⁸⁰ Locke, John. *Locke: Two Treatises of Government, Student Edition*. Cambridge University Press, 1988, pp.68-70.

powers.²⁸¹ Rather than the ‘organs’ themselves being fully separated, Locke’s work was focused more on identifying the different ‘functions’ of government and then seeking to provide a balance between them to ensure that no one organ could become completely dominant and thus exercise arbitrary power.²⁸² Nonetheless, Locke still believed that particular organs of government (for example the king and parliament) could share in, for example, the legislative power. Thus, Locke’s vision did not embrace the ‘full’ separation of powers that became a core aspect of Enlightenment constitutional thought.

To a broad degree, then, particularly within British political thought and theory, many of the core ideas behind the separation of powers had been developed as both scholars and agents of government had moved away from more fundamental and medieval ideas about the absolute power of a divinely ordained monarch towards a system of government in which power was to be divided within a number of different organs of governance.²⁸³ However such proposed systems did not fully encapsulate or encompass the ‘true’ idea of separation of powers such as we have come to understand it in modern constitutional parlance. This was because of two core differences which I will elaborate on in the forthcoming section. Firstly, earlier visions failed to sufficiently delineate between the exact powers of each specific organ of governance (the legislative, executive, and the judiciary) and the inter-relationship between these powers.²⁸⁴ Secondly, such conceptions failed to sufficiently ‘separate’ the powers of each constituent organ by placing each function

²⁸¹ Ibid.

²⁸² Ibid, pp.68-75.

²⁸³ McIlwain, Charles Howard. *Constitutionalism: Ancient and Modern*. The Lawbook Exchange, Ltd, 2017. Grimm, Dieter. *The Achievement of Constitutionalism*. Twilight of Constitutionalism, Oxford University Press, 2010, pg.8.

²⁸⁴ Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012 pp.120-125.

within a distinct and separate group of people that were able to exercise their core functions fundamentally independently from the other organs. As Vile suggests, ‘although the bare bones of a separation of powers theory may well have existed by the mid-17th century, such theories suffered from the fact that no real attempt was made to work out the arrangements necessary for such organs to stand separated and protected from each other, or to ensure that such arrangements would not result in deadlock between the organs’.²⁸⁵ As I will demonstrate in the next section, it was in reconciling how and what functions were required of each organ, and how they might best relate to best protect individual liberty from arbitrary power, that the modern, constitutional conception of separation of powers emerged.

2.1 Montesquieu

A brief historical summary on early conceptions of separation of powers has been offered to demonstrate how some of these ideas emerged and their historical importance. I will now look at the emergence of the modern idea of the separation of powers – namely, that, genuine constitutionalism requires governmental power to be separated into three distinct branches – the executive, judiciary, and legislature – and that doing so is necessary for what we have earlier defined as a ‘comprehensive and legitimate framework for the establishment and exercise of public power’, the core goal of constitutionalism.²⁸⁶

To offer a basis for this analysis, I will look at the work of Montesquieu, whose *De l’esprit des lois* is historically, the first and foundational text in which separation of powers in the modern sense is enunciated. For Montesquieu,

²⁸⁵ Ibid.

²⁸⁶ Marshall, Geoffrey. *Constitutional Theory*. Oxford Univ Pr, 1971. Wahl, Rainer. “In Defence of Constitution.” Dobner, Petra, and Martin Loughlin, eds. *The Twilight of Constitutionalism?* Oxford University Press, 2010. Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010.

separation of powers was no longer an isolated doctrine to be taken up when expedient, it was rather a ‘necessary characteristic of that system which has political liberty as its direct aim’,²⁸⁷ which, as was demonstrated earlier, is a core purpose of constitutionalism. Montesquieu began his treatise with the statement that ‘constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go’.²⁸⁸ Thus, for Montesquieu, the key to establishing legitimate government was in channelling and controlling power to ensure it could not be exercised arbitrarily.²⁸⁹ In this respect, Montesquieu suggested that liberty is lost if the three key powers are not separated. Montesquieu defines these powers as ‘that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals, or judging’.²⁹⁰ Although he does not explicitly use the terms ‘executive, legislative, and judiciary’, the terms he uses are clearly comparable to what are commonly understood as such today.²⁹¹

To clarify then, Montesquieu saw that the division of power into three distinct bodies was necessary. The first, legislative body exists to ‘create laws’, and, by today’s standards, must be called a legislature. The second body, the executive, is invested with the authority and resources to ‘execute’ the laws made by the first, and the final body – the judiciary – is given the power to judge and pronounce authoritatively on the nature of the law itself and whether certain actions comply with it.²⁹² The purpose of this separation is spelt out quite clearly by Montesquieu in

²⁸⁷ Montesquieu. *The Spirit of Laws*, Chapter 11. Constitution Society. 1750.
http://www.constitution.org/cm/sol_11.htm-Accessed 16th June 2017

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ Pushaw Jr, Robert J. “Justiciability and Separation of Powers: A Neo-Federalist Approach.” *Cornell L. Rev.* 81, 1995: 393, pp.406-407.

²⁹² Ibid. Also, Montesquieu, *The Spirit of Laws*, Chapter 11. Constitution Society, 1750.
http://www.constitution.org/cm/sol_11.htm- Accessed 16th June 2017.

such a way as would be broadly recognised today as the classic formulation of the concept.²⁹³ It bears well here to offer Montesquieu's entire quotation on this

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end to everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.²⁹⁴

It is the elevation and separation of the third power, the 'power of judging' to 'co-equal' status within the constitutional framework that is perhaps the most important and crucial shift towards the modern concept of separation of powers.²⁹⁵ Gerhard Casper describes this aspect of Montesquieu's work as squaring the circle of constitutionalism.²⁹⁶ As we saw during the English Civil War and the renaissance, the lines between 'rule by law', and 'rule of law' were becoming increasingly blurred within both scholarship and government.²⁹⁷ While all three functions existed in some regard, one or more functions may practically have been

²⁹³ Casper, Gerhard. "An Essay in Separation of Powers: Some Early Versions and Practices." *Wm. & Mary L. Rev.* 30, 1988: 211, p.215.

²⁹⁴ Ibid. Also, Montesquieu, *The Spirit of Laws*, Chapter 11. Constitution Society, 1750. http://www.constitution.org/cm/sol_11.htm- Accessed 16th June 2017.

²⁹⁵ Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012, pp.120-123.

²⁹⁶ Casper, Gerhard. "An Essay in Separation of Powers: Some Early Versions and Practices." *Wm. & Mary L. Rev.* 30, 1988: 211.

²⁹⁷ Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012.

exercised by a number of organs. In particular, where the power of judging and dispute settlement lay was often unclear, and was in practice often exercised by the executive, leading to the ‘arbitrary’ exercise of public power’.²⁹⁸ Montesquieu’s elevation of the judiciary to ‘co-equal and independent’ to the other organs of government as the ‘guardian of the higher law’ finally and decisively enshrined the law itself as ‘undeniably and eternally’ above those who wielded it.²⁹⁹

Importantly, Montesquieu suggested that not only should these categories exist, but that, fundamentally, these spheres should exist independently of each other, exist in conditions of emergency, or in conditions otherwise whereby interdependence might enhance the condition of liberty.³⁰⁰ Montesquieu thus moves decisively from the ‘mixed powers’ doctrine, which had been prominent during the civil war, and towards a true ‘separation of powers’ as we understand it today. Through his formulation that ‘were any competence exercised by the same body or man, it would be the end of everything’³⁰¹ Montesquieu argues not only for the existence of these separate powers, but that, apart from exceptional circumstances, the organs should be separated and independent from each other in carrying out their prerogatives and competences.³⁰² Montesquieu argued that this is because each separate organ is fundamentally not suited to exercising prerogative or power carried out by the others, and allowing their intermingling would remove the clarity necessary to ensure that arbitrary power was not exercised by one organ or another.³⁰³

²⁹⁸ Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012, pp.88-93.

²⁹⁹ Grimm, Dieter. *The Achievement of Constitutionalism in Twilight of Constitutionalism*, Oxford University Press, 2010, pg.8.

³⁰⁰ Ibid. Also, Montesquieu, *The Spirit of Laws*, Chapter 11. Constitution Society. 1750. http://www.constitution.org/cm/sol_11.htm- Accessed 16th June 2017.

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ Ibid.

De l'esprit des lois offers further insight into modern constitutionalism by highlighting two exceptions to the separations of power which have also been key in understanding how various constitutional structures eventually developed. Firstly, Montesquieu suggested that particular exceptions could exist to the separation of powers to prevent overreach by any one body.³⁰⁴ Resultantly, he allowed that the executive might have a share in 'rejecting' law from the legislature, but not in its formulation, or that the legislature or executive might have a role in commuting excessively harsh sentence.³⁰⁵ Modern manifestations of these phenomena can be seen, for example, in the presidential veto and pardon. Thus, Montesquieu did allow for certain forms of sharing if they helped to 'check and balance' particular powers as long as they did not infringe on primary competences. From this perspective, a limited degree of interdependence does not negate independence and can, in fact, help to enhance it, a topic we will return to in the following chapters when looking at the idea of checks and balances at the global level.³⁰⁶ Furthermore, as we will see later in this chapter, the flexibility that Montesquieu allows became key in understanding some of the differences between various constitutional structures, while still recognising the core importance of separating governmental power.

As Vile contends, Montesquieu's doctrine that an effective separation of the executive, legislative, and judiciary was necessary for the protection of individual liberty and the extrication of arbitrary power from government provided a 'manual for the nascent constitutionalism that was emerging across Europe and the United States'.³⁰⁷ Thomas Paine, writing in the US at the height of revolutionary fervour,

³⁰⁴ Ibid.

³⁰⁵ Ibid.

³⁰⁶ Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012, p.104.

³⁰⁷ Ibid, pg.118

echoed Montesquieu's statements, highlighting that not only must the *powers* of the organs be separated, but also the personnel, arguing that 'for the protection of the realms liberty, persons associated in one form of government might never be associates of another'.³⁰⁸ This view, held by both Montesquieu and Paine, also critically distinguishes from earlier, pre-Enlightenment visions such as that of John Locke, who saw the possibility of a more 'mixed' vision, whereby legislative, executive, and 'federative' powers might be exercised by more than one specific body.

It was in the United States that Montesquieu's vision perhaps held the most influence, being cited by the most prominent founding fathers, notably James Madison, as the key intellectual foundation stone for their structured and separated vision of US constitutionalism.³⁰⁹ The scope of this thesis is not sufficient to give an in-depth analysis of all the various types and visions of separation of powers that emerged post-Montesquieu, but it is reasonable to say that the majority of the most prominent constitutional visions accepted both the core separation of powers into the judicial, executive, and legislative and also broadly concurred that these powers must be girded against undue interference from the other organs so they might perform their specified duty effectively. In a real-world sense, this core idea of separation of powers spread across the nascent constitutionalism emerging across Europe and the United States and became a foundational feature in the very idea of constitutionalism itself.³¹⁰

³⁰⁸ Paine, Thomas. *Common Sense*. Broadview Press, 2004.

³⁰⁹ Cohler, Anne M., and Comparative Politics Montesquieu. "The Spirit of American Constitutionalism." *Lawrence: University Press of Kansas* 1988.

³¹⁰ Lang. *A Constitutionalising Global Order: An Introduction*. Lang and Wiener *Handbook for Global Constitution*, 2017.

2.2 The Separation of Powers in Practice: American and European Visions

Although the idea of the separation of powers existed as a core component within all the main forms of constitutionalism that emerged in Europe and the US, the importance of and structure of the doctrine varied, sometimes substantially, between each nation. The extent to which powers were separated varied substantially between a ‘purer’ form of separation of powers which such as that which existed in the United States, and a more ‘mixed’ doctrine of separation of powers, such as that which existed in the United Kingdom and France, in which the delineations and overlap between certain governmental powers have been somewhat less clear.³¹¹

I will briefly outline below how the most important contemporary constitutions handled these potential differences. I will then demonstrate that sufficient similarity exists between them to prove that particular core structural characteristics regarding separation of powers are nonetheless required for the constitution to exist as a ‘legitimate and comprehensive framework for the exercise of public power.’³¹² I will look primarily at the functioning of the doctrine in the United States, France, and the United Kingdom to assess this paradigm.

Revolutionary constitutionalists in the United States, as previous denizens of an empire they considered despotic and unjust, were uniquely aware of the danger of allowing one political actor too much power.³¹³ It is thus no surprise that it was

³¹¹ Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012. Rogoff, Martin A. “A Comparison of Constitutionalism in France and the United States” *Me. L. Rev.* 49, 1997: 21.

³¹² Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pg.64.

³¹³ Billias, G. A. *American Constitutionalism Heard Round the World, 1776-1989: A Global Perspective*. NYU Press. 2009.

among the founding fathers of the US Constitution that the doctrine of separation of powers found perhaps its most natural home.³¹⁴ The US Constitution is often seen as a manifestation of a relatively ‘pure’ separation of powers doctrine, as the organs of the government remain almost entirely independent of each other and their functions are clearly stipulated in a written constitution.³¹⁵ This was very much the intention of the prevailing vision within the United States at the time, who, after enduring what they considered to be despotic rule from the British Crown, felt that the key danger of government was ‘excessive power vested in one man or group of men’.³¹⁶ The need for clear limitation and separation of powers was made perhaps most clearly by Alexander Hamilton, in Federalist Paper 71, in which Hamilton stated

The same rule, which teaches the propriety of a partition between the various branches of power, teaches us likewise that this partition ought to be so contrived as to render the one independent of the other. To what purpose separate the executive, or the judiciary, from the legislative, if both the executive and the judiciary are so constituted as to be at the absolute devotion of the legislative’.³¹⁷

Although here Hamilton refers to the dangers of legislative hegemony, such a distinction could, and indeed was, made by other founding fathers about the potential for executive hegemony. Madison, mindful of the colonial experience, argued that fear of an unbridled or unchecked executive power in the form of governor or president is the greatest risk of tyranny,³¹⁸ and argued that such power

³¹⁴ Casper, Gerhard. “An Essay in Separation of Powers: Some Early Versions and Practices.” *Wm. & Mary L. Rev.* 30, 1988: 211, pg.216.

³¹⁵ Loughlin, Martin. “What is Constitutionalisation?” *Twilight of Constitutionalism*, Oxford University Press, 2010, p.55. Rogoff, Martin A. “A Comparison of Constitutionalism in France and the United States” *Me. L. Rev.* 49, 1997: 21.

³¹⁶ Hamilton Federalist Paper 71, 1788, Avalon Series, Yale School of Law – http://avalon.law.yale.edu/18th_century/fed71.asp

³¹⁷ *Ibid.*

³¹⁸ Madison. Federalist Paper 47, 1750, – http://avalon.law.yale.edu/18th_century/fed47.asp.

must be bounded firmly within a system that allows for independent checks by a fully empowered legislative body made up of the representatives of the people, as well as a 'well established' judicial power with the capacity to authoritatively limit the capacity of the other, 'active' organs of government if their practices moved beyond the clear confines set by the constitutional system.³¹⁹

Structurally, the importance of this doctrine can be seen very clearly in the actual construction of the US Constitution and the clear delineation of powers between the executive, legislative, and judiciary.³²⁰ Insofar as legislating is concerned, the Houses of Congress are key in both the production and passing of legislation. In this respect, they are very strongly shielded from formal interference from the executive branch, with the only key executive check existing in the form of the presidential veto, which can anyhow be overridden with a 2/3 majority in Congress.³²¹ Similarly, the judicial branch, in the form of the Supreme Court, after appointment by the President and confirmation by Congress, then exists entirely independently of the executive and legislative body as members are appointed for life.³²² It is empowered to strike down both acts of the executive and the passage of primary legislation in Congress demonstrating the importance placed on its status as guardian of the law, and also the importance placed on the almost absolute separation of powers by the founding fathers of US constitutionalism.³²³

³¹⁹ Ibid.

³²⁰ Rogoff, Martin A. "A Comparison of Constitutionalism in France and the United States" *Me. L. Rev.* 49, 1997: 21, pg. 31. Gwyn, William B. *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution*. Vol. 9. Tulane University, 1965.

³²¹ Storey, William. *US Government and Politics*. Edinburgh University Press, 2010. Bowles, Nigel, and Robert K. McMahon. *Government and Politics of the United States*. Palgrave Macmillan, 2014.

³²² Bowles, Nigel, and Robert K. McMahon. *Government and Politics of the United States*. Palgrave Macmillan, 2014.

³²³ Bowles, Nigel, and Robert K. McMahon. *Government and Politics of the United States*. Palgrave Macmillan, 2014, Chapter 7.

Clear evidence of the operation of the separation of powers can be seen particularly in times when the House, Senate, and Presidency are in different hands, as often much of the agenda of the Executive is rebuffed by the legislative or judiciary, and many legislative attempts by the majority party are rebuffed by the possibility of presidential veto or by another house of Congress.³²⁴ Such a paradigm was clearly evident in the later years of the Obama administration, in which the administration was unable to achieve any of its key legislative goals as a result of Republican control of the House and Senate, and similarly, the Republican Congress was unable to legislate any of its priorities into law because of the power of the presidential veto.³²⁵ Scholars and critics have debated the efficacy of such a system when it comes to effective government, but there is little doubt that such a system is entirely germane to one of the core goals of constitutionalism – that is, in ensuring that no organ of governance can exercise arbitrary power over another, thus protecting individual liberty to the maximum possible extent.³²⁶

Separation of powers between the legislative, executive, and judiciary is apparent in all three of the major European powers discussed earlier, albeit in slightly different forms and with differing approaches to the interdependence between respective organs. In particular, European conceptions of separation of powers place less importance on the separation of personnel than Montesquieu and Paine did, as members of the executive are often drawn from the legislature.³²⁷

³²⁴ The recent Obama administration being a case in point, particularly after the take-over of the senate and house by the Republican Party.

³²⁵ Jacobson, Gary C. "Polarization, Gridlock, and Presidential Campaign Politics in 2016." *The Annals of the American Academy of Political and Social Science* 667.1, 2016: 226-246.

³²⁶ Loughlin, Martin. "What is Constitutionalisation?" in *Twilight of Constitutionalism*, Oxford University Press, p.59. Rogoff, Martin A. "A Comparison of Constitutionalism in France and the United States" *Me. L. Rev.* 49, 1997: 21. pp.30-35.

³²⁷ Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012, Chapters 2 & 7.

In France, the separation of powers is enunciated as a core constitutional principle through the entrenchment of Article 13 of the Declaration of the Rights of Man, which reads ‘a society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.’³²⁸ In practice, the current French constitutional system divides executive power between the President, who appoints a Prime Minister and Cabinet who share in the utilisation of executive power, although the President wields the majority thereof.³²⁹ Legislative, or law-making capacity is exercised by the Parliament of France in the form of National Assembly and the Senate, who are almost solely discharged with this purpose. However, the separation of personnel is not quite as stratified as within the US constitution as members of the Cabinet and the Prime Minister are very frequently drawn from the national assembly.³³⁰ At the judicial level, the Constitutional Council acts as a ‘supreme arbiter’ insofar as it is able to review legislation which it deems not to be in accordance with the letter of the constitutional provisions and principles laid down within the constitution itself.³³¹ This capacity has been strengthened in recent years, with the Modernisation of the Institutions of the Fifth Republic Act of 2008, which allows for the French Constitutional Council to review statutes already ‘in the book’, where previously it was deemed only competent to do so when recommended by the opposition before the adoption of legislation.³³² Thus we can see that Separation of Powers remains a core feature of French

³²⁸ Declaration of the Rights of Man, Preamble, 1789, Avalon Law Project, Yale Law School – http://avalon.law.yale.edu/18th_century/rightsof.asp

³²⁹ Cole, Alistair. *French Politics and Society*. Taylor & Francis, 2017, Chapter 5.

³³⁰ Ibid. Boyron, Sophie. *The Constitution of France: A Contextual Analysis*. Bloomsbury Publishing, 2012.

³³¹ Ibid.

³³² Constitution of France, Articles 61-62 – https://www.constituteproject.org/constitution/France_2008.pdf?lang=en

constitutionalism, and its importance has in fact increased within the French constitutional system as time has gone by.³³³

As the British constitution was not forged directly through some kind of revolutionary process, it handles the idea of the separation of power slightly differently in practice to the US and other European powers, but nonetheless the concept clearly has importance in practice. Thus, the executive function of the government lies with Her Majesty's Government in the form of the Prime Minister and Cabinet who are responsible for carrying out and enforcing legislation through the various governmental departments, while legislative authority lies in the Houses of Parliament who are solely competent in the approval and creation of legislation.³³⁴ Once again, the fact that the UK government is solely comprised of members of the legislature, and that the leader of the majority party becomes Prime Minister, means that the very clear delineations that exist within the purer concept of separation of powers is not entirely present within the UK, particularly as much of the legislation originates within the government.³³⁵ Nonetheless, Parliament is, still, ultimately and supremely responsible for the passage, approval and amendment of this legislation, and the government cannot create law without the consent of parliament.³³⁶

Although the 'separation' of judicial power in the United Kingdom has at times appeared ambiguous, there has been a historic move toward a more effective separation of powers within the UK, particularly towards separating the judicial

³³³ Sweet, Alec Stone. "The Constitutional Council and the Transformation of the Republic." 2008. Yale Law School Legal Scholarship Repository –

http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1077&context=fss_papers

³³⁴ Jones, Bill, and Philip Norton, eds. *UK Politics*. Routledge, 2014, See Chapters 4, 5.

³³⁵ *Ibid.*

³³⁶ *Ibid.*

power from the executive and legislative.³³⁷ The first Act which might be considered to evince some form of separation of powers was the Act of Settlement of 1701, which was intended to give judges independence from the executive by ensuring they could only be removed by a vote in both Houses of Parliament.³³⁸ The Appellate Jurisdiction Act of 1876 created the Law Lords as the Ultimate Court of Appeal, whose powers were finally transferred to the Supreme Court of the United Kingdom in the Constitutional Reform Act of 2005, arguing that the ‘judicial functions of the House of Lords’, should be separated from their legislative underpinnings.³³⁹ As a result of the principle of Parliamentary Supremacy entrenched in British constitutionalism, the British Supreme Court cannot overturn primary legislation.³⁴⁰ However, it has substantial power in checking the executive’s use of ‘delegated’ legislation or claims of power from the executive in the form of the so-called ‘royal prerogative’, as was clear from the Supreme court’s recent decision and capacity to prevent the British Government from invoking Article 50 of the Lisbon Treaty without the consent of Parliament.³⁴¹ Thus, although the British constitution is likely to be the most ‘mixed’ constitution, separation of powers between the executive, legislative, and judiciary remains a critical component within it.³⁴²

³³⁷ Elliott, Catherine, and Frances Quinn. *English Legal System*. Pearson, 2013, p.12.

³³⁸ Act of Settlement, 1701 in Hutton Webster, *Historical Source Book*, D.C. Heath and Company, 1920, pp.58-62.

³³⁹ See Appellate Jurisdiction Act, 1876, at Gov.uk –

http://www.legislation.gov.uk/ukpga/1876/59/pdfs/ukpga_18760059_en.pdf and Constitutional Reform Act, 2005 – <https://www.legislation.gov.uk/ukpga/2005/4/contents-> Accessed 13th November 2017.

³⁴⁰ Elliott, Catherine, and Frances Quinn. *English Legal System*, Pearson, 2013.

³⁴¹ Bowcott, Owen. ‘Supreme court rules that Parliament must have vote to trigger Article 50’. *The Guardian*, 24th Jan 2017 – <https://www.theguardian.com/politics/2017/jan/24/supreme-court-brexit-ruling-parliament-vote-article-50>

³⁴² Elliott, Catherine, and Frances Quinn. *English Legal System*. Pearson, 2013, pp.10-14.

Separation of powers has thus taken a number of forms across most prominent constitutions in Europe, and more recent and increasingly influential democratic constitutions in Asia, such as in India and Japan.³⁴³ Despite these important differences, sufficient similarities exist across varying visions of separation of powers to posit a specific set of characteristics which are present throughout varied visions of constitutionalism I have described.³⁴⁴ Most importantly, the idea that the three ‘core’ organs of government and respective functions are necessary within a constitutional order is reflected, as we have seen, throughout all developed constitutional orders. Each constitutional order makes a substantive divide between a legislative which makes law (usually in the form of an elected, representative body), an executive in the form of the ‘government’ which executes and enforces laws, and a judiciary which adjudicates on the law. The exact configuration of these powers differs because of numerous factors, but the core functions that Montesquieu described – those of making laws, those of executing laws, and those of judging – remain defiantly enduring in all forms of constitutionalism.³⁴⁵

The second core feature of the doctrine of separation of powers is that the three powers must be broadly ‘separated’ insofar as they do not impinge on each other’s fundamental competences. This point is of great importance and stretches throughout constitutional practice. Perhaps most important to this vision is that the ‘executive’ body, which implements law, does not possess a fundamental competence over either its creation or its interpretation. Thus, in particular, the

³⁴³ The Constitution of India, for example, often seen as a model for post-colonial constitutionalism, defers substantive power to the Supreme Court as guardian of the written constitution.

³⁴⁴ Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012, p.15

³⁴⁵ *Ibid*, p.17.

separation of the judicial power, i.e. ‘the power of judging’, from the power of the executive in enforcing the law is a key aspect in the restriction of arbitrary power and the creation of a rule of law system, which is why it has garnered increasing importance in constitutional practice. The UK Supreme Court, French Constitutional Council, German Constitutional Court, and US Supreme Court³⁴⁶ all have different powers and competences, as well as relationships with the other organs. Pertaining specifically to their roles as guardians of constitutional law however, they are fundamentally and structurally insulated from the executive and legislative branches. In ensuring this separation of powers, *rule by law* is transformed into *rule of law*, which in turn allows for the ‘comprehensive and legitimate exercise of public power’ envisioned by the early constitutionalists.³⁴⁷ This in turn, allows for constitutionalism to achieve one of its core and ultimate aims, to ‘bind political actors within the framework of the law’.³⁴⁸

The separation of powers, while being a limiting device on political actors, becomes an enabling device for the liberty of subjects living within a constitutional republic.³⁴⁹ It is what allows men and women to live free from fear of tyranny and to know that if their behaviour is ‘conducive to the bounds of the constitutional and common law’,³⁵⁰ then they might freely enjoy the rights enshrined to them within that constitutional system, free from the potential whims and interests of an over-

³⁴⁶ The focus on these courts is not to undermine the importance of the vast number of other judicial bodies that exist within these countries. Much of this, regarding judicial independence, of course also applies to lower courts in many countries and in many systems. However, as this thesis is offering a ‘structural’ analysis of the main organs, I primarily focus on the highest courts within any system, to offer a definitive idea of separation of powers.

³⁴⁷ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pg.64.

³⁴⁸ Grimm, Dieter. *The Achievement of Constitutionalism*. Twilight of Constitutionalism, Oxford University Press, 2010, pg.8.

³⁴⁹ Lang, Anthony F. *A Constitutionalizing Global Order, An Introduction* in Lang and Wiener *Handbook for Global Constitution*, 2017, p.15.

³⁵⁰ Ibid.

mighty king or tyrannical government not concerned with respect for the constitutional structure. It allows individuals and citizens to be subject to a ‘rule of law and not of men’, which allows them to approach agents of the state without fear, as long as the exercise of their liberty remains within the framework of the constitution.³⁵¹ Thus, the core separation of powers is a critical aspect of constitutionalism, and without it, the constitution cannot claim to ‘comprehensively and legitimately exercise public power’.³⁵²

We have seen from the above how, for the constitution to create a ‘coherent and comprehensive framework for the legitimate exercise of public power’, a separation of powers between the three branches of government is critical. This separation is the core ‘institutional’ characteristic required for effective constitutionalism. This institutional aspect is not, however, the only prerequisite for effective constitutionalism. As we will see in the forthcoming section of this chapter, the idea of ‘constituent power’, that a direct, legitimating link must exist between the governed and the government is also necessary to allow for the establishment of comprehensive constitutionalism.

3. Manifesting Popular Sovereignty: Constituent Power and Representative Democracy

3.1 History

The previous section of this chapter outlined what one might term as the necessary ‘institutional’ characteristics that are required in a constitutional system to limit power. However, this institutional aspect is only one of two core components

³⁵¹ Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund Romney, Paul. “From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture.” *Law and History Review* 7.1, 1989: 121-174.

³⁵² Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pg.64.

required for the functioning of legitimate constitutionalism. This first aspect, separation of powers, ensures liberty under the conditions of the broader ‘higher law’ framework of constitutionalism. However, as we saw in the first chapter, the ‘rule of law’ framework is only one of two important legitimating components of constitutionalism. As well as limiting the exercise of sovereignty, constitutionalism must ultimately place this sovereignty into the hands of the people.

This study will now look more deeply at the requirement for some form of ‘constituent power’ as a core component of constitutionalism. As Loughlin argues, ‘constituent power’, is the expression of how the maxim ‘power ultimately rests with the people’, finds empirical form through the constitutional structure.³⁵³ It is thus the way in which the requirement of ‘popular sovereignty’ can be channelled to provide a genuine, identifiable link between the government and the governed through providing citizenry an active role in the body politic.³⁵⁴

As seen in the previous chapter, within a constitutional system, only government that ultimately ‘rests on the people’, can find legitimate form.³⁵⁵ This section begins by looking at some of the more historical conceptions of constituent power, focusing particularly on the work of Abbe Sieyes as the progenitor of the term itself.

As touched upon in the previous chapter, prior to the constitutional revolution, the source of authority for governance and law was ambiguous. Previous medieval doctrines outlining the key source of authority as God, lying within the

³⁵³ Loughlin, Martin. “The Concept of constituent Power.” *European Journal of Political Theory* 13.2, 2014: 218-237, p.219. Grimm, Dieter. “*The Achievement of Constitutionalism*” *Twilight of Constitutionalism*, Oxford University Press, 2010, pp. 8-10.

³⁵⁴ Loughlin, Martin. “The Concept of Constituent Power.” *European Journal of Political Theory* 13.2, 2014: 218-237, pp.218-220.

³⁵⁵ Rousseau, Jean Jacque, *The Social Contract*, 1762 – Archives of the University College, Cork – https://www.ucc.ie/archive/hdsp/Rousseau_contrat-social.pdf Paine, Thomas. *Common Sense*. Broadview Press, 2004.

doctrine of the ‘Divine Right of Kings’, or early renaissance conceptions of sovereignty and authority lying solely with the prince as a result of the social contract, were coming undone.³⁵⁶ Nonetheless, they had yet to be replaced with a stringent doctrine of *where* the source of authority for the governed came from; by what right did the government exercise sovereignty over the governed? As we saw in the previous chapter, many suggestions were mooted; scholars such as Hobbes and Machiavelli suggested that ultimately, sovereignty lay with the prince himself,³⁵⁷ while others, including Samuel Rutherford suggested that sovereignty rested in the law itself and that organs of governance existed solely to enforce this codified doctrine.³⁵⁸

The fundamental break made by modern constitutionalism with these previous conceptions of sovereignty was in transferring the locus of that power from manifold concepts – the prince, the law, or God, and shifting it into the people.³⁵⁹ This idea that sovereign authority must ultimately lie with the people, outlined in Chapter 1, is at the core of all conceptions of constituent power such as they pertain to constitutionalism.³⁶⁰ Such an idea perhaps found its first prominent expression in the works of Locke and Rousseau, who argued for the first time that political society should be founded not ‘on’ the people, as Hobbes and other social contract theorists had suggested, but by them.³⁶¹ Locke, for example, recognised that the ‘community

³⁵⁶ See previous chapter for detailed discussion on this.

³⁵⁷ See Machiavelli, Niccolò, and Maurizio Viroli. *The Prince*. Vol. 43. Oxford University Press, 2008; Hobbes, Thomas. *Leviathan*. A&C Black, 2006.

³⁵⁸ Rutherford, Samuel, and James Elliott Robb. *Lex, Rex*. John Field, 1977.

³⁵⁹ Rousseau, Jean Jacque, *The Social Contract*, 1762 – Archives of the University College, Cork – https://www.ucc.ie/archive/hdsp/Rousseau_contrat-social.pdf Paine, Thomas. *Common Sense*. Broadview Press, 2004. Paine, Thomas, *Rights of Man*, Mineola, NY: Dover Thrift Editions, 1999.

³⁶⁰ Loughlin, Martin. “The Concept of Constituent Power.” *European Journal of Political Theory* 13.2, 2014: 218-237, p.220. See Chapter 1 for more detailed discussion.

³⁶¹ Loughlin, Martin. *The Idea of Public Law*, 2003, Oxford University Press, p.101. ³⁶¹ Rousseau, Jean Jacque, *The Social Contract*, 1762 – Archives of the University College, Cork – https://www.ucc.ie/archive/hdsp/Rousseau_contrat-social.pdf

retains the supreme power of saving themselves³⁶² if those governing them act in breach of the trust placed in them. By acknowledging that the people have a continuing political role, Locke implicitly accepts the distinction between constituted (institutional) authority and the ‘constituent’ power of the people.³⁶³

Rousseau, developing on this, recognised that the setting up of a ‘people’ required the transformation of solitary individuals into part of a much greater whole, ‘allowing for the conversion of a multitude of individuals into a body of citizens’.³⁶⁴ Rousseau’s focus on the ‘general will’ can be seen as an early, raw manifestation of the idea of constituent power. Unlike later visions of democratic representation that came to dominate debates on constituent power, Rousseau argued that the ‘general will’, was best manifested through a form of direct democracy, engendered through yearly ‘assemblies’, in which joint decisions would be taken.³⁶⁵ For Rousseau, then, a core goal was to shift the locus and impetus of political virtue from the elite into the general citizenry, a core element of what would later develop into democratic constitutionalism, a manifestation of the ‘constituent power’ aspect of constitutionalism discussed here.³⁶⁶

It was, however, in Abbe Sieyes’ seminal pamphlet *What is The Third Estate?* that the first comprehensive depiction of the idea of constituent power emerges. The pamphlet was intended as a critique of the ‘Ancien Regime’, which predominated in France before the revolution.³⁶⁷ Prior to the revolution, people were

³⁶² Locke, John. *Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government*. John Wiley & Sons, 2014, pg.48.

³⁶³ Ibid. Also, Loughlin, Martin. *The Idea of Public Law*, Oxford University Press p.103.

³⁶⁴ Rousseau, Jean Jacques, *The Social Contract*, 1762 – Archives of the University College, Cork – https://www.ucc.ie/archive/hdsp/Rousseau_contrat-social.pdf, p.78.

³⁶⁵ Ibid, p.83.

³⁶⁶ Ibid.

³⁶⁷ Sieyes, Abbe Emmanuel Joseph. *What is the Third Estate?* University of Oregon, Archives, 1789. <http://pages.uoregon.edu/dluebke/301ModernEurope/Sieyes3dEstate.pdf>

divided into three ‘estates’, with varying degrees of power and privilege.³⁶⁸ The First Estate was the clergy, the Second Estate the nobility, and the Third Estate, the ‘commoners’. The First and Second Estate enjoyed legal and political privileges. Despite numbering only 200,000 people or so, compared to the ‘Third Estate’, which comprised 25 or 26 million, the First and Second Estate held a vast preponderance of both wealth and political power, and, indeed, in many cases were subject to different, and less onerous, laws, than the Third.³⁶⁹ It was this perceived injustice, core to the French Revolution, which Sieyes sought to address in his famous work.

As the Third Estate comprised the vast majority of citizenry and, as Sieyes rightly pointed out, did the vast majority of the ‘work that brings the Kingdoms wealth’,³⁷⁰ the lack of representation provided to this estate, as well as the legal and political privileges according to the First and Second Estates, was anathema to the revolutionary and constitutional ideal that was taking place in France, namely the political and legal equality of all citizens.³⁷¹ As Sieyes argued, without the First and Second Estate, the Third Estate ‘contains everything necessary to constitute a free and flourishing nation’.³⁷² According to Sieyes, the nation, comprised of the free and equal citizenry of the Third Estate, ‘is prior to everything. It is the ‘source of everything’, as it constitutes the vast majority of citizens’.³⁷³ The nation comprises not of ‘constituted power’, but instead, crucially, of ‘constituent power’,³⁷⁴ the

³⁶⁸ Sieyes, Abbe Emmanuel Joseph. *What is the Third Estate?* 1789. *The French Revolution and Human Rights: A Brief Documentary History*, 1963, pp.1-3.

³⁶⁹ Sieyes, Abbe Emmanuel Joseph. *What is the Third Estate?* University of Oregon, Archives, 1789. <http://pages.uoregon.edu/dluebke/301ModernEurope/Sieyes3dEstate.pdf>

³⁷⁰ *Ibid*, p.11.

³⁷¹ *Ibid*, pp.9-11.

³⁷² *Ibid*, pg.3.

³⁷³ Sieyes, Abbe Emmanuel Joseph. *What is the Third Estate?* University of Oregon, Archives, 1789. <http://pages.uoregon.edu/dluebke/301ModernEurope/Sieyes3dEstate.pdf>

³⁷⁴ *Ibid*, p.12.

power of the people to determine outcome within constitutional order.³⁷⁵ To belong to the nation, one must belong to this common, and equal order. Any who claim particular legal or political privilege based on hereditary, ecclesiastical, or other rights were not part of the Third Estate, and thus, not part of the nation, from whence all true power must emanate.³⁷⁶ Thus, it is the nation that comprises ‘constituent power’, i.e. the power to create constitutions, which is prior to the ‘constituted’ institutional power of the state, i.e. the power resting itself on some prior constitution.

Importantly, Sieyes advocated that for the exercise of political power to be legitimate, the ‘constituent power’ of the nation must manifest itself through a legislative body chosen by a ‘count of heads’ rather than separated by estates.³⁷⁷ A National Assembly competent to legislate and govern the lives of the multitude may only claim legitimate right to do so when representative of the common will. According to Sieyes, the only elements of the common will are individual wills. Thus, according to Sieyes

It is a certainty that among the national representatives, whether ordinary or extraordinary, influence must be proportionate to the number of citizens who have the right to be represented. If it is to accomplish its task, the representative body must always be the substitute for the nation itself. It must partake of the same nature, the same proportions and the same rules.³⁷⁸

This aspect of Sieyes’ work is critical to understanding a core feature of constitutionalism which will be developed below and distinguishes him from earlier scholars such as Rousseau. Sieyes argues that ‘those who establish the legislative

³⁷⁵ Ibid.

³⁷⁶ Ibid, pg.3.

³⁷⁷ Ibid, pg.5.

³⁷⁸ Ibid, pg.14.

body are founded by the national will before the constitution is established'.³⁷⁹

Thus, for the constituent power of the people which resides in the equal citizenry of the nation to be exercised, a legislative body comprised solely of the elected representatives of the nation becomes necessary.³⁸⁰

Certain aspects of Sieyes' work have been criticised, in particular his idea that constituent power must exist 'a priori' to the creation of a constitution and that it cannot be incorporated more slowly through a series of 'constitutive' moments or acts, such as those which allowed for the more gradual emergence of the British constitution.³⁸¹ However, Sieyes' fundamental arguments, that the 'constituent' power itself resided with the people and must manifest itself through representative democracy has become a foundational cornerstone of constitutionalism. While the manifestation of this constituent power sometimes differed between different systems, the idea that legitimate constitutional government was premised on the 'will of the people', represented through some sort of democratically elected legislature, is a fundamental principle of all important constitutional systems.

3.2. The Concept of Constituent Power in Practice: Democracy and Legitimation

Both the American and French 'revolutionary' forms of constitutionalism were key in pushing the 'idea that rather than relying on custom and tradition, democracy provided the foundation of modern political legitimacy'.³⁸² As Loughlin suggests, the language of the US Declaration of Independence presents itself as a

³⁷⁹ Ibid, p.12.

³⁸⁰ Ibid. Also, Loughlin, Martin. *The Idea of Public Law*, Oxford University Press, 2006, pp.112-114.

³⁸¹ See Loughlin, Martin. "The Concept of Constituent Power." *European Journal of Political Theory* 13.2, 2014: 218-237, Loughlin, Martin. *The Idea of Public Law*, 2003, Oxford University Press and Bailey, Saki, and Ugo Mattei. "Social Movements as Constituent Power: The Italian Struggle for the Commons." *Indiana Journal of Global Legal Studies* 20.2, 2013: 965-1013, parts 1 and 2. These articles challenge the conception of constituent power as 'a priori', but rather see it as part of dialectical constitutional process.

³⁸² Loughlin, Martin. *The Idea of Public Law*, 2003, Oxford University Press, p.106.

supreme act of constituent power in that its purpose is to create conditions whereby individuals might live in conditions of autonomy and freedom, self-governing and self-governed.³⁸³ It is stipulated within the Declaration of Independence regarding government, which states that

whenever government becomes destructive to the ends of individual freedom, it is the right of the people to alter and abolish it, to institute new government, laying its foundations and organising its powers in such form as to them shall seem most likely to affect their happiness.³⁸⁴

Such a statement within the Declaration of Independence itself demonstrates clearly that the founders of the US constitution intended for ultimate power to lie within the governed population, and not within the government itself. The constitution thus provided not merely a framework for government, but ‘critically constitutes a ‘people’ whose social energy is fundamental for legitimate, constitutional government’.³⁸⁵ As Wolin suggested, the constitution ‘proposes a distinctive identity and envisions a form of politicalness for individuals in their new collective capacity, summed up best in the famous phrase ‘E Pluribus Unum’, or ‘Out of Many, One’.³⁸⁶

The importance of channelling the ‘constituent’ power of the people through representative legislatures is clearly a critical component of the US Constitution, as is made clear in the critical place of elections in the system, electing not only national, but also state representatives. It is also ‘written into the framework of

³⁸³ Loughlin, Martin. *The Idea of Public Law*, 2003, Oxford University Press, pp. 107-109.

³⁸⁴ US Declaration of Independence, 1776 – *US History.Org* – <http://www.ushistory.org/declaration/document/> Accessed 1st January 2018.

³⁸⁵ Loughlin, Martin. *The Idea of Public Law*, Oxford University Press, p.106.

³⁸⁶ Wolin, Sheldon. ‘Collective Identity and Constitutional Power’ in *The Presence of the Past: Essays on the Present and the Citizen*, 1989, p.9. Also Rogoff, Martin A. “A Comparison of Constitutionalism in France and the United States” *Me. L. Rev.* 49, 1997: 21.

constituted power’.³⁸⁷ As James Madison argued, constituent power in the US Constitution is present in ‘the regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institutions of courts composed of judges holding their offices during good behaviour, and the representation of the people in the legislature by deputies of their own election’,³⁸⁸ such that the constitutional order represents the whole and not simply the ‘proclivities of the majority’.³⁸⁹ Constituent power is present in the US system throughout all the cogs of the constitutional machine, as well as being manifested through the aspect of representative democracy at both state and federal levels.³⁹⁰

As we have seen, earlier French scholars, in particular Jean-Jacques Rousseau, perceived the ‘will of the people’ as a raw, unbounded force, which should govern directly through ‘people’s assemblies’.³⁹¹ Indeed, influential figures in the French Revolution were deeply divided as to whether channelling constituent power purely through representative democracy sufficiently allowed for the revolutionary character of the concept to fully gestate.³⁹² However, with Sieyès at the helm, the idea that constituent power must be bounded up within some form of representative body became the dominant perspective in the broader French debate on the application of the general will.³⁹³

The continuous political turmoil that occurred in the aftermath of the revolution until the emergence of the Third Republic in 1875 meant that later French

³⁸⁷ Loughlin, Martin. *The Idea of Public Law*, Oxford University Press, 2003, p.106.

³⁸⁸ Madison, James, Alexander Hamilton and John Jay, *Federalist 9, 1787*, Isaac Kramnick ed., 1987.

³⁸⁹ Loughlin, Martin. *The Idea of Public Law*, Oxford University Press, 2003, p.107. Rogoff, Martin A. “A Comparison of Constitutionalism in France and the United States” *Me. L. Rev.* 49, 1997: 21.

³⁹⁰ *Ibid*, p.109.

³⁹¹ Rousseau, Jean Jacques, *The Social Contract*, 1762 – Archives of the University College, Cork – https://www.ucc.ie/archive/hdsp/Rousseau_contrat-social.pdf, pg 83

³⁹² Jaume, Lucien. “Constituent Power in France: The Revolution and its Consequences.” Loughlin and Walker (eds). *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford University Press, 2007, pp.66-69.

³⁹³ *Ibid*.

constitutionalists were concerned primarily with harnessing the multitude into some form of collective agency manifested through representative democracy and separation of powers, as can be demonstrated by the fact that, from 1875, 'constituent power almost entirely identified with parliamentary sovereignty, and that the general will was expressed through these representatives from the moment of their election'.³⁹⁴ While the idea of direct democracy through referenda was revived under De Gaulle, such an idea never overrode the broad consensus that constituent power must ultimately flow through representative democracy.³⁹⁵ Nonetheless, in general, later French constitutions increasingly marginalised such a concept by highlighting the 'representative' rather than revolutionary elements of this concept, with latter-day French constitutions increasingly focused on channelling constituent power within the broader constitutional framework of representative democracy and separation of powers.³⁹⁶

As with separation of powers, the delineation between constituted and constituent power was less clearly defined within British constitutionalism than within American and French. This was, much like in the former aspect, a result of the British Constitution growing organically through time rather than through the inception of one 'constitutional moment'.³⁹⁷ Nonetheless, by looking at British constitutional practice, we can clearly see that the two core elements of Sieyes' constituent power – namely, that legitimate political power ought to rest with the people, and secondarily, that that power must be manifested through elected

³⁹⁴ Ibid, p.79.

³⁹⁵ Ibid, p.90-95.

³⁹⁶ Ibid.

³⁹⁷ Loughlin, Martin. *Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice*. Oxford University Press, 2007. Loughlin and Walker (eds). *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford University Press, 2007.

representatives³⁹⁸ – find considerable expression in the core British principle of parliamentary sovereignty. AV Dicey’s work on the principle, considered authoritative, states:

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.³⁹⁹

As the existence and composition of Parliament is predicated on the ‘consent of the people’ as a body directly elected by constituents, then it is not unreasonable to suggest that the idea of ‘constituent power’ manifesting through the election of a ‘supreme’ legislative assembly, such as that advocated by Sieyes, also remains close to British constitutionalism.

It is clear then that, although in its unbounded and abstract form constituent power represents simply the organic will of the people, in reality and practice this force needs to be channelled through some form of institutional representative practice as continuous revolutionary politics are deleterious to the stability of a polity and to the rule of law.⁴⁰⁰ As Loughlin suggests, and as we have seen from the above examples, democracy in reality ‘cannot be understood in terms of some unmediated notion of popular will.’⁴⁰¹ Burke states that ‘constituent power cannot be found in shaky metaphysical principles on which the earliest of enlightenment revolution on which the French revolutionaries liked to found their droit de’homme,

³⁹⁸ Ibid, pp 4-10.

³⁹⁹ Dicey, Albert Venn. *The Law of the Constitution*. Vol. 1. OUP Oxford, 2013, pg. 87.

⁴⁰⁰ Loughlin, Martin. “The Concept of Constituent Power.” *European Journal of Political Theory* 13.2, 2014: 218-237, pp.227-231.

⁴⁰¹ Loughlin, Martin. *The Idea of Public Law*, Oxford University Press, 2003, p.112.

but in the real, operational working of a constitutional order'.⁴⁰² Such a system allows the 'legitimizing link' between the people and ruler that is the core of constituent power to remain in place while simultaneously ensuring that the potentially deleterious consequences of unchecked mob rule are not realised.⁴⁰³ A good example of this is the protection of minority rights through both the democratic process and specific constitutional provisions in many constitutional orders, for example, specific protections for Muslims in the Indian Constitution as outlined in Article 20.⁴⁰⁴ The concept of 'popular sovereignty, a founding component of constitutionalism, has thus been an evolving one; one which began as a manifestation of the pure will of the multitude, but which, in practice, has manifested itself through the continuously iterative process of representative democracy.⁴⁰⁵

The idea of constituent power has thus been critical to the development of constitutionalism. As we have seen, an order which claims to exist as 'comprehensively and legitimately exercise public power' can only claim to do so, if, ultimately, the source of authority lies with the governed themselves through the legitimizing link of democratic representation. Constituent power is thus required within constitutional order primarily as a legitimating device to allow for rightful rule.⁴⁰⁶

The legitimising aspect of constituent power has great practical as well as theoretical value and is not simply a static mechanism that allows for the exercise of

⁴⁰² Ibid, p.108.

⁴⁰³ Ibid, p.113.

⁴⁰⁴ Constitution of India Article 20, 1950. – <http://indiacode.nic.in/coiweb/welcome.html>

⁴⁰⁵ Loughlin, Martin. "The Concept of Constituent Power." *European Journal of Political Theory* 13.2, 2014: 218-237, pp.227-231.

⁴⁰⁶ Negri, Antonio. *Insurgencies: Constituent Power and the Modern State*. Vol. 15. U of Minnesota Press, 1999, pp10-16.

power by the organs of government. Constituent power, by linking the people to the government and the constitution, is also a dynamic and liberating force which allows for constitutional change and development.⁴⁰⁷ As Frank Michelman argues, through processes of historical change and learning, changes in constitutional doctrine or practice often become necessary as circumstance forces systems of government to adapt.⁴⁰⁸ For example, the founders of the US constitution never anticipated the enormous development of governmental power which has been a result of expansion and modernisation, good examples being the creation of federal departments, the use of delegated legislation and many other aspects of contemporary US government which would have been unimaginable to the founders. Such constitutionally unforeseen developments are inevitable in societies faced with technological, cultural, and demographic change.⁴⁰⁹

This continual creation of new and unforeseen departments, organs of governance, and forms of delegated legislation could, however, quickly become used by governments to bypass constitutional mechanisms in the absence of some form of direct accountability. The generation of so many new bodies of governance and government would be vastly prone to the emergence of tyrannical and arbitrary power without direct accountability to the sovereign people through democracy, which allows for the removal of actors who voters perceive to be acting beyond constitutional boundaries. It also allows for the continual involvement of the constituent body in the decision-making process. Thus, as well as a legitimising

⁴⁰⁷ Loughlin, Martin. "The Concept of Constituent Power." *European Journal of Political Theory* 13.2, 2014: 218-237, p.220.

⁴⁰⁸ Balkin, Jack M. "Respect-Worthy: Frank Michelman and the Legitimate Constitution." *Tulsa L. Rev.* 39, 2003: 485, pp.487-490

⁴⁰⁹ *Ibid.*

force, constituent power is also a vital generative one, allowing for necessary constitutional change without undermining the core purposes of constitutionalism.⁴¹⁰

We have seen above that the idea of ‘constituent power’, that constitutional authority can only be legitimate if ultimate authority rests with the people through the legitimating link of representative democracy, is the second core component of constitutionalism. However not only are separation of powers and constituent power both necessary components for constitutionalism, but in fact their dialectical relationship helps considerably to tie together the constitutional puzzle and allows for the effective operation of a constitutional order.

This chapter has demonstrated how the effective functioning of constitutionalism has two key components, the institutional component (comprised of the separation of powers), and the constituent power aspect (which ensures that ultimate authority lies with the people). However, these two empirical elements of constitutionalism do not exist as islands and often work congruently. Instead, their mutual operation within a symbiotic framework helps to engender the legitimate framework for government that is a key purpose of constitutionalism.⁴¹¹ In this respect, Neil Walker suggests that this method of constitutionalism may be ‘best understood as possessing a holistic quality’, and ‘operating as a cluster concept’ rather than as a series of individual conditions.⁴¹² Thus, the two core aspects of constitutionalism – the institutional aspect represented through separation of powers

⁴¹⁰ Loughlin, Martin. *The Idea of Public Law*, Oxford University Press, 2003, p.99.

⁴¹¹ Walker, Neil. ‘Beyond the Holistic Constitution’ in Dobner and Loughlin (eds) *Twilight of Constitutionalism*, Oxford University Press, 2010. Peters, Anne. “The Merits of Global Constitutionalism.” *Indiana Journal of Global Legal Studies* 16.2, 2009: 397-411.

⁴¹² Walker, Neil. ‘Beyond the Holistic Constitution’ in Dobner and Loughlin (eds) *Twilight of Constitutionalism*, Oxford University Press, 2010. p.297.

and the constituent/democratic aspect – in fact work together to allow for the exercise of legitimate power.⁴¹³

The above section on constituent power shows how it supports the institutional aspects of constitutionalism by providing these organs with the necessary legitimacy to carry out their governance functions. Similarly, the institutional aspects of the constitution also act as important checks on the dangers of what Loughlin describes as ‘dangerous mob rule’, where the view of the majority can be imposed in a tyrannical or arbitrary way on the rights of the minority.⁴¹⁴ Constituent power within the constitution, as Vile suggests, is intended to represent the ‘constituent body as a whole’, not simply amplify the will of the majority.⁴¹⁵ By enclosing the raw concept of constituent power within the institutional framework of the separation of powers and in particular by elevating the rule of law within the constitutional order, minority groups and individual rights are protected from the arbitrary will of the majority.⁴¹⁶ It is only through this constantly iterative relationship that the constitutional order can continue to develop, and yet still lay claim to offering a legitimate and comprehensive claim to public power within a given polity or order.

Thus we can ascertain that for constitutionalism to offer a ‘comprehensive and legitimate framework for the exercise of public power’, two key empirical conditions need to be met. Firstly, it is necessary that power be divided between an executive, legislative, and judiciary, and that the competences of these organs be broadly separated from each other.

⁴¹³ Ibid.

⁴¹⁴ Loughlin, Martin. *The Idea of Public Law*, Oxford University Press, 2003, pp.109-114.

⁴¹⁵ Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012, p.146.

⁴¹⁶ Rohr, John Anthony. *Founding Republics in France and America: A Study in Constitutional Governance*. Univ Pr of Kansas, 1995.

Secondly, it is critical that, ultimately, constitutionalism must be founded on some form of constituent power which ensures that ultimate and sovereign authority lies with the people, and is manifested through some form of representative democracy which ties the government to the governed.

Conclusion

The purpose of this chapter was to assess the empirical conditions required for constitutionalism to offer a ‘comprehensive and legitimate’ framework for the exercise of public power. At a core level, it demonstrated that for this framework to emerge, a constitution must possess two core characteristics. Firstly, it must ensure a ‘separation of powers’ between executive, legislative, and judicial functions, and secondly, it must allow for existence of ‘constituent power’ within the constitutionalism system, manifested through some form of representative democracy.

The first section of this chapter looked in greater depth at the concept of separation of powers, and why this phenomenon is critical within constitutionalism. To do so, it first examined the seminal work of Montesquieu in *De l’esprit de lois* before moving on to look at how the separation of powers actually operates in modern constitutional polities. In doing so, this section of the chapter outlined two necessary components within the separation of powers that are critical to constitutionalism and in preventing the emergence of arbitrary power: First, that power must be divided between legislative, executive, and judicial powers and that, secondly, these powers must be ‘separated’, insofar as their competences should not fundamentally impinge on each other, although to some extent the degree of ‘mix’ between the three powers might exist on a continuum. Nonetheless, this section demonstrated – by looking at how separation of powers works within the British,

French, and American constitutions – that there exists sufficient similarity to posit a core set of required characteristics within the separation of powers doctrine, and that such a doctrine is core in limiting power and allowing for the protection of individual liberty and rights.

The second section of this chapter analysed and demonstrated the importance of ‘constituent power’ within the constitutional order. Beginning with an assessment of the work of Abbe Sieyes, it demonstrated that to ensure that the exercise of constitutional power remained legitimate, the ultimate source of sovereign authority must not only lie with the people, but, importantly, must give those people an active voice through the creation of a representative democracy. Thus, as demonstrated, rather than basing popular sovereignty on some concept of the ‘unmediated will of the people’ in reality, constitutional systems sought to channel constituent power through the medium of representative democracy, and it is this which provides the legitimating link between the governed and government and allows for the legitimate exercise of governmental power within a constitutional system. Finally, this chapter went on to demonstrate that, in fact, for the effective operation of constitutionalism, separation of powers and constituent power actually operate in a symbiotic relationship, and that this relationship is critical to constitutional function.

This thesis will now test the core characteristics of constitutionalism identified in Chapters 1 and 2 against the realities of the international system. The proceeding chapter will seek to assess whether ‘liberal’ visions of global constitutionalism, which seek to identify a singular global constitution in the international system, fit the requirements of creating ‘legitimate and comprehensive’

framework for the exercise of public power, incorporating the requirements for both 'separation of powers' and 'constituent power' within this analysis.

Chapter 3 – Global Constitutionalism

Introduction

The previous chapters of this thesis, broadly through historical analysis, demonstrated that constitutionalism requires the establishment of a legitimate and comprehensive framework for the exercise of public power, and that for this to be achieved, power must be separated, and the constituent power of the people channelled through some form of representative democracy. This chapter will begin the assessment of the argument for ‘global’ constitutionalism. It will focus primarily on an assessment of ‘mainstream’ or ‘liberal’ visions of global constitutionalism which seek to posit or promote the existence of a single global constitution in the international system, usually premised on the existence of a ‘normative hierarchy’ within that system and advocating the UN as a critical component of such a constitution, both by concretising these norms into a single system as well as offering the nascent institutional framework to enforce them.

Before beginning this analysis, however, this chapter will seek to introduce readers to the background conditions and foundations of global constitutionalism. It will thus begin by looking at the background conditions which led to the emergence of global constitutionalism as a significant discipline. It will suggest there have been two core driving forces behind the emergence of global constitutionalism. The first of these is domestic ‘deconstitutionalisation’, whereby globalisation has meant that state constitutions can no longer regulate the totality of their own affairs, thus necessitating a ‘compensatory’ constitutionalism at the international level.⁴¹⁷ Secondly, the emergence of a ‘global’ human rights discourse where certain

⁴¹⁷ Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures.” *Leiden Journal of International Law* 19.3. 2006: 579-610, p.580.

fundamental rights are seen to transcend state boundaries has led to discussion of whether such rights might be best protected by taking the ‘rights protection’ idea of constitutionalism into the global level.⁴¹⁸

Moving on from these background conditions, this chapter will then sketch out the core ‘mainstream’ or ‘liberal’ vision of global constitutionalism. Through an assessment of important scholars, it will suggest, at a fundamental level, that this vision seeks to elevate particular fundamental norms to ‘constitutional’ or ‘higher law’ status and then protect these norms through the creation of sound legal structures and institutions, thus engendering a ‘constitutional’ rule of law in the international system.⁴¹⁹ To do this, as will be demonstrated, these scholars seek to identify ‘higher law’ norms in the international system as well as the institutional structures that might be utilised to enforce and guard them, generally focusing on the United Nations as the core substantive and institutional body that might ‘house’ this global constitution.⁴²⁰

After outlining both the background conditions for global constitutionalism and its key tenets, this chapter will critically analyse them against the conditions required for constitutionalism outlined in Chapters 1 and 2. This chapter will begin by looking at claims that a normative and legal ‘hierarchy of norms’ might exist in the international system. Through looking at the increasing eminence of *Jus cogens* norms in international legal practice, as well as the entrenchment of these norms in

⁴¹⁸ See De Wet, Erika. “The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order.” *Leiden Journal of International Law* 19.3. 2006: 611-632. Ferrajoli, Luigi. ‘Beyond Sovereignty. “Citizenship: A Global Constitutionalism’ in Richard Bellamy (ed) *Constitutionalism, Democracy and Sovereignty: American and European Perspectives*. 1997.

⁴¹⁹ See Peters, Anne. “The Merits of Global Constitutionalism”, *Indiana Journal of Global Legal Studies* 16.2. 2009: 397-411, pp.397-401. Schwöbel, Christine EJ. “Situating the Debate on Global Constitutionalism.” *International Journal of Constitutional Law* 8.3. 2010: 611-635.

⁴²⁰ De Wet, Erika. “The International Constitutional Order.” *International & Comparative Law Quarterly* 55.1, 2006: 51-76, pp.64-67.

the UN Charter, this section will suggest that arguments that a ‘hierarchy of norms’ might exist in the international legal system do have some merit.⁴²¹ However, as has been discussed in previous chapters, constitutionalism also requires core empirical as well as normative components. It is at this level that the chapter will suggest that visions of global constitutionalism, which focus on the UN are substantively flawed. It will suggest that the UN, despite entrenching norms, does not provide that such norms are protected within a rigorous rule of law framework. It will suggest that this is primarily a result of the absence of checks and limitations on the primary organ of the UN, the Security Council.⁴²² It will further suggest that because of the absence of a genuine ‘separation of powers’ within the UN, there is little to prevent the exercise of arbitrary power by the Security Council, a situation compounded by the absence of clear legal limits to its power in the Charter itself. By looking at the historical foundation of the council, it will demonstrate that the council’s right to rule was premised fundamentally on the military might of its key members as opposed to any constitutional precedents, and as a result the exercise of power by the council could be considered arbitrary, as it can be exercised selectively based on the interests and whims of its key members, a situation that is anathema to the power-limiting vision of constitutionalism.⁴²³

To demonstrate this, I will look at the exercise of power by the council in two concrete situations. Firstly, I will look at two contrasting approaches to military

⁴²¹ De Wet, Erika. “The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order.” *Leiden Journal of International Law* 19.3. 2006: 611-632, pp.611-618. De Wet, Erika, and Jure Vidmar. “Conflicts between International Paradigms: Hierarchy versus Systemic Integration.” *Global Constitutionalism* 2.2, 2013: 196-217, pp.201-208.

⁴²² Koskenniemi, Martti. “The Police in the Temple Order, Justice and the UN: A Dialectical View.” *Eur. J. Int’l L.* 6. 1995: 325. Cannizzaro, Enzo. “A Machiavellian Moment – The UN Security Council and the Rule of Law.” *Int’l Org. L. Rev.* 3. 2006: Selkirk, Michael. “Judge, Jury and Executioner – Analysing the Nature of the Security Council’s Authority under Article 39 of the UN Charter.” *Auckland UL Rev.* 9. 2000: 1101.

⁴²³ Koskenniemi, Martti. “The Police in the Temple Order, Justice and the UN: A Dialectical View.” *Eur. J. Int’l L.* 6. 1995: 325, pg.326.

intervention taken by the council in 1994 regarding prospective ‘threats to international peace and security’, in Rwanda and Haiti.⁴²⁴ I will demonstrate that the decisions taken were premised fundamentally not on objective, legal criteria such as would be expected within a constitutional system but on the interests of the predominant power in the council at the time, the United States.⁴²⁵ I will then go on to look at the use of ‘terror lists’ by the council and the resulting *Kadi* case, which could be argued to further undermine the separation of powers and the lack of ‘constitutional’ limits on the Security Council’s powers.⁴²⁶ Finally, I will demonstrate through looking at the membership of the Security Council as well as the exercise of its veto powers that the UN also fails to offer any genuine form of ‘constituent power’ to the ‘peoples’ articulated in the preamble of the Charter.⁴²⁷ In particular, this section will focus on the unrepresentative nature of the council’s membership, as well as on how the veto power prevents reform that might allow for at least greater indirect representation of the people in the council.⁴²⁸ Thus, while primary visions of global constitutionalism may have some validity in terms of identifying a ‘normative hierarchy’ in the international system, they fail to offer realistic empirical and institutional conditions in which this hierarchy might manifest into a genuine form of global constitutionalism.

1. Global Constitutionalism

⁴²⁴ Barnett, Michael N. “The UN Security Council, Indifference and Genocide in Rwanda.” *Cultural Anthropology* 12.4. 1997: 551-578. Kreps, Sarah E. “The 1994 Haiti intervention: A unilateral operation in Multilateral Clothes.” *Journal of Strategic Studies*. 30.3. 2007: 449-474.

⁴²⁵ Kreps, Sarah E. “The 1994 Haiti intervention: A Unilateral Operation in Multilateral Clothes.” *Journal of Strategic Studies*. 30.3. 2007: 449-474. Barnett, Michael N. “The UN Security Council, Indifference and Genocide in Rwanda.” *Cultural Anthropology* 12.4. 1997: 551-578.

⁴²⁶ Gordon, Joy. “The United Nations Security Council and the Emerging Crisis of Legitimacy.” *Yale J. Int’l Aff.* 9. 2014: 40.

⁴²⁷ Giegerich, Thomas. “The Is and Ought of International Constitutionalism: How Far Have We Come on Habermas’s Road to a Well-Considered Constitutionalization of International Law.” *German LJ* 10. 2009: 31, pp.48-52.

⁴²⁸ Ibid. Coicaud, Jean-Marc, and Veijo Aulis Heiskanen, eds. *The Legitimacy of International Organizations*. United Nations Publications, 2001.

The previous two chapters of this thesis offered a comprehensive analysis of the core purposes and structures of constitutionalism with the intention of creating a framework for the main purpose of this thesis: A rigorous assessment of the concept of global constitutionalism against the realities of the international system. The following chapter will assess, with substantive reference to the idea of constitutionalism expressed in Chapters 1 and 2, whether a singular global constitution in the form of the UN (and associated normative framework) can be said to exist. While the introductory chapter of this thesis gave something of a background to *why* the phenomena of global constitutionalism arose in the background of globalisation, it is worth re-iterating and advancing some of these ideas here to offer a framework via which the normative and institutional goals of global constitutionalists can be analysed. To do so, this section will highlight two core and related characteristics which have substantially influenced the emergence of global constitutionalism. The first is the domestic ‘deconstitutionalisation’ created by exponential globalisation⁴²⁹ and the second is the emergence of something of a global consciousness, where certain fundamental human rights are perceived as transcending state boundaries and applying universally to humanity.⁴³⁰ I will first outline these phenomena, before looking at how they were key to the emergence of the discipline of global constitutionalism.

1.1. Precedents

As Neil Walker states, the idea of global constitutionalism has been the subject of fierce debate. The idea that constitutional modes of governance are

⁴²⁹ Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures.” *Leiden Journal of International Law* 19.3. 2006: 579-610, p.579.

⁴³⁰ James, Stephen. *Human Rights*. John Wiley & Sons, Ltd, 2008, See Chapters 1 and 2.

exclusive to states ‘has come under both sustained criticism and strong defence’.⁴³¹

The process of globalisation has undoubtedly been at the core of these debates.

Globalisation refers to a ‘process by which national and regional economies, societies, and cultures have become integrated through the global network of trade, communication, immigration, and transportation’.⁴³² As a result of this process, which continues to exponentially grow in pace and potency, the porosity of state boundaries has continued to increase at all levels.⁴³³

As Peters rightly points out, the advance of these global forces has led to a process which she describes as the ‘deconstituationalisation’ of the state.⁴³⁴ As we have seen from Chapter 1 of this thesis, the constitution seeks not only to govern the state *legitimately*, but also, importantly, *comprehensively*. As we saw in that chapter, should a constitutional order fail to be able to offer this comprehensive framework, this can undermine the order’s capacity to fulfil its foundational function of legitimate government.⁴³⁵ As Peters points out, globalisation puts the capacity of the state to offer this comprehensive order under considerable strain, meaning the constitutional state can no longer act as a ‘black box’ of self-contained government.⁴³⁶ Forces which can substantially affect the capacity of the state to regulate its own affairs include, not exhaustively, global financial markets,

⁴³¹ Walker, Neil. “Taking Constitutionalism Beyond the State.” *Political Studies* 56.3. 2008: 519-543, pg.520.

⁴³² Financial Times Lexicon, Globalization: <http://lexicon.ft.com/Term?term=globalisation> – Accessed 12th September 2015.

⁴³³ Prandini. “The Morphogenesis of Constitutionalism”, in Dobner and Loughlin (eds) *The Twilight of Constitutionalism*, 2010, pp.312-315. Oxford University Press. Berman, Paul Schiff. “Global Legal Pluralism.” *S. Cal. L. Rev.* 80. 2006: 1155.

⁴³⁴ Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures.” *Leiden Journal of International Law* 19.3. 2006: 579-610., p.579.

⁴³⁵ See Chapter 1, and also Paine, Thomas. *Rights of Man*, Mineola, NY: Dover Thrift Editions, 1999. Also Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010.

⁴³⁶ Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures.” *Leiden Journal of International Law* 19.3, 2006: 579-610, pp. 580, 591.

multinational corporations, transnational criminal organisations, inter-governmental organisations and a host of others.⁴³⁷ This has led to a situation of enormous global interdependence, where the actions of vastly geographically disparate actors can nonetheless have enormous impacts on each other. For example, the collapse of the US housing market and financial system in 2008 had tremendous consequences for states across the globe, even ones which had no primary involvement in the situation.⁴³⁸ Similarly, multinational corporations based in one country have frequently infringed upon or affected human rights in other countries through their practices.⁴³⁹ Transnational armed groups, insurgents, and terrorist groups can also pose substantial threats in countries far from their origin. The rapid advancement of technological globalisation, particularly through the Internet, has produced a multiplier effect on all of these phenomena through providing the means for the rapid communication as well as the instant transfer of funds and information across the globe.⁴⁴⁰ These and many other forces continue to impinge on the ability of state constitutions to ‘regulate the totality of their own affairs’ and thus form the ‘basal order for society’ that fully fledged constitutionalism requires.⁴⁴¹

A great number of international organisations of all types have emerged to regulate this increasingly interdependent and globalised international system. Some

⁴³⁷ Teubner, Gunther. “Fragmented Foundations.” *Dobner, P. & Loughlin, M. The Twilight of Constitutional Law*, 2010: 327-341. Joerges, Christian, Inger-Johanne Sand, and Gunther Teubner, eds. *Transnational Governance and Constitutionalism*. Bloomsbury Publishing, 2004, see introduction.

⁴³⁸ Claessens, Stijn, and Kirsten Forbes, eds. *International Financial Contagion*. Springer Science & Business Media, 2013, See Chapter 1.

⁴³⁹ Deva, Surya. “Human Rights Violations by Multinational Corporations and International Law: Where from here?” *Conn. J. Int’l L.* 19, 2003. Teubner, Gunther. “The Anonymous Matrix: Human Rights Violations by Private Transnational Actors.” *The Modern Law Review* 69.3, 2006. Makarenko, Tamara. “The Crime-Terror Continuum: Tracing the Interplay between Transnational Organised Crime and Terrorism.” *Global Crime* 6.1, 2004: 129-145.

⁴⁴⁰ Sarikakis, Katharine. *Ideologies of the Internet*. Hampton Press, Incorporated, 2005.

⁴⁴¹ Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures.” *Leiden Journal of International Law* 19.3, 2006: 579-610.

of these organisations, such as the UN and World Trade Organisation are broad global organisations with tremendous capacity to penetrate and influence the domestic affairs of states in vital areas such as security or economic and trade policy, while other organisations such as ICAAN or the International Olympic Committee are more concerned with more specific or techno-functional purposes.⁴⁴² As Peters suggests, the emergence of these organs of global governance is not merely a convenience, but a requirement in a globalised system, as the great number of deterritorialised problems occurring as a result of globalisation can only be solved through co-operative mechanisms and the pooling of resources and sovereignty.⁴⁴³ This process has led to the ‘migration’ of many of the facets traditionally associated with state constitutionalism into the international system, further impacting on the capacity of the state to operate as an organised ‘black box’, within the more disordered international system.⁴⁴⁴

As well as the practical complications in terms of governance, the cross pollination of ideas from globalisation, particularly legal and institutional globalisation, has had another major impact which has led to the emergence of something of a global consciousness. This has been another major influence on the emergence of global constitutionalism.⁴⁴⁵ The atrocities committed during the Second World War and the proceeding Nuremberg trials allowed for the emergence

⁴⁴² Berman, Paul Schiff. *Global legal pluralism: a jurisprudence of law beyond borders*. Cambridge University Press, 2012, See introduction for further discussion on the extent of global pluralism. Also Chapter 6 of this thesis goes into much greater depth on this.

⁴⁴³ Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures.” *Leiden Journal of International Law* 19.3, 2006: 579-610, p.594.

⁴⁴⁴ Ibid, p.590.

⁴⁴⁵ Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures.” *Leiden Journal of International Law* 19.3, 2006: 579-610. Peters, Anne. “The Merits of Global Constitutionalism.” *Indiana Journal of Global Legal Studies* 16.2, 2009: 397-411. Wiener, Antje, et al. “Global Constitutionalism: Human Rights, Democracy and the Rule of Law.” *Global Constitutionalism* 1.1, 2012: 1.

of a global human rights culture, which persists and strengthens continually.⁴⁴⁶ Prior to the Second World War, the Westphalian system of states had broadly assumed that matters internal to the ‘black box’ of the constitutional state, including what rights these citizens might be entitled too, was a matter for those countries.⁴⁴⁷ However, given the atrocities committed during the war and the criminal trials of Nazi leaders, an increasing perception emerged that certain fundamental rights belonged to all humans regardless of their state, and that the states’ right to self-government is predicated on respect for these rights.⁴⁴⁸

This emergent human rights discourse can be seen not only in the UN Declaration of Human Rights, but in the host of binding treaties which further enunciated and clarified these rights. These include the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the International Convention on Torture and many others.⁴⁴⁹ At the same time, the emergence of *Jus cogens* (norms from which no derogation is permitted) and *Erga Omnes* (norms applicable to all) norms into both legal practice and scholarship have strengthened this idea, as most of these are directly or at least tangentially related to the issue of protecting a global layer of human rights.⁴⁵⁰ Thus, a perceived requirement to protect human rights not just within states, but globally, has added

⁴⁴⁶ Iriye, Akira, Petra Goedde, and William I. Hitchcock, eds. *The Human Rights Revolution: An International History*. Vol. 3. Oxford University Press, 2012. See Chapters 2 & 3.

⁴⁴⁷ Ibid. Also C. Tomuschat, ‘Obligations Arising for States Without or Against Their Will’, 1993, 241-IV Recueil des cours 209–40.

⁴⁴⁸ C. Tomuschat, ‘Obligations Arising for States Without or Against Their Will’, 1993, 241-IV Recueil des cours 209–40. Bassiouni, M. Cherif. “International Crimes: Jus Cogens and obligatio erga omnes.” *Law & Contemp. Probs.* 59, 1996: 63.

⁴⁴⁹ Nowak, Manfred. *Introduction to the International Human Rights Regime*. Vol. 14. Brill Academic Pub, 2003. Steiner, Henry J., Philip Alston, and Ryan Goodman. *International Human Rights in Context: Law, Politics, Morals: Text and Materials*. Oxford University Press, USA, 2008.

⁴⁵⁰ Bianchi, Andrea. "Human rights and the magic of jus cogens." *European journal of international law* 19.3 (2008): 491-508, p.491. Kadelbach, Stefan. “Jus Cogens, Obligations Erga Omnes and Other Rules – The Identification of Fundamental Norms.” *The Fundamental Rules of the International Legal Order*. Brill, 2005. 21-40.

another complex paradigm to the relationship between state and global levels of interaction and iteration. The idea that a global layer of human rights exists also impacts on the conception of the ‘self-contained’ constitution of the state, as the holistic legal protection of rights has, traditionally, as we have seen in the previous chapter, a core and foundational function of state constitutionalism.⁴⁵¹ Within this new internationalist paradigm, however, importance has been placed not simply on the traditionalist view whereby international law fundamentally regulated the relationship between states, but, also, importantly, on creating the individual as both the subject and object of particular international rights regardless of state affiliation, something which also ultimately undermines the state constitutions’ claim as sole guardian of these affairs.

1.2. Purposes and Core Characteristics

At the core of these two concepts is a fundamental reorientation between the state constitution and the international level, meaning that the state constitution can no longer appropriately be seen to holistically regulate its own internal affairs. This is true at a descriptive level in terms of the empirical capacity of outside forces to impact on the constitutional integrity of the state. Conversely, the increased eminence of global human rights treaties, laws, and debate suggests that this may also be true at a prescriptive level in that respect for certain fundamental human rights is seen as a priori to a state’s right to self-government, and therefore holistic control of affairs within their own borders.⁴⁵²

⁴⁵¹ Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures.” *Leiden Journal of International Law* 19.3, 2006: 579-610, pg.591.

⁴⁵² Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures.” *Leiden Journal of International Law* 19.3, 2006: 579-610. Peters, Anne. “The Merits of Global Constitutionalism.” *Indiana Journal of Global Legal Studies* 16.2, 2009: 397-411. Wiener, Antje, et al. “Global Constitutionalism: Human Rights, Democracy and the Rule of Law.” *Global Constitutionalism* 1.1 2012: 1.

It is in response to these background conditions that global constitutionalism has emerged as an important sub-discipline within both the study of international law and international relations.⁴⁵³ The relative breakdown of state constitutionalism has led to serious issues of control and accountability in the international system.⁴⁵⁴ Unlike within the constitutional state, the multitude of transnational forces impacting on both states and individuals is, broadly, not contained within a robust legal and political framework that both restricts and legitimises its exercise of power or influence in the international system.⁴⁵⁵ Without such a framework, as Klabbers points out, the capacity for the exercise of arbitrary power is high, as the ability to exert such power becomes primarily based on material capacity to exert influence rather than on adherence to important principles such as rule of law, respect for fundamental rights, and democracy.⁴⁵⁶ Thus, the question of both controlling and, importantly, legitimising the exercise of power beyond state confines are key themes within both international legal and political scholarship.

Given both the inability (as the result of transnational forces unleashed by globalisation) and sometimes unwillingness (in terms of protecting fundamental human rights) of states to exercise their full constitutional functions, the idea of a compensatory ‘global’ constitutionalism has taken on increasing importance.⁴⁵⁷ If

⁴⁵³ Lang, A. *Constitutionalising Global Order, An Introduction* In Lang and Wiener *Handbook for Global Constitution*, 2017. Wiener, Antje, et al. “Global Constitutionalism: Human Rights, Democracy and the Rule of Law.” *Global Constitutionalism* 1.1, 2012: 1.

⁴⁵⁴ Teubner, Gunther. “The Anonymous Matrix: Human Rights Violations by Private Transnational Actors.” *The Modern Law Review* 69.3, 2006: 327-346. Teubner, Gunther. “Fragmented Foundations.” *Dobner P. & Loughlin, M., The Twilight of Constitutionalism*, Oxford University Press, 2010 327-341. Teubner, Gunther, and Peter Korth. “Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society.” 2009.

⁴⁵⁵ Klabbers, Jan. *Setting the Scene*, in Klabbers, Jan, Anne Peters, and Geir Ulfstein. *The Constitutionalization of International Law*. Oxford University Press, 2009, pp.11-13. Goldsmith, Jack L., and Eric A. Posner. *The Limits of International Law*. Oxford University Press, 2005.

⁴⁵⁶ Klabbers, Jan *Setting the Scene* Klabbers, Jan, Anne Peters, and Geir Ulfstein. *The Constitutionalization of International Law*. Oxford University Press, 2009, pp.8-9.

⁴⁵⁷ Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures.” *Leiden Journal of International Law* 19.3, 2006: 579, pg.580.

‘constitutional functions are migrating into the international system’, then, many scholars argue, constitutionalism should not simply exist within states, but must also exist globally.⁴⁵⁸ According to such a vision, the most effective way to restrict the use of arbitrary power in the international system is to extrapolate the core qualities of constitutionalism from the state context and apply them at a broader, more overarching level in the international system.⁴⁵⁹ Such a logic would argue that this global constitution would then be competent in ‘constitutional’ matters which have migrated into the international system as a result of globalisation and other related factors.⁴⁶⁰ In doing so, global constitutionalists seek to square the circle of legitimacy regarding governance beyond the state both by seeking to comprehensively extend its reach through the creation of this material constitution, and, at the same time, legitimise it through the strong legitimating factors inherent within constitutionalism which have been discussed in the first two chapters. In other words, in a world where non-state forces play a substantial role in affecting outcomes in the international system, the aim of most global constitutionalists is to use theoretical and practical attributes of constitutionalism to legally and politically harness the beneficial qualities of a globalised world while at the same time mitigating globalisation’s more dangerous and dialectical attributes.⁴⁶¹

Sweet, Alec Stone, and Jud Mathews. “Proportionality balancing and global constitutionalism.” *Colum. J. Transnat’l L.* 47, 2008: 72.

⁴⁵⁸ Luigi Ferrajoli, *Beyond Sovereignty and Citizenship: A Global Constitutionalism*, in Richard Bellamy ed. *Constitutionalism, Democracy, and Sovereignty: American and European Perspectives* 154, 1997.

⁴⁵⁹ Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures.” *Leiden Journal of International Law* 19., 2006. Peters, Anne. “The Merits of Global Constitutionalism.” *Indiana Journal of Global Legal Studies* 16.2, 2009: 397-411.

⁴⁶⁰ *Ibid.*

⁴⁶¹ Schwöbel, Christine EJ. “Situating the Debate on Global Constitutionalism.” *International Journal of Constitutional Law* 8.3, 2010: 611-635, p.611-620.

Within these broader objectives, there have been a number of different approaches taken as to how constitutional quality might be extrapolated from the domestic to the international system without losing its fundamental value as a legitimating device for the exercise of public power. Many scholars seek to identify a singular global constitution founded in the fundamental norms of public international law and often, at least nascently, manifested in the UN.⁴⁶² Other scholars see the idea in a more partial way, in which specific international organisations might be undergoing or undergo processes of ‘constitutionalisation’, in order to make their practices become more efficient, regulated, and globally just.⁴⁶³ Still other scholars see the possibility of some form of ‘constitutional pluralism’, where a multitude of constitutional entities might exist within one global system, possibly linked through particular sorts of ‘interface norms’ or ‘meta-rules’ to help with harmonious co-existence.⁴⁶⁴

The latter two as well as more nuanced approaches to global constitutionalism will be addressed in the later chapters of this thesis. The focus of this chapter, however, will be what might, at least historically, be considered the mainstream of global constitutionalist thought. This model seeks to identify, or at least posit, the existence of a singular global constitution in the international system which might be capable of effectively governing the constitutional functions which

⁴⁶² See, for important examples De Wet, Erika. “The International Constitutional Order.” *International & Comparative Law Quarterly* 55.1, 2006: 51-76. MacDonald, Ronald St John. “The International Community as a Legal Community.” *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*. Leiden: Brill, 2005. Fassbender, Bardo. *The United Nations Charter as the Constitution of the International Community*. Vol. 51. Brill, 2009.

⁴⁶³ For example, Petersmann, Ernst-Ulrich. “How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society.” *Mich. J. Int’l L.* 20, 1998: 1. Habermas, Jürgen. “Plea for a Constitutionalization of International Law.” *Philosophy & Social Criticism* 40.1, 2014: 5-12.

⁴⁶⁴ See Walker, Neil. “The Idea of Constitutional Pluralism.” *The Modern Law Review* 65.3, 2002: 317-359. Maduro, Miguel Poiares. “Three Claims of Constitutional Pluralism.” *Constitutional Pluralism in the European Union and Beyond*, 2012: 67-84. Sweet, Alec Stone. “Constitutionalism, Legal Pluralism, and International Regimes.” *Indiana Journal of Global Legal Studies* 16.2, 2009: 621-645.

have ‘migrated’ to the international system, in particular, the protection of global human rights and human security.⁴⁶⁵

Whilst various models for an overarching global constitution have been offered, they tend to have various base similarities. As Schwöbel suggests, most of these visions are founded in what she describes broadly, as ‘liberal’ vision of global constitutionalism, which would entail a singular, global constitutional premised on ‘tenets of classical and political liberalism, as well as liberal legalism,’ which set out as key the limitation of political and material power through protecting fundamental rights and liberties within a strong rule of law framework, as well as ensuring the formal equality of subjects within this framework.⁴⁶⁶ The elevation of particular norms to entrenched or ‘higher law’ status and the protection and enforcement of those norms through strong rule of law institutions are crucial to such a vision.⁴⁶⁷ In order to create such a system, this ‘liberal vision’ of global

⁴⁶⁵ Schwöbel, Christine EJ. “Situating the Debate on Global Constitutionalism.” *International Journal of Constitutional Law* 8.3, 2010: 611-635. Peters, Anne. “The Merits of Global Constitutionalism.” *Indiana Journal of Global Legal Studies* 16.2, 2009: 397-411.

⁴⁶⁶ See Schwöbel, Christine EJ. *Global Constitutionalism in International Legal Perspective*. Vol. 4. Martinus Nijhoff Publishers, 2011, pp.1, 49, 56, 74,108. The use of the terms ‘classical liberalism’ liberal legalism, and political liberalism here is of course broad-brush and focuses on material and institutional characteristics of a ‘liberal’ order. In outlining as core a normative and legal hierarchy to protect fundamental rights and buttressed by strong institutions as main tenets for governance within this view, the idea of ‘liberalism’ here draws on a wide variety of scholars who highlight in particular these goals including John Locke, Thomas Paine, and Montesquieu, as well as more recent scholars such as Rawls. See also Schwöbel, Christine EJ. *Global Constitutionalism in International Legal Perspective*. Vol. 4. Martinus Nijhoff Publishers, 2011 at the above pages, who outlines clearly the link between these ‘liberal’ characteristics and structures and the global constitutional argument and project. Liberal Legalism refers specifically to enclosing and limiting politics within legal structures and is similarly pertinent to the debate, for the core characteristics of this vision see Dossa, Shiraz. “Liberal Legalism: Law, Culture and Identity.” *The European Legacy* 4.3, 1999: 73-87, pg.75-80. Thus, the overarching term ‘liberal’ is used broadly to refer to the conglomerate characteristics shared by these various ‘liberal perspectives’, and is not intended to *explicitly* differentiate this ‘liberal’ idea of global constitutionalism from other visions (many of which possess certain ‘liberal’ characteristics anyway), but merely to highlight a particular focus of these mainstream visions of global constitutionalism.

⁴⁶⁷ Peters, Anne. “The Merits of Global Constitutionalism.” *Indiana Journal of Global Legal Studies* 16.2, 2009: 397-411, pp.407-411. Klabbers, Jan *Setting the Scene*, in Klabbers, Jan, Anne Peters, and Geir Ulfstein. *The Constitutionalization of International Law*. Oxford University Press, 2009, pg.9. Grimm, Dieter. “The Achievement of Constitutionalism”, in *The Twilight of Constitutionalism*, Oxford University Press, 2010.

constitutionalism seeks to find unity in the international system and offer a hierarchy of norms and laws that can counter and ameliorate the dangerous and disordered potentialities inherent in globalisation.⁴⁶⁸ Such a vision can be found among many important theorists, including Alfred Verdross, Bruno Simma, Christian Tomuschat, Anne Peters, and Erika De Wet.⁴⁶⁹ Klabbers describes this school of thought as ‘working on the assumption that a constitutional order is one based on ‘pre-political’ values, containing transcendent values beyond the here and now’.⁴⁷⁰ These higher law values are then formalised into ‘institutional and doctrinal’ mechanisms which entrench them in a manner such that they ‘cannot be altered by ordinary legal procedures’. In this respect, the UN is usually posited as the doctrinal repository for these higher law norms as well as the nascent institutional mechanism through which they might be enforced.⁴⁷¹ The emerging global constitution with the UN providing the institutional mortar to bind would then create a dialectical global order in which the ‘centralisation and empowerment of political institutions would be bound through the control of those same institutions by creating fundamental rights for citizens and a system by which courts and other institutions can keep each other in check’.⁴⁷² This ‘liberal’ vision of global

⁴⁶⁸ Klabbers, Jan. “*Setting the Scene*,” in Klabbers, Jan, Anne Peters, and Geir Ulfstein. *The Constitutionalization of International Law*. Oxford University Press, 2009. Peters, Anne. “The Merits of Global Constitutionalism.” *Indiana Journal of Global Legal Studies* 16.2, 2009: 397-411.

⁴⁶⁹ Verdross, Alfred, and Bruno Simma. *Universelles Völkerrecht*. Duncker & Humblot, 1984. 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. Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures.” *Leiden Journal of International Law* 19.3, 2006: 579-610.

⁴⁷⁰ Klabbers, Jan “*Setting the Scene*,” in Klabbers, Jan, Anne Peters, and Geir Ulfstein. *The Constitutionalization of International Law*. Oxford University Press, 2009. pg.9 These fundamental ideals are of course enunciated in the Federalist Papers, the work of Thomas Paine, John Locke, and many others.

⁴⁷¹ Fassbender, Bardo. *The United Nations Charter as the Constitution of the International Community*. Vol. 51. Brill, 2009.

⁴⁷² Klabbers, Jan. “*Setting the Scene*,” in Klabbers, Jan, Anne Peters, and Geir Ulfstein. *The Constitutionalization of International Law*. Oxford University Press, 2009. pp.9, 10.

constitutionalism is therefore tethered closely to what we identified in the first chapter of this thesis as the ‘power-limiting’ aspect of constitutionalism, where the ‘exercise of public power’ is limited through the framework of a hierarchal base of norms and laws, in an arrangement ‘specifically vertical and not horizontal’.⁴⁷³

Before assessing whether such a vision of a ‘liberal’ global constitution founded in the UN reflects the empirical realities of the international system and the organisation itself, I will first look deeper into some of the historical and contemporary scholars who advocate this liberal vision of global constitutionalism which seeks to limit the exercise of power in the international system through the creation of fundamental norms and a strong rule of law framework. Given the breadth of literature on global constitutionalism, I will focus in this background section on visions that broadly adhere to the liberal vision of a single global constitution underpinned by a fundamental set of norms tethered to a strong rule of law framework.

1.3. Overview

Although interest in the idea of global constitutionalism has accelerated in recent years as a result of exponential globalisation, many of the core ideas underpinning the concept are not new, and a better understanding of some of the key scholars is critical to understanding the framework within which the debate on global constitutionalism is situated. While many scholars, probably most significantly Christine Schwöbel, have offered a comprehensive analysis of the various distinctions between different visions of a singular global constitution or constitutionalism, this analysis lies beyond the scope of this chapter.⁴⁷⁴ Thus, in this

⁴⁷³ Ibid, pp.11-13.

⁴⁷⁴ See both Schwöbel, Christine EJ. *Global Constitutionalism in International Legal Perspective*. Vol. 4. Martinus Nijhoff Publishers, 2011, and Schwöbel, Christine EJ. “Situating the Debate on Global Constitutionalism.” *International Journal of Constitutional Law* 8.3, 2010: 611-635.

background section, I will draw on commonalities between the visions, demonstrating that, in particular, the ideas of a singular global constitutional underpinned by ‘higher law’ framework of fundamental norms and usually manifested in the United Nations are key to most visions and therefore worthy of further study.⁴⁷⁵ As previously iterated, more partial and pluralistic versions of global constitutionalism will be addressed in later chapters. While certain aspects of this brief overview are based on the excellent literature reviews provided by Christine Schwöbel in both her article ‘Situating the debate on Global Constitutionalism’, and the more detailed review in her later book *Global Constitutionalism in International Legal Perspective*, I place the scholarship analysed within something of a different analytical paradigm, with the intention of creating a framework for the forthcoming critical analysis of the topic.⁴⁷⁶

Most contemporary scholars of global constitutionalism look back to the work of Immanuel Kant, who is often seen as providing much of the philosophical foundation for the mainstream modern idea of global constitutionalism. In his seminal work, *Perpetual Peace*, Kant outlined a vision for the international order that many scholars claim has significance within the framework of liberal constitutionalism.⁴⁷⁷ Kant was the first political thinker who developed a comprehensive theory of international constitutionalism based on the insight that the problem of establishing a civil constitution is subordinate to the problem of the absence of a law governed external relationship with other states and cannot be

⁴⁷⁵ Schwöbel, Christine EJ. “Situating the Debate on Global Constitutionalism.” *International Journal of Constitutional Law* 8.3, 2010: 611-635, pp.614-617. Klabbers, Jan “*Setting the Scene*,” in Klabbers, Jan, Anne Peters, and Geir Ulfstein. *The Constitutionalization of International Law*. Oxford University Press, 2009.

⁴⁷⁶ See, again Schwöbel, Christine EJ. *Global Constitutionalism in International Legal Perspective*. Vol. 4. Martinus Nijhoff Publishers, 2011, and Schwöbel, Christine EJ. “Situating the Debate on Global Constitutionalism.” *International Journal of Constitutional Law*, 8.3, 2010: 611-635.

⁴⁷⁷ Kant, Immanuel. *Perpetual Peace: A Philosophical Sketch*. Cambridge: Cambridge University Press, 1970, p.19.

solved unless the latter is solved'.⁴⁷⁸ Kant's conception of the ideal international order consisted of a domestic republican constitution complemented by a public international law, which regulates the relations between states.⁴⁷⁹ Importantly, Kant saw this physical constitution as founded on a global level of fundamental human rights from which 'civilised states', within a 'pacific federation', could not deviate from as a result of the inherent universality of such rights.⁴⁸⁰

The application of Kant's theory to modern conceptions of global constitutionalism has been significant, especially within the 'German School' of thought on global constitutionalism. For example, Angela Emmerike-Fritsch seeks to build on Kant's conception of a cosmopolitan layer of fundamental legal rights in her 'world law' vision, in which she suggests that certain fundamental legal norms transcend from 'international' to 'world' law, and could thus form the foundations of a global constitution, which would then be most effectively institutionalized through and codified through the UN system.⁴⁸¹ Kant has also been a strong influence on other influential global constitutionalists, including Bruno Simma, Alfred Verdross, Matthias Kumm, and many others.⁴⁸²

Alongside Kant, Alfred Verdross must be considered the single most important pre-war global constitutionalist. Often considered the father of the

⁴⁷⁸ Kant, Immanuel. *An Answer to the Question: 'What is enlightenment?'* Penguin UK, 2013, pg.47.

⁴⁷⁹ Kant, Immanuel. *Perpetual Peace: A Philosophical Sketch*. Cambridge: Cambridge University Press, 1970, pp.19-21.

⁴⁸⁰ Kant, Immanuel. *Perpetual Peace: A Philosophical Sketch*. Cambridge: Cambridge University Press, 1970. See also Kant, Immanuel. *Kant: The Metaphysics of Morals*. Cambridge University Press, 1996.

⁴⁸¹ Emmerich-Fritsche, Angelika. *Vom Völkerrecht zum Weltrecht*. Duncker & Humblot, 2007 'Short Summary in English'. Cited in Schwöbel, Christine EJ. "Situating the debate on global constitutionalism." *International Journal of Constitutional Law* 8.3 (2010): 611-635, pg.625.

⁴⁸² Alfred Verdross, Bruno Simma, *Universelles Völkerrecht: Theorie Und Praxis*. cited in Schwöbel, Christine EJ. "Situating the debate on global constitutionalism." *International Journal of Constitutional Law* 8.3 (2010): 611-635, p.630. Kumm, Matthias "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice." *Int'l J. Const. L.* 2 2004: 574. See also Kleinlein, Thomas. "Alfred Verdross as a Founding Father of International Constitutionalism." *Goettingen J. Int'l L.* 4, 2012: 385.

International Community School, Verdross' seminal work 'The Constitution of the International Legal Community' can likely be understood as the first attempt to identify an empirical global constitution existing in the international system.⁴⁸³

Fassbender perceives the core of this philosophy as 'assuming the existence of a base set of shared values, norms, and beliefs that unite actors in the international system, so that they can be said to form a community in the most basic sense.'⁴⁸⁴

Verdross suggested that this international community, manifested in the development of international law, was also a legal community that could form the basis for a global constitution.⁴⁸⁵ Verdross argues that the existence of fundamental principles of international law, determining its source, subjects and execution', as well as 'norms which deal with the structure and subdivision of and the distribution of the spheres of jurisdiction in the international community' can be said to form a constitution.⁴⁸⁶ According to Verdross, these norms could be located within customary international law and certain multilateral treaties such as the Kellogg Briand Pact, and were sufficient to suggest the existence of a nascent international legal constitution governing the behaviour of states that was emerging in the international system.⁴⁸⁷

The end of the Second World War and the creation of the UN were seen by most advocates of an 'encompassing' vision of global constitutionalism as a

⁴⁸³ Verdross, Alfred. *Die Verfassung der Völkerrechtsgemeinschaft*. J. Springer, 1926, cited in Schwöbel, Christine EJ. "Situating the debate on global constitutionalism." *International Journal of Constitutional Law* 8.3 (2010): 611-635, pp.630-632. Kleinlein, Thomas. "Alfred Verdross as a Founding Father of International Constitutionalism, *Goettingen J. Int'l L.* 4, 2012: 385.

⁴⁸⁴ Fassbender, Bardo. "The United Nations Charter as Constitution of the International Community." *Colum. J. Transnat'l L.* 36, 1998: 529. pg. 546.

⁴⁸⁵ Verdross, Alfred. *Die Verfassung der Völkerrechtsgemeinschaft*. J. Springer, 1926, cited in Schwöbel, Christine EJ. "Situating the debate on global constitutionalism." *International Journal of Constitutional Law* 8.3 (2010): 611-635, pp.630-631.

⁴⁸⁶ Ibid. Also Schwöbel, Christine EJ. "Situating the Debate on Global Constitutionalism." *International Journal of Constitutional Law* 8.3, 2010: 611-635, pg.630.

⁴⁸⁷ Verdross, Alfred. *Die Verfassung der Völkerrechtsgemeinschaft*. J. Springer, 1926.

constitutive moment, in which the ‘entirety of the global system can be governed by one constitution’.⁴⁸⁸ While previous visions of global constitutionalism focused on the theoretical existence of certain fundamental norms and rights, the creation of the UN Charter, and indeed the UN Universal Declaration of Human Rights, gave both formal and material weight to the existence of such norms.⁴⁸⁹

The Charter both enunciates certain core rights and principles as well as offering an institutional and doctrinal basis for their potential enforcement. These characteristics allowed scholars who previously had only been able to discuss global constitutionalism in terms of ‘free floating’ norms’ to move towards more substantive visions.⁴⁹⁰ I will now look at the emphasis placed both on ‘fundamental’ norms existing at the international level as well as a general idea or requirement that ultimately the UN Charter can provide the anchoring formal and material characteristics to manifest these fundamental norms into empirical constitutional practice.

As Schwöbel argues, at the core of the great majority of post-war visions of global constitutionalism lies the belief that the international order is, or at the very least, should be, underpinned by certain fundamental legal norms that are applicable to all and limit the activity of states and other bodies within the international

⁴⁸⁸ Fassbender, Bardo. “The United Nations Charter as constitution of the international community.” *Colum. J. Transnat’l L.* 36, 1998: 529. De Wet, Erika. “The International Constitutional Order.” *International & Comparative Law Quarterly* 55.1, 2006: 51-76.

⁴⁸⁹ Tomuschat, Christian, ed. *the United Nations at Age Fifty: A Legal Perspective*. Vol. 23. Martinus Nijhoff Publishers, 1995. De Wet, Erika. “The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order.” *Leiden Journal of International Law* 19.3, 2006: 611-632.

⁴⁹⁰ Brun-Otto Bryde, *International Democratic Constitutionalism*, In Macdonald, Ronald St J., and Douglas M. Johnston, eds. *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*. Martinus Nijhoff Publishers, 2005. De Wet, Erika. “The International Constitutional Order.” *International & Comparative Law Quarterly* 55.1, 2006: 51-76. Fassbender, Bardo. “The United Nations Charter as constitution of the international community.” *Colum. J. Transnat’l L.* 36, 1998: 529.

system.⁴⁹¹ In perhaps the earliest fully fledged iteration of this view, Alfred Verdross and Bruno Simma argue in the book *Universelles Volkerecht*, building on Verdross's earlier work, that the global constitution comprised of a 'system of fundamental norms' and that these now were articulated and embedded in the UN Charter, forming the 'core' of an 'empirical global constitution'.⁴⁹²

Christian Tomuschat is another influential theorist who emphasises the importance of fundamental norms as forming the potential basis for a global constitution. Tomuschat was one of the earlier pioneers of the idea of a global constitutionalism and argued that a framework of basic norms and rules binds states with or without their will to articulate the constitution of the international community.⁴⁹³ Tomuschat highlighted Article 38(1) of the Statute of the ICJ which identifies the sources of international law as one such norm, and Article 2(1) of the Charter of the United Nations stipulating the sovereign equality of states as amongst these core principles.⁴⁹⁴ Tomuschat developed on this idea of a constitutional international community further in his seminal lecture "International Law: Ensuring the Survival of Mankind on the Eve of a New Century," in which Tomuschat argued that not only were the legal principles which he had early enunciated binding on states without their consent, but, importantly, so were particular fundamental norms and values.⁴⁹⁵ Tomuschat focuses on what he sees as fundamental *Jus cogens* norms

⁴⁹¹ Schwöbel, Christine EJ. "Situating the Debate on Global Constitutionalism." *International Journal of Constitutional Law* 8.3, 2010: 611-635, pg.614.

⁴⁹² Verdross, Alfred, and Bruno Simma. *Universelles Völkerrecht*. Duncker & Humblot, 1984, pp.84-90.

⁴⁹³ Tomuschat, Christian. *Obligations Arising for States Without or Against Their Will*. Martinus Nijhoff, 1993.

⁴⁹⁴ Tomuschat, Christian, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century" General Course on Public International Law, 1999, 281 Recueil des Cours de l'Académie de Droit International 237, p.165.

⁴⁹⁵ Tomuschat, Christian, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century" General Course on Public International Law, 1999, 281 Recueil des Cours de l'Académie de Droit International 237, p.161.

regarding human rights as particularly important, many of which he sees as outlined in core UN treaties such as the International Convention Against Torture, the International Convention on Civil and Political Rights, and the Geneva Convention.⁴⁹⁶ According to Tomuschat, protection of these rights is afforded to all as members of the international community regardless of the consent of states through peremptory norms, and such rights form the basis for a nascent constitution of the international community.⁴⁹⁷ Although Tomuschat is less definitive on the UN Charter as an explicit global constitution, in his *The United Nations at Age 50* he does appear to perceive the UN as the most effective potential vehicle to uphold the peremptory norms of international law.⁴⁹⁸

Many other important scholars have also highlighted the importance of these fundamental or 'higher' norms in the international system as part of a nascent global constitution. For example, Brun-Otto Byrde suggests that it is the hierarchy of norms within public international law that forms the core of the global constitution.⁴⁹⁹ States and international organisations, as subjects and objects of international law, play the role of lawmaker and are bound by a set of higher-norms, forming the basis of global constitutionalism.⁵⁰⁰ Byrde describes his vision of constitutionalism as 'not horizontal but verticalised. It recognises a source of legitimacy that is higher than the individual states, encompassing a hierarchy of norms in which ordinary legal rules have to be reviewed against constitutional

⁴⁹⁶ Christian Tomuschat, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century" General Course on Public International Law, 1999, 281 *Recueil des Cours de l'Académie de Droit International* 237, pp.81-85.

⁴⁹⁷ *Ibid*, pp.49,161.

⁴⁹⁸ Tomuschat, Christian, ed. *The United Nations at Age Fifty: A Legal Perspective*. Vol. 23. Martinus Nijhoff Publishers, 1995, foreword.

⁴⁹⁹ Byrde, Brun-Otto. "International democratic constitutionalism." *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* 103, 2005.

⁵⁰⁰ Byrde, Brun-Otto. "International democratic constitutionalism." *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* 103, 2005.

principles, and it employs constitutionalist methods of interpretation'.⁵⁰¹ According to Byrde, the core of these higher-law principles are in the 'universal acceptance of the common interests of mankind.'⁵⁰² The existence of *Jus Cogens* norms are again used by Byrde as an example of these universal norms.⁵⁰³ As Byrde explicitly mentions both 'hierarchy' and 'higher law' as key to his constitutional vision, we can draw a strong correlation between this vision and core 'power-limiting' visions of domestic constitutionalism, in particular that of the US.

Both Luigi Ferrajoli and Erika De Wet, who will be discussed in greater detail later, argue, similarly, that such *Jus Cogens* norms form the ethical underpinning of the global constitution.⁵⁰⁴ Both scholars see the UN as the core 'linking factor', providing a material manifestation of the underpinning constitutional norms of the international community. Ferrajoli suggests that scholars and practitioners need to 'take seriously' the constitutional character of both the Charter and the Universal Declaration of Human Rights as fundamental norms underpinning state action in the international system.⁵⁰⁵ Erika De Wet similarly argues it is the 'universal ethical underpinnings' of core *Jus Cogens* norms, in particular those relating to human rights and security that make them important as constitutional values. De Wet suggests that the constitutional order is thus composed of fundamental norms with *Jus Cogens* at its apex.⁵⁰⁶ She outlines articles 1(3) of

⁵⁰¹ Ibid.104.

⁵⁰² Ibid.

⁵⁰³ Ibid, p.108.

⁵⁰⁴ Ferrajoli, Luigi. 'Beyond Sovereignty. "Citizenship: A Global Constitutionalism' in Richard Bellamy (ed) *Constitutionalism, Democracy and Sovereignty: American and European Perspectives*.1997. De Wet, Erika. "The International Constitutional Order." *International & Comparative Law Quarterly* 55.1, 2006: 51-76.

⁵⁰⁵ Ferrajoli, Luigi. 'Beyond Sovereignty. "Citizenship: A Global Constitutionalism' in Richard Bellamy (ed) *Constitutionalism, Democracy and Sovereignty: American and European Perspectives*," p.155, 1997.

⁵⁰⁶ 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.

the UN Charter, as well as articles 55, 56, 62, and 68 as core elements of the international value system of constitutional human rights, which have ‘then inspired the elaborate systems of human rights protections within Charter treaties as well as other regional organisations.’⁵⁰⁷ Whilst neither Ferrajoli nor De Wet explicitly argue that, taken alone, the UN exists as an actual empirical constitution, both of them see it as a core component in which the fundamental constitutional norms of the international system find themselves a substantive home, and therefore a key component in the emergence of a nascent global constitutionalism.

The scholarship of Angelika Emmerich Fritzche builds upon this idea of fundamental norms to distinguish between what she describes as ‘international’ law and ‘world law.’⁵⁰⁸ According to Fritzche, world law is distinguished from international law by a degree of acceptance by the international community and also by its normative and moral content.⁵⁰⁹ This content, if sufficiently entrenched through processes of constitutionalisation and institutionalisation then transcends international law in that it is no longer based on inter-state consent but rather on values which are universal and from which no derogation is possible.⁵¹⁰ Importantly, despite its imperfections, Fritzche perceives the UN, on the basis of its universal membership and the existence of the Charter as the best empirical container for her ‘world law’ vision of global constitutionalism.⁵¹¹

The work of Anne Peters overlaps this idea of global constitutionalism and scholarship on constitutionalisation, which will be developed upon in the next

⁵⁰⁷ De Wet, Erika. “The International Constitutional Order.” *International & Comparative Law Quarterly* 55.1 2006: 51-76, pg.57.

⁵⁰⁸ Emmerich-Fritsche, Angelika. *Vom Völkerrecht zum Weltrecht*. Duncker & Humblot, 2007 (Short Summary in English)- cited in Schwöbel, Christine EJ. "Situating the debate on global constitutionalism." *International Journal of Constitutional Law* 8.3 (2010): 611-635, pp.625-626.

⁵⁰⁹ *Ibid.*

⁵¹⁰ *Ibid.*

⁵¹¹ *Ibid.*

chapter. Peters sees the international system as having some of the formal properties of constitutionalism, in that some universal values can be identified in the international system, while organisations like the UN and WTO possess some of the formal legal characteristics of constitutions like ‘founding’ charters and particular ‘higher law precepts’ guiding them.⁵¹² Peters suggests that, given ‘domestic deconstituationalisation’, which we have discussed, identifying and strengthening these norms and rule of law structures would lead to a more efficient and globally just government.⁵¹³

Although these scholars often offer different analytical paradigms in their analysis and advocacy of global constitutionalism, certain themes can be identified throughout. Perhaps the most prevalent one is the belief that the exercise of power in the international system (by states or international organisations) should be effectively contained and limited by the existence of fundamental ‘higher-law’ legal norms (often relating to the protection of rights) from which no derogation is permitted. These visions are thus focused, in particular, on one of the core characteristics of constitutionalism which I identified in Chapter 1 – the limitation of political power through law. The above scholars, thus, by and large, predicate the legitimacy of political action in the international sphere as acting within a certain set of fundamental normative principles which take the form of peremptory law.

Another core aspect unifying these scholars is that most, if not all, offer the UN Charter and associated treaties and institutions as forming the substantive core

⁵¹² Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures.” *Leiden Journal of International Law* 19.3, 2006: 579-610, p.585-595.

⁵¹³ *Ibid.* Also, Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures.” *Leiden Journal of International Law* 19.3. 2006: 579-610.

of the global constitution, if not comprising the global constitution itself.⁵¹⁴ This is as a result of the UN's ability to ground these norms in substantive form and to offer 'rudimentary structures for their enforcement.'⁵¹⁵ Whilst most of them see the UN as in some way key to a global constitution, certain others offer a stronger vision, where the UN actually operates as the empirical constitution of the international community in a way that can structurally and institutionally be compared to domestic constitutions.⁵¹⁶ These scholars broadly accept the 'fundamental norms' arguments offered by the scholars discussed and build on them with greater focus on the function of the UN.

At the softer end of this spectrum is likely Jurgen Habermas, the eminent German scholar. Habermas broadly agrees that certain core international norms should govern the international system, of which he identifies democracy, peace, and human rights as fundamental. Although Habermas accepts the need for certain reforms, he is keen to posit the UN as at least offering the 'supranational' aspects of a global constitution.⁵¹⁷ According to Habermas' vision, global constitutionalism would be 'multilevel', with the UN providing particularly the core functions of peace, democracy, and human rights. Habermas suggests that the UN is uniquely placed to do so as a result of three core characteristics which make it possible to view the UN as a potential global constitution.⁵¹⁸ The first is its inclusive universal

⁵¹⁴ Emmerich-Fritsche, Angelika. *Vom Völkerrecht zum Weltrecht*. Duncker & Humblot, 2007 (Short Summary in English, supra note 507). Ferrajoli, Luigi. 'Beyond Sovereignty. "Citizenship: A Global Constitutionalism' in Richard Bellamy (ed) *Constitutionalism, Democracy and Sovereignty: American and European Perspectives*." 1997. Bryde, Brun-Otto. "International Democratic Constitutionalism." *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* 103, 2005.

⁵¹⁵ De Wet, Erika. "The International Constitutional Order." *International & Comparative Law Quarterly* 55.1, 2006: 51-76, pg.51.

⁵¹⁶ MacDonald, Ronald St John. "The International Community as a Legal Community." *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*. Leiden: Brill, 2005, pg. 863.

⁵¹⁷ Habermas, Jürgen. *The Divided West*. Polity, 2006, pp.136, 173.

⁵¹⁸ *Ibid*, p.160.

nature, articulated through article 103 of the UN Charter, which states: ‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’⁵¹⁹ The second is its explicit connection between the goal of achieving peace with the politics of human rights and the third the link between the prohibition on the use of force and the threat of criminal action or sanctions.⁵²⁰

Finally, two scholars offer perhaps the strongest identification of the UN with a fully-fledged global constitution. In ‘The Meaning of International Constitutional Law’, Fassbender argues that in order to get out of the ‘indistinct fog of constitutional rhetoric’, it is necessary to view the UN Charter as the constitution of the international community.⁵²¹ According to Fassbender, the UN Charter is an authoritative statement of the fundamental rights and responsibilities of the members of the international community and the values to which this community is committed – ‘and a document that is also the basis of the most important community institutions.’⁵²² According to Fassbender the express provisions relating to legislation, application of law, and adjudication offered cumulatively between the general assembly, Security Council and international court of justice strengthen this claim of constitutionalism.⁵²³ Thus, while the great majority of visions of global

⁵¹⁹ Charter of the United Nations, Article 103, 1945. United Nations – <http://www.un.org/en/sections/un-charter/chapter-xvi/index.html>

⁵²⁰ Habermas, Jürgen. *The Divided West*. Polity, 2006, pp.159-162.

⁵²¹ Fassbender, Bardo, ‘The Meaning of International Constitutional Law’ in Ronald St. John Macdonald and Douglas M. Johnston (eds), *Towards World Constitutionalism* (Koninklijke Brill NV, Leiden, 2005, 838, pg.848.

⁵²² Fassbender, Bardo. “Rediscovering a Forgotten Constitution: Notes on the place of the UN Charter in the International Legal Order”. Dunoff, Jeffrey L., and Joel P. Trachtman, eds. *Ruling the world?: constitutionalism, international law, and global governance*. Cambridge University Press, 2009, p.137.

⁵²³ Fassbender, Bardo. "The United Nations Charter as constitution of the international community." *Colum. J. Transnat'l L.* 36 (1998): 529, pg.574.

constitutionalism see the UN as an integral part, Fassbender goes further and argues that the UN *is* the global constitution.⁵²⁴ A similar view can be seen in the work of Ronald St. John Macdonald, who argues that ‘it is apparent that the material content of the Charter of United Nations is indeed constitutional and that we are fully justified in treating the Charter as the constitution of the international community.’⁵²⁵ Further, he argues that the provisions for the establishment of the UN organs (the General Assembly, Security Council, and others set forth in Chapter III UN Charter) are ‘a reflection of the formal constitutional authority by which power is delegated from the people to their respective government representatives.’⁵²⁶ Thus, like Fassbender, Macdonald draws a direct parallel from the ‘institutional’ domestic structures of constitutionalism and suggests that such a structure already exists in the international system in the form of the UN.

1.4. Erika De Wet and the International Constitutional Order

As we have seen from the above, then, much of the scholarship identifying or at least advocating for global constitutionalism places central emphasis on the identification of a ‘normative hierarchy’ of fundamental norms and laws in the international system and the existence of the UN as the substantive institutional home of these norms. Between these two core precepts, global constitutionalists argue, the exercise of public power can be effectively limited through a rule of law framework. As we saw in Chapter 1, this limitation of power through law is a core feature of constitutionalism. Before going on to critically assess this vision of global constitutionalism, it is worth focusing on one more important scholar, Erika De Wet,

⁵²⁴ Ibid.

⁵²⁵ MacDonald, Ronald St John. “The International Community as a Legal Community.” *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*. Leiden: Brill, 2005, pg.879.

⁵²⁶ Ibid.

who provides a clear, paradigmatic vision of this ‘liberal’ vision of global constitutionalism. De Wet focuses two core articles on this topic, ‘The International Constitutional Order’ and ‘The Emergence of International and Regional Value Systems as Manifestation of the Emerging International Constitutional Order’.⁵²⁷ Later works discussing *Jus Cogens* and *Erga Omnes* norms support many of the points made by De Wet in these two core articles, as we will see.⁵²⁸

In ‘The International Constitutional Order’ and ‘The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order’ De Wet makes her core arguments as to the structure of the international constitutional order. De Wet argues that, within the international system, there exists an ‘international value system, an international community, and rudimentary structures for their enforcement’.⁵²⁹

According to De Wet’s vision, the international value system is premised in the fundamental norms of the international legal system, with *Jus Cogens* and *Erga Omnes* norms at its apex.⁵³⁰ Importantly, De Wet argues that not only do these values exist, but that they are also closely linked to the UN Charter as the Charter’s ‘connective role is not only structural but substantive in nature’.⁵³¹ By providing a structural linkage of the different communities through universal State membership, the ‘UN Charter also inspires those norms that articulate the fundamental values of

⁵²⁷ De Wet, Erika. “The International Constitutional Order.” *International & Comparative Law Quarterly* 55.1 2006: 51-76. De Wet, Erika. “The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order.” *Leiden Journal of International Law* 19.3. 2006: 611-632.

⁵²⁸ For example De Wet, Erika, and Jure Vidmar. “Conflicts between International Paradigms: Hierarchy versus Systemic Integration.” *Global Constitutionalism* 2.2, 2013: 196-217.

⁵²⁹ De Wet, Erika. “The International Constitutional Order.” *International & Comparative Law Quarterly* 55.1, 2006: 51-76,p.51.

⁵³⁰ “The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order.” *Leiden Journal of International Law* 19.3. 2006: 611-632, p.614.

⁵³¹ De Wet, Erika. “The International Constitutional Order.” *International & Comparative Law Quarterly* 55.1 2006: 51-76, pg.57.

the international community.⁵³² As a result of this, De Wet suggests that the UN Charter provides the key ‘*institutional linking factor*’, connecting the international value system with the international community, resulting in the creation of an increasingly integrated international order.⁵³³ De Wet also argues that although not always completely effective, the presence of the Security Council provides an embryonic supranational enforcement mechanism, which has the (sometimes unrealised) potential to enforce the core constitutional norms of the international system.⁵³⁴

De Wet’s claims offer a paradigmatic view of what I have termed ‘the liberal vision’ of global constitutionalism and run thus: Firstly, a core set of fundamental norms and values exist within the international system to provide the ‘hierarchically superior’ constitutional law to underpin and limit the behaviour of international actors. Secondly, the UN provides the material and substantive home for these norms as well as an embryonic mechanism for their enforcement. Taken together, these core features ‘add up’ to the existence, or at least nascent existence, of a global constitution.⁵³⁵ This chapter will now assess the validity of these claims. In doing so, it will suggest that De Wet is correct in her assertion that, at some level, it might be possible to identify a degree of normative hierarchy within public international law that is broadly recognisable within and through the UN system and in the existence of *Jus Cogens* norms. However, despite this, it will nonetheless suggest that ultimately such a vision of global constitutionalism is both incomplete and overambitious given the actual institutional structure of the UN. It will suggest that

⁵³² Ibid.

⁵³³ Ibid.

⁵³⁴ Ibid. p, 75.

⁵³⁵ “The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order.” *Leiden Journal of International Law* 19.3. 2006: 611-632.

the lack of effective legal or institutional checks on the Security Council means that there is little within the institutional structure of the UN that can ensure that power is exercised within a rule of law framework or that rights within the Charter are fundamentally protected in practice.

2. Global Constitutionalism: Critique

2.1. Normative Hierarchy

De Wet's first claim is that there exists in the international system an identifiable international value system which possesses normative superiority over other norms of international law.⁵³⁶ The idea that there are certain fundamental norms governing state practice within the international system pre-dates the emergence of the UN. For example, the principle of diplomatic immunity, now entrenched in the Vienna Convention dates back to the Congress of Vienna of 1815 and has thus long been a cornerstone of international relations.⁵³⁷ Similarly, the principle of *pacta sunt servanda*, ultimately encoded into the Vienna Convention, was also considered a core principle of international relations as well as a customary principle of international law.⁵³⁸ The 'Lotus Principle' to the effect that sovereign states may act in any way they see fit as long as it does not contravene an explicit prohibition, also represents long-standing fundamental norms of international

⁵³⁶ De Wet, E. The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order." *Leiden Journal of International Law* 19.3. 2006: 611-632.

⁵³⁷ See. Langhorne, Richard. "The Regulation of Diplomatic Practice: the Beginnings to the Vienna Convention on Diplomatic Relations, 1961." Weatherall, Thomas. "Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence." *Geo. J. Int'l L.* 46, 2014: 1151 *Review of International Studies* 18.1, 1992: 3-17. Vienna Convention on the Law of Treaties, 1969, United Nations. In particular, see Articles 21, 22, 30 and 31.

⁵³⁸ Vienna Convention on the Law of Treaties, 1969. United Nations. See Preamble and Article 26.

law.⁵³⁹ The above principles, despite the absence of global institutions to enforce them, were broadly adhered to, and acted as the cornerstones of interaction in what Hedley Bull describes as the ‘anarchical’ international system.’⁵⁴⁰

Therefore, it would not be reasonable to suggest that there existed no ‘fundamental norms’ governing international behaviour before the Second World War and the creation of the UN. What it is reasonable to suggest about the norms that existed before the Second World War, and certainly before the First World War, is that they were to a large extent ‘functional’ norms to ensure for sovereign states a certain degree of predictability in international affairs. This was done with the intention of preventing the outbreak of conflict between states that could lead to existential challenges to their sovereignty, which remained the core *grundnorm* of international affairs.⁵⁴¹ It is difficult to thus compare these norms to the norms of constitutionalism, which, as we have demonstrated in Chapter 1, are ‘strongly value based’ in that they seek to promote, entrench and protect particular and fundamental *rights* for individuals in a way that is strongly premised in a particular view of legitimacy, and has a heavy normative and moral underpinning relating to the political and legal ‘good’ of a particular community and the individuals therein.⁵⁴² The precepts of constitutionalism are a lot more than simply particular functional norms governing conduct within a particular polity or system, and therefore it is unlikely that the pre-war norms of international law could reasonably be compared to these.

⁵³⁹ See Permanent Court of International Justice ‘The Case of the SS Lotus’, 1927. World Courts – http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm

⁵⁴⁰ Bull, Hedley. *The Anarchical Society: A Study of Order in World Politics*. Palgrave Macmillan, 2012.

⁵⁴¹ Vidmar, Jure. “Norm Conflicts and Hierarchy in International Law.” De Wet, Erika, and Jure Vidmar, eds. *Hierarchy in International Law: The Place of Human Rights*. OUP Oxford, 2012, pp.15-17.

⁵⁴² *Ibid*, pp.16-20.

The horrors of the Second World War in terms of sheer human devastation and loss of life, as well as the state-sanctioned genocide of millions of individuals, undoubtedly led to a shift in this state-centric view of international law and a wider recognition of the common interests and rights of humankind more generally.⁵⁴³ It is relatively uncontroversial to argue that, in this respect, the creation of the UN offered a constitutive moment which articulated a fundamental shift in common understandings of the purposes of international law.⁵⁴⁴ As Vidmar contends, the emergence of the UN as the core global institution entailed almost a fundamental redesigning of the international institutional system.⁵⁴⁵ According to Vidmar, ‘the new design led not only to the codification of new rules of international law, but it also changed the fundamentals of the international legal system.’⁵⁴⁶ The opening words of the UN Charter ‘We the Peoples’ of the UN articulates at some level the fundamental importance of individuals, not just states within the UN.⁵⁴⁷ The preamble begins by determining that the UN’s purpose is to ‘save future generations from the scourge of war, which twice has brought untold horror to mankind’, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be

⁵⁴³ Vidmar, Jure. “Norm Conflicts and Hierarchy in International Law.” De Wet, Erika, and Jure Vidmar, eds. *Hierarchy in International Law: The Place of Human Rights*. OUP Oxford, 2012, pp.14-17.

⁵⁴⁴ De Wet, E. The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order.” *Leiden Journal of International Law* 19.3. 2006: 611-632.

⁵⁴⁵ Vidmar, Jure. “Norm Conflicts and Hierarchy in International Law.” De Wet, Erika, and Jure Vidmar, eds. *Hierarchy in International Law: The Place of Human Rights*. OUP Oxford, 2012, pp.15-16.

⁵⁴⁶ *Ibid*, pg.15.

⁵⁴⁷ *Ibid*, pp.15-17.

maintained, and to promote social progress and better standards of life in larger freedom.⁵⁴⁸

Indeed, the fundamental rights of people are mentioned no less than 13 times. Erika De Wet argues that, in particular, articles 1(3) of the UN Charter, as well as articles 55, 56, 62, and 68 form core elements of the international value system of constitutional human rights, which have then inspired the multitude of subsidiary treaties and conventions which proceeded from these core principles.⁵⁴⁹

It is thus clear, from both the pre-ambule of the Charter and from its content, that the Charter is intended to possess profound normative conduct as an expression of the fundamental values of the global community.⁵⁵⁰ In this regard we can see that the Charter intended to promote something much more ambitious than simply functional co-operation. Rather, we can see the Charter of the UN as premised on the existence of an interdependent international community in which conduct must be based on a particular set of core values.⁵⁵¹

At the most basic level, one might say that we can see two core interrelated normative principles as the driving forces behind the Charter. The first is an absolute ban on the aggressive use of force, and the second is a respect for fundamental human rights.⁵⁵² In this sense, then, we can see that the Charter very much resembles many domestic constitutions in the way it sets out particular core

⁵⁴⁸ Charter of the United Nations, Preamble, 1945. United Nations – <http://www.un.org/en/charter-united-nations/> – Accessed 6th Jan 2018.

⁵⁴⁹ De Wet, Erika. “The International Constitutional Order.” *International & Comparative Law Quarterly* 55.1, 2006: 51-76, pg.57.

⁵⁵⁰ De Wet, E. The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order.” *Leiden Journal of International Law* 19.3. 2006: 611-632.

⁵⁵¹ Ibid.

⁵⁵² Fassbender, Bardo. “The United Nations Charter as Constitution of the International Community.” *Colum. J. Transnat'l L.* 36, 1998: 529, p.577-578. Vidmar, Jure. “Norm Conflicts and Hierarchy in International Law.” De Wet, Erika, and Jure Vidmar, eds. *Hierarchy in International Law: The Place of Human Rights*. OUP Oxford, 2012.

norms as underpinning and being fundamental to both its structure and operation. The idea of the Charter (and attached norms) as a fundamental and ‘hierarchically superior’ framework for the international system is emphasised by the existence of article 103, which states that ‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’⁵⁵³ The presence of this article further emphasises the idea of the fundamental norms and laws of the UN having superior character to ordinary legislation, which, of course, as we have seen in Chapter 1, is a core feature of constitutionalism.⁵⁵⁴

Although the exact nature of the ‘fundamental human rights’ in the Charter are left broadly undefined, a series of treaties and conventions that are part of the broader ‘UN System’ define these rights more clearly, and have a very broad degree of acceptance in the international community, as demonstrated by almost universal ratification.⁵⁵⁵ The Universal Declaration of Human Rights, ratified by the great majority of states, offers an extensive list of individual rights, including not only basic rights to life, liberty and human dignity but also certain social and economic rights.⁵⁵⁶ The Declaration has been compared by many to core constitutional declarations of rights in domestic systems, such as the ‘Declaration of the Rights of Man and Citizen’ in post-revolutionary France and the ‘Bill of Rights’ in the US

⁵⁵³ Charter of the United Nations, Article 103, 1945. Website of the United Nations – <http://www.un.org/en/charter-united-nations/> – Accessed 7th Jan 2018.

⁵⁵⁴ Fassbender, Bardo. “The United Nations Charter as constitution of the international community.” *Colum. J. Transnat’l L.* 36, 1998: 529.

⁵⁵⁵ Heyns, Christof H., and Frans Viljoen, eds. *The impact of the United Nations Human Rights Treaties on the Domestic Level*. Martinus Nijhoff Publishers, 2002.

⁵⁵⁶ Hannum, Hurst. “The Status of the Universal Declaration of Human Rights in National and International Law.” *Ga. J. Int’l & Comp. L.* 25, 1995: 287, pp.287-291. Universal Declaration of Human Rights, 1948 – Website of the United Nations – <http://www.un.org/en/universal-declaration-human-rights/> Accessed 10th December 2017.

constitutional system.⁵⁵⁷ Certainly, the Declaration does suggest a widespread acceptance of certain ‘core’ rights which derive from the wider United Nations Framework, and premised on strong ethical underpinnings which suggest the existence of fundamental legal rights that transcend state boundaries.⁵⁵⁸ In terms of binding treaties, the International Covenant on Civil and Political Rights, which has been signed by 115 of 193 recognised states, mandates many rights which are considered core to the expression of constitutional liberty, including the right to life, the right to a fair trial, the right to freedom of expression, and the right to freedom of religion.⁵⁵⁹ Once again, this UN-mandated treaty promotes many values that would be familiar to the key Enlightenment constitutionalists. More specific and widely ratified treaties, like the Convention on Genocide and the International Convention Against Torture, set these rights down specifically, as well as advocating particular remedies. Thus, it is reasonable to suggest that the UN Charter and many of the bodies associated with the wider UN system do seek to entrench a certain ‘hierarchy’ of norms standing above ordinary processes of international law because of their fundamental character, and that many of these norms have gained genuine and widespread acceptance in a broader international community.

As we can see, then, the claims made that the UN plays a considerable role in offering a ‘substantive home’ for fundamental norms in the international system, regardless of source, seem to have validity. As well as the UN providing a certain degree of normative hierarchy through both the Charter and wider system, the idea

⁵⁵⁷ Hannum, Hurst. “The Status of the Universal Declaration of Human Rights in National and International Law.” *Ga. J. Int’l & Comp. L.* 25, 1995: 287, pp.289-292.

⁵⁵⁸ De Wet, E. The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order.” *Leiden Journal of International Law* 19.3. 2006: 611-632.

⁵⁵⁹ International Convention on Civil and Political Rights, 1966 – See in Particular Articles 2, 14, 15. <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>

of ‘higher-law’, or fundamental norms also increasingly finds expression in international legal practice as well, through the concept of *Jus Cogens*, which refers to ‘norms from which no derogation is permitted’, and are recognised as such by the international community of states.⁵⁶⁰

While not specifically termed as such, the first incarnation or manifestation of such norms can likely be found in the Nuremberg trials.⁵⁶¹ The Nuremberg trials were the first time in world history that individuals had been trialled under international jurisdiction and on the basis of international crimes.⁵⁶² The removal of the previously inviolable principle of sovereign immunity from the defendants was based on the premise that certain crimes were of such a grave nature as to constitute ‘crimes against humanity’.⁵⁶³ Accordingly, international liability for such crimes must exist even in the absence of positive law demarcating them, as their practice threatened civilisation itself.⁵⁶⁴ Nuremberg, thus, for the first time, posited the idea that certain norms were fundamental on the basis of their *moral* qualities, and their breach was a crime against humanity itself that transcended the normal protection of state immunity which existed in positive international law.⁵⁶⁵ The idea of *Jus Cogens* itself first finds manifestation in the Vienna Convention of the Law of Treaties in Articles 53 and 64. Article 53, the key article, states: ‘A treaty is void if,

⁵⁶⁰ Whilst ‘Erga Omnes’ (applicable to all) norms are often also discussed as part of the ‘fundamental norms’ aspect of global constitutionalism, the relative interdeterminacy of these norms as well as the lack of clarity on whether they fundamentally ‘outrank’ other norms of international law means, that for the purpose of identifying a ‘hierarchy of norms’, this chapter will focus on *Jus Cogens*.

⁵⁶¹ Scharf, Michael P. *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments*. Cambridge University Press, 2013, pp.3-6.

⁵⁶² Ibid. Meron, Theodor. “The Geneva Conventions as Customary Law.” *American Journal of International Law* 81.2, 1987: 348-370.

⁵⁶³ Meron, Theodor. “The Geneva Conventions as Customary Law.” *American Journal of International Law* 81.2, 1987: 348-370, pg.352.

⁵⁶⁴ Commentary on The Geneva Conventions of 12 August 1949: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 26, J. Pictet ed. 1952.

⁵⁶⁵ Ibid.

at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general in international law having the same character.’⁵⁶⁶

Article 64, following on from Article 53, states that: ‘If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.’⁵⁶⁷

The identification of *Jus Cogens* in the Vienna Convention on the Law of Treaties, widely considered a bedrock of international relations and international legal practice, is certainly significant.⁵⁶⁸ If particular norms can invalidate the traditional ‘positive law’ bilateralism of treaties, then the clear implication is that the international system is governed by particular fundamental norms that can override ordinary forms of international law.⁵⁶⁹ As we have seen, the idea of this ‘higher-law’, premised on certain fundamental truths is an important feature of constitutionalism. Although an exact process for identifying *Jus Cogens* is difficult to identify and disagreement exists on actually which norms have attained peremptory status, there has been widespread acceptance that at least *some* norms have attained this ‘hierarchically superior’ status in the international legal system,

⁵⁶⁶ Vienna Convention on the Law of Treaties, 1969, Article 53 – <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> – Accessed 13th Nov 2017.

⁵⁶⁷ Vienna Convention on the Law of Treaties, 1969, Article 64 – <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> – Accessed 11th Nov 2017.

⁵⁶⁸ Bassiouni, M. Cherif. “International Crimes: Jus Cogens and obligatio erga omnes.” *Law & Contemp. Probs.* 59, 1996: 63. Bianchi, Andrea. “Human Rights and the Magic of Jus Cogens.” *European Journal of International Law* 19.3, 2008: 491-508. De Wet, Erika. “Jus Cogens and obligations erga omnes.” 2013.

⁵⁶⁹ Ford, G. “Adjudicating Jus Cogens”. *Wisconsin Journal of International Law* 14.5, 1994, pg.143

and their use can be identified in important cases.⁵⁷⁰ Most, but not all, refer to the protection of core human rights.

One influential norm widely considered to be *Jus Cogens* is the prohibition on torture.⁵⁷¹ The emergence of this prohibition as a core principle of international law found manifestation in the UN Convention Against Torture, which has received ratification from 162 states.⁵⁷² As De Wet argues, the treaty embeds an absolute principle of customary international law which has reached peremptory status.⁵⁷³ The recognition of this status can be seen in the case of *Prosecutor vs Anto Furundzija*, in which the ICTY stated that the fact that the prohibition on torture is a peremptory norm of international law ‘serves to delegitimise any legislative or administrative act authorising torture.... and places restrictions on the normally unfettered treaty making powers of states’.⁵⁷⁴ The prohibition on torture was also cited in *Questions Relating to the Obligation to Prosecute or Extradite*, in which the ICJ argued that, as the prohibition on torture was a peremptory norm of international law, individuals could not be extradited to countries in which they faced torture, regardless of other treaty obligations.⁵⁷⁵

⁵⁷⁰ De Wet, Erika. “The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order.” *Leiden Journal of International Law* 19.3. 2006: 611-632. Hannikainen, Lauri. *Peremptory norms (Jus Cogens) in international law: Historical development, criteria, present status*. Vol. 1. Coronet Books Inc, 1988.

⁵⁷¹ De Wet, Erika. “The prohibition of torture as an international norm of Jus Cogens and its implications for national and customary law.” *European Journal of International Law* 15.1, 2004: 97-121.

⁵⁷² United Nations Convention Against Torture 1984 – <http://legal.un.org/avl/ha/catcidtp/catcidtp.html> – Accessed 2nd Jan 2018.

⁵⁷³ De Wet, Erika. “The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law.” *European Journal of International Law* 15.1, 2004: 97-121.

⁵⁷⁴ *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, available at: <http://www.refworld.org/cases, ICTY, 40276a8a4.html> [accessed 10 January 2018].

⁵⁷⁵ *Questions Relating to the Obligation to Extradite or Prosecute*, International Court of Justice (ICJ) 20 July 2012. <http://www.icj-cij.org/files/case-related/144/144-20120720-JUD-01-00-EN.pdf> – pg. 6.

Other norms which are widely accepted to have attained *Jus Cogens* status include the prohibition on the use of force articulated in article 2(4) of the UN Charter, as exemplified by the ICJ in *Nicaragua vs United States*.⁵⁷⁶ The prohibition on genocide, first articulated in the UN Convention on Genocide, is also largely perceived to have attained *Jus Cogens* status, as articulated in the *Armed Activities on the Territory of the Congo* case.⁵⁷⁷ Norms against racial discrimination and apartheid have also been classified as *Jus Cogens*, and the peremptory status of such norms meant that South Africa's claim to being a 'persistent objector' against the rule was not upheld in court.⁵⁷⁸

Although there is little clarity on the exact process used to define *Jus Cogens*, as well as a lack of clarity on the legal effect of the norms or in what cases and how they can be enforced, the broad recognition in international legal practice and amongst states of such a concept can be seen to some extent to support De Wet's claim that an international value system exists. As De Wet argues, the 'foundational' norms to which *Jus Cogens* status attaches are normally linked to core human rights.⁵⁷⁹ As she also rightly argues, these norms have a dialectical relationship with the UN Charter, which helped both to 'concretise' emerging norms within state practice as well as to inspire the articulation and creation of more.⁵⁸⁰ Almost, if not all of the norms that have been identified as *Jus Cogens* by important

⁵⁷⁶ *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits*, International Court of Justice (ICJ), 27 June 1986, available at: <http://www.refworld.org/cases,ICJ,4023a44d2.html> [accessed 7 January 2018], see paragraph 190.

⁵⁷⁷ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, International Court of Justice (ICJ), 18 September 2002, available at: <http://www.refworld.org/cases,ICJ,4040b4f97.html> [accessed 10 January 2018].

⁵⁷⁸ See *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Yearbook of the International Law Commission, 2001. Vol. II, part two, pp. 112-113.*

⁵⁷⁹ De Wet, Erika. "The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order." *Leiden Journal of International Law* 19.3. 2006: 611-632, p.613.

⁵⁸⁰ *Ibid*, p.615.

international courts, find expression within either the Charter itself or within the wider UN system of treaties and conventions.⁵⁸¹

We can therefore see that there is some validity to the claim, at least at the level of public international law, that the existence of certain fundamental norms is broadly recognised by the international community and that these norms find their substantive home in the UN Charter, which, simultaneously inspires and articulates their creation.⁵⁸² The existence of fundamental norms to limit the exercise of political and public power, as we saw in Chapter 1, is one of the important ‘legitimising’ factors of constitutionalism as these norms underpin the actual practice and exercise of the constitutional order.⁵⁸³ Therefore, it is not unreasonable to suggest that in this way, the UN and associated fundamental norms may provide elements recognisable as presenting a ‘normative hierarchy’, which would not be unfamiliar to constitutions anywhere.⁵⁸⁴

2.2. The UN system, rule of law, and separation of powers: The problem of the Security Council

However, as I have iterated in both the first and second chapter of this thesis, constitutionalism is a complex phenomenon of which the entrenchment of certain fundamental norms only construes one of a number of necessary legitimating elements. In order to ensure that power cannot be exercised arbitrarily, it is also required that governmental powers are sufficiently separated to produce a system of ‘checks and balances’, which ensure that all organs of governance operate within the

⁵⁸¹ Ibid.

⁵⁸² De Wet, Erika. “The International Constitutional Order.” *International & Comparative Law Quarterly* 55.1 2006: 51-76, pg.57.

⁵⁸³ See Chapter 1 (2.1).

⁵⁸⁴ Fassbender, Bardo. “The United Nations Charter as constitution of the international community.” *Colum. J. Transnat'l L.* 36, 1998: 529.

confines of the constitution.⁵⁸⁵ As Dieter Grimm and Rainer Wahl argue, pure normativity is not sufficient to engender constitutionalism, but instead a constitution is an existent ‘thing’, and must, as we have already seen, ensure the comprehensive and legitimate exercise of public power.⁵⁸⁶ As we have seen, although the allocation of powers between the varying constitutional organs can vary, to effectively prevent the exercise of arbitrary power, it must be separated into legislative, executive, and judicial bodies.⁵⁸⁷ Although certain overlap in this regard is permitted within constitutional systems, each function must be fundamentally exercised independently to prevent any one organ from exercising arbitrary power and thus undermine the legitimacy of the constitution itself.⁵⁸⁸ As has been demonstrated in the previous chapter with particular reference to Montesquieu, a genuine separation of powers, and in particular the removal of legislative and judicial power from an unrestrained executive (usually in the form of a king), were absolutely key to ensuring ‘rule of law’, rather than ‘rule by law’, which is of course a key feature of constitutionalism. Most importantly, the core powers of judging and of creating the law cannot lie with the executive branch of any constitutional system without undermining its core objective of limiting arbitrary power and offering legitimate government under a constitutional system. In such a system, from a constitutional perspective, Montesquieu argued that an unchecked executive would mean the ‘end

⁵⁸⁵ Macdonald, Ronald. “The Charter of the United Nations in constitutional perspective.” *Aust. YBIL* 20, 1999: 205.

⁵⁸⁶ Wahl, Rainer. “In Defence of Constitution.” Dobner, Petra, and Martin Loughlin, eds. *The Twilight of Constitutionalism?* Oxford University Press, 2010, pp.221-222. Grimm, D. “The Achievement of Constitutionalism” in *Twilight of Constitutionalism*, Oxford University Press, 2010, pg.9

⁵⁸⁷ Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012, pg.104. Montesquieu, 1750 *The Spirit of Laws*, Translated 1752: Thomas Nugent, Batoche Books, 2001.

⁵⁸⁸ Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012.

of everything’, so far as the power limiting and rule of law vision of constitutionalism he espoused went.⁵⁸⁹

A number of scholars have suggested that not only does the UN Charter provide the normative foundations for a global constitution, but also the nascent institutional structure to enforce them. Bardo Fassbender, for example, argues that there exists within the Charter ‘express provisions for legislation, application of law, and adjudication’.⁵⁹⁰ Similarly, Macdonald argues that ‘the provisions for the establishment of the organs (the General Assembly, Security Council, and others set forth in Chapter III of the UN Charter) are a reflection of the formal constitutional authority by which power is delegated from the people to their respective governmental representatives.’⁵⁹¹ According to these scholars, then, the delegation of power from the Charter itself (acting as the written or formal constitution of the international community) to the various organs of the UN, in particular the General Assembly, Security Council, and International Court of Justice, allows the UN to govern the international system with sufficient legitimacy to claim at least the embryonic mantle of the global constitution. I will now argue against such a claim and suggest that the dominance of the ‘executive’ organ of the UN, in the form of the Security Council, undermines the core principle of separation of powers that exists as a necessary, power-limiting component of constitutionalism.⁵⁹²

Before moving on to make this argument, a couple of points must be made clear. The purpose of this section of the chapter is not to argue, normatively,

⁵⁸⁹ Montesquieu. *The Spirit of Laws*, Chapter 11. Constitution Society. 1750. http://www.constitution.org/cm/sol_11.htm – Accessed 17th Jan 2018.

⁵⁹⁰ Fassbender, Bardo. “The United Nations Charter as Constitution of the International Community.” *Colum. J. Transnat’l L.* 36, 1998: 529, p.576.

⁵⁹¹ MacDonald, Ronald St John. “The International Community as a Legal Community.” *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*. Leiden: Brill, 2005, pg.879.

⁵⁹² Hurd, Ian. *After Anarchy: Legitimacy and Power in the United Nations Security Council*. Princeton University Press, 2008.

whether the exercise of power by the Security Council in the international system has overall positive or negative effects for the broader international community, or whether the Security Council has the right to undertake certain actions within the framework of the UN or public international law more broadly. It is, rather, to assess the actions and powers of the Security Council against the parameters of *constitutional legitimacy*, of which the limitation of arbitrary power through the separation of powers and checks and balances is a key precept.

As we have seen from our earlier analysis of constitutionalism, one of the key purposes of constitutional creation was the limitation of executive power. Indeed, given the historical background of all three constitutional orders we have studied, the UK, US, and France limiting any form of unlimited or unchecked ‘executive’ sovereignty was perhaps the core purpose of ‘separating’ governmental power.⁵⁹³ As a result, the powers and limitations of each organ must be explicitly stipulated and the mechanisms for limiting that power must also be explicitly spelt out.⁵⁹⁴ This is of course, particularly true with regard to the exercise of executive power, which is directly related to the capacity of that governmental organ to use force and therefore potentially deprive citizens of fundamental liberties, rights, or even life. In a sense, the ‘arbitrary’ exercise of such power is the ultimate ill that constitutionalism seeks to avert and control.⁵⁹⁵

The Security Council is often regarded as the ‘executive’ organ of the United Nations. Charged with primary responsibility for the maintenance of peace and security, the council is the only organ within the UN competent to issue binding

⁵⁹³ This is addressed in detail in Chapters 1 and 2.

⁵⁹⁴ Montesquieu. *The Spirit of Laws*, Chapter 11. Constitution Society. 1750.
http://www.constitution.org/cm/sol_11.htm – Accessed 10th Jan 2018.

⁵⁹⁵ Grimm, D. “The Achievement of Constitutionalism”. *Twilight of Constitutionalism*, Oxford University Press, 2010. Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pp.280-282.

edicts in the form of Security Council Resolutions and to exercise the use of material power through authorising the use of economic sanctions, or, in extreme cases, the use of force against states within the UN system.⁵⁹⁶ These powers are explicitly stated in Chapter 7 of the UN Charter which allows for the council to take economic or military action respectively where they deem a threat to international peace and security to have occurred.⁵⁹⁷ The council is comprised of 15 members, of whom five sit permanently. In order for the council to exercise material power through the use of its Chapter 7 powers, the actions must be sanctioned by 11 of the 15 members of the council.⁵⁹⁸ Importantly, the 5 permanent members of the Security Council (UK, US, France, China, and Russia) possess a ‘veto’ over any exercise of the council’s enforcement power, meaning that if any one of those powers actively votes against enforcement measures or resolutions, they cannot take effect within the UN system.⁵⁹⁹

The Security Council clearly, then, is in possession of what might be described as executive powers. Given that the primary purpose of the Charter is the maintenance of international security, and the Security Council is the primary organ for discharging this requirement, the council is often described, with merit, as the ‘pre-eminent’ organ of the UN.⁶⁰⁰ As discussed above, the council possesses clear executive power and capacity to make decisions that can affect both the fundamental sovereignty of states and potentially the security liberty, and economic

⁵⁹⁶ Charter of the United Nations, 1945, Chapter 7 – United Nations: <http://www.un.org/en/sections/un-charter/chapter-vii/index.html>

⁵⁹⁷ Ibid.

⁵⁹⁸ *Membership of the Security Council*, United Nations – <http://www.un.org/en/sc/members/> Accessed 11th November 2017.

⁵⁹⁹ *Powers and Functions of the Security Council* United Nations – <http://www.un.org/en/sc/about/functions.shtml> – Accessed 12 Oct 2017.

⁶⁰⁰ Thompson, Alexander. *Channels of Power: The UN Security Council and US Statecraft in Iraq*. Cornell University Press, 2015, pg.8. Fassbender, Bardo. “The United Nations Charter as Constitution of the International Community.” *Colum. J. Transnat’l L.* 36, 1998: 529.

well-being of individuals within those states. Given these characteristics, it would be expected within a system of constitutionalism that sufficient checks and balances (manifested through a separation of powers) would be in place to ensure that such power is not exercised 'arbitrarily', and, that, importantly, it is exercised as a means to enforce the rule of law and not 'selectively', depending on the political interests of the executive.⁶⁰¹ This should be particularly true in the case of a body such as the Security Council, in which power is exercised only by a small, select group of states, with five in particular holding enormous power over outcomes and decisions through the use of the veto.⁶⁰² However, as I will demonstrate below, it is not at all clear whether power is separated at all within the United Nations to provide a system of checks and balances, and therefore it is likely that the Security Council exercises power which would be considered arbitrary, and therefore unacceptable to the idea of constitutionalism.⁶⁰³

To understand the particular position held by the Security Council, and the danger this power poses to the tenets of constitutionalism, it is necessary to look more deeply at its origins and relationships with other organs of the UN. In most constitutional systems, the empirical division of power is explicitly not intended to play a key role in how a system is constructed.⁶⁰⁴ Indeed, most constitutional systems are consciously and explicitly constructed with the express intention of limiting that exercise of power. However, given the geopolitical realities of the time, such a balance was difficult to attain when constructing the UN system. As

⁶⁰¹ See Chapter 1, Section 2.2.

⁶⁰² Glennon, Michael J. "Why the Security Council Failed." *Foreign Aff.* 82, 2003: 16, pp.18-21

⁶⁰³ Johnstone, Ian. "Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit." *American Journal of International Law* 102.2, 2008: 275-308, pp.275-277.

⁶⁰⁴ Again, see the early constitutionalists, such as Paine, Montesquieu, and Rousseau who explicitly moved away from the Hobbesian, might is right idea that seems partially inherent in the Security Council's privileged place.

Koskenniemi argues, the fact that the core features of the UN Charter were constructed and debated in conferences dominated by the major powers, and culminating in the Dumbarton Oaks conference had a substantial impact on its outcome and its appropriateness as a ‘constitutional’ executive.⁶⁰⁵ Firstly, the fact that the role of the Security Council was negotiated in a time of war impacted on its purposes and eventual composition. As Koskenniemi further contends, the emergent role of the Charter and Security Council, discussed in the Atlantic Charter, the Declaration of the United Nations, and the Moscow conference focused above all on the maintenance of peace and not on global justice.⁶⁰⁶ As Hinsley argues ‘The charter was less interested in legal and just settlement. The great danger was war and any settlement was better than war’.⁶⁰⁷ The second, and more obvious point is that, given the dominance of the great powers in the negotiations, these powers wanted to entrench their advantage into the global institutional arrangement.⁶⁰⁸

The military and economic dominance of the great allied powers, as well as the urgent need to construct an international system free of war and ‘Hitlerism’ created a particular institutional configuration, which, while potentially useful for the purposes of international peace and security, is certainly questionable when discussing its latency as a constitutional framework. Within the newly-configured system, all ‘hard power’ functions, in essence, were granted to the Security Council (dominated by a small group of dominant states), while the ‘soft’ functions of the UN were delegated to other organs, mainly the General Assembly and to

⁶⁰⁵ Koskenniemi, Martti. “The Police in the Temple Order, Justice and the UN: A Dialectical View.” *Eur. J. Int’l L.* 6, 1995: 325.

⁶⁰⁶ Koskenniemi, Martti. “The Police in the Temple Order, Justice and the UN: A Dialectical View.” *Eur. J. Int’l L.* 6, 1995: 325, pg.335.

⁶⁰⁷ Hinsley, F.H. *Power and the Pursuit of Peace: Theory and Practice in the History of Relations Between States*, 1963, pg.338.

⁶⁰⁸ Koskenniemi, Martti. “The Police in the Temple Order, Justice and the UN: A Dialectical View.” *Eur. J. Int’l L.* 6, 1995: 325.

ECOSOC.⁶⁰⁹ Whilst the International Court of Justice was created as the ‘primary judicial organ’ of the UN, its explicit power runs only to judging on disputes between states where consent has been given by both parties, and, at least at the level of the Charter as a ‘constitutional document’, has no binding power to review the determinations of the Security Council.⁶¹⁰ Thus, at least understood in constitutionalist terms, there is no comparable ‘separation of powers’ within the UN. Discussing this issue in the *Tadic* case, the International Criminal Tribunal of Yugoslavia declared fundamentally that no legislative power existed within the United Nations, stating

It is clear that the legislative, executive, and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting, nor, more specifically, to the setting of an international organisation such as the United Nations. Among the principal organs of the United Nations, the divisions between judicial, executive, and legislative functions are not clear cut. Regarding the judicial function the International Court of Justice is clearly the ‘principal judicial organ’. There is, however, no legislature, in the technical sense of the term, in the United Nations system, and more generally, no parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.⁶¹¹

Whether the International Court of Justice, with reference to general principles of international law or through advisory opinions might operate as a

⁶⁰⁹ *Main Organs*. United Nations – <http://www.un.org/en/sections/about-un/main-organs/>

⁶¹⁰ *Ibid.* Also, Luck, Edward C. *UN Security Council: Practice and Promise*. Routledge, 2006, pg.23.

⁶¹¹ *Prosecutor vs Dusko Tadic*, Decision on the Defence Motion of Interlocutory Appeal on Jurisdiction case, Appeals Chamber, 2 Oct 1995, para.43 – <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>

judicial ‘check’ to the Security Council’s executive power has been the subject of some debate.⁶¹² Indeed, the ICJ has at times offered concurrent and contrary judgements to those of the Security Council. Perhaps the two most prominent examples of such situations can be perceived in the *Lockerbie* and *Wall cases*. In *Lockerbie*, the Court found itself competent to judge on an application made by Libya regarding the extradition of terror suspects, despite the fact that Libya’s application ran contrary to Security Council Resolutions 748 and 883.⁶¹³ While the conflict was eventually resolved through diplomatic means, this did raise the possibility that the court might seek to exercise a form of judicial review over the executive powers of the council.⁶¹⁴ Similarly, in its *Wall* advisory opinion the ICJ ruled that the construction of a wall by Israel was illegal, since Article 51 of the Charter does not give a state the right to pre-emptive self-defence. This appeared to be in direct contradiction to the Security Council interpretation of Article 51, which, since the September 11th attacks, had allowed a ‘right of self-defence’ against non-state-sponsored terror.⁶¹⁵ Such ‘advisory’ opinions have led a number of scholars to suggest that the ICJ might be able to exercise some form of judicial review of the SC’s actions.⁶¹⁶ The scope of this chapter as an overarching assessment of the global

⁶¹² For example, Martenczuk, Bernd. “The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?” *European Journal of International Law* 10.3, 1999: 517-547. Fassbender, Bardo. “Quis judicabit? The Security Council, Its Powers and Its Legal Control (Review Essay).” *European Journal of International Law (EJIL)* 11.1, 2000: 219-232.

⁶¹³ Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, International Court of Justice, 1998, para.38 – <http://www.icj-cij.org/files/case-related/89/089-19980227-JUD-01-00-EN.pdf> – Accessed 10th Dec 2017.

⁶¹⁴ Matheson, Michael J. “ICJ Review of Security Council decisions.” *Geo. Wash. Int’l L. Rev.* 36, 2004: 615. Cronin-Furman, Kathleen Renée. “The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship.” *Columbia Law Review*, 2006: 435-463.

⁶¹⁵ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, available at: <http://www.refworld.org/cases,ICJ,414ad9a719.html> [accessed 12 January 2018].

⁶¹⁶ Martenczuk, Bernd. “The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?” *European Journal of International Law* 10.3, 1999: 517-547. Cronin-

constitutionalist argument is not sufficient to assess the legal minutiae of these cases or whether such determinations by the ICJ fall beyond the scope of its powers.

However, despite such cases, it nonetheless appears unlikely that the ICJ offers a genuine judicial ‘check’ on the power of the Security Council in the manner traditionally understood within constitutional systems, for several reasons.

The first of these is that at no point in the Charter is such a power of judicial review of the council explicitly stipulated and, indeed, analysis of the *travaux préparatoires* suggests that such a power to review the primary actions of the Security Council was explicitly ruled out by the founders.⁶¹⁷ Thus, there exists no clear ‘constitutional’ and conscious power within the UN Charter for the ICJ to limit the Security Council’s exercise of power, substantially weakening such a claim.⁶¹⁸ Secondly, any form of review that the ICJ might offer with regard to the Security Council would strictly be in an *advisory* capacity.⁶¹⁹ This is in explicit contrast to the binding power of review that the ICJ claims over disputes where two state parties consent to have their dispute heard.⁶²⁰ Indeed, the ICJ expressly ruled out the idea that it might authoritatively review decisions of the other primary organs of the UN in its *Namibia* decision, and ultimately *Lockerbie* did not distinctly demonstrate otherwise, particularly given that much of the 1998 ruling was procedural and based on the fact that the council rulings had come into force *after* the case had been

Furman, Kathleen Renée. “The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship.” *Columbia Law Review*, 2006: 435-463.

⁶¹⁷ Watson. “Constitutionalism, Judicial Review, and the World Court”, 1993, *Harvard International Law Journal* 34.1, pp.8-14.

⁶¹⁸ Alvarez, Jose E. “Judging the Security Council.” *American Journal of International Law* 90.1, 1996: 1-39, pp.5-7.

⁶¹⁹ Charter of the United Nations, Article 96, 1945, – <http://www.un.org/en/sections/un-charter/chapter-xiv/index.html>. Also, Alvarez, above, pg.5.

⁶²⁰ Statute of the International Court of Justice, June 26, 1945.

http://avalon.law.yale.edu/20th_century/decad026 See Articles 36, 65/66.

presented to the court.⁶²¹ As Cannizzaro argues, thus, to compare a *potential* advisory power of the council to the fully-fledged legal controls over the executive present in almost all democratic, constitutional systems appears to be a rather thin claim.⁶²² Within domestic constitutional systems, if injured parties are found by courts to have had their constitutional rights violated by the executive, they possess an express and determinative remedy which actively limits the actions of the executive.⁶²³ On the other hand, it is unclear how or if any such advisory opinion by the ICJ would limit the empirical exercise of power by the council in, for example, its capacity to impose sanctions or actually employ military force.⁶²⁴ As Fassbender argues, the SC is hardly going to rescind one of its own resolutions in the wake of such an advisory opinion and despite an advisory opinion from the ICJ, it would be difficult to argue, at least within the UN system, that such a resolution was not still ‘in force, particularly as the ICJ relies on the Security Council for enforcements of any of its decisions, even binding ones.⁶²⁵ Secondly, there exists no mechanism for individuals to petition the ICJ in the case of their rights being abrogated by the Security Council. This might be less problematic if the Security Council’s

⁶²¹ *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, International Court of Justice (ICJ), 21 June 1971, available at: <http://www.refworld.org/cases,ICJ,4023a2531.html> [accessed 8 January 2018], pg.87. Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, International Court of Justice, 1998, para.37 – <http://www.icj-cij.org/files/case-related/89/089-19980227-JUD-01-00-EN.pdf>

⁶²² Alvarez, Jose E. “Judging the Security Council.” *American Journal of International Law* 90.1, 1996: 1-39, pp.5-6.

⁶²³ Cannizzaro, Enzo. “A Machiavellian Moment – The UN Security Council and the Rule of Law.” *Int’l Org. L. Rev.* 3, 2006: 189, p.200. Fassbender, Bardo. “Quis judicabit?: The Security Council, Its Powers and Its Legal Control (Review Essay).” *European Journal of International Law (EJIL)* 11.1, 2000: 219-232.

⁶²⁴ Cannizzaro, Enzo. “A Machiavellian Moment – The UN Security Council and the Rule of Law.” *Int’l Org. L. Rev.* 3, 2006: 189. Pp.196-197. Fassbender, Bardo. “Quis judicabit?: The Security Council, Its Powers and Its Legal Control (Review Essay).” *European Journal of International Law (EJIL)* 11.1, 2000: 219-232, p.222-224.

Alvarez, Jose E. “Judging the Security Council.” *American Journal of International Law* 90.1, 1996: 1-39, pp.5-6.

⁶²⁵ Fassbender, Bardo. “Quis judicabit?: The Security Council, Its Powers and Its Legal Control (Review Essay).” *European Journal of International Law (EJIL)* 11.1, 2000: 219-232, p.223.

determinations were explicitly aimed only at states, but as we will see later in this chapter, the Council, through the use of ‘terror lists’ and other mechanisms, has moved into the creation of ‘legislative’ acts with direct effects on the fundamental rights of individuals.⁶²⁶

Given this absence of genuine judicial or legislative checks, the Security Council’s powers to both ‘determine’ and ‘take action’ on what it perceives as ‘threats to international peace and security’, appear to be problematic from the perspective of the constitutional paradigm in the absence of any defined competence to determine the legality of such action as *ultra vires* in the instance of challenge.⁶²⁷ This is compounded by the absence of any clear definition of what a ‘threat to peace and security’ might constitute in the Charter itself, meaning there is no clear set of empirical legal parameters to bind its action.⁶²⁸ This has led to the council using both executive and judicial powers, or, in more prosaic terms, acting as ‘judge and jury’, which is the very definition of the arbitrary exercise of power.⁶²⁹ It is difficult to square the potential exercise of material power in such an arbitrary way with the idea of constitutionalism discussed in previous chapters, where constitutionalism was defined by the control of the executive through a strong ‘rule of law’ framework supported by a genuine separation of powers.

⁶²⁶ Cannizzaro, Enzo. “A Machiavellian Moment – The UN Security Council and the Rule of Law.” *Int’l Org. L. Rev.* 3, 2006: 189, p.200. Talmon, Stefan. “The Security Council as World Legislature.” *The American Journal of International Law* 99.1, 2005: 175-193. Rasand, Eric. “The Security Council as Global Legislator: Ultra Vires or Ultra Innovative.” *Fordham Int’l LJ* 28, 2004: 542.

⁶²⁷ Johnstone, Ian. “Security Council deliberations: The power of the better argument.” *European Journal of International Law*, 14.3, 2003: 437-480, p.457.

⁶²⁸ Fassbender, Bardo. “Quis judicabit?: The Security Council, Its Powers and Its Legal Control (Review Essay).” *European Journal of International Law (EJIL)* 11.1, 2000: 219-232, pp.219-224. Whilst the Council is required within Article 24 (2) to act in accordance with the purposes and principles of the United Nations, these are many, and vague, and weakened further by the absence of a genuine power of judicial review within the United Nations System as regards Security Council practice.

⁶²⁹ Selkirk, Michael. “Judge, Jury and Executioner – Analysing the Nature of the Security Council’s Authority under Article 39 of the UN Charter.” *Auckland UL Rev.* 9, 2000: 1101, p.1101-1105.

In the absence of an effective rule of law and separation of powers, the presence and influence of ‘Permanent Five’ (P5) states, which have enormous control over the council because of both their permanent position and veto, may well further undermine the precepts of constitutionalism.⁶³⁰ Given that these organs were granted these privileged positions on the very realist premise that they possessed the greatest military power and capacity, Koskenniemi asks whether, in the absence of clear legal limits and genuine checks and balances, at its core, the Security Council cannot be seen as something of a ‘Hobbesian sovereign.’⁶³¹ The idea that particular political actors should, in a ‘great covenant’,⁶³² be granted unchecked power over the international community on the basis of their superior ability to enforce the law seems distinctly unconstitutional, as that power is not definitively limited by the law itself, separation of powers, and other checks and balances.⁶³³ In the absence of such checks, there seems to be no guarantee that this power will not be exercised selectively and arbitrarily, thus substantially undermining the core power-limiting aspect of constitutionalism. As Koskiennemi argues, the UN’s collective security system is based on the ‘co-option’ of overwhelming military power.⁶³⁴ Tautologically, ‘it follows that if such power is overwhelming, it allows co-option only on its own terms, a situation problematic to constitutionalism’.⁶³⁵ Once again, it must be iterated that this critique is not an analysis of whether the actions of the Security Council are beneficial or not to the

⁶³⁰ Berdal, Mats. “The UN Security Council: Ineffective but Indispensable.” *Survival* 45.2, 2003: 7-30.

⁶³¹ Koskenniemi, Martti. “The Police in the Temple Order, Justice and the UN: A Dialectical View.” *Eur. J. Int’l L.* 6, 1995: 325, p.326.

⁶³² Thomas Hobbes, *Leviathan*, 1651, Part II, Ch. 18.6 (Penguin 1982, ed. & Intr. by C.B. Macpherson) at 232-3.

⁶³³ Hubbard, Heidi K. “Separation of Powers Within the United Nations: A Revised Role for the International Court of Justice.” *Stanford Law Review*, 1985: 165-194.

⁶³⁴ Koskenniemi, Martti. “The Police in the Temple Order, Justice and the UN: A Dialectical View.” *Eur. J. Int’l L.* 6, 1995: 325, p.338.

⁶³⁵ *Ibid.*

international system as a whole. It is, specifically, an assessment of the UN's primary organ against the precepts of constitutionalism, both normatively and empirically, that have been set out in Chapters 1 and 2. I will now go on to look at two essential ways in which the practice of the Security Council demonstrates the exercise 'arbitrary' power and thus undermines the core precepts of constitutionalism. Firstly, the inherently political nature of the Security Council means that whether it chooses to determine, or not, a 'threat to peace and security' is often based on political concerns and therefore exercised selectively. Thus, the decision to enforce could be considered arbitrary and self-interested.⁶³⁶ Secondly, the absence of power-limiting devices within the UN system more broadly has led the Security Council to fundamentally define its own powers, culminating in the Security Council increasingly, and without recourse to due process, taking on legislative and judicial powers, undermining further the constitutional requirement that power must be effectively limited and separated.⁶³⁷

The inherently political nature of the Security Council can be perceived through its history. Indeed, during the first 45 years of its existence, the council was fundamentally paralysed in its role as the key guarantor of international peace and security by the division between the western permanent members (US, UK, and France) and Russia (and to a lesser extent, China), during the Cold War.⁶³⁸ During this period, the council was able to pass resolutions only very rarely. Whilst this meant that the council did not act *ultra vires*, the question was certainly raised as to whether a body paralysed by conflict between its core 'veto wielding' members

⁶³⁶ Koskenniemi, Martti. "International law and hegemony: A reconfiguration." *Cambridge Review of International Affairs*, 17.2, 2004: 197-218, pp.204-208.

⁶³⁷ Cannizzaro, Enzo. "A Machiavellian Moment – The UN Security Council and the Rule of Law." *Int'l Org. L. Rev.* 3, 2006: 189.

⁶³⁸ Caron, David D. "The Legitimacy of the Collective Authority of the Security Council." *American Journal of International Law* 87.4, 1993: 552-588, p.570.

could reasonably conduct its fundamental function of maintaining international peace and security.⁶³⁹

In the aftermath of the Cold War and the emergence of the US as the sole global superpower, the council became considerably more active, a development that was hailed by many as the council finally taking up the role for which it was intended within the global security paradigm, and consistently applying its powers for the benefit of the wider global community.⁶⁴⁰ However, in reality, as the US had emerged as the sole global superpower (a situation which remains today, as the US is the key contributor of military force), without direct military support from the US, action by the council was fundamentally implausible.⁶⁴¹ Thus, the fact that geopolitical realities dictated council action had not fundamentally changed, they had merely shifted from a bipolar to unipolar reality, and were now tethered to US geopolitical interests.⁶⁴² One clear example of how the conduct of council action was premised on selective enforcement by the US can be demonstrated by the clear difference in the action of the council in two different cases occurring in the same year (1994). Namely, in one instance, the authorisation for the Use of Force in Haiti (Resolution 970), and the relative inaction of the council on the Rwanda Genocide, a far greater humanitarian crisis and arguably a much greater threat to international peace and security.⁶⁴³

In the case of Haiti, the overthrow of the democratically elected government put in place a new regime which was not aligned to US interests, in an area that the

⁶³⁹ Ibid.

⁶⁴⁰ Koskenniemi, Martti. "The Police in the Temple Order, Justice and the UN: A Dialectical View." *Eur. J. Int'l L.* 6, 1995: 325.

⁶⁴¹ Glennon, Michael J. "Why the Security Council Failed." *Foreign Aff.* 82, 2003: 16, pp.18-25.

⁶⁴² Haass, Richard N. "The age of nonpolarity: What will follow US Dominance?" *Foreign Affairs*, 2008: 44-56.

⁶⁴³ Malone, David. *Decision-making in the UN Security Council: the Case of Haiti, 1990-1997*. Oxford University Press, 1998. Barnett, Michael N. "The UN Security Council, indifference, and genocide in Rwanda." *Cultural Anthropology* 12.4, 1997: 551-578, pp.560-575.

US had always considered to be within its 'sphere of influence', the Americas.⁶⁴⁴

The US had considerable economic interests in Haiti which were affected by the emergence of the unfriendly new regime in the form of the Junta.⁶⁴⁵ Secondly, the violence occurring in the country was causing a huge influx of refugees arriving on flotillas into the United States, raising the country's profile domestically.

Fundamentally then, events in Haiti had a direct impact on US interests both in the country and the region more widely.⁶⁴⁶

In response to this situation, the US utilised all the diplomatic tools at its disposal to push for council authorisation for directly military intervention, using the full might of the US military, to restore the democratically elected government.⁶⁴⁷ This resulted in the authorisation of force through Resolution 948, which authorised a multinational force under US command to intervene militarily, duly ousting the military junta in Haiti and restoring the democratically elected president.⁶⁴⁸ While violence and loss of life undoubtedly occurred as a result of the coup in Haiti, the situation was relatively 'self-contained', with a death toll perhaps numbering in the hundreds.⁶⁴⁹ It is unlikely, then, as the Uruguay delegation argued, that the situation in Haiti constituted a major threat to the 'peace and security' of the broader region.⁶⁵⁰ Nonetheless, with US interests at stake, the US utilised all the diplomatic and political pressure it possessed to ensure that the council took military action to restore a government more favourable to itself.

⁶⁴⁴ Kreps, Sarah E. "The 1994 Haiti intervention: A Unilateral Operation in Multilateral Clothes." *Journal of Strategic Studies*, 30.3, 2007: 449-474, p.458.

⁶⁴⁵ Ibid, p.457.

⁶⁴⁶ Ibid, p.455.

⁶⁴⁷ Ibid.

⁶⁴⁸ UN Security Council, *Security Council resolution 948, 1994 [Haiti]*, 15 October 1994, S/RES/948 1994, available at: <http://www.refworld.org/docid/3b00f15840.html> [accessed 12 January 2018].

⁶⁴⁹ Kreps, Sarah E. "The 1994 Haiti intervention: A Unilateral Operation in Multilateral Clothes." *Journal of Strategic Studies* 30.3, 2007: 449-474.

⁶⁵⁰ Ibid, p.465.

A strong contrast can be made to the US, and, relatedly, Security Council reaction to the genocide in Rwanda, which had a death toll totalling almost one million, clearly an act of genocide as defined by the UN convention on genocide, as well as a clear threat to wider regional stability as a result of potential further tribal conflict and war.⁶⁵¹ However, despite strong initial intelligence and evidence that the genocide was about to take place, followed by the council and wider international community watching the genocide ‘unfold before their eyes’, the US did not push for a full Chapter 7 intervention or volunteer its own military forces for such an intervention.⁶⁵² Indeed, it did not contribute to the mainstay of UNAMIR, a United Nations Peacekeeping Force present in the region, to actively defend the Tutsi population who were subject to the genocide and encouraged its drawdown when the situation began to escalate.⁶⁵³ It is clear nonetheless that events in Rwanda posed a much greater threat both to life and to regional and international security than events in Haiti.

The very different approach taken by the US and Security Council were the result of US perceptions regarding its own interest in intervention, particularly in the wake of the ‘Black Hawk Down’ crisis, in which US forces captured by Somali militants, had been murdered and paraded through the streets of Mogadishu.⁶⁵⁴ This event had substantially moved public opinion against further US involvement in African conflicts. Resultantly, the unofficial US policy was not to get militarily involved in any African conflicts unless specific US interests were at stake.⁶⁵⁵ This

⁶⁵¹ Berdal, Mats. “The UN Security Council: Ineffective but Indispensable.” *Survival* 45.2, 2003: 7-30, pg.20

⁶⁵² Barnett, Michael N. “The UN Security Council, Indifference and Genocide in Rwanda.” *Cultural Anthropology* 12.4, 1997: 551-578, pp.558-560.

⁶⁵³ Heinze, Eric A. “The Rhetoric of Genocide in US Foreign Policy: Rwanda and Darfur Compared.” *Political Science Quarterly*, 122.3, 2007: 359-383, pp.364-366.

⁶⁵⁴ *Ibid*, p.360.

⁶⁵⁵ *Ibid*.

policy was articulated in draft Presidential Directive 25 which created a ‘vital national interest’ test.⁶⁵⁶ The test limited US involvement to operations in the best interests of the US government and with popular support by the US population.⁶⁵⁷ Given that such specific US interests were not identified in the case of the Rwandan genocide, the US did not intervene or encourage more decisive activity from the Security Council, resulting in a situation that certainly threatened ‘international peace and security’. Thus, we can see the selective nature of Security Council intervention, often being directly tethered to the geopolitical interests of one major power.⁶⁵⁸

Despite a shift in the balance of power, we can see a similar paradigm at work in the recent persecution of the Rohingya in Myanmar by the Burmese military. Despite the deaths of approximately 6,400 Rohingya in one month at the hands of the Burmese military, and the resulting flood of refugees into Bangladesh and resultant destabilising effect, the Security Council has not taken any definitive action beyond a strongly worded statement, and seems extremely unlikely to do so.⁶⁵⁹ This is, again, broadly a result of strategic considerations of the two major global powers in the form of the US and, in particular, China. China has been extremely averse to undertaking any concrete action against Myanmar because of considerable material interests (broadly with regard to natural resources) therein, particularly in the Rakhine State itself, whilst the US’s response has similarly been

⁶⁵⁶ Presidential Directive NSC 25, 1994 – <https://fas.org/irp/offdocs/pdd/pdd-25.pdf>-Accessed 13th Jan 2017.

⁶⁵⁷ Ibid.

⁶⁵⁸ Koskeniemi, Martti. “The Police in the Temple Order, Justice and the UN: A Dialectical View.” *Eur. J. Int’l L.* 6, 1995: 325.

⁶⁵⁹ Hasan, Md Mahmudul. “The Rohingya Crisis: Suu Kyi’s False Flag and Ethnic Cleansing in Arakan.” *Irish Marxist Review*, 6.19, 2017: 50-61, pg.59.

restrained as a result of the strategic importance of Myanmar in the broader geopolitical sphere.⁶⁶⁰

In a sense, then, we can see that many of the decisions of the Security Council, as a fundamentally political organ, are often not based on a consistent set of legal criteria but rather on the geopolitical interests of its members. The absence of a clear, legal delineation of the council's power or any genuine institutional checks seem to suggest an arbitrary nature to its exercise of executive power which would appear anathema to the 'power-limiting' vision which is at the heart of constitutionalism.⁶⁶¹ As we have seen, this requires that political power be limited through both a rule of law framework, and, importantly, through the 'separation' of 'executive, legislative, and judicial' functions. If this power is not clearly delineated or limited by institutional separation, then, as we have seen from the practice of the council, it may well be exercised arbitrarily. In essence, in both 'determining' and then 'enforcing' edicts without any external legal or institutional check, the Security Council is exercising both 'the power of judging and the power of execution', a Hobbesian trait that constitutionalists sought fundamentally to overturn.⁶⁶² Finally, I will now go on to look at how, through the use of 'terror lists', the Security Council has expanded its power through a 'mixing' of legislative judicial, and executive power, further undermining the idea of the Charter as a 'constitutional' system, defined by rule of law and separation of powers.⁶⁶³

⁶⁶⁰ Ibid.

⁶⁶¹ Whilst Article 24(2) does state that the Council must act 'Within the principles and purposes of the United Nations' these principles are many and at times can be conflicting. Again, this is not to argue that the Council's powers are necessary boundless – it is merely to argue that, within the constitutional idea of power limitation, they appear extremely excessive.

⁶⁶² Koskeniemi, Martti. "The Police in the Temple Order, Justice and the UN: A Dialectical View." *Eur. J. Int'l L.* 6, 1995: 325, pg.326.

⁶⁶³ Gordon, Joy. "The United Nations Security Council and the Emerging Crisis of Legitimacy." *Yale J. Int'l Aff.* 9, 2014: 40. Elberling, Bjorn. "The ultra vires character of legislative action by the Security Council." *Int'l Org. L. Rev.* 2, 2005: 337.

2.3. Judge, Jury, and Executioner- The Security Council as Legislator

The creation of ‘terror lists’, by the UN Security Council has often been seen as a move from the traditional ‘executive’ role and into the field of international legislation. In 1999, the council adopted Resolution 1267 which imposed a set of measures to freeze funds of those with ties to terrorist operations, specifically the Taliban, Al-Qaeda, and Usama bin Laden. It also established a committee to designate the funds that were to be frozen.⁶⁶⁴ This regime was strengthened by several proceeding resolutions, perhaps most importantly resolution 1373, which stated, with binding force, that ‘all states shall freeze without delay funds and other financial assets or economic resources of persons who commit or attempt to commit terrorist attacks or participate in or facilitate the commission of terrorist acts’.⁶⁶⁵ As Talmon argues, the ‘general and abstract’ nature of the obligations demanded by the council are arguably of ‘legislative’ character.⁶⁶⁶ Importantly, Resolution 1373 imposes new and general obligations on all members of the UN without their express consent. Unlike a treaty, of course, the Resolutions do not require consent from all affected parties.⁶⁶⁷

Importantly, the Resolutions affect the fundamental rights of individuals directly, including those who would under ordinary circumstances be protected by certain national constitutional provisions of their own, particularly the right to have their guilt determined through an ‘impartial’ legal process.⁶⁶⁸ However, the

⁶⁶⁴ Security Council resolution 1267, 1999, [Afghanistan], 15 October 1999, S/RES/1267, 1999, available at: <http://www.refworld.org/docid/3b00f2298.html> [accessed 12 January 2018].

⁶⁶⁵ Security Council, Security Council resolution 1267, 1999, [Afghanistan], 15 October 1999, S/RES/1267 1999, available at: <http://www.refworld.org/docid/3b00f2298.html>, accessed 12 January 2018. See 1(c).

⁶⁶⁶ Talmon, Stefan. “The Security Council as World Legislature.” *The American Journal of International Law* 99.1, 2005: 175-193, p.176.

⁶⁶⁷ Ibid. pp.175-177.

⁶⁶⁸ Gordon, Joy. “The United Nations Security Council and the Emerging Crisis of Legitimacy.” *Yale J. Int’l Aff.* 9, 2014: 40.

procedure designed by the Security Council did not offer this recourse. Instead, the ‘terror listing’ undertaken by the council was compiled by a ‘committee of experts’, dominated by the major powers.⁶⁶⁹ Importantly, the Security Council did not provide individuals sanctioned under the ‘legislation’ with any details of the charges against them, nor did it provide any mechanisms via which such determinations might be made.⁶⁷⁰ Instead, the Security Council demanded, through Article 103 and its Chapter 25 powers, that all states comply with Resolutions 1267 and 1373 and impose punitive measures against individuals not convicted of any crime and without recourse to any form of due process.⁶⁷¹

Given that both the right to property and the right to a fair trial are rights guaranteed as fundamental in most systems of domestic constitutional law as well as within the UN system itself (in the International Convention on Civil and Political Rights), the manner in which the council has sought to impose these Resolutions seems problematic indeed from the perspective of constitutionalism.⁶⁷² In this case, we see the council exercising both legislative and judicial power in a manner which undermines fundamental rights by edict without recourse to due process. The case famously brought by Yusuf Kadi highlighted this situation further. Kadi, a wealthy Saudi businessman had his assets frozen by Sweden under Council Resolutions.⁶⁷³ The Security Council had refused to provide Kadi with the particulars of the claims against him, and resultantly did not give him the opportunity to review or respond to allegations made against him.⁶⁷⁴ Kadi then challenged the rulings of the Security

⁶⁶⁹ Ibid, p.44.

⁶⁷⁰ Ibid, p.44-45.

⁶⁷¹ See resolutions listed above.

⁶⁷² International Convention on Civil and Political Rights, United Nations, 1966 – See in Particular Articles 9(3) and <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>

⁶⁷³ Gordon, Joy. “The United Nations Security Council and the Emerging Crisis of Legitimacy.” *Yale J. Int’l Aff.* 9, 2014: 40.

⁶⁷⁴ Ibid, p.44.

Council in the European Court of Justice. Ultimately, the ECJ ruled that Kadi's fundamental rights under European law, including the right to a fair trial and the right to property had been violated, and lifted the sanctions against him within the European Union.⁶⁷⁵ Thus we can see again how the absence of legal and institutional limits to the Security Council's power poses a problem to ideas of constitutionalism, which would generally expect any exercise of executive or political power which affects fundamental rights to be bound within a legal framework and subject to review, something which has clearly not been the case in the Security Council's use of terror lists.

The episode discussed above further supports the argument that the institutional structure of the UN, as well as the Charter itself, does not provide the clear 'rule of law' framework or separation of powers that would allow for it to play the role of global constitution. As the Charter does not offer any clear limits or definition as to what entails the 'maintenance of peace and security', the lack of a legislative or judicial body with binding power has allowed the Security Council to fundamentally define its own competence and to exercise, at times, executive, judicial, and legislative body, something that constitutionalists would almost certainly label an 'exercise of arbitrary power'. Limiting this exercise through the rule of law and separation of powers, as we have seen in Chapters 1 and 2, is a core purpose of constitutionalism. Thus, while the Charter does provide something of a normative hierarchy in the international system which might set out the beginnings of some form of global constitutionalism, it is not sufficient to engender constitutionalism. Rather, an institutional framework to limit the exercise of power and ensure the rule

⁶⁷⁵ *Kadi v. Council of the European Union and Commission of the European Communities*, C-402/05 P and C-415/05 P, European Union: Court of Justice of the European Union, 3 September 2008, available at: <http://www.refworld.org/cases,ECJ,51e6bbe4.html> [accessed 12 January 2018]. See in Particular para. 370.

of law is also required- a task the UN does not appear able to able to undertake without fundamental reform, particularly with regard to the unchecked power of the Security Council.

2.4. Where are ‘the peoples’? The UN and Constituent Power

The main section of this chapter, analysing the institutional structure of the UN, appears sufficient to challenge ideas of global constitutionalism that advocate the UN as the institutional centrepiece of such a constitution on their own terms, insofar as we can see that the UN fails to ‘limit the exercise of political power through a strong rule of law framework’ with appropriate institutional mechanisms, checks, and balances. As was discussed in Chapters 1 and 2, constitutionalism also requires government, at some level, to be legitimised through the consent of the governed. Without this vital legitimising link, it is difficult to guarantee that the organs of government will act in accordance with the wider norms entrenched in the constitution. This would appear to be particularly salient for the United Nations, where, as we can see, the ‘legal and institutional’ framework of the organisation itself is insufficient to ensure that its central organ, the Security Council, acts in accordance with a rule of law framework and not arbitrarily based on the political preferences of its members.

However, once again, it is extremely difficult to identify any such legitimating mechanism within the UN system. While the Charter does identify a symbolic ‘we the people’ as a constituent force in the preamble, this appears to be almost the limit of the involvement of the actual ‘people’ of the UN within the

broader order.⁶⁷⁶ As we have seen from our analysis of constitutionalism in Chapters 1 and 2, the fundamental shift from the Hobbesian view of government to the ‘constitutional’ view was based on the role of the people. In a constitutional system, rather than a ‘passive’ force having tacitly granted consent to the sovereign in a ‘great covenant’ to ensure their security, the people are a force who legitimise government by active participation in it, usually through the process of representative democracy.⁶⁷⁷ It is clear that such a paradigm cannot be observed within the United Nations system. Within the UN system, individuals are passive bearers of rights and duties; they are subjects of the system, but not its authors or shapers.⁶⁷⁸ Individuals do not vote to hold the organs of the UN to account, nor is there a fundamental right of petition where individuals who believe they have had their rights violated can receive a binding remedy or redress.⁶⁷⁹ It is hard to reconcile such a system with ideas of ‘popular sovereignty’ and ‘constituent power’, which envisage the people as a vital, active participant in the decision making process, and also as an important tool for dynamic reform in constantly changing circumstances.⁶⁸⁰

Arguments to the effect that the constituent power of the people is realised through their representative states also seem to run into considerable difficulty.

Firstly, many governments across the world are not democratic. It would seem

⁶⁷⁶ Kelsen, Hans. *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*. Vol. 11. The Lawbook Exchange, Ltd., 1950, p.6. Klabbers, Jan. “Constitutionalism Lite.” *Int’l Org. L. Rev.* 1, 2004: 31, pg.46.

⁶⁷⁷ Hobbes, Thomas. *Leviathan*. A&C Black, 2006. Grimm, D. “The Achievement of Constitutionalism”. *Twilight of Constitutionalism*, Oxford University Press, 2010.

⁶⁷⁸ Anderson, Kenneth. “Accountability as Legitimacy Global Governance, Global Civil Society and the United Nations.” *Brook. J. Int’l L.* 36, 2010: 84, pg.871.

⁶⁷⁹ Giegerich, Thomas. “The Is and Ought of International Constitutionalism: How Far Have We Come on Habermas’s Road to a Well-Considered Constitutionalization of International Law.” *German LJ* 10, 2009: 31, pg.38.

⁶⁸⁰ Reinicke, Wolfgang H., et al. *Critical Choices: The United Nations, Networks, and the Future of Global Governance*. IDRC, Ottawa, ON, CA, 2000, pp.22-23.

strange to assume an indirect legitimating link between, say the people of North Korea or Saudi Arabia and the UN based on the representation of their delegation at the UN, given that the ‘constituent people’ are not even represented through their own governments.⁶⁸¹ Leaving this criticism aside for a moment and assuming that people can be represented through their government, problems remain nonetheless. The core ‘representative institution’ of the UN is the General Assembly, in which each ‘sovereign’ state is represented and has one vote.⁶⁸² However, as we have demonstrated, forms of binding power, that is, power that we would traditionally associate with government, almost exclusively lie with the Security Council, and not with the Assembly. As Giegerich argues, the ‘input’ legitimacy of the council is certainly questionable.⁶⁸³ Setting aside for a moment the permanent members of the Security Council, even within the non-permanent members Europe is ‘grossly overrepresented’, having three members on the council, while Asia, Africa, and South America are similarly underrepresented.⁶⁸⁴ Further to this, more than 60 members of the United Nations have never sat on the Security Council.⁶⁸⁵ Overall, even including the permanent members, this means that 65% (approximately) of the world’s population is completely unrepresented at any one time by the Security Council, an organ that continuously creates ‘binding’ decisions that can affect their fundamental rights and human and economic security.⁶⁸⁶

⁶⁸² Hubbard, Heidi K. “Separation of Powers within the United Nations: A Revised Role for the International Court of Justice.” *Stanford Law Review*, 1985: 165-194.

⁶⁸³ Giegerich, Thomas. “The Is and Ought of International Constitutionalism: How Far Have We Come on Habermas’s Road to a Well-Considered Constitutionalization of International Law.” *German LJ* 10, 2009: 31, pp.49-50.

⁶⁸⁴ *Ibid* p.49.

⁶⁸⁵ *Ibid*, p.50.

⁶⁸⁶ *Ibid*.

The presence of the ‘permanent’, veto wielding, members of the council further exacerbates the lack of representation and therefore ‘constituent power’ manifested in the Security Council.⁶⁸⁷ As we have seen, the council’s power is based not on elections or ‘moral right’, but purely on the basis of having been militarily dominant in the aftermath of the Second World War.⁶⁸⁸ Certainly, from a democratic constitutional perspective, this is a pretty thin basis for ‘legitimacy’, or the right to rule.⁶⁸⁹ Furthermore, whole continents are excluded from permanent membership of the council, including Africa and Latin America⁶⁹⁰. Attempts to reform the council to either create more permanent members such as India or Brazil, or remove the veto altogether, have been spectacularly unsuccessful.⁶⁹¹ This has broadly been the result of the fact that invariably, the geopolitical interests of at least one, or possibly more of the permanent members have been threatened by an expansion of the Security Council to better represent population or regional dynamics of the contemporary global system.⁶⁹² For example, any move towards permanent membership for India in the Security Council as a result of its huge population and burgeoning global power has been consistently blocked by China, which perceives India as a potential geopolitical rival to its regional hegemony.⁶⁹³ Thus, the veto has created a self-re-enforcing cycle, where any attempts to reform the under-representative nature of the council’s membership are prevented by the

⁶⁸⁷ Ibid, pp.49-51.

⁶⁸⁸ Koskenniemi, Martti. “The Police in the Temple Order, Justice and the UN: A Dialectical View.” *Eur. J. Int’l L.* 6, 1995: 325.

⁶⁸⁹ Giegerich, Thomas. “The Is and Ought of International Constitutionalism: How Far Have We Come on Habermas’s Road to a Well-Considered Constitutionalisation of International Law.” *German LJ* 10, 2009: 31, pp.49-55.

⁶⁹⁰ Ibid.

⁶⁹¹ Weiss, Thomas G. “The Illusion of UN Security Council Reform.” *Washington Quarterly* 26.4, 2003: 147-161.

⁶⁹² Ibid, p.150-151.

⁶⁹³ Bourantonis, Dimitris. *The History and Politics of UN Security Council Reform*. Routledge, 2004. Malik, J. Mohan. “Security Council Reform: China Signals its Veto.” *World Policy Journal* 22.1, 2005: 19-29.

entrenchment of that very same system.⁶⁹⁴ As we saw in Chapter 2, one of the core functions of ‘constituent’ power is as a dynamic and generative force that allows constitutional systems to adapt to changing circumstances and times while not fundamentally losing their core legitimacy. The presence of the Security Council veto, fundamentally precluding such change, is clearly deleterious to the representative and dynamic requirements that constitutionalism requires through the active participation of the governed in their government.

Therefore we can see that, as well as failing to effectively limit the exercise of ‘arbitrary’ power through a strong rule of law framework, the UN also cannot be said to be a government ‘by the people’, as the ‘constituent’ power of the people has no genuine link to the organs of government. Thus, it is difficult to see how arguments that the UN Charter might provide for a global constitution may succeed, when two of the most important requirements for constitutional legitimacy are not fulfilled. It would seem that, despite the UN’s positive role in articulating and concretising certain ‘higher-law’ norms at the international level, it cannot reasonably be said to provide a ‘legitimate and comprehensive’ framework for the exercise of public power without fundamental reform, which, as we have seen from the presence of the Security Council veto, would be very difficult to achieve.

Conclusion

This chapter has both sought to introduce the idea of global constitutionalism as well as to assess its mainstream vision. In so doing, it first demonstrated that global constitutionalism has primarily been a response to two key phenomena in the international system both of which are broader manifestations of globalisation.

⁶⁹⁴ Weiss, Thomas G. “The Illusion of UN Security Council Reform.” *Washington Quarterly* 26.4, 2003: 147-161, pp.149-151.

Firstly, ‘domestic deconstitutionalisation’ has led to demands for a ‘compensatory’ form of constitutionalism at the international level. Secondly, the emergence of a global human rights discourse, in which particular rights are seen to transcend state boundaries engendered a debate as to whether such rights could be protected by a ‘global’ level of constitutional human rights.

Moving on from this, this chapter examined a range of important ‘global constitutionalists’ with a particular focus on Erika de Wet, outlining mainstream visions of global constitutionalism which focus on the protection of rights and liberties through a normative hierarchy manifested in robust institutions founded on the rule of law. As I demonstrated, these visions focus at a fundamental level on a ‘hierarchy’ of norms and laws in the international system usually focusing on the UN as the core institutional mechanism through which such norms can be concretized and then enforced.

After outlining this key vision, this chapter then went on to critically analyse it against the precepts of constitutionalism outlined in Chapters 1 and 2. It argued, through looking at the increased eminence of *Jus Cogens* norms and the entrenchment of these norms in the UN Charter which both inspires and articulates them that claims that a ‘hierarchy’ of norms and laws might exist in the international system do have some validity. Despite this, however, as I demonstrated, the current institutional configuration of the UN precludes true constitutionalism. This is as a result of the excessive ‘arbitrary’ power wielded by the Security Council as the result of an absence of a genuine ‘separation of powers’, or clear doctrinal checks. As a result, the council has defined its own powers, acting not necessarily within a strong and bounded rule of law framework but instead often selectively and premised on the geopolitical interests of its core ‘P5 members’. This was

demonstrated by looking at the very different approach taken by the council with respect to situations in Haiti and Rwanda respectively. The chapter also highlighted the dangers, at least from a 'constitutional' perspective, of the Security Council defining its own powers by looking at how the Security Council has used 'terror lists' to further advance its powers into the legislative field, even when doing so clashes with fundamental rights such as the right to property and the right to a fair trial, a situation that would once again be unacceptable to the tenants of constitutionalism outlined in Chapters 1 and 2. Finally, the chapter demonstrated that as well as not effectively limiting the exercise of 'arbitrary' power by the council through a robust rule of law framework, the UN system also fails to offer any genuine 'constituent' power to its 'peoples' through any genuine form of democracy or representation, further undermining any claim it might have, at least in its current manifestation, to the role of a global constitution.

Chapter 4: The Constitutionalization Thesis

The previous chapter assessed the prospects for the existence of a ‘liberal’ global constitution in the international system and demonstrated that as a result of both inadequate rights protection and insufficient separation of powers, the UN cannot reasonably be said to form such a constitution. Following on from this analysis, I will now look at the second key component of the global constitutionalist argument, which Martin Loughlin describes as the ‘constitutionalisation thesis’.

Anne Peters offers perhaps the most well-known version of this argument when she claims that ‘domestic deconstitutionalisation can and should be compensated for by the constitutionalisation of international law’.⁶⁹⁵ In general, this argument is a prescriptive one that argues that by identifying and strengthening on-going processes of constitutionalisation in the international system, raw power can be constrained and thus rule of law can be obtained.⁶⁹⁶

To critically assess this paradigm, this chapter will be divided into three main sections. The first section, with particular reference to the framework offered by Martin Loughlin, will look more deeply at the core characteristics of constitutionalisation and the implications of these characteristics. Firstly, it will demonstrate that the constitutionalisation thesis represents a ‘partialised’ vision of constitutionalism that is inherently legalistic and conservative.⁶⁹⁷ The second section of this chapter will look at the implications of this phenomenon with regard to

⁶⁹⁵ Peters, Anne. ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ *Leiden Journal of International Law*, 19, 3. 2006. 579-610, p.580.

⁶⁹⁶ Loughlin, Martin. “What is Constitutionalisation?” In *The Twilight of Constitutionalism*, Oxford University Press, pp.47-69, p.63. 201. Also Peters, Anne. “The Merits of Global Constitutionalism.” *Indiana Journal of Global Legal Studies* 16.2 (2009): 397-411.

⁶⁹⁷ Loughlin, Martin. “What is Constitutionalisation?” In *The Twilight of Constitutionalism*, Oxford University Press, pp.47-69, 2010, pg.47. Brown, Garrett Wallace. “The Constitutionalization of What?” *Global Constitutionalism* 1.2 (2012): 201-228.

broader ideas of global constitutionalism. This section of the thesis, focusing primarily on an assessment of the core institutions of international economic governance, will suggest that processes of constitutionalisation may not necessarily lead to the goals espoused by global constitutionalists. Through an assessment of the International Monetary Fund (IMF) and World Trade Organisation (WTO), it will suggest that the ‘core institutional pillars’ of the economic system remain tied to particular hegemonic interests and constitutionalising them thus could simply reinforce the interests of these powers while institutionalising negative consequences for others. The final section of this chapter will demonstrate that effectively constitutionalising these organisations in the future will also be difficult, since they lack the fundamental component of ‘constituent power’ which ‘links the governed to the government’ and allows for the effective legitimisation of constitutional organisation.⁶⁹⁸

1. What Is Constitutionalisation? The Constitutionalisation Thesis

The previous chapter offered an in-depth analysis of the proposition that an emergent global constitution exists within the international system. It demonstrated that as the United Nations fail to effectively separate institutional power as well as to incorporate any form of constituent power in their decision making processes, they cannot be seen as a global constitution in its current manifestation. This section of the thesis will focus on ‘prescriptive’ arguments, which importantly do not necessarily focus on the idea of a global constitution as a whole, but nonetheless seek to find areas of institutionalisation and legalisation within the international system and ‘subject them to the norms and processes of a constitution’.⁶⁹⁹

⁶⁹⁸ Loughlin, Martin. “The Concept of Constituent Power.” *European Journal of Political Theory* 13.2, 2014: 218-237, pp.230-237. Loughlin, Martin. ‘Constituent Power’ in *The Idea of Public Law*, Oxford University Press, 2003.

⁶⁹⁹ Loughlin, Ibid.

As Alec Stone Sweet suggests, the international system is undoubtedly undergoing a process of legalisation.⁷⁰⁰ It is clear that an increasingly dense thicket of laws is emerging to regulate every aspect of international governance, from the economy to the environment.⁷⁰¹ Many legal structures that would be familiar to domestic lawyers are emerging in the international system, with an increasing profusion of charters, courts and tribunals emerging in every area.⁷⁰²

It is within this context of increased legalisation that arguments for the ‘constitutionalisation’ of international law have taken on increasing eminence within scholarly debate. Relatedly, as was demonstrated in the previous chapter, globalisation has meant that domestic constitutions are ‘no longer able to regulate the totality of basic governance within their own sovereign space’.⁷⁰³ The study of ‘constitutionalization’ thus sits at the intersection of these two phenomena—increased legalisation in the international sphere and ‘deconstitutionalization’ at the domestic level.⁷⁰⁴

A number of varying definitions have been put forward for the idea of constitutionalization, which will be explored in the remainder of this section. A good starting point is offered by Anne Peters who suggests that the process of constitutionalization refers to the ‘identification and strengthening’ of constitutional

⁷⁰⁰ Sweet, Alec Stone. “Constitutionalism, Legal Pluralism, and International Regimes.” *Indiana Journal of Global Legal Studies* 16.2, 2009: 621-645.

⁷⁰¹ Ibid. Also, Hale, Thomas, David Held, and Kevin Young. *Gridlock: Why Global Cooperation is Failing When We Need it Most*. Polity, 2013, Joerges, Christian, Inger-Johanne Sand, and Gunther Teubner, eds. *Transnational Governance and Constitutionalism*. Bloomsbury Publishing, 2004.

⁷⁰² Sweet, Alec Stone. “Constitutionalism, Legal Pluralism, and International Regimes.” *Indiana Journal of Global Legal Studies* 16.2, 2009: 621-645, pp.620-630.

⁷⁰³ Peters Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ *Leiden Journal of International Law*”, 19, 3. 2006. 579-610, p.580.

⁷⁰⁴ Lang, “*A Constitutionalising Global Order: An Introduction*” In Lang and Wiener *Handbook for Global Constitution*, 201, pp.10-26. Klabbbers, “Setting the Scene” in *The Constitutionalization of International Law*, Oxford University Press, 2009.

or ‘constitution-like’ structures in the international system.⁷⁰⁵ This definition has considerable utility because it highlights that the idea of constitutionalisation can be both descriptive in the sense of identifying existing processes in the international system⁷⁰⁶ as well as prescriptive, in terms of advocating a further strengthening of the processes in these organisations deemed as potential candidates.⁷⁰⁷

Nonetheless, greater detail is needed on what processes, procedures, and structures might be entailed within this overarching idea of constitutionalisation. A detailed account of more mainstream approaches to constitutionalisation can be found in Martin Loughlin’s work, which deals extensively with the idea. Loughlin describes constitutionalisation as ‘the process of attempting to subject all governmental action within a designated polity to the structures processes, principles and values of a constitution’.⁷⁰⁸ It refers to the ‘processes by which an increasing range of public life is being subjected to the discipline of the norms of liberal legal constitutionalism’⁷⁰⁹ and, usually, an active advocacy of such a process.⁷¹⁰

As I iterated in the previous chapter, there are a number of key factors associated with this ‘liberal’ vision of constitutionalism. Prominent among these, as we saw, are the existence of higher-law norms (what might be called the ‘formal’

⁷⁰⁵ Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures”. *Leiden Journal of International Law*, 19, 3. 2006. 579-610, p.582.

⁷⁰⁶ Loughlin, Martin. “What is Constitutionalisation?” In *The Twilight of Constitutionalism*, Oxford University Press, pp.47-69.

⁷⁰⁷ Peters Anne. ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ *Leiden Journal of International Law*, 19, 3. 2006. 579-610, p.582. Peters, Anne. “The Merits of Global Constitutionalism.” *Indiana Journal of Global Legal Studies* 16.2, 2009: 397-411.

⁷⁰⁸ Loughlin, Martin. “What is Constitutionalisation?” In *The Twilight of Constitutionalism*, Oxford University Press, pp.47-69, p.47. 2010.

⁷⁰⁹ *Ibid*, pg.61.

⁷¹⁰ Again, the Anne Peters’ articles referenced at (12) offer one of the most prominent advocacies of this process, as well as Habermas ‘Does the Constitutionalization of International Law Still Have a Chance?’, in *The Divided West*, Polity, 2006.

elements of the constitution), as well as the institutional and juridical structures required to ensure compliance with these higher-law norms and thus subject the exercise of public power to the rule of law. Such a philosophy, ‘expresses centralisation as a core tenet’,⁷¹¹ and assumes the existence of ‘pre-political rights’ which transcend the here and now and can reasonably be enforced through appropriate institutional structures.⁷¹²

Following from this liberal vision, conceptions of constitutionalisation in the international system, seek, according to Loughlin, to detach the idea of the constitution from its holistic and statist moorings and transpose it into other forms of governance in the international system.⁷¹³ Advocates of constitutionalisation in the international system, such as Anne Peters, seek to present constitutionalisation as a ‘free standing process’.⁷¹⁴ Within this process, the ‘structural coupling’ that exists within the domestic constitution between the ‘institutional’ aspects of constitutionalism and the constituent power aspect which refers to the democratisation and legitimisation of the polity through representation becomes peripheral or unimportant.⁷¹⁵ Rather, the legitimacy of the ‘constitutionalised structure’ is premised on rational truths embodied in the ‘hierarchically superior norms’, which provide the legitimising framework under which the institutional

⁷¹¹ Loughlin, Martin. “What is Constitutionalisation?” In *The Twilight of Constitutionalism*, Oxford University Press, pp.47-69, p.61. 2010. Kadelbach and Kleinlein, ‘International Law, A Constitution for Mankind: An Attempt at a Reappraisal with an Analysis of Constitutional Principles’, *Yearbook for International Law*, 50, 2007: 303.

⁷¹² Loughlin, Martin. “What is Constitutionalisation?” In *The Twilight of Constitutionalism*, Oxford University Press, pp.47-69, p.61. Giegerich, Thomas. “The Is and Ought of International Constitutionalism: How Far Have We Come on Habermas’s Road to a Well-Considered Constitutionalization of International Law?” *German LJ* 10, 2009: 31.

⁷¹³ Klabbers, Jan. *Constitutionalism Lite*, *International Law Review* 1, 31-58, 2004, pp.46-48. Walker, Neil. “Beyond the Holistic Constitution”, *The Twilight of Constitutionalism*, 2010, pp. 301-303.

⁷¹⁴ Loughlin, Martin. “What is Constitutionalisation?” In *The Twilight of Constitutionalism*, Oxford University Press, 2010, pp.47-69, p.61.

⁷¹⁵ *Ibid.* p.63. For more on the importance of structural coupling in constitutional systems, see Luhmann, *Law as a Social System*, Oxford University Press, 2004.

framework can then reasonably enforce the order.⁷¹⁶ Although processes of constitutionalisation are often seen as contributing to or creating a global constitution, this is not necessarily the ultimate goal of such a process, and it can also refer to regime or organisation specific processes of constitutionalisation.⁷¹⁷ Constitutionalisation thus refers to the verticalisation, legalisation, and centralisation of the international legal system or aspects therein.

From this perspective, constitutionalisation has been advocated as a legitimising device for the international legal system, or at the very least particular aspects of it.⁷¹⁸ Peters puts forward this thesis most clearly when she states that ‘domestic deconstitutionalisation because of globalisation could and should be compensated for by the constitutionalisation of international law’.⁷¹⁹ It does this by bringing greater swathes of international law and governance within the ambit of constitutional norms, so that they could be ‘disciplined by formal legal procedures’.⁷²⁰ In this undertaking, Peters suggests that raw power could be transformed into legitimate governance.⁷²¹ This would, theoretically, serve to enhance one of the core objectives of constitutionalism outlined in Chapter 1 – the limitation of arbitrary power and thus the subjection of the international system, or

⁷¹⁶ Peters, Anne. ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ *Leiden Journal of International Law*, 19, 3. 2006. 579-610, p.585-590.

⁷¹⁷ Sweet, Alec Stone. “Constitutionalism, Legal Pluralism, and International Regimes.” *Indiana Journal of Global Legal Studies* 16.2, 2009: 621-645, p.621. Brown, Garrett Wallace. “The Constitutionalization of What?” *Global Constitutionalism* 1.2, 2012: 201-228.

⁷¹⁸ Peters, Anne. “The Merits of Global Constitutionalism.” *Indiana Journal of Global Legal Studies* 16.2, 2009: 397-411, p.398.

⁷¹⁹ Peters Anne. ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ *Leiden Journal of International Law*, 19, 3. 2006. 579-610, p.580.

⁷²⁰ Loughlin, Martin. What is Constitutionalisation? In *The Twilight of Constitutionalism*, Oxford University Press, 2010, pp.47-69, p.61.

⁷²¹ Peters Anne. ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ *Leiden Journal of International Law*, 19, 3. 2006. 579-610, p.579. Also Peters, Anne. “The Merits of Global Constitutionalism.” *Indiana Journal of Global Legal Studies* 16.2, 2009: 397-411.

at least parts of it, to an effective rule of law system. Within this system, basic rights are ‘proclaimed as trump cards’ in the political game and the status of these rights are then determined by a cadre of judges and enforced through a system of institutions.⁷²²

Peters’ proposed method for ‘constitutionalising’ the international system in this manner has been to ascertain where legal norms might be found within international organisations and structures and then to strengthen the procedures that are already underway.⁷²³ As well as Peters, Christian Tomuschat is considered a leading advocate of such a view. Tomuschat, for example suggests that to protect human rights at a global level from external threats posed by globalisation, the supranational oversight of institutions would be required to compensate for the loss of ‘constitutional power’ at the nation state level.⁷²⁴ This would then add a necessary layer of rights and government to deal with the transnational forces that he perceives as impinging on individual rights at both the national and transnational level.⁷²⁵ As I earlier iterated, advocates of constitutionalisation seek to both identify where potential processes of constitutionalisation might be occurring, and to strengthen these processes. In this respect, a number of sites have been identified as possessing certain ‘constitutional’ characteristics which might be strengthened in such a way.

⁷²² Loughlin, Martin. “What is Constitutionalisation?” In *The Twilight of Constitutionalism*, Oxford University Press, 2010, pp.47-69, pp.61-62.

⁷²³ Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures” *Leiden Journal of International Law*, 19, 3. 2006. 579-610, pp.579, 585-600. Peters, Anne. “The Merits of Global Constitutionalism.” *Indiana Journal of Global Legal Studies* 16.2, 2009: 397-411.

⁷²⁴ Tomuschat, Christian. *International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*. Martinus Nijhoff, 1999. Tomuschat, Christian, ed. *Modern Law and Self-Determination*. Vol. 16. Martinus Nijhoff Publishers, 1993.

⁷²⁵ *Ibid.*

The first and foremost of these is, of course, the UN.⁷²⁶ The UN is often considered by advocates of constitutionalisation as the potential core for ‘potential multi-level’ global constitution.⁷²⁷ Habermas is a key proponent of such a system, in which certain constitutional functions of world government would be placed in the hands of a reformed UN. These would importantly include ensuring and enforcing basic human rights, in particular those norms identified as having *Jus Cogens* character.⁷²⁸ In response to many of the critiques I levelled against the organisation in the previous chapter, advocates of the ‘constitutionalisation’ of the UN would argue that the process within the UN remains incomplete. To fulfil its role as a global constitution, the UN should be reformed to take into account the current problems relating to the exercise of arbitrary power, accountability, and transparency.⁷²⁹

International Economic Law, and in particular the WTO has also been seen as a possible site for further processes of constitutionalisation. Given the presence of ‘formal’ arguably ‘higher-law’ principles within the WTO’s purposes relating to the promotion of free trade and market liberalisation, the ‘material’ aspects of the WTO in terms of the WTO Agreements, and finally the juridification of the organisation through the Dispute Settlement Mechanism, many scholars have seen the WTO as a

⁷²⁶ Fassbender, Bardo. “The United Nations Charter as Constitution of the International Community.” *Colum. J. Transnat’l L.* 36 (1998): 529. Macdonald, Ronald St J., and Douglas M. Johnston, eds. *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*. Martinus Nijhoff Publishers, 2005.

⁷²⁷ Pernice, Ingolf. “The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalisation.” *Völkerrecht als Wertordnung/Common Values in International Law: Festschrift für Christian Tomuschat/Essays in Honour of Christian Tomuschat*, 2006: 973-1006. Petersmann, Ernst - Ulrich. “Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration.” *European Journal of International Law* 13.3, 2002: 621-650.

⁷²⁸ Habermas, Jürgen. “Does the Constitutionalization of International Law Still Have a Chance?” *The Divided West*, Polity, 2006, pp.172-174.

⁷²⁹ *Ibid.*

prime candidate for constitutionalisation.⁷³⁰ Joel Trachtmann, for example, suggests that the WTO ‘already possesses some aspects of the constitution’, and that furthering such aspirations might lead to a more effective and responsive WTO.⁷³¹ Anne Peters, too, argues that strengthening some of the ‘constitutional’ aspects of the WTO might compensate for the economic dangers caused by the transnationalisation of the global economy by providing a rule-based and predictable order therein.⁷³² The International Financial Institutions (IFIS) are also sometimes seen as part of an emergent global economic constitution insofar as they play a role in furthering market liberalisation and free trade through many of their policies and policy prescriptions.⁷³³ There is also substantial discussion about the idea of constitutionalisation at the European level. As this thesis is fundamentally premised on analysing the prospects for a global constitution, this idea will not be discussed in detail, since the European Legal Order is a ‘unique, self-contained’ legal order which broadly sits apart from wider discussions on global constitutionalism.⁷³⁴

Thus, constitutionalisation is seen as a process of subjecting the main organs of the international legal system to the discipline and hierarchy of constitutional norms and law. It is also, broadly speaking, seen as a process of strengthening

⁷³⁰ Cass, Deborah Z. “The ‘Constitutionalization’ of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade.” *European Journal of International Law* 12.1 (2001): 39-75, Picciotto, Sol. “Constitutionalizing Multilevel Governance?” *International Journal of Constitutional Law* 6.3-4 (2008): 457-479. Jia, Bing Bing. “The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System.”, 2007: 253-254.

⁷³¹ Trachtman, Joel P. “The Constitutions of the WTO.” *European Journal of International Law* 17.3, 2006: 623-646, pp.624-630.

⁷³² Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures”, *Leiden Journal of International Law*, 19, 3. 2006. 579-610, pp.597-599.

⁷³³ Gill, Stephen. “Constitutionalizing inequality and the clash of globalizations.” *International Studies Review* 4.2 (2002): 47-65, pp.49-50.

⁷³⁴ Von Bogdandy, Armin. “Legal Case for Unity: The European Union as a Single Organization with a Single Legal System” *Common Market L. Rev.* 36, 1999: 887.

supranational institutions, and, by extension, the existing international order. Such a conception is intimately linked to pre-political conceptions of global justice and a fundamental assumption that such values are in some way *already embedded* in the fabric of the international legal system, and that subjecting them to more formal constitutional procedures will lead to better outcomes.⁷³⁵ In this sense, constitutionalisation is inextricably linked to the idea of progress, a constitutionalising world order being one where society progresses towards higher law values which will allow for the general development of international society.⁷³⁶ When unpacking the logic, the liberal argument set forth is this: Encouraging existing processes of constitutionalisation in the international system will create greater egalitarianism, protection of rights, and will provide legitimacy to international government.

1.1 Fixing Pathways: The Conservative Nature of Constitutionalisation.

In the above section, I have described the key features of the ‘constitutionalisation’ thesis. Before going on to assess this paradigm against the realities of the international system, one important characteristic of ‘constitutionalisation’ must be highlighted that will become important in the forthcoming section. This characteristic is the inherently ‘conservative’ nature of constitutionalisation.⁷³⁷ As we have seen from the above, the concept of constitutionalisation refers to a particularly ‘legal’ form of constitutional thought insofar as it focuses on ‘pre-political’ higher law norms and laws and removes itself

⁷³⁵ Loughlin, Martin. “What is Constitutionalisation?” In *The Twilight of Constitutionalism*, Oxford University Press, 2010, pp.47-69, pp.61-68.

⁷³⁶ Dunoff, Jeffrey L., and Joel P. Trachtman, eds. *Ruling the World?: Constitutionalism, International Law, and Global Governance*. Cambridge University Press, 2009, pp.62-63.

⁷³⁷ Brown, Garrett Wallace. “The Constitutionalization of What?” *Global Constitutionalism* 1.2, 2012: 201-228, p12. Krisch ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’. 2005. 16 *European Journal of International Law* 377.

from the broader, holistic philosophy of constitutionalism which also includes the aspect of constituent power and representative democracy. As we have seen in the first and second chapters of this thesis, such a philosophy involves an ‘entrenchment’ of the legal structure into a polity in such a way that it is difficult to amend or change, usually requiring a great deal more unanimity and consent than ordinary legislative change. This can be seen throughout the ‘legalistic’ written constitutions of nation states. The US Constitution, for example, requires three-quarters of the states to consent as well as a two-thirds majority of both the House, Senate, and the Legislature, a consensus in practice which has been often extremely difficult to achieve.⁷³⁸

Similarly, the German and Dutch constitutions require a two-thirds majority of both houses of parliament in order to pass a constitutional amendment.⁷³⁹ Indeed, some constitutions, such as the German Basic Law and the Indian Constitution, involve ‘eternity clauses’, which are intended to be non-amendable even through the conventional procedures of constitutional amendment.⁷⁴⁰

Because of this, constitutions are conservative insofar as they lock in arrangements and outcome-pathways, as constitutional law takes on a symbolic dimension by claiming to be fundamentally ‘right’ through its reference to pre-political claims of justice and fairness.⁷⁴¹ Resultantly, the question of ‘what’ is being

⁷³⁸ US National Archives- <https://www.archives.gov/federal-register/constitution>, accessed 16th August 2017.

⁷³⁹ Constitution of Germany, Article 79, 1949, – <https://www.btg-bestellservice.de/pdf/80201000.pdf> – Accessed 14th August 2017, Constitution of the Netherlands Article 137, 2002 – <https://www.rechtspraak.nl/SiteCollectionDocuments/Constitution-NL.pdf>- Accessed 14th August 2017

⁷⁴⁰ Preuss, Ulrich K. “The Implications of Eternity Clauses: The German Experience.” *Isr. L. Rev.* 44, 2011: 429.

⁷⁴¹ Brown, Garrett Wallace. “The Constitutionalization of What?” *Global Constitutionalism* 1.2, 2012: 201-228, p.225. Also, N Walker, ‘Making a World of Difference? Habermas, Cosmopolitanism and the Constitutionalization of International Law’ in O Shabani (ed), *Multiculturalism and Law: A Critical Debate* (University of Wales Press, Cardiff, 2007).

constitutionalised is extremely important as, once in place, the difficulty of amending such procedures could mean that, if such systems were not fundamentally-oriented towards liberty and justice, then ‘negative pathways’ could be locked in place which would not result in the sort of societal development that constitutionalists seek.⁷⁴² As perhaps the most prominent liberal constitution, this potential danger was not lost on the founders of the US Constitution, and there existed substantial disagreement about whether the constitution should become ‘fixed’ and legalistic as it eventually became or whether more flexibility would better serve the goals of the founding fathers.⁷⁴³ The US debate offers some insight into the importance of this paradigm.

During the contestation within the US constitutional convention, Madison argued that the best way of engineering efficacious government was in ‘so contriving the interior structure of government as that its several constituent parts, may in their mutual relations, be means of keeping each other in their proper places’.⁷⁴⁴ Thus, according to this logic, the core purpose of the constitution is creating an elaborate framework in which all political action is channelled, but held in tension, in a state of irresolution.⁷⁴⁵ Adams, too, suggested that the most effective constitutional configuration would be one in which ‘power must be opposed to power, force to force, strength to strength, interest to interest, as well as reason to reason, eloquence to eloquence and passion to passion’.⁷⁴⁶ According to such a

⁷⁴² Brown, Ibid.

⁷⁴³ Loughlin, Martin. “What is Constitutionalisation?” In *The Twilight of Constitutionalism*, Oxford University Press, 2010. pp.47-69, pp.55-57.

⁷⁴⁴ Federalist no 51 (Madison), 320. Constitution Society-
<http://www.constitution.org/fed/federa51.htm>- Accessed 13th Jan 2018.

⁷⁴⁵ Loughlin, Martin. “What is Constitutionalisation?” In *The Twilight of Constitutionalism*, Oxford University Press, 2010. pp.47-69.

⁷⁴⁶ Kaplan, Harold. *Henry Adams and the American Naturalist Tradition*. Routledge, 2017, p.39.

view, constitutional meaning remains the subject of continuing and structured political contestation.⁷⁴⁷

Both Adams and Madison feared that excessive reliance on a fixed and formal constitution without sufficient adaptability and flexibility could result in the creation of a permanent hegemonic class.⁷⁴⁸ Finally, it was the view of Hamilton that won over; that the ‘legal’ constitution should be set in stone and enforced only by a cadre of judges.

However, the constitutional convention was only won over after considerable persuasion that the legal structure of the constitution had been so effectively contrived as to make the possibility of dominance or arbitrary rule extremely low.⁷⁴⁹ The debate between early US constitutionalists demonstrates that even within a domestic system in which both separation of powers and representative democracy were present, serious concerns that the conservative nature of a constitution could reinforce negative pathways were still an important part of the argument.

The next section of this thesis will assess whether the constitutionalisation of international law would necessarily lead to better outcomes in the international system. It will suggest that despite the ambitions of many global constitutionalists, the hegemonic structure of international law and the core international organisations mean that processes of constitutionalisation might simply lead to a reinforcement of existing power structures rather than offer the legitimate rule of law government that most constitutionalists desire.

⁷⁴⁷ Loughlin, Martin. “What is Constitutionalisation?” In *The Twilight of Constitutionalism*, Oxford University Press, 2010. pp.47-69, p.55-57.

⁷⁴⁸ Ibid.

⁷⁴⁹ Ibid.

2. **Hegemonic Foundations: The Unequal nature of International Law and Organisations.**

The previous section outlined the concept of constitutionalisation. As we saw there, constitutionalisation is presented as a ‘free-standing process’ distinct from the wider and more holistic process of constitutionalism discussed in Chapter 1. Instead, advocates of constitutionalisation focus on a narrower concept which suggests that legitimacy can be attained through the strengthening of ‘higher law’ norms and associated enforcement mechanisms within the international system, leading to a process of ‘legalisation, verticalisation, and centralisation’.

As we also saw in Chapters 1 and 2, these processes, along with the inception of constituent power, played a vital role in forming more just societies at the domestic level by assisting with the transformation of ‘rule by law’ societies, to ‘rule of law societies’. Thus, scholars have suggested that transplanting such models into the international system could reap similar benefits. However, through a thorough historical examination of the hegemonic and imperialistic structure of the international legal system itself, the remainder of this chapter will suggest that there are significant tensions between the normative desire for constitutionalisation espoused by such scholars and the realities of such a process within the international system.⁷⁵⁰ It will suggest that the fundamental core of the international legal system and attached institutions remains tethered to a number of hegemonic foundations, which, without serious reform, would not necessarily benefit from processes of constitutionalisation in the way that such scholars desire, but might rather entrench

⁷⁵⁰ Brown, Garrett Wallace. “The Constitutionalization of What?” *Global Constitutionalism* 1.2, 2012: 201-228, pp.211-220.

the interests of particular hegemonic states and interests as beyond reproach, thereby leading to a further imposition of arbitrary power.⁷⁵¹

As has been touched upon, many advocates of global constitutionalism, including Christian Tomuschat, Erika De Wet, and Bardo Fassbender, see the end of the Cold War, the creation of the UN and the Bretton Woods systems as a ‘constitutional moment’ in the creation of a fairer and more just international legal system.⁷⁵² In some cases, particularly the creation of the UN is seen as a sort of ‘reset’ in international relations whereby international law, previously premised on the core precept of state sovereignty and Westphalian anarchy, was replaced with a better system of rule of law, human rights, and non-aggression.⁷⁵³

However, as Schwöbel states, the creation of the UN and Bretton Woods international order did not arise from a vacuum, and neither did the legal precepts underlying their creation.⁷⁵⁴ Instead, they had their roots in a conception of law that was ‘distinctively not global but European’.⁷⁵⁵ The conceptions underlying many of the core legal precepts have their roots in a number of noteworthy events, conferences, and conflicts which might be considered to have begun with the Peace of Westphalia in 1649.⁷⁵⁶ The Westphalian peace and the concept of Westphalian sovereignty were based on the principle that Europe should consist of a number of

⁷⁵¹ Krisch, Nico. “International Law in Times Of Hegemony: Unequal Power and the Shaping of the International Legal Order.” *European Journal of International Law* 16.3, 2005: 369-408, pp.381-390. Koskenniemi, Martti. “International Law and Hegemony: A Reconfiguration.” *Cambridge Review of International Affairs* 17.2, 2004: 197-218.

⁷⁵² De Wet, Erika. “The International Constitutional Order.” *International & Comparative Law Quarterly* 55.1 (2006): 51-76. Fassbender, Bardo. *The United Nations Charter as the Constitution of the International Community*. Vol. 51. Brill, 2009. Tomuschat, Christian, ed. *The United Nations at Age Fifty: A Legal Perspective*. Vol. 23. Martinus Nijhoff Publishers, 1995.

⁷⁵³ Fassbender, Bardo. “The United Nations Charter as Constitution of the International Community.” *Colum. J. Transnat’l L.* 36 (1998): 529. Slaughter, Anne-Marie, and William Burke-White. “An International Constitutional Moment.” *Harv. Int’l LJ* 43, 2002: 1.

⁷⁵⁴ Schwöbel, Christine EJ. *Global Constitutionalism in International Legal Perspective*. Vol. 4. Martinus Nijhoff Publishers, 2011, p.98.

⁷⁵⁵ Ibid.

⁷⁵⁶ Ibid.

co-existing sovereign states that do not fundamentally interfere in the internal, territorial affairs of other states. This idea of Westphalian sovereignty became a founding principle of the international order which remained (and remains) the pre-eminent legal norm of the international system.⁷⁵⁷

International law was in its beginnings European law.⁷⁵⁸ Indeed, as Anthony Anghie argues, looking particularly at the case of Spanish imperialism in Latin America, throughout much of its history ‘sovereignty’ was a two-tier system in which colonised peoples were not offered the similar right of self-determination.⁷⁵⁹ These rights were instead only offered to European peoples who were deemed ‘civilised enough’ to enjoy the benefits.⁷⁶⁰ Indeed, as Schwöbel suggests, justifications for colonisation were increasingly couched in secular, legal language as opposed to the religious language that had predominated before. Even among many of the more revered scholars of the Enlightenment, there was a broad acceptance of this divide between ‘civilised’ people, who were entitled to the benefits and protections provided by international law, and the ‘savages’ who would benefit from the civilising European influence.⁷⁶¹ John Locke, for example, writing on the aboriginal peoples of America, suggested that ‘it is for their own good and comfort to become part of the commercial system and assimilate to European ways,

⁷⁵⁷ Croxton, Derek. “The Peace of Westphalia of 1648 and the Origins of Sovereignty.” *The International History Review* 21.3, 1999: 569-591. Kayaoglu, Turan. “The Extension of Westphalian Sovereignty: State Building and the Abolition of Extraterritoriality.” *International Studies Quarterly* 51.3, 2007: 649-675.

⁷⁵⁸ Schwöbel, Christine EJ. *Global Constitutionalism in International Legal Perspective*. Vol. 4. Martinus Nijhoff Publishers, 2011, p.98.

⁷⁵⁹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, Cambridge 2008) Chapter 1.

⁷⁶⁰ *Ibid.*

⁷⁶¹ Schwöbel, Christine EJ. *Global Constitutionalism in International Legal Perspective*. Vol. 4. Martinus Nijhoff Publishers, 2011, pp.100-101. Huggan, Graham, and Ian Law, eds. *Racism Postcolonialism Europe*. Vol. 6. Liverpool University Press, 2009.

for then they too can share the commodities and jobs and general conveniences of Europeans'.⁷⁶²

The imposition of colonial rule and the removal of sovereign rights from colonised (and usually non-white) people was couched in an ambiguous combination of both moral and legal language which frequently depicted colonised races as insufficiently 'civilised' or advanced to enjoy equal rights under either domestic constitutional or international law. David T. Butleritchie argues that 'naked imperialism was often cloaked in the language of law, liberty, and democracy'.⁷⁶³ Similarly, as Catherine Mackinnon points out, women were almost entirely excluded from both the construction of early international law as well as its content.⁷⁶⁴ As 'public' international law existed entirely in the public sphere of international relations, women, who were at that point historically largely relegated to the private sphere, were doubly disadvantaged.⁷⁶⁵ Thus, we may see that the origins of international law were steeped in imperialism, racism, and indeed sexism and are very far from the ideas of individual liberty, equality, and protection of rights that modern advocates of global constitutionalism desire to see manifested in a prospective international constitution.⁷⁶⁶

As we have seen from the previous section of this chapter, the process of 'constitutionalisation' is usually an inherently conservative one insofar as it seeks to entrench particular norms, values, and procedures at a particular point in time. Thus, as Schwöbel argues, if the prior aspects of hegemony, dominance, and inequality

⁷⁶² John Locke, Peter Laslett, (ed), *Two Treatises of Government*, CUP, Cambridge, 1991, pg.41.

⁷⁶³ David T. ButleRitchie 'Critiquing Modern Constitutionalism', 2004, 3 *Appalachian.JL* p.45.

⁷⁶⁴ Catherine MacKinnon, *Towards a Feminist Theory of the State*, HUP, Cambridge MA, 1989,pg.219.

⁷⁶⁵ Ibid.

⁷⁶⁶ Schwöbel, Christine EJ. *Global Constitutionalism in International Legal Perspective*. Vol. 4. Martinus Nijhoff Publishers, 2011, pp.97-102.

that existed in international law were to be ‘constitutionalised’, the mix of exclusionism and constitutionalism within the international legal system could lead to a ‘toxic mix of hegemony’.⁷⁶⁷ This chapter will assess whether the ‘constitutionalisation’ of the international legal system would lead to the development of an international society that global constitutionalists advocate, or whether it might fall prey to the potential entrenchment of hegemonic interests and dominant power within the international system.

This section will argue that as ‘constitutionalisation’ is broadly seen as a ‘free-standing’ process of verticalisation and legalisation, rather than as the more holistic process of constitutionalism, which importantly includes the legitimating component of representative democracy, the process may well simply reinforce the position of dominant actors within the international system.⁷⁶⁸ It will argue by looking at the history of key contemporary international organisations in the post-war period that, despite something of a re-orientation of the international system, there remains a substantial hegemonic bias within contemporary international ordering. As a result, hegemonic powers and interests have often utilised international law and international organisations as a vehicle to legitimise and maintain their dominance within the international system, and that ‘constitutional’ forms of language and legalisation have often played a role in this.⁷⁶⁹ I will begin by looking at the creation of the UN and the Bretton Woods organisations in this

⁷⁶⁷ Ibid, p.103.

⁷⁶⁸ Koskeniemi, Martti. “International Law and Hegemony: A Reconfiguration.” *Cambridge Review of International Affairs* 17.2, 2004: 197-218, see in particular sections 1,2.

⁷⁶⁹ Ibid. Also, Krisch, Nico. “International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order.” *European Journal of International Law* 16.3 (2005): 369-408. Brown, Garrett Wallace. “The Constitutionalization of What?” *Global Constitutionalism* 1.2, 2012: 201-228.

regard, as they are integral to the foundation of the international order and to the primary arguments for constitutionalisation.⁷⁷⁰

Despite the arguments of scholars from the ‘International Community’ school which we looked at in the previous chapter, James Tully argues that the UN and its security regime were still fundamentally founded by a core group of states who had emerged victorious from the war and held an unparalleled capacity to shape the international order in their own image.⁷⁷¹ The creation of the UN, whilst undoubtedly a landmark in the globalisation of international organisation, was fundamentally a creation of the ‘Big Three’ states of the United States, USSR, and the United Kingdom, who held a series of conferences, beginning with the Washington Conference in 1941 in which the idea of the UN itself was propagated and carrying through to the Yalta conference of 1945.⁷⁷² These conferences also had intermittent involvement from both France and China, who became the two remaining permanent members of the Security Council.⁷⁷³ The vast majority of initial signatories thus had little contribution to the eventual construction of the United Nations.⁷⁷⁴ Indeed, at the San Francisco Conference which formalised the creation of the UN itself, Roosevelt openly declared that the ‘new world order’ would be led by the United Kingdom, France, the Soviet Union, China, and the United States, and it was under this premise that the permanent veto was to be given

⁷⁷⁰ Klabbers, Setting the Scene in *The Constitutionalization of International Law*, Oxford University Press, 2009. Van Dormael, Armand. *Bretton Woods: Birth of a Monetary System*. Springer, 1978.

⁷⁷¹ Tully, James. “Modern Constitutional Democracy and Imperialism.” *Osgoode Hall LJ* 46, 2008: 461, p.474. Panitch, Leo, and Martijn Konings, eds. *American Empire and the Political Economy of Global Finance*. Springer, 2008.

⁷⁷² Website of the United Nations, History of the Security Council- <http://www.un.org/en/sections/history-united-nations-charter/1945-san-francisco-conference/index.html>- accessed 13th August 2017.

⁷⁷³ Website of the United Nations, History of the Security Council- <http://www.un.org/en/sections/history-united-nations-charter/1945-san-francisco-conference/index.html>- accessed 13th August 2017.

⁷⁷⁴ Schlesinger, Stephen C. *Act of Creation: The Founding of the United Nations*. Basic Books, 2003, See Chapter 1.

to these five countries.⁷⁷⁵ Strenuous objections were raised by many smaller nations on the fairness of the permanent veto, who raised concerns about the potential for these states to act ‘both as judge and jury’, a problem that, as we saw in the previous chapter, came to pass.⁷⁷⁶ Nonetheless, the tremendous preponderance of power possessed by the ‘Big Five’ states both military and economically at the time meant that the smaller states were forced to acquiesce to their wishes or risk the collapse of the institution as a whole.⁷⁷⁷ Indeed, although the rhetoric of the Charter is both utopian and constitutional insofar as it refers to an intangible ‘we the people’ element, the developments and processes which led to its institutional formation were markedly influenced by *realpolitik* and naked power play.⁷⁷⁸ As we saw in Chapter 3, the ‘people’ referenced in the Charter’s pre-amble, even in terms of an indirect link via state representation, had little, if any influence on how the organisation was in practice constructed or the balance of power within it.⁷⁷⁹ The three western powers comprising the mainstay of the Security Council were all strong colonial powers, and, indeed, Britain and France still maintained two of the largest empires in the world. Thus, it remains open to question whether a closed off process created by nations which still openly upheld imperialistic practices could legitimately claim to form a constitutional order that fairly represented all states.⁷⁸⁰

Substantial space was granted to an analysis of the UN in the previous chapter, particularly relating to the failure of the organisation to sufficiently separate

⁷⁷⁵ Website of the United Nations, History of the Security Council- <http://www.un.org/en/sections/history-united-nations-charter/1945-san-francisco-conference/index.html>- accessed -13th August 2017.

⁷⁷⁶ *Ibid.*

⁷⁷⁷ *Ibid.*

⁷⁷⁸ Kelsen, Hans. *The law of the United Nations: A Critical Analysis of its Fundamental Problems*. Vol. 11. The Lawbook Exchange, Ltd., 1950, p.6.

⁷⁷⁹ *Ibid.*, pp.5-7.

⁷⁸⁰ Tully, James. “Modern Constitutional Democracy and Imperialism.” *Osgoode Hall LJ* 46, 2008: 461.

power or limit power, and thus the potential for the exercise of arbitrary power by its pre-eminent institution, the Security Council. It is therefore not necessary here to go into detail on those points. One further point, however, is worth highlighting and noting in the context of this chapter. Despite a shifting balance of power, with many countries rising to increasing prominence within the international system such as Brazil, India, Japan, and Germany, there has been little reform in terms of representation in the council, aside from the increase in non-permanent membership from six to ten in 1965.⁷⁸¹ The strongest demands for reform have come from the G4 countries of Brazil, Germany, India, and Japan but demands have also arisen from both the African continent and Arab nations, who have increasingly felt voiceless in matters of international security even as their economic relevance grows. As we saw in the previous chapter, influential edicts can be imposed on these nations by the council, yet these states and indeed whole continents do not possess a permanent voice on the Security Council to defend or uphold their own interests.⁷⁸² Although a serious reform agenda has been promoted and proposed by the 2004 ‘Uniting for Consensus’ group of states and by Kofi Annan in the ‘Annan Plan’, no progress has been made on reforming the Security Council to be more representative of either population demographics, shifts in the balance of economic and military power, or any other reason.⁷⁸³ This has largely been because of realpolitik among the five permanent members as in cases where one party supports the inclusion of

⁷⁸¹ Jahn, Egbert. “Should Germany Be a Permanent Member of the UN Security Council? On the Efforts to Reform the United Nations.” *German Domestic and Foreign Policy*. Springer Berlin Heidelberg, 2015. 225-241., pp.226-228. Roberts, Adam, and Benedict Kingsbury. *The UN's Roles in International Relations*. 2008.

⁷⁸² Tully, James. “Modern Constitutional Democracy and Imperialism.” *Osgoode Hall LJ* 46, 2008: 461, p.487

⁷⁸³ Ibid.

certain members, another may not, particularly if such a shift affects their geopolitical interests or those of their allies.⁷⁸⁴

As we can see, then, the pathways for action within the UN have been locked in such a way as to produce outcomes that disproportionately benefit a select group of states and interests. In this respect, then, the idea of ‘we the peoples of the United Nations’ stipulated in the Charter appears to exist more as an aspiration or a formality than as a ‘people’ in the representative sense, which, as we demonstrated in the first and second chapter of this thesis is a necessary component in legitimising a constitutional system.⁷⁸⁵ In this regard, the core function of the UN, the maintenance of peace and security, remains tethered to the will of a select group of historically hegemonic states, each with their own geopolitical agendas.⁷⁸⁶ For these reasons, as well as others raised in the previous chapter, it is questionable whether the UN in its current manifestation is a suitable candidate for further legalisation and constitutionalisation.

2.1 Bretton Woods and the International Monetary Fund

The second core aspect of the post-war global order lies in the formation of a ‘global economic order’, which comprises the Bretton Woods organisations, most prominently the IMF, and the WTO and is broadly premised on the principles of free trade, market liberalisation, and global capitalism.⁷⁸⁷ More so even than within

⁷⁸⁴ Butler, Richard. “Reform of the United Nations Security Council.” *Penn St. JL & Int’l Aff.* 1, 2012.

⁷⁸⁵ Kelsen, Hans. *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*. Vol. 11. The Lawbook Exchange, Ltd., 1950, pp.5-7.

⁷⁸⁶ Tully, James. “Modern Constitutional Democracy and Imperialism.” *Osgoode Hall LJ* 46, 2008: 461.

⁷⁸⁷ Jacobson, Harold Karan, and Michel Oksenberg. *China’s participation in the IMF, the World Bank, and GATT: Toward a Global Economic Order*. University of Michigan Press, 1990. Gilpin, Robert. *Global Political Economy: Understanding the International Economic Order*. Princeton

the UN security system, the creation of both the Bretton Woods organisations and the General Agreement on Trade and Tariffs (which later became the WTO) were manifestations of the hegemony of the US within the global economy.⁷⁸⁸ The US possessed two characteristics which allowed it to entrench its economic hegemony within the international system. Firstly, the United States possessed a huge resource advantage over every other country in the world, possessing around 30% of the global economy.⁷⁸⁹ Secondly, through the Marshall Plan, the US was using this enormous resource hegemony to finance the rebuilding of other major nations which had been badly damaged during the war.⁷⁹⁰ Thus, the US was in a unique position to entrench its own interests into the structure of global economic governance, and did so through the two core institutional structures that were created: The Bretton Woods structure consisting of the IMF and World Bank and the General Agreement in Trade and Tariffs (GATT), which later evolved into the WTO.⁷⁹¹

I will now demonstrate how these organisations, rather than possessing the power-limiting attributes usually associated with constitutionalism, rather served primarily to serve the interests of one particular state – the US – as well as a broader corporate elite whose primary concern has been the furthering of neoliberalism for its own ends.⁷⁹² I will begin this discussion by looking at the IMF and how this organisation has been used to impose the interests of the US and other neoliberal

University Press, 2011. Jackson, John H. “Global Economics and International Economic Law.” *J. Int’l Econ. L.* 1, 1998: 1.

⁷⁸⁸ Chorev, Nitsan, and Sarah Babb. “The Crisis of Neoliberalism and the Future of International Institutions: A Comparison of the IMF and the WTO.” *Theory and Society* 38.5, 2009: 459-484. Peet, Richard. *Unholy Trinity: the IMF, World Bank and WTO*. Zed Books Ltd., 2009. Plehwe, Dieter, Bernhard JA Walpen, and Gisela Neunhöffer, eds. *Neoliberal Hegemony: A Global Critique*. Routledge, 2007.

⁷⁸⁹ <https://infogram.com/share-of-world-gdp-throughout-history-1gjk92e6yjqm16> – Accessed 14th August 2017.

⁷⁹⁰ Gimbel, John. *The Origins of the Marshall Plan*. Stanford University Press, 1976, p.43.

⁷⁹¹ Saad-Filho, Alfredo, and Deborah Johnston. *Neoliberalism: A Critical Reader*. University of Chicago Press, 2005.

⁷⁹² Sklair, Leslie. *Transnational Capitalist Class*. John Wiley & Sons, Ltd, 2012, p.150.

powers and entities onto the international system. As the more powerful of the two Bretton Woods organisations and as a clearer example of the paradigm I am arguing for, I will primarily focus on the IMF as opposed to the World Bank when discussing Bretton Woods, although there will be some discussion of the bank at the end of this section. I will then go on to look at how the creation of GATT and the WTO was also aligned with similar objectives, albeit to a lesser extent and thus, at its core, the ‘global economic order’ is fundamentally attuned to particular hegemonic interests and therefore, in its current form, not suitable for processes of constitutionalisation.⁷⁹³

The IMF, along with the World Bank, was set up as part of the Bretton Woods programme. It came into formal existence in 1945 with the purported goal of managing balance of payment issues and international financial crises – in essence, with the goal of ensuring international financial stability.⁷⁹⁴ To do this, the fund was given the capacity to provide loans to countries experiencing financial difficulties either internally or with regard to repayment of their creditors.⁷⁹⁵ The financial resources for this fund would be provided by a ‘pool’ of lending money provided by member states. Importantly, voting power within the organisation was, and remains, dependent on the level of contribution to the overall pool provided by specific countries. Such a system clearly gave enormous voting power to wealthier countries and essentially afforded them control over the lending practices and policies of the organisation.⁷⁹⁶

⁷⁹³ Dillon, Sara. “Opportunism and Trade Law Revisited: The Pseudo-Constitution of the WTO.” *BC Int’l & Comp. L. Rev.* 36, 2013: 1005, p.1006 Shaw, M. 2000. *Theory of the Global State: Globality as an Unfinished Revolution*. Cambridge: Cambridge University Press.

⁷⁹⁴ Chorev, Nitsan, and Sarah Babb. “The Crisis of Neoliberalism and the Future of International Institutions: A Comparison of the IMF and the WTO.” *Theory and Society* 38.5, 2009: 459-484, p.464.

⁷⁹⁵ Ibid.

⁷⁹⁶ <http://www.imf.org/external/np/sec/memdir/members.aspx> – Accessed 12th August 2017.

In its initial manifestation, the IMF's main purpose was helping with countries' liquidity rather than in restructuring their economies.⁷⁹⁷ Moreover, as Gill argues, during the period of unprecedented economic growth and stability that followed the war, the IMF worked relatively harmoniously to bind together a strong working alliance between NATO, Washington, and Tokyo and assisted in ensuring the general good financial health and liquidity of the global order.⁷⁹⁸ The IMF during this period broadly acted as a 'lender of last resort', rather than attempting to restructure the infrastructure of national economies. Although by the 1950s the IMF had started to demand market liberalisation as a precondition for receiving loans, these conditions were not normally overly difficult for recipients of loans to achieve and did not require any considerable restructuring of their economies.⁷⁹⁹

However, after the collapse of the gold standard in 1971 and the proceeding global economic crisis, the mandate of the IMF substantially shifted toward a more interventionist and activist one that propagated US hegemony much more stridently.⁸⁰⁰ The post-war compromise was attacked in two core ways: 'Firstly, in terms of the domestic compromise which tied in labour and welfare interests, and secondly in terms of the international compromise of mediating between national interests and the global order.'⁸⁰¹ As a result of this, the crisis in the 1970s 'led to the breaking down of the Post-War Fordist-Keynsian consensus', which had

⁷⁹⁷ Taylor, Ian. Hegemony, Neoliberalism, and the IMF in Boas, Morten, and Desmond McNeill, eds. *Global Institutions and Development: Framing the World?* Routledge, 2004, p.127.

⁷⁹⁸ Gill, S. American Hegemony and the Trilateral Commission, Cambridge: Cambridge University Press. 1990a. Also Taylor, Ian. Hegemony, Neoliberalism, and the IMF in Boas, Morten, and Desmond McNeill, eds. *Global Institutions and Development: Framing the World?* Routledge, p.128.

⁷⁹⁹ Choev, Nitsan, and Sarah Babb. "The Crisis of Neoliberalism and the Future of International Institutions: A Comparison of the IMF and the WTO." *Theory and Society* 38.5, 2009: 459-484, p.466.

⁸⁰⁰ Feldstein, Martin. "Refocusing the IMF." *Foreign Affairs – New York – 77*, 1998: 20-33.

⁸⁰¹ Taylor, Ian. Hegemony, Neoliberalism, and the IMF in Boas, Morten, and Desmond McNeill, eds. *Global Institutions and Development: Framing the World?* Routledge, 2004, p.129. Ibid.

predominated before.⁸⁰² This led to a ‘reinvention of US hegemony’ through a transition from the post-war consensus of embedded liberalism to a more aggressive policy of neo-liberalism and global capitalism.⁸⁰³ As I will demonstrate, the IMF played a crucial role in re-entrenching this US and corporate dominance into the international system – not always for the benefit of the global order more broadly or for the benefit of the citizens of affected states but rather in order to ‘normalise’ dominance of particular interests within the international system.

As Chorev and Babb argue, the catalyst for re-invention of the IMF as a tool of US power began with Richard Nixon’s announcement of his ‘New Economic Policy’.⁸⁰⁴ The closing of the gold window, which led to the elimination of the pegged exchange rate, meant that the core purpose of the IMF, which had been to maintain the stability of the Bretton Woods system, was now broadly redundant.⁸⁰⁵ As a result, the IMF increasingly began to undertake activities and impose conditions on loan recipients which were not part of its initial mandate and increasingly involved building its power, influence, and capacity to penetrate the internal affairs of states.⁸⁰⁶

This development was facilitated by the Third World debt crisis that emerged in Latin America in the 1980s. During this period, it became apparent that

⁸⁰² Chorev, Nitsan, and Sarah Babb. “The Crisis of Neoliberalism and the Future of International Institutions: A Comparison of the IMF and the WTO.” *Theory and Society* 38.5, 2009: 459-484, p.461.

⁸⁰³ Ibid, p.462.

⁸⁰⁴ Ibid, p.468.

⁸⁰⁵ Taylor, Ian. Hegemony, Neoliberalism, and the IMF in Boas, Morten, and Desmond McNeill, eds. *Global Institutions and Development: Framing the World?* Routledge, 2004, p.129 Polak, J. *The Changing Nature of IMF Conditionality*. Princeton, NJ: International Finance Section, Department of Economics, Princeton University. Essays in International Finance. 1991.

⁸⁰⁶ Körner, Peter, et al. “The IMF and the Debt Crisis. A Guide to the Third World’s dilemmas.” 1986. Cypher, James M. “The Debt Crisis as “Opportunity” Strategies to Revive US Hegemony.” *Latin American Perspectives* 16.1, 1989: 52-78. Babb, Sarah, and Ariel Buirá. “Mission Creep, Mission Push and Discretion: The Case of IMF Conditionality.” *The IMF and the World Bank at Sixty* 59, 2005.

the vast loans that Latin American countries had accrued from both international public and private markets were no longer sustainable, and thus these states were unable to repay their creditors.⁸⁰⁷ Resultantly, these countries were forced to utilise the IMF as a ‘lender of last resort’, as credit had become unavailable elsewhere.⁸⁰⁸ The key players in the IMF saw the debt crisis as an opportunity to reshape the economies of the Latin American countries by opening up their markets to international trade and foreign direct investment (FDI).⁸⁰⁹ As a result, loans made by the IMF to the Latin American countries were made under strict conditions of ‘structural adjustment’.⁸¹⁰

Although structural adjustment loans were country specific, a set of core conditions relating to market liberalisation were common. These included the divesting and privatising of resources, allowing the free market to determine prices without state intervention, opening up the country to FDI and reducing state budgets as much as possible (particularly regarding welfare).⁸¹¹ Overall, the aim of these reforms was to bring the Latin American countries in line with the Washington Consensus that advocated the ‘Reagan-Thatcher’ economic model, which advocated leaving the greater portion of economic governance to be decided by free market forces.⁸¹² Given the extreme debt crisis faced by the Latin American countries at the

⁸⁰⁷ Pastor Jr, Manuel. “The effects of IMF Programs in the Third World: Debate and Evidence from Latin America.” *World Development* 15.2, 1987: 249-262.

⁸⁰⁸ Chorev, Nitsan, and Sarah Babb. “The Crisis of Neoliberalism and the Future of International Institutions: A Comparison of the IMF and the WTO.” *Theory and Society* 38.5, 2009: 459-484, pp.468-470.

⁸⁰⁹ Ibid.

⁸¹⁰ Peet, Richard. *Unholy Trinity: The IMF, World Bank and WTO*. Zed Books Ltd., 2009, p.33.

Körner, Peter, et al. “The IMF and the Debt Crisis. A Guide to the Third World’s Dilemmas.” 1986.

⁸¹¹ Chorev, Nitsan, and Sarah Babb. “The Crisis of Neoliberalism and the Future of International Institutions: A Comparison of the IMF and the WTO.” *Theory and Society* 38.5, 2009: 459-484, p.466.

⁸¹² Taylor, Ian. Hegemony, Neoliberalism, and the IMF in Boas, Morten, and Desmond McNeill, eds. *Global Institutions and Development: Framing the World?* Routledge, 2004, p.112.

time, they had little choice but to accept the conditions imposed by the IMF or face defaulting on their debts and potential economic ruin.

This paradigm was reinforced by the fact that most central banks had by this point agreed to use the IMF as a central co-ordinator to their claims, therefore meaning that countries were unable to both borrow more money from the banks or to negotiate directly with them over the conditions of their loans.⁸¹³ Economists within the IMF, as well as the main powers behind it, assured debtors that the economic policies they were advocating would bring substantial economic growth to concerned countries and that the policies being advocated by the IMF were ‘common sense’ policies which would lead to rapid debt relief and prosperity.⁸¹⁴ The Baker Plan of 1986 further strengthened the capacity of the IMF to enforce structural reform in states by increasing the number of long-term loans which were given over longer periods of time based on the compliance of states with the conditions of structural adjustment.⁸¹⁵

However, as Ramirez argues, at a fundamental level, the policy changes required by the IMF did not strengthen the Latin American economies in the way that macroeconomists from the IMF suggested they would. Rather, the reforms enacted actually had a substantially deleterious effect on both the overall GDP of the countries, and at an even greater level, on the living standards of ordinary people.⁸¹⁶ Ramirez demonstrates that during the period of structural adjustment between 1982 and 1990 there was a substantial drop of 11% in real GDP across the region. Real

⁸¹³ Chorev, Nitsan, and Sarah Babb. “The Crisis of Neoliberalism and the Future of International Institutions: A Comparison of the IMF and the WTO.” *Theory and Society* 38.5, 2009: 459-484, p.468.

⁸¹⁴ *Ibid*, p.469.

⁸¹⁵ Cline, William R. *The Baker Plan: Progress, Shortcomings, and Future*. No. 250. The World Bank, 1989.

⁸¹⁶ Ramirez, Michael D, “Stabilization and Adjustment in Latin America”, *Journal of Economic Issues*, Vol.27 No.4, 1993, p.1016.

wages fell by up to 28 % and the numbers of people living in poverty increased dramatically.⁸¹⁷ Also, although the structural reforms were intended to reduce inflation, in many cases the opposite was true, and the reforms suggested by the IMF in fact served to increase it. Such an outcome was evident in Argentina, where inflation at times exceeded 800% under the programmes of structural adjustment.⁸¹⁸ Overall, broad scholarly consensus is that the structural adjustments made by the IMF to the Latin American countries were unsuccessful and created many more problems than those they purported to solve.⁸¹⁹

Stiglitz suggests that the structural adjustments were damaging to the economies of the Latin American countries as they attempted to impose a ‘one size fits all’ policy garnered from western experience onto a diverse set of nations each with specific economic and social circumstances as well as differing institutional capacity to actually effectively implement reform.⁸²⁰ As a result of this, the only winners from the process of structural adjustment were powerful neoliberal states and corporations who now had better access to the Latin American markets. The losers of this equation, conversely, were undoubtedly the people of the states whose prosperity and standards of living decreased markedly during this period.⁸²¹

⁸¹⁷ Ibid. p.1016.

⁸¹⁸ Easterly, William. "What did structural adjustment adjust?: The association of policies and growth with repeated IMF and World Bank adjustment loans." *Journal of development economics* 76.1 (2005): 1-22. Argentina Inflation Rate *Trading Economics*,

<https://tradingeconomics.com/argentina/inflation-cpi>- Accessed 12th Jan 2018.

⁸¹⁹ Hutchison, Michael M., and Ilan Noy. "Macroeconomic effects of IMF-Sponsored Programs in Latin America: Output Costs, Program Recidivism and the Vicious Cycle of Failed Stabilizations." *Journal of International Money and Finance* 22.7, 2003: 991-1014. Green, Duncan. "Latin America: Neoliberal Failure and the Search For Alternatives." *Third World Quarterly* 17.1, 1996: 109-122. Stromquist, Nelly P. "The Impact of Structural Adjustment Programmes in Africa and Latin America." *Gender, Education and Development: Beyond Access to Empowerment*, 1999: 25-30.

⁸²⁰ Serra, Narcís, and Joseph E. Stiglitz, eds. *The Washington consensus reconsidered: Towards a new global governance*. Oxford University Press on Demand, 2008, p.89.

⁸²¹ Hutchison, Michael M., and Ilan Noy. "Macroeconomic effects of IMF-sponsored programs in Latin America: output costs, program recidivism and the vicious cycle of failed stabilizations." *Journal of International Money and Finance* 22.7 (2003): 991-1014.

Although the IMF ostensibly attempted to address these problems through the removal of the ‘structural adjustment policies’ and the introduction of the Poverty Reduction Strategy Papers (PRSPs), in reality, much of the conditionality associated with the SAP’s remains intact within new IMF policy.⁸²² In particular the tendency for ‘deep interventionism’ brought about by structural adjustment remained.⁸²³ The key conditions for receiving loans under the PRSP papers still broadly correlate with neoliberal goals and include liberalisation and privatisation of markets, removal of barriers to competition, and ‘fiscal discipline’ in policy.⁸²⁴ Although the PRSPs do allow for the conditions of the country and its safety net to be considered when enforcing these policies, the extent of intervention permitted still remains tethered to a neoliberal vision of governance and thus the capacity of governments to intervene to assist in cases of emergencies of poverty or health remains limited.⁸²⁵

Furthermore, the IMF and World Bank remain as ‘gatekeepers’, deciding which countries will receive help, how much they will receive, and the conditions under which they will receive it.⁸²⁶ Ruckert demonstrates, by looking at the case study of Nicaragua, that in practice many of the potentially damaging conditions of the structural adjustment loans remain present in the PRSP approved loans, including a commitment to liberalisation, privatisation, and ‘fiscal discipline’, and thus contribute to the same issues that plagued IMF loans before.⁸²⁷ In Nicaragua, for example, the sudden opening up of markets to unfettered international

⁸²² Rückert, Arne. “Producing Neoliberal Hegemony? A Neo-Gramscian Analysis of the Poverty Reduction Strategy Paper (PRSP) in Nicaragua.” *Studies in Political Economy* 79.1, 2007: 91-118.

⁸²³ *Ibid*, p.92.

⁸²⁴ *Ibid*, p.100.

⁸²⁵ Mueller, Julie L. “The IMF, Neoliberalism and Hegemony.” *Global Society* 25.3, 2011: 377-402.

⁸²⁶ Peet, Richard. *Unholy Trinity: The IMF, World Bank and WTO*. Zed Books Ltd., 2009, p.33.

⁸²⁷ Rückert, Arne. “Producing Neoliberal Hegemony? A Neo-Gramscian Analysis of the Poverty Reduction Strategy Paper (PRSP) in Nicaragua.” *Studies in Political Economy* 79.1, 2007: 91-118, p.103.

competition caused severe damage to local industries resulting in a significant increase in poverty in certain areas.⁸²⁸ Overall, poverty increased by 4% and extreme poverty by 2 % during the period of PRSP adjustment, despite the existence of a general global economic boom over the same period (2002-2006) and despite a 3% growth in Nicaragua's overall GDP.⁸²⁹ Although there was some consultation among NGOs and civil society in Nicaragua regarding reforms, the 'core conditions of the aid package were not up for discussion',⁸³⁰ and there was little involvement of civil society in determining conditions and outcomes, leading to a secretive process dominated by the IMF and complied with by the Nicaraguan government, under substantial pressure. Thus, the 'hegemonic project' of the IMF and World Bank remains within the reformulated PRSPs and it has not fundamentally changed the deep conditionality associated with its loans.

Cerny suggests, thus, that the US and other powerful actors who controlled the IMF utilised their dominance of the institution as a way in which to advance their hegemonic, neoliberal worldview onto states that would not necessarily benefit from it.⁸³¹ The advancement of these mandatory reforms as 'common sense' economic policy can be seen as an attempt by the IMF and its controlling western powers to elevate certain norms of economic governance which benefited them to a 'superior, constitution-like' status within the international system.⁸³² Wade goes further and suggests that the strict conditions of neoliberalism imposed on the IMF

⁸²⁸ Guimarães, João PC, and Néstor Avendaño. "The Great Experiment: Testing the PRSP Approach in Nicaragua, 2000–2007." *The European Journal of Development Research* 23.2, 2011: 319-336.

⁸²⁹ Ibid, p.330-331.

⁸³⁰ Rückert, Arne. "Producing neoliberal hegemony? A Neo-Gramscian Analysis of the Poverty Reduction Strategy Paper (PRSP) in Nicaragua." *Studies in Political Economy* 79.1, 2007: 91-118, p.103.

⁸³¹ Cerny, Philip G. "Embedding Neoliberalism: The Evolution of a Hegemonic Paradigm." *The Journal of International Trade and Diplomacy* 2.1, 2008: 1-46. p.30. Mueller, Julie L. "The IMF, Neoliberalism and Hegemony." *Global Society* 25.3 (2011): 377-402.

⁸³² Taylor, Ian. 'Hegemony, Neoliberalism, and the IMF' in Boas, Morten, and Desmond McNeill, eds. *Global Institutions and Development: Framing the World?* Routledge, 2004.

and in some instances the World Bank amount to a form of ‘Soft Empire’, where the key powers of the neoliberal global order use their material dominance to force less powerful and wealthy countries to restructure their economies to the benefit of the dominant players in the international system.⁸³³ This utilisation of material power was clearly on display when the US and other powerful states used their influence in the international system to ensure that the only way in which debtor states could attain relief was through the IMF, therefore ensuring the only pathway to survival for these states was to undertake a pathway that was beneficial for the hegemonic states and the neoliberal order.⁸³⁴

Further, as Harvey suggests, there is ‘more than a whiff’ of the old imperialism in the attitude of the IMF towards the human cost of their policies.⁸³⁵ Despite unmistakable evidence of the huge damage to Latin American countries from structural adjustment policies in the early 1980s, the US and IMF pushed even harder for ‘structural reform’ in the later 1980s with little regard to human cost of these policies.⁸³⁶ During structural adjustment the main western powers were willing to impose levels of poverty and hardship on countries on ‘beneficiaries’ of IMF loans that they in no way would have been prepared to accept for their own citizens.⁸³⁷ As Schwöbel argues, the willingness of the IMF, an organisation dominated by rich white countries, to impose conditions of extreme poverty onto the

⁸³³ Wade, Robert Hunter. “The Invisible Hand of the American Empire.” *Ethics & International Affairs* 17.2 2003: 77-88, p.80. Pieterse, Jan Nederveen. *Globalization or Empire?* Routledge, 2004.

⁸³⁴ Chorev, Nitsan, and Sarah Babb. “The Crisis of Neoliberalism and the Future of International Institutions: A Comparison of the IMF and the WTO.” *Theory and Society* 38.5, 2009: 459-484. Taylor, Ian. Hegemony, Neoliberalism, and the IMF in Boas, Morten, and Desmond McNeill, eds. *Global Institutions and Development: Framing the World?* Routledge, 2004, pp.130-131.

⁸³⁵ Harvey, David. *The New Imperialism*. Oxford University Press, USA, 2003, p.77.

⁸³⁶ Ramirez, Michael D., “Stabilization and Adjustment in Latin America”, *Journal of Economic Issues*, (Vol.27 No.4) 1993, Chorev, Nitsan, and Sarah Babb. “The Crisis of Neoliberalism and the Future of International Institutions: A Comparison of the IMF and the WTO.” *Theory and Society* 38.5, 2009: 459-484

⁸³⁷ Chorev and Babb, *Ibid*.

citizens of poorer developing countries often populated by people of colour may have particularly sinister implications.⁸³⁸ Kaplan suggests that such policies may be a manifestation of an ‘imperial gaze’⁸³⁹, whereby the interests of the white, wealthy, and privileged are seen as more important than those of the ‘coloured and poor’.⁸⁴⁰ Schwöbel sees this as potentially a modern-day manifestation of the ‘civilising mission’ of the old imperial powers in which powerful colonial states sought to ‘civilise’ colonies by imposing their own laws and economic practices on them in spite of enormous cultural, economic, and social differences, which in practice meant the destruction or at least damage of the original civilisations.⁸⁴¹

This section of the thesis has focused on the IMF as opposed to the World Bank, as it is normally considered the more influential of the two organisations and many of the same paradigms apply to both organisations. Although the paths of the two organisations have not been identical, many of the same issues that I have discussed relating to the IMF also apply to the World Bank, and it is worth mentioning some of those here. Firstly, voting power in the structure of the World Bank is very similar to that of the IMF, with the wealthiest countries (largest donors) possessing enormous control through substantial advantages in voting.⁸⁴² Indeed, the World Bank has been even more tied to US policy and interests as each director of the World Bank has been an American citizen, and World Bank policy has, historically, largely been dictated in Washington.⁸⁴³

⁸³⁸ Schwöbel, Christine EJ. *Global Constitutionalism in International Legal Perspective*. Vol. 4. Martinus Nijhoff Publishers, 2011, pp.100-101.

⁸³⁹ Kaplan, E. Ann. *Looking for the Other: Feminism, Film, and the Imperial Gaze*. Psychology Press, 1997, p.11.

⁸⁴⁰ Anne Orford, ‘Muscular Humanitarianism: Reading the Narratives of the New Interventionism’, 1999, 10 EJIL 678–689, p.683.

⁸⁴¹ Schwöbel, Christine EJ. *Global Constitutionalism in International Legal Perspective*. Vol. 4. Martinus Nijhoff Publishers, 2011, p.120.

⁸⁴² <http://www.worldbank.org/en/about/leadership/votingpowers> – Accessed 18th August 2017.

⁸⁴³ <http://www.worldbank.org/en/about/archives/history/past-presidents>

The bank has been in tandem with the IMF on many of its most important policies, most notably during the debt crisis in Latin America in which the bank based its development loans on the same criteria that the IMF utilised when offering debt relief loans, as well as basing more recent loans such as the ones offered to Nicaragua on the PRSP policy prescriptions.⁸⁴⁴ As the second of the Bretton Woods organisations and based on the same founding principles, the World Bank and IMF have broadly run in tandem with each other, re-enforcing neo-liberal ideas and structures in order to further the hegemony of the US and the global capitalist order.⁸⁴⁵ This is not to suggest that World Bank programmes have never been beneficial for alleviating poverty or improving particular situations in countries. It does, however, suggest that decision making within the organisation remains tethered to the will of a few dominant powers and interests in the international system, and therefore, along with the IMF, remains a ‘potent tool of the hegemonic order’ put in place to maximise the benefits of particular interests in the international system.⁸⁴⁶

The above has demonstrated that the International Financial Institutions, and in particular, the IMF, have in reality often been tools for hegemonic states and powerful corporate interests to entrench their interests into the international system. Therefore, as we can see, it would be inappropriate to ‘constitutionalise’ these organisations or the norms they espouse in terms of unfettered market liberalisation

⁸⁴⁴ Peet, Richard. *Unholy Trinity: The IMF, World Bank and WTO*. Zed Books Ltd., 2009.

Guimarães, João PC, and Néstor Avendaño. “The Great Experiment: Testing the PRSP Approach in Nicaragua, 2000–2007.” *The European Journal of Development Research* 23.2, 2011: 319-336.

Ramirez, Michael D., “Stabilization and Adjustment in Latin America”, *Journal of Economic Issues*, (Vol.27 No.4) 1993.

⁸⁴⁵ Ibid. Also, Goldman, Michael. *Imperial nature: The World Bank and Struggles for Social Justice in the Age Of Globalization*. Yale University Press, 2006.

⁸⁴⁶ Mueller, Julie L. “The IMF, Neoliberalism and Hegemony.” *Global Society* 25.3, 2011: 377-402.

as doing so could lead to the entrenchment of negative pathways which would not attain the ends liberal advocates of global constitutionalism seek.⁸⁴⁷

2.2 The World Trade Organisation.

Moving on from the Bretton Woods organisations, I will now look at the second, and probably most important pillar of the ‘international economic order’, the World Trade Organisation (WTO). I will demonstrate that, although the functioning of the WTO differs from the IMF by offering a somewhat more egalitarian and participatory system, the overall dynamic provided by the WTO’s objectives and legal structure means that the WTO still favours a particular set of neo-liberal, hegemonic actors in the international system, particularly global corporations.⁸⁴⁸ As a result, ‘constitutionalisation’ might once again simply entrench some interests at the expense of others.

The WTO was officially created in 1995 as an evolution of the General Agreement in Trade and Tariffs, following the Uruguay round of negotiations. It evolved from a series of ‘rounds’ of GATT agreement, which sought to increasingly reduce tariffs and liberalise trade. The WTO substantially enhanced the power of the GATT agreements by formalising the main rules under which nations were to trade as well as creating an institution with the power to directly enforce the agreement through the dispute settlement mechanism, a judicial body empowered to settle trade disputes and enforce sanctions for non-compliance.⁸⁴⁹ The primary goals of the

⁸⁴⁷ Brown, Garrett Wallace. “The Constitutionalization of What?” *Global Constitutionalism* 1.2, 2012: 201-228, pp.212-214.

⁸⁴⁸ Dillon, Sara. “Opportunism and Trade Law Revisited: The Pseudo-Constitution of the WTO.” *BC Int’l & Comp. L. Rev.* 36, 2013: 1005, pp.1021-1030.

⁸⁴⁹ Chorev, Nitsan, and Sarah Babb. “The Crisis of Neoliberalism and the Future of International Institutions: A Comparison of the IMF and the WTO.” *Theory and Society* 38.5, 2009: 459-484, p.466-468.

organisation were clear – to promote the liberalisation of trade, most importantly the removal of both tariffs and other non-tariff barriers to free trade.⁸⁵⁰

The WTO has been considered as a possible ‘nascent economic constitution’, or at least an organisation ripe for constitutionalisation because of a number of core characteristics. Firstly, the potential existence of free trade as a ‘higher law’ norm governing the policies and practices of the organisation offers a form of normative hierarchy familiar to constitutionalists. Secondly, the Dispute Settlement Body exists as a fully empowered judicial interpreter of WTO law with the power to settle disputes, and enforce sanctions for non-compliance. Thus, the WTO possesses at least some of the formal and material characteristics associated with a constitution, particularly in regards to its legal aspects.⁸⁵¹ As we have earlier discussed, a number of scholars have advocated strengthening these constitutional qualities, with the view that enhancing and entrenching the goals of the WTO would lead to better outcomes in the international system.

However, in reality, the WTO also possesses a number of characteristics which make the idea of further constitutionalisation or ‘entrenchment’ into the international system questionable. At the heart of these critiques is the core agenda of the WTO and whether the goals of absolute free trade and market liberalisation advocated for by the organisation actually provide the universal benefits that advocates suggest or rather picks winners and losers and entrenches certain powerful interests.⁸⁵² This section of the thesis will argue for the latter.

⁸⁵⁰ Ibid.

⁸⁵¹ Cass, Deborah Z. *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System*. OUP, 2005, Chapters 1 and 2.

⁸⁵² Dillon, Sara. “Opportunism and Trade Law Revisited: The Pseudo-Constitution of the WTO.” *BC Int’l & Comp. L. Rev.* 36, 2013: 1005.p.1013. Also Cass, above.

The WTO operates under a discourse which, although the emphasis has shifted over time, consistently advocates the liberalisation of trade which it is argued leads to rapid economic growth and prosperity.⁸⁵³ As Chorev and Babb argue, this philosophy is deeply tied to the neoliberal philosophy that also underpins the IMF in which the ‘growth of civilisation comes from the freedom of the individual to pursue their own ends in the context of private property markets.’⁸⁵⁴ The WTO is not, then, merely an adjudicative body that provides a forum to adjudicate disagreements based on treaties and rules but a passionate advocate ‘against protectionism and for market liberalisation’.⁸⁵⁵

The pre-eminence of free trade and market liberalisation was reinforced in the transformation of the GATT into the WTO. Under the GATT system, opt outs had existed when the economic pain on a particular state or a particular group within a state caused by GATT obligations was too great.⁸⁵⁶ However, the eventual and formalised agreement in the WTO contained no such provisions and all states were then legally obligated to accept the full set of rules and responsibilities of the organisation under the Single Undertaking.⁸⁵⁷ As Chorev and Babb suggest, the WTO is now the ‘only game in town’ as all states of any economic significance are within the framework. Few options therefore exist for states wishing to operate

⁸⁵³ Ibid, p.19 also Elsig, Manfred. “World Trade Organization’s Legitimacy Crisis: What Does the Beast Look Like, The.” *J. World Trade* 41, 2007: 75. Herwig, Alexia. “Towards Normative Legitimacy of the World Trade Order.” *Contrasting European and International Governance (RECON Report No 4, 2008)* 2008: 223-253.

⁸⁵⁴ Peet, Richard. *Unholy Trinity: The IMF, World Bank and WTO*. Zed Books Ltd., 2009, p.11.

⁸⁵⁵ Peet, Richard. *Unholy Trinity: The IMF, World Bank and WTO*. Zed Books Ltd., 2009, p.193.

⁸⁵⁶ Chorev, Nitsan, and Sarah Babb. “The Crisis of Neoliberalism and the Future of International Institutions: A Comparison of the IMF and the WTO.” *Theory and Society* 38.5, 2009: 459-484, p.466-468, p.471.

⁸⁵⁷ Ibid.

outside the organisation. Thereby other pathways for trade are ‘locked off’ by the existence of the WTO, and thus states are forced to work within its rules.⁸⁵⁸

As discussed in the earlier section on constitutionalisation, ‘locking’ in rules can be a dangerous process, particularly if those rules are created with the intention of benefiting a particular group of states, interests, or individuals at the expense of others. Park suggests that the ‘one size fits all’ approach taken by the WTO may well do just that, creating clearly definable winners and losers in the global economy.⁸⁵⁹ As we have seen in the previous section, prescribing single policy solutions for different states at different stages of their development can be a counterproductive enterprise. Peet argues that the WTO’s rules attempt to ‘homogenise’ societies as ‘consumer societies’ through its advocacy of untrammelled market liberalisation when in fact the real picture is much more complex and other considerations such as the effects on labour standards, wages (particularly at the lower end) and social and human rights are often neglected in debates discussing the overall effects of these policies.⁸⁶⁰

By looking at a case study of five ‘Trade Policy Reviews’, under which the members of the WTO assess a members compliance with WTO guidelines and general trade policy, Peet demonstrates that regardless of a country’s internal and external economic situation or any issues it raises with the panel, the prescription of the panel, and often even the wording, is almost identical.⁸⁶¹ The five reviews analysed by Peet come from widely differing countries, including Poland, Indonesia,

⁸⁵⁸ Chorev, Nitsan, and Sarah Babb. “The Crisis of Neoliberalism and the Future of International Institutions: A Comparison of the IMF and the WTO.” *Theory and Society* 38.5, 2009: 459-484, p.466-468.

⁸⁵⁹ Stephen Kim Park, Bridging the Global Governance Gap: Reforming the Law of Trade Adjustment, 43 *Geo. J. Int’l L.* pp.803-811, pp. 817-819.

⁸⁶⁰ Peet, Richard. *Unholy Trinity: The IMF, World Bank and WTO*. Zed Books Ltd., 2009 p.259
 Petersmann, Ernst-Ulrich. “From Negative to Positive Integration in the WTO: Time for Mainstreaming Human Rights into WTO Law.” *Common Market L. Rev.* 37, 2000: 1363.

⁸⁶¹ Peet, *Ibid*, p.198.

the Philippines, Brazil, and South Korea. In each of the country reports, the respective countries' governments had, while attempting to enforce and implement the trade liberalisation policies advocated by the WTO, also highlighted concerns regarding damage caused to particular industries and sectors by WTO regulations or related policies.⁸⁶²

Brazil, for example noted that developing countries like itself still faced substantial disadvantages in the agricultural field, as well as particular difficulties in previously state-subsidised manufacturing, meaning that unemployment was surging in particular aspects of the manufacturing sector, as well as suffering from a decline in real wages.⁸⁶³ However, the WTO reports on the countries' situation did not reflect any of the concerns expressed and simply recommended identical policies of trade liberalisation not considering at all the specific circumstances of the countries involved.⁸⁶⁴ They also did not offer any concessions or redress for the damage that such policies caused to particular sectors of the economy or to the employment or living standards of workers within them. Indeed, the Trade Policy Reviews appeared to be less trade reviews than assessments of a country's entire system of government under 'conditions of power and duress', with the implicit future threat of sanction for non-compliance, and therefore states have felt pressured to implement measures prescribed even in the knowledge that they might be harmful to particular sectors of their economies.⁸⁶⁵ Thus, Peet argues that the Trade Policy Reviews manifest themselves as 'instruments of neoliberal discipline in a limited discursive space' rather than the democratic, discursive forums they claim to be.⁸⁶⁶

⁸⁶² Ibid, p199-200.

⁸⁶³ Ibid, p.199

⁸⁶⁴ Ibid, p.200.

⁸⁶⁵ Ibid.

⁸⁶⁶ Ibid, p.240.

Dillon suggests that this ‘passionate and complete commitment to neoliberalism, at the expense of other societal and human concerns’ is at the core of the WTO agenda.⁸⁶⁷ In particular, Dillon submits that untrammelled free trade has both costs and benefits, and ‘while the WTO is keen to underline the overall macro-economic benefits in terms of overall capital gain to the global economy, citing a number of studies suggesting that freer trade has added between 100 and 500 billion dollars to the overall global economy’⁸⁶⁸, it is ‘curiously reluctant when asked to produce comprehensive studies on the overall impact of its policies on employment, wage growth, or labour conditions’.⁸⁶⁹ In these situations, the WTO often claims that such data is ‘difficult to quantify, statistically non-resolvable, and therefore the issue is politely dropped from the agenda’.⁸⁷⁰

Despite the protestations of the organisation, the WTO’s relentless pursuit of economic globalisation has quantifiable human costs. Among local producers and their respective employees who were previously protected by government subsidies or tariffs ‘sudden exposure to a slew of foreign competition’ can rapidly drive businesses out of competition, reduce wage growth, and contribute substantially to inequality between different societal groups.⁸⁷¹ The United Nations Conference on Trade and Development (UNCTAD) report of 2002 demonstrated that, although the volume of exports coming from developing countries massively increased between the years 1995 and 2000, this increase did not substantially contribute to the developing countries’ income, and in particular cases, levels of both poverty and

⁸⁶⁷ Dillon, Sara. “Opportunism and Trade Law Revisited: The Pseudo-Constitution of the WTO.” *BC Int’l & Comp. L. Rev.* 36, 2013: 1005.pp.1020-1021.

⁸⁶⁸ Peet, Richard. *Unholy Trinity: The IMF, World Bank and WTO*. Zed Books Ltd, 2009.

⁸⁶⁹ *Ibid*, p.193.

⁸⁷⁰ *Ibid*.p.199.

⁸⁷¹ Dillon, Sara. “Opportunism and Trade Law Revisited: The Pseudo-Constitution of the WTO.” *BC Int’l & Comp. L. Rev.* 36, 2013.

inequality increased.⁸⁷² The UNCTAD suggests that this is because many developing countries are at a natural disadvantage in a dynamic global market as they are mainly reliant on bulk produces like agriculture and natural resources.⁸⁷³ The price of these commodities has generally decreased over time, with the exception of fuel. Reliance on exports in the face of declining commodity prices has led to an intense ‘race to the bottom’ in terms of wage levels in developing countries, meaning that ‘individuals already living in poverty often become poorer’, and those individuals who had previously secure jobs in tariff or government protected industries often find themselves either unemployed or forced to take on far worse paid and insecure work.⁸⁷⁴ The case study of Mexico over the period 1995-2000, during which, despite a huge increase in FDI and exports, the GDP per capita of the country did not substantively rise in real terms, clearly demonstrates this.⁸⁷⁵ Indeed in certain areas, standards of living and wages in blue-collar manufacturing declined precipitously, particularly relative to white-collar work.⁸⁷⁶ For example, the collapse in Coffee prices created by WTO policy drove rural unemployment up 40% in Guatemala and forced 300,000 Mexican coffee farmers to migrate looking for work.⁸⁷⁷ Thus, it is clear that whilst trade liberalisation may create particular macro-economic benefits for the global system, it can also have severely deleterious consequences at a micro-level, particularly for industries previously reliant on state protection.

⁸⁷² UNCTAD Trade and Development Report, 2002-http://unctad.org/en/Docs/tdr2002_en.pdf

⁸⁷³ Ibid, p.20.

⁸⁷⁴ Peet, Richard. *Unholy Trinity: The IMF, World Bank and WTO*. Zed Books Ltd., 2009, p.196.

⁸⁷⁵ Ibid.

⁸⁷⁶ Pavcnik, Nina. “Globalization and Within-Country Income Inequality.” *Making Globalization Socially Sustainable*, 2011: 233-259, pp.246-248.

⁸⁷⁷ Gonzalez, Carmen G. "Institutionalizing inequality: the WTO Agreement on Agriculture, food security, and developing countries." *Colum. J. Envtl. L.* 27 (2002): 433, pg.436.

The WTO's response to these problems has been, at times, almost 'socially Darwinian'. The WTO suggests that economies are most effective when competition is strongest, and 'although adjustments must be made to compensate for job losses, protectionism is not the answer'.⁸⁷⁸ While it is undoubtedly true that competition in a marketplace can boost growth, efficiency, and output, the WTO's view does not sufficiently consider that for such development to occur, a relatively level playing field must exist. This is often simply not the case for local industries in developing countries, which are often enormously outmatched by foreign corporations in terms of resources, influence, efficiency and structure.

Because the WTO tends to see the world as a society of global consumers, it tends to downplay the fact that practices that might benefit product consumers might simultaneously harm producers.⁸⁷⁹ Dillon points out that the deleterious consequences for labour of WTO regulation go beyond developing countries and have impacted on particular industries and workers within developed countries too.⁸⁸⁰ The removal of tariff and non-tariff barriers in developing, lower wage countries have meant that increasingly, unskilled and semi-skilled manufacturing has moved abroad, leaving deep pockets of unemployment and depression in their wake.⁸⁸¹ This paradigm has been particularly prevalent in the US, where previously prosperous manufacturing communities in the rust belt have been ravaged as well-paid industry has shut down and moved abroad where production and labour costs are cheaper. The City of Youngstown, for example, once thriving and prosperous,

⁸⁷⁸ Peet, Richard. *Unholy Trinity: The IMF, World Bank and WTO*. Zed Books Ltd, 2009, p.194.

⁸⁷⁹ Dillon, Sara. "Opportunism and Trade Law Revisited: The Pseudo-Constitution of the WTO." *BC Int'l & Comp. L. Rev.* 36, 2013, p.1034.

⁸⁸⁰ *Ibid*, p.1027-1029.

⁸⁸¹ *Ibid*.

now faces one of the highest levels of poverty in the entire US.⁸⁸² Thus, in both developing and developed countries, it is often the poorest that are hit the hardest, while wealthier consumers, corporations, and states benefit.⁸⁸³ Accordingly, while the WTO may promote certain valuable economic advantages to some, the ‘increased prosperity for all’ espoused in the organisation’s preamble appears highly suspect.

To understand why powerful neoliberal states and interests have sought so stridently to elevate WTO norms to constitution-like status, it is necessary to understand the key beneficiaries of unfettered trade liberalisation.⁸⁸⁴ As well as the most powerful states, the interests of transnational corporations are key to understanding the neoliberal vision enshrined in the WTO.⁸⁸⁵ As we have earlier seen, the Keynesian economic model which had predominated until the 1970s was replaced by the late 1980s by a neoliberal vision which emphasised the importance of privatisation and enhanced the role of corporations in governance, a trend supported unconditionally by the hegemonic global power in the form of the US.⁸⁸⁶

The creation of the WTO in 1995 correlated with the peak of US neoliberal power, with the cold war over and US ideology and economic power at its absolute zenith.⁸⁸⁷ Multinational corporations in the US thus possessed enormous capacity to

⁸⁸² Data.U.S.A., Youngstown- <https://datausa.io/profile/geo/youngstown-oh/>- Accessed 12th November 2017.

⁸⁸³ Dillon, Sara. “Opportunism and Trade Law Revisited: The Pseudo-Constitution of the WTO.” *BC Int’l & Comp. L. Rev.* 36, 2013, p.1021.

⁸⁸⁴ Dillon, Sara. “Opportunism and Trade Law Revisited: The Pseudo-Constitution of the WTO.” *BC Int’l & Comp. L. Rev.* 36, 2013, p.1021.

⁸⁸⁵ Robinson, William I., and Jerry Harris. “Towards a global ruling class? Globalization and the transnational capitalist class.” *Science & Society*, 2000: 11-54, pp.13-27. Storey, Andy, and Colóquio Pobreza. *The Multilateral Mode Of Regulation, And Its Discontents: Challenges to the World Bank, IMF and WTO*. 2007.

⁸⁸⁶ Peet, Richard. *Unholy Trinity: The IMF, World Bank and WTO*. Zed Books Ltd., 2009. Taylor, Ian. Hegemony, Neoliberalism, and the IMF in Boas, Morten, and Desmond McNeill, eds. *Global Institutions and Development: Framing the World?* Routledge, 2004, p.128

⁸⁸⁷ Taylor, Ian. Hegemony, Neoliberalism, and the IMF in Boas, Morten, and Desmond McNeill, eds. *Global Institutions and Development: Framing the World?* Routledge, 2004, pg.128.

influence governmental behaviour and, indeed, were at the heart of pushing for the most 'extreme' forms of market liberalisation in the WTO agreement as well as for the removal of 'opt-outs' for governments struggling with the economic cost of sudden liberalisation.⁸⁸⁸ One notable example is the enormous influence and pressure exerted by the US and European pharmaceutical industry to ensure that the 'TRIPS' agreement was incorporated into the final WTO treaty, despite strident objections from developing countries that it could damage access to vital healthcare.⁸⁸⁹

Multinational corporations benefited hugely from the liberalisation of global trade in two main ways. Firstly, the removal of tariffs and government protection from local industries opened up enormous new markets in developing countries for these corporations to sell their products. Secondly, the liberalisation of trade and the removal of barriers 'allowed multinational corporations to scour the globe for countries where goods could be produced at the lowest cost'.⁸⁹⁰ Such a procedure allowed for a huge increase in profitability for corporations by substantially reducing labour costs, as it was almost invariably cheaper for multinationals from developed countries to produce in developing ones where wages, as well as employment protections, were much lower.⁸⁹¹

However, as we have seen in the previous section of this thesis, although the liberalisation of global trade may have benefited the overall profitability and

⁸⁸⁸ Boggs, Carl. *The End Of Politics: Corporate Power and the Decline of the Public Sphere*. Guilford Press, 2001.

⁸⁸⁹ Drahos, Peter. "Global Property Rights in Information: The Story of Trips at the GATT." *Prometheus* 13.1 1995: 6-19, p.7. Boggs, Carl. *The End of Politics: Corporate Power and the Decline of the Public Sphere*. Guilford Press, 2001.

⁸⁹⁰ Kostova, Tatiana, Kendall Roth, and M. Tina Dacin. "Institutional Theory in the Study of Multinational Corporations: A Critique and New Directions." *Academy of Management Review* 33.4, 2008: 994-1006. Dillon, Sara. "Opportunism and Trade Law Revisited: The Pseudo-Constitution of the WTO." *BC Int'l & Comp. L. Rev.* 36, pp.1016-19.

⁸⁹¹ *Ibid.*

turnover of corporations, the macro-economic gains from this process have not been shared equally, either in the developing or the developed world.⁸⁹² The transfer of manufacturing from developed to developing countries, combined with the removal of trade barriers, has led to a ‘race to the bottom’ in many developing countries, depressing both wages and labour conditions. In developed countries, simultaneously, unskilled or semi-skilled production has moved abroad, leaving deep pockets of depression and unemployment. This trend can be seen in the US but also, significantly, in the UK, France, and other European countries.⁸⁹³

Moreover, even within the corporations which have benefited financially from the WTO’s policies of liberalisation, there is little evidence that salaries at entry level or at the lower tiers of corporations have increased markedly in real terms. Rather, there is considerable evidence that the vast majority of gains have been shared amongst the elite tiers, with wealth increasingly congregating at the top of corporations and societies. For example, the difference between the salary of an entry-level worker and CEO in an American multinational company has increased from 30/1 in 1965 to a staggering 300/1 in 2010.⁸⁹⁴ Allott goes further and suggests that, an ‘emerging international aristocracy’ has been both the main beneficiary and advocate of neoliberalism.⁸⁹⁵ He claims that the economic policy of many states are increasingly becoming ‘aggregates of corporate interests’⁸⁹⁶, and that such a

⁸⁹² Pavcnik, Nina. “Globalization and within-country income inequality.” *Making Globalization Socially Sustainable*, 2011: 233-259, pp.246-248. Robinson, William I., and Jerry Harris. “Towards a Global Ruling Class? Globalization and the Transnational Capitalist Class.” *Science & Society*, 2000: 11-54.

⁸⁹³ Wang, Zhi. “The Impact of China’s WTO Entry on the World Labour - intensive Export Market: A Recursive Dynamic CGE Analysis.” *The World Economy*, 22.3, 1999: 379-405.

⁸⁹⁴ <http://www.payscale.com/data-packages/ceo-pay> – Accessed 19th August 2017.

⁸⁹⁵ Allott, Philip. “The Emerging International Aristocracy.” *NYUJ Int’l L. & Pol.* 35, 2002: 309, p.310.

⁸⁹⁶ *Ibid.* p.330-331.

paradigm can only lead to an increase in many of the deleterious consequences I have previously discussed in this section.

The disparities created by the WTO have not been lost on many of the states and interests who have been negatively affected by them. As US power has relatively declined, as well as its capacity to direct global affairs through sheer material superiority and global influence, developing states have increasingly become aware of disadvantages they face in the current global trading system.⁸⁹⁷ As a result of this, the most recent Doha ‘Round’ of negotiations within the WTO has run into a number of roadblocks and has stalled on many fronts, leading to what the financial times described as a ‘merciful death’.⁸⁹⁸ In particular, developing countries have pointed to agriculture, access to medicine, and implementation issues as core areas where substantial disparities exist between developed and developing countries.⁸⁹⁹ Further to this, and related to what I have discussed above, many developing countries have highlighted the potential damage to domestic industries and labour conditions caused by the economic restructuring that would be required by further changes.⁹⁰⁰ The increased power of developing states, as well as a general reluctance amongst the most powerful developed states, particularly the US, to give up their privileged place within the system has led to a considerable degree of gridlock within the trade system.⁹⁰¹

⁸⁹⁷ Laïdi, Zaki. “Towards a Post-Hegemonic World: The Multipolar Threat To The Multilateral Order.” *International Politics* 51.3, 2014: 350-365, pp.350-353. Chorev, Nitsan, and Sarah Babb. “The Crisis of Neoliberalism and the Future of International Institutions: A Comparison of the IMF and the WTO.” *Theory and Society* 38.5, 2009: 459-484.

⁸⁹⁸ Financial Times. 21st December 2015 The Doha Round Finally Dies a Merciful Death – <https://www.ft.com/content/9cb1ab9e-a7e2-11e5-955c-1e1d6de94879>

⁸⁹⁹ Hartman, Stephen W. “The WTO, the Doha Round Impasse, PTAs, and FTAs/RTAs.” *The International Trade Journal* 27.5, 2013: 411-430. Pritchard, Bill. “The Long Hangover from the Second Food Regime: A World-Historical Interpretation of the Collapse of the WTO Doha Round.” *Agriculture and Human Values* 26.4 2009: 297.

⁹⁰⁰ Ibid.

⁹⁰¹ Hale, Thomas, David Held, and Kevin Young. *Gridlock: Why Global Cooperation is Failing When We Need it Most*. Polity, 2013, see chapter 1.

Thus, as we can see, whilst the WTO may have macroeconomic benefits for the global system, it also creates negative consequences for many of the less prosperous, and therefore less influential, members of global society and favours the wealthier and more economically powerful. It is also fundamentally tied to a particular set of powerful states and corporate interests that have thus historically used their preponderant global influence to set in place ‘pathways for action that disproportionately benefit them while potentially causing damaging consequences for other sectors of world society’.⁹⁰² Thus, the constitutionalisation of the WTO – in terms of emphasising the superiority of its ‘higher law’ norms and strengthening its enforcement capacity – may well lock in some these negative pathways. It is also particularly noteworthy that developing countries are increasingly resisting the organisation based on these very grounds.

This analysis is not intended to critique the WTO outside the sphere of constitutionalisation or to argue whether the WTO is ‘good’ or ‘bad’ overall for the international system. The purpose of this analysis is to analyse it *within* the context of the constitutionalisation thesis and the idea of constitutionalisation itself. As we have discussed in the first chapter, constitutionalism explicitly sought to avoid the imposition of hegemonic or arbitrary dominance within a constitutional system and to reduce the significance of material power in political interactions. In the case of the WTO, the above analysis shows that there is sufficient ambiguity in the operation, structure, and practice of the organisation such that we cannot reasonably be assured of attaining such goals when constitutionalising it. As a result, Peters’

⁹⁰² Brown, Garrett Wallace. “The Constitutionalization of What?” *Global Constitutionalism* 1.2, 2012: 201-228, p.225.

claim that ‘constitutionalising’ the organisation would make up for the deficits in constitutional governance she identifies at the domestic level seems suspect.

3. Implications for Further Global Economic Constitutionalisation

Despite clear differences in the organisational structure and goals of the WTO and the IMF, our analysis has also noted a number of similarities which should be concerning to advocates of global economic constitutionalisation. Firstly, both organisations essentially attempt to achieve the same objectives under the premise that such objectives would bring increased prosperity for all. These objectives, broadly, are unfettered trade liberalisation and the opening up of markets to international competition, privatisation, and the removal of government protection from local industries.⁹⁰³ Both were created and then reframed at the zenith of US power to help maintain the dominance of the US and both acted to support multinational corporations who hold tremendous influence over governments. In both cases, these corporations strongly argued for the imposition of ‘extreme’ neoliberal policy and were the main beneficiaries of the policies of both organisations. Similarly, the ‘losers’ from both organisations tend to be lower paid workers and industries in developing countries that have been damaged through both the sudden loss of government protection and subsidy and the introduction of better funded and equipped foreign competition. As both organisations present themselves *de facto* as the ‘only game in town’, they also close off other alternatives that might ease some of the more damaging facets of the organisations policies,

⁹⁰³ Chorev, Nitsan, and Sarah Babb. “The Crisis of Neoliberalism and the Future of International Institutions: A Comparison of the IMF and the WTO.” *Theory and Society* 38.5, 2009: 459-484. Peet, Richard. *Unholy Trinity: The IMF, World Bank, and WTO*. Zed Books Ltd, 2009.

forcing states and actors in the international system to operate within the pathways created by the institution.⁹⁰⁴

Thus, a number of characteristics suggest that both of the ‘core pillars’ of international economic governance, the International Financial Institutions and the WTO are manifestations of a particular hegemonic project in the form of neoliberalism which seeks to privilege particular interests, sometimes at the expense of others. Accordingly, further constitutionalisation of these organisations may well simply lead to a deeper entrenchment of inequalities.⁹⁰⁵ The previous chapter demonstrated that the core organisation for the protection of international security and human rights, the UN, also has substantial flaws in its structure, particularly with regard to the pre-eminence of the Security Council which infringes on key ideas of separation of powers as well as privileges certain states premised on their possession of material power, which leads to the potentiality of the exercise of arbitrary power beyond any definable rule of law.⁹⁰⁶ Clearly, the second core pillar of the international institutional order in terms of the global economic institutions also possesses a number of characteristics that link it to a particular hegemonic and unequal vision of international order, and therefore runs the risk of locking in negative pathways through processes of constitutionalisation.⁹⁰⁷

Thus the core theses of constitutionalisation that were discussed at the beginning of this chapter, that domestic deconstitutionalisation ‘can and should be compensated for by the constitutionalisation of international law’, and that the best way to do this is to ‘locate institutions in the international system which may

⁹⁰⁴ Chorev and Babb, *Ibid.*

⁹⁰⁵ Cass, Deborah Z. *The Constitutionalisation of the World Trade Organization: Legitimacy, Democracy, And Community in the International Trading System*. OUP, 2005.

⁹⁰⁶ See Chapter 3 for detailed analysis.

⁹⁰⁷ Brown, Garrett Wallace. “The Constitutionalization of What?” *Global Constitutionalism* 1.2, 2012: 201-225.

possess particular constitutional features and strengthen them accordingly' are certainly questionable.⁹⁰⁸ As has been demonstrated, the organisations where the most 'constitutional' features can be found, the UN and WTO, also possess a number of features which reinforce hegemonic preferences and therefore elevating them to the 'higher law' status of the constitution may simply reinforce these characteristics and make them difficult to change. Processes of legalisation in the international system must therefore be subjected to substantial scrutiny before attributing the legitimising status of the constitution onto them.

Many of the problems related to the constitutionalisation of international organisations may well relate to the absence of the key secondary element of constitutionalism that prevails in domestic society – constituent power, manifested through the legitimising force of representative democracy.⁹⁰⁹ As we discussed in the first chapter of the thesis, representative democracy provides the vital legitimising link between the constituent body of people ruled by the sovereign government and the government itself.⁹¹⁰ In doing so, it allows for rightful rule and limits the use of arbitrary power by ensuring that government is accountable to the people and thus cannot simply govern entirely its own interests for fear of removal.⁹¹¹ Democratic representation also allows the constituent power of the people to manifest itself by legitimating dynamic change through the iterative process of pluralism and elections.⁹¹² This component has been vital in effecting constitutional change in the US, for example, where earlier constitutional

⁹⁰⁸ Citations for these quotes at 1 and 11.

⁹⁰⁹ Klabbers, Jan. "Constitutionalism Lite." *Int'l Org. L. Rev.* 1, 2004: 31, pp.32-33.

⁹¹⁰ Dobner, Petra "More Law Less Democracy" In *The Twilight of Constitutionalism*, in *The Twilight of Constitutionalism*, Oxford University Press, 2010, pp.143-149.

⁹¹¹ See Chapter 1 for a detailed analysis of the characteristics required for such a legitimating link to exist in a polity.

⁹¹² Loughlin, Martin. *The Idea Of Public Law*. Oxford University Press, 2003, p.111.

arrangements privileged particular groups such as white people or men. However, within the primary global organisations, and in particular the international economic organisations, there is little capacity for those who are actually affected by the actions of the organisation to influence them, and thus it is hard to challenge hegemonic practices in the face of enormous power disparities.

As suggested, the IFIs, WTO, and UN can affect the economic lives and security of millions of people across the globe both positively and negatively.⁹¹³ However, the majority of those affected have little, if any, direct or indeed indirect influence on the policies of these organisations, with the real power lying either with a select group of states in the case of the UN, or in the case of the global economic institutions, a select group of states and the most powerful transnational corporations.⁹¹⁴ This has led to the use of global power and leverage remaining preeminent in the structure and operation of these organisations, with little evidence of the dynamic reform that would allow these organisations to create legitimating structures that would allow for the participation of constituent power and thus move them closer to offering the benefits of genuine constitutionalism.⁹¹⁵ The potential for the democratisation of international law and international institutions will be assessed in more detail in Chapter 7, but it is sufficient to say here that, given the current trajectory of international law and institutionalisation, such a development looks increasingly unlikely.

In this way, then, it is vital to clarify between this partial concept of ‘constitutionalisation’ which represents a partialised, ‘free-standing process’ lacking

⁹¹³ Barnett, Michael, and Raymond Duvall, eds. *Power in Global Governance*. Vol. 98. Cambridge University Press, 2004.

⁹¹⁴ Hegemonic structure of UN and int. economic organisations outlined in Chapter 3 and 4.

⁹¹⁵ Loughlin, Martin. *What is Constitutionalisation?* in *Twilight of Constitutionalism* Oxford University Press, 2010.

the legitimising controls to offer a ‘comprehensive and legitimate exercise of public power’ within a polity or organisation and ‘constitutionalism’, which represents a more holistic approach in which the ‘political’ or representative aspects of the constitution and the ‘institutional and normative’ characteristics interact in an iterative relationship allowing a constitutional polity to develop and change in response to shifting dynamics. As we have seen, scholarship advocating ‘global constitutionalism’ or ‘constitutionalisation’ often conflates these concepts, and in so doing, removes vital legitimising elements from the constitutional paradigm while still assuming the same potential benefits. Thus, critically distinguishing between genuine ‘constitutionalism’ and more partial processes of constitutionalisation will be key to future research on this topic. The normative and institutional aspects of the constitution cannot be removed from the broader constitutional structure without deleterious consequences.

Conclusion

The previous chapter of this thesis assessed the empirical arguments for the existence of a singular global constitution, demonstrating that in its current manifestation the UN cannot be argued to be a constitution for the international system. Following on from that analysis, the present chapter sought to assess the ‘constitutionalisation thesis’, which offers the prescriptive argument that the governance of international law would be well served by encouraging and strengthening processes of ‘constitutionalisation’ within the international system. To assess this argument, this chapter was split into three core sections. The first examined, with a particular focus on the ideas of Martin Loughlin and Anne Peters, what ‘constitutionalisation’ itself entailed. It demonstrated that ‘constitutionalisation’ as advocated in the international system presents itself as a

‘free-standing’ process which emphasises the legal and hierarchical aspects of the constitution, while detaching itself from the holistic idea of constitutionalism which importantly also includes components such as constituent power and representative democracy. It then went on to demonstrate that constitutionalisation is an inherently conservative philosophy insofar as it seeks to pose particular norms, laws and institutions without the dynamic elements of constituent power that allow for legitimate constitutional change. Thus, within such a spectrum, the idea of ‘what’ is being constitutionalized is extremely important, since, if the structures being constitutionalised are not suited to the processes of justice and egalitarianism that constitutionalists espouse, the potential danger of ‘locking in’ negative pathways is high.

The remainder of this chapter then went on to assess core international organisations against this paradigm. It argued that the core international institutions within the international system are currently tied to particular hegemonic interests and influences within the international system. As a result of this, the constitutionalisation advocated by scholars such as Peters may simply lead to the imposition of hegemonic interests and power onto the international system. To make this argument, the second part of this chapter offered a historical analysis of the core international organisations and their structures, focusing particularly on the key global economic institutions. As the UN was discussed in detail in the previous section of this thesis, such an analysis was not necessary here beyond simply outlining some of the historical factors which entrenched particular hegemonic factors into the organisation as well as the problematic nature of UN reform.

This chapter instead focused on a more detailed analysis of the core economic institutions in the international system, the Bretton Woods Organisations

(with a particular focus on the IMF) and the WTO. Beginning with an assessment of the IMF, it was demonstrated that, since the 1970s, the IMF has increasingly been used as a hegemonic tool by powerful neoliberal states and interests. Through an analysis of the use of the 'structural adjustment' policy of the IMF as regards the Latin American Debt Crisis in the 1980s, this chapter demonstrated that the IMF used its position as the sole global creditor to impose conditions on Latin American countries which damaged their economies and drove millions into poverty, and that the IMF continued to impose such policies despite these consequences and concomitant criticism. Further, it demonstrated that the main beneficiaries of the 'one size fits all' policy of 'good governance' imposed on debtors were powerful neo-liberal states, in particular the US, that controlled the IMF. This chapter therefore demonstrated that the IMF and World Bank are tethered to the interests of particular powerful actors and are not suitable candidates for constitutionalisation.

After the assessment of the International Financial Institutions, this chapter then proceeded to assess the prospects for constitutionalisation of the WTO. This section demonstrated that, much like the IMF, the WTO frequently offers a 'one size fits all' paradigm with regard to global trade that does not sufficiently take into account the widely differing economic and social conditions within states. As a result of this, WTO policy can often be damaging to developing countries as well as to unskilled and semi-skilled workers in both developing and developed states. It also demonstrated, that, once again, policies of trade liberalisation through the WTO have disproportionately benefited powerful neoliberal forces, in particular multinational corporations who have enormously benefited from such policies often at the expense of other, less influential sectors of global society. On top of this, as the balance of power has shifted in the international system, the WTO has

increasingly been subject to gridlock as developing countries object to many of the conditions I have discussed in my analysis. As a result of these factors, once again, the constitutionalisation of the WTO might simply lead to the entrenchment of hegemonic actors in the international system rather than producing egalitarian and just outcomes.

Finally, this chapter argued that the core issues which prevent the effective constitutionalisation of international organisations lie in the absence of representative democracy which would allow for the exercise of constituent power by those affected by the policies and actions of these organisations and thus legitimate them in a 'constitutional' manner. Further, the absence of this characteristic prevents dynamic change necessary within these organisations as conditions in the international system shift and makes them extremely difficult to reform. Therefore, without a hitherto unforeseen shift towards democratic governance within these international organisations, they are unlikely to be suitable candidates for constitutionalisation that core global constitutionalists advocate.

Chapter 5: Legal Pluralism and Constitutionalism

Introduction

The previous two chapters of this thesis discussed the empirical and normative arguments made by global constitutionalists and demonstrated that, at both levels, substantive flaws exist in the global constitutionalist argument. From this study, it was concluded that there is little support for an empirical overarching global constitution in the international system, and indeed, even if one were to come into existence, there would be certain inherent risks posed by the hegemony of dominant actors coupled with the absence of sufficient legitimation mechanisms.

This thesis will now look at a more contemporary, yet nonetheless important, critique of global constitutionalism. This critique might be considered a ‘legal pluralist’ critique, which argues that the decentralised nature of the international system – and the existence of multiple, unregulated legal orders within this system – might fatally undermine the claim of global constitutionalists that a ‘comprehensive and legitimate framework for public power’ can be found or created in the international system. This pluralist argument has been a focus for many prominent scholars, including Gunther Teubner, Nico Krisch, Paul Schiff Berman, and a host of others.⁹¹⁶ Given the breadth of scholarship and debate on legal pluralism and global legal pluralism, the analysis of the relationship between legal pluralism and global constitutionalism will be divided into two chapters. To provide an analytical framework for the second chapter on global legal pluralism and global constitutionalism, the first of these chapters will assess the concept of legal

⁹¹⁶ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010. Teubner, Gunther. *Constitutional Fragments: Societal Constitutionalism and Globalization*. Oxford University Press, 2012. Berman, Paul Schiff. *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*. Cambridge University Press, 2012.

pluralism itself, and how this concept has both historically, and theoretically, related to the broader idea of constitutionalism.

This chapter will therefore look more deeply at the concept of legal pluralism and its relationship with constitutionalism. To offer this assessment, the chapter begins with a brief historical overview of legal pluralism and some of the core characteristics associated with it. It will begin by looking at the pluralism that existed in ancient and medieval Europe, which was fundamentally the *de facto* form of governance across most of the world before the creation of the Westphalian state.⁹¹⁷ It will demonstrate that during this period, a particularly ‘pure’ form of legal pluralism existed, characterised by the existence of a host of autonomous legal orders operating in parallel and without an overarching framework, resulting in many different bodies of law potentially applying to the same individual or legal situation.⁹¹⁸ As I will show, this ancient form of pluralism was chaotic, and often resulted in conflict between the various orders.

Following this, the chapter will demonstrate how the creation of the Westphalian state went a long way towards controlling and regulating this chaotic form of pluralism with an emphasis on a single legal sovereign and the relegation of many previously autonomous orders – such as the *lex mercatoria* and Canon Law – to the private sphere.⁹¹⁹ It will then briefly assess another historical form of legal pluralism, predominant in colonised nations, which might be described as colonial pluralism. As I will show, colonial powers often allowed indigenous legal orders to

⁹¹⁷ von Benda-Beckmann, Franz. “Who’s Afraid of Legal Pluralism?” *The Journal of Legal Pluralism and Unofficial Law* 34.47, 2002: 37-82. Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30, 2008: 375.

⁹¹⁸ Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30, 2008: 375, p.378.

⁹¹⁹ *Ibid*, p.377.

stay intact and regulate local populations, meaning these orders were broadly pluralistic, despite the existence of a theoretical sovereign in the form of the colonial authority or power itself.

As a result, many of the characteristics associated with medieval legal orders – including the broadly ‘autonomous and parallel’ nature of many of these legal orders – remained intact.⁹²⁰

Moving on from these historical forms of pluralism, the chapter will look at more contemporary arguments relating to the existence of legal pluralism within the modern, constitutional state. However, it will also argue that as a result of these orders being only ‘semi-autonomous’, they ultimately rely on the authority of the constitutional state to continue operating independently and are, therefore, of a fundamentally different kind to the ‘autonomous and parallel’ legal orders which predominated before.⁹²¹ It will also examine some of the definitional issues and divides surrounding legal pluralism, particularly in terms of what constitutes a ‘legal order’. In doing so, it will argue that, as no definition of legal order or legal pluralism can ultimately be reached, it is reasonable to utilise or compartmentalise the term in a way that is most expedient to the analytical paradigm within which the concept is used.

Finally, with reference to the historical and analytical framework provided above, the chapter will look at how legal pluralism interacts with the idea of constitutionalism. It will suggest that constitutional orders have recognised the *de facto* existence of plural orders within their polities, and have sought to use various

⁹²⁰ Ibid, p.382. Also, Lauren Benton, *Law and Colonial Culture: Legal Regimes in World History, 1400-1900*, 2002.

⁹²¹ Tully, James. *Strange Multiplicity: Constitutionalism in an Age of Diversity*. No. 1. Cambridge University Press, 1995, p.43 Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010.

strategies of recognition to prevent these orders from undermining the overall cohesiveness of the constitution. As we will see, two key strategies have been used to recognise the relative autonomy of plural orders within the broader constitutional system: Consociationalism and, relatedly, federalism.⁹²² Despite the use of these strategies, however, this section will argue that, ultimately, within a constitutional system, the relative autonomy of these orders is fundamentally predicated on *recognition* from the broader constitutional order. Thus, they do not have independent or self-sufficient legitimacy; if they did, this would fundamentally undermine the constitution's basic claim.⁹²³

1. Legal Centralism and Legal Pluralism

It has often been the practice of lawyers and legal scholars to view law as a 'unitary phenomenon', a sort of monolithic tool of the state to ensure social order and mete out justice according to the codified law of the state. John Griffiths describes such an approach as a 'legal centralist' approach.⁹²⁴ What constitutes law, according to such a logic, is its reference to a specific set of institutional and structural characteristics. According to such a definition, law is 'uniform for all persons, exclusive of other law, and administered by state institutions'.⁹²⁵ These institutions derive their authority directly from the sovereign. For such a legal system to exist, a legal sovereign must both be in place and possess hierarchal superiority or supremacy to provide the fount of authority from which other

⁹²² Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, 61-63.

⁹²³ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010. Dryzek, John S. *Deliberative Global Politics: Discourse and Democracy in a Divided World*. Cambridge: Polity, 2006, chp.3.

⁹²⁴ Griffiths, John. "What is Legal Pluralism?" *The Journal of Legal Pluralism and Unofficial Law* 18.24, 1986: 1-55, p.3.

⁹²⁵ *Ibid.*

components of the legal system draw their legitimacy.⁹²⁶ Law within this system is an ‘exclusive systematic ordering of normative propositions. Various sub-ordinate norms within the system carry legal validity only because of their position in the hierarchy.’⁹²⁷ Such an idea of law is deeply ingrained into much of the political and legal discourse of the early and modern day state, and can be found in many influential legal scholars, beginning with Thomas Hobbes, for whom ‘law is the command of the sovereign’, and moving on to more sophisticated accounts such as those of Austin, Kelsen, and Hart, whose positivist theories of law served to influence huge swathes of jurisprudence, particularly before 1970.⁹²⁸

On the other hand, many scholars consider such a monolithic idea of law as fundamentally misrepresenting the real nature of legal orders and their operations. These scholars instead suggest that law operates pluralistically, whereby ‘multiple legal systems co-exist in the same social field’.⁹²⁹ The vast plethora of scholarship on this paradigm has broadly been categorised under the umbrella term of legal pluralism. With the increasing complexity of both inter-state legal and normative orders and post-state ones, discussions about the impact and nature of legal pluralism have become increasingly eminent in a number of disciplines. International relations and international law are two important disciplines within this paradigm, but legal pluralism has also been heavily addressed within such

⁹²⁶ Kelsen, Hans. *General Theory of Law and State*. Vol. 1. The Lawbook Exchange, Ltd., 1945, pg. 124-128, 393. Hart, Herbert Lionel Adolphus, and Leslie Green. *The Concept of Law*. Oxford University Press, 2012.

⁹²⁷ Griffiths, John. “What is Legal Pluralism?” *The Journal of Legal Pluralism and Unofficial Law* 18.24, 1986: 1-55, p.3.

⁹²⁸ Hobbes, Thomas. *Leviathan*. A&C Black, 2006. Austin, John, and Sarah Austin. *The Province of Jurisprudence Determined*. Vol. 2. J. Murray, 1861. Hans & Kelsen *Supra* note 925.

⁹²⁹ Merry, Sally Engle. “Legal Pluralism.” *Law & Society Review* 22.5, 1988: 869-896, pg.870. Pospisil, Leopold. “Legal Levels and Multiplicity of Legal Systems in Human Societies.” *Journal of Conflict Resolution* 11.1, 1967: 2-26.

disciplines as sociology, political science, and legal anthropology.⁹³⁰ It is a phenomenon that has been addressed in depth both at the domestic and international level, often with considerable crossover. At the domestic level, scholars including Sally Falk Moore, John Griffiths, and Leonard Pospisil have increasingly sought to identify and analyse multiple legal orders operating within the state, and to assess the implications of this for broader conceptions of governance.⁹³¹ Neil Walker, Gunther Teubner, and Nico Krisch stand at the forefront of a wide range of scholars delving into the idea at a global level.⁹³² These scholars focus on the emergent processes of global legalisation, which increasingly seek to regulate a globalising international system.

The existence or potential existence of multiple legal orders in the international system has, of course, substantial implications for the study of global constitutionalism. As demonstrated in Chapter 1 of this thesis, a constitutional order is one which makes a claim to create a ‘comprehensive framework for the legitimate establishment and exercise of public power under the rule of law’.⁹³³ Resultantly, the existence of ‘multiple legal orders’ occupying the same social space or area could cause substantive problems therein. As constitutionalism seeks legal and political supremacy, if multiple legal orders can exist concurrently and

⁹³⁰ For example, Griffiths, John. “What is Legal Pluralism?” *The Journal of Legal Pluralism and Unofficial Law*. 18.24, 1986: 1-55. Fuller, Chris. “Legal Anthropology: Legal Pluralism and Legal Thought.” *Anthropology Today* 10.3, 1994: 9-12.

⁹³¹ Griffiths, John. “What is Legal Pluralism?” *The Journal of Legal Pluralism and Unofficial Law* 18.24, 1986:1-55. Pospisil, Leopold. “Legal Levels and Multiplicity of Legal Systems in Human Societies.” *Journal of Conflict Resolution* 11.1, 1967: 2-26. Moore, Sally Falk. “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study.” *Law & Society Review* 7.4, 1973: 719-746.

⁹³² Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010. Teubner, Gunther. *Constitutional Fragments: Societal Constitutionalism and Globalization*. Oxford University Press, 2012. Walker, Neil. “The Idea of Constitutional Pluralism.” *The Modern Law Review* 65.3, 2002: 317-359. Walker, Neil. *Intimations of Global Law*. Cambridge University Press, 2014.

⁹³³ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pg.64.

autonomously within such an order, then the constitution's claim to regulate the totality of the basic order within a polity or social space may be challenged or defeated.⁹³⁴

Before moving on to this analysis of global legal pluralism and its implications, for our wider discussion on global constitutionalism, it is necessary first to look with greater depth at the concept of legal pluralism itself and its historical and theoretical relationship with the idea of constitutionalism. To this end, this chapter will begin by looking at the history of legal pluralism in terms of both practice and scholarship. In doing so, it will highlight and clarify some of the key characteristics associated with pluralist orders, as well as some of the divergences within scholarship, as to what a pluralist order could, or should, look like. After doing so, it will focus on the relationship between legal pluralism and state constitutionalism. In particular, it will focus on the critical relationship between the *autonomy* of pluralist orders and the centralising tendencies of constitutionalism, and some of the ways in which constitutionalism has attempted to channel the more chaotic tendencies of pluralism. This chapter will thus set up something of an analytical framework for the forthcoming chapter, which will then examine in greater detail 'global legal pluralism' and how this phenomenon affects our broader discussion on global constitutionalism.

2. Legal Pluralism: A Brief History

Legal pluralism began to garner attention within academic and legal circles in the early 1970s through the study of law in colonial and post-colonial countries.⁹³⁵ Scholars including Sally Falk Moore, Leonard Pospisil, and MB

⁹³⁴ Peters, Anne. "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures." *Leiden Journal of International Law* 19.3, 2006: 579-610.

⁹³⁵ Tamanaha, Brian Z. "Understanding Legal Pluralism: Past to Present, Local to Global." *Sydney L. Rev.* 30 2008: 375, p.377.

Hooker were key in opening up a new field of study which assessed and analysed the relationship between the indigenous law of colonised people and the legal systems of the European powers who ruled them.⁹³⁶ Although I will come back to this paradigm later in the chapter, it must first be made clear that the ‘fact’ of legal pluralism long pre-dated scholarship on the matter.⁹³⁷ Indeed, legal pluralism was, *de facto*, the primary way in which governance was organised stretching back into antiquity.⁹³⁸ As the space available for discussion of historical pluralism within this thesis is limited, this section will focus mainly on legal pluralism in the European context, but, as Tamanaha discusses, it is reasonable to assume that the phenomena discussed here were mirrored and represented across the world.⁹³⁹

Legal pluralism in Europe can be observed perhaps most prevalently in the medieval period, understood as covering about 1,000 years between the collapse of the Roman Empire and the emergence of the Renaissance and the Westphalian state in the 14th and 15th centuries. During this period, the entire continent could be considered to exist in a condition of fundamental legal plurality.⁹⁴⁰ This medieval epoch was characterised by a ‘remarkable jumble of different laws and institutions which occupied the same space, sometimes conflicting, sometimes complementary, and lacking any overarching hierarchy or organisation’.⁹⁴¹ This host of laws and

⁹³⁶ Hooker, Michael Barry. “Legal pluralism: An Introduction to Colonial and Neo-Colonial laws. Clarendon Press, 1975. Pospisil, Leopold. “Legal Levels and Multiplicity of Legal Systems in Human Societies.” *Journal of Conflict Resolution* 11.1, 1967: 2-26. Moore, Sally Falk. “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study.” *Law & Society Review* 7.4, 1973: 719-746.

⁹³⁷ Chiba, Masaji. “Other Phases of Legal Pluralism in the Contemporary World.” *Ratio Juris* 11.3, 1998: 228-245, pg.232. Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30 2008: 375.

⁹³⁸ Chiba, Masaji. “Other Phases of Legal Pluralism in the Contemporary World.” *Ratio Juris* 11.3, 1998: 228-245, pg.232.

⁹³⁹ Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30, 2008: 375, p381.

⁹⁴⁰ *Ibid*, p.377.

⁹⁴¹ *Ibid*.

legal systems included feudal law, merchant law (an ancient *lex mercatoria*), the Canon Law of the Catholic Church, and what might in the broadest sense be described as ‘state’ law which came in the form of edicts of the king.⁹⁴²

However, it must be clear that this state law little resembled the overarching sovereign authority claimed later by the Westphalian state. Within this pluralistic system, various types of court and judicial fora co-existed; manorial courts, municipal courts, church courts, royal courts, and many others. Staffing these variform courts were, respectively, barons of the manor, burghers, merchants, guild members, bishops, kings, and their appointees.⁹⁴³ Further to this, different laws were applicable to people depending on their status: Townsmen were separated from countrymen, nobles from commoners, churchmen from students, and members of guilds and crafts from the unaffiliated.⁹⁴⁴ Thus the ‘great and small ordines of society lived according to a distinct set of rules’⁹⁴⁵, administered by distinct networks of law courts. Bishop Agobard of Lyons, for example, stated in the 9th century that ‘it often happened that five men were present or sitting together, and not one of them would be subject to the same laws’.⁹⁴⁶

Such a form of pluralism thus consisted of co-existing, overlapping bodies of law with different geographical and categorical reaches, without recourse to an overarching hierarchal order. Jansen describes this as a ‘raw’ or ‘pure’ form of pluralism.⁹⁴⁷ The defining characteristics of this particular form of pluralism were

⁹⁴² Ibid.

⁹⁴³ Ibid.

⁹⁴⁴ Ibid, p.378.

⁹⁴⁵ van Caenegem, *Legal History: A European Perspective*, Bloomsbury, 1991, p.117-118.

⁹⁴⁶ Story, Joseph. *Commentaries on the Conflict of Laws*. Keip, 2007, pg.5.

⁹⁴⁷ Jansen, Nils *European Private Law in Europe: National Laws, European Legislation and Non-Legislative Codifications*, in Niglia, Leone, ed. *Pluralism and European Private Law*. Bloomsbury Publishing, 2013. Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30 2008: 375.

the autonomous and parallel nature of the various legal orders operating within it.⁹⁴⁸ These bodies operated within a heterarchical framework, in which no single order was able to claim dominance over another. Resultantly, in most cases, no formal way of deciding which order should take precedence existed.⁹⁴⁹ As Tamanaha suggests, although ‘to modern ears this multifarious legal situation sounds unusual, it was the normal state of affairs for at least 2,000 years of European history.’⁹⁵⁰ The centralisation of legal authority under the nation state, and then the further centralisation through the constitutional state are relatively recent developments in the ordering of society through law.⁹⁵¹ Pluralism was not a matter of study for early political theorists as it was simply the way in which governance operated – the conception of a single, unified state under the legal command of the sovereign was simply not an important part of political and legal consciousness at the time. As Tamanaha states ‘the fact that we tend to view law as a monopoly of the state is broadly a result of the universalisation and success of the state-building product.’⁹⁵² Such a system was by no means a historical inevitability, and indeed, had early nation state building failed, it is quite possible that today we could be living in a world of city states or other forms of social organisation.

The absence of an overarching legal authority or sovereign to authoritatively decide between the various orders meant, of course, that legal orders continually clashed over who possessed legal authority over matters and subjects, as, frequently,

⁹⁴⁸ As above.

⁹⁴⁹ Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30 2008: 375, p.377-379.

⁹⁵⁰ *Ibid*, p.379.

⁹⁵¹ Mann, Michael. “The Autonomous Power of the State: Its Origins, Mechanisms and Results.” *European Journal of Sociology/Archives Européennes de Sociologie* 25.2, 1984: 185-213.

⁹⁵² Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30 2008: 375, p.377-379.

more than one order may claim authority over a particular case or person.⁹⁵³ One of the more common clashes was between church and state, particularly with regard to crimes committed by church personnel.⁹⁵⁴ Many offences, in principle, could be tried by legal or secular authorities, and the outcomes of the trial or legal matter would almost certainly be markedly different. To this end, clergymen often sought refuge in ecclesiastical courts for crimes committed, even particularly egregious ones such as murder, on the likelihood of lesser punishment.⁹⁵⁵ Clashes also occurred over other matters such as property inheritance and marriage laws, in which both church law and secular law potentially applied. Such a system of unregulated, autonomous pluralism was ‘naturally chaotic’ and meant that the ‘use of law as a tool for the furtherance of social objectives or cohesion’⁹⁵⁶ was difficult because of the continuous clashes between different legal orders, as well as the lack of a clear distinction between the public and the private, which came to define more developed and centralised legal orders.⁹⁵⁷

Within more developed state and constitutional orders, the existence and nature of legal pluralism engendered fierce debates. However, as Tamanaha suggests, there can be little doubt that the medieval world was fundamentally pluralistic, and can thus be taken as paradigmatic of the phenomenon.⁹⁵⁸ The ‘relative’ decline of legal pluralism at the domestic level was a slow process, and it

⁹⁵³ Tierney, Brian. *The Crisis of Church and State, 1050-1300*. No. 21, University of Toronto Press, 1964, pp.97-98, 138. Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30, 2008: 375.

⁹⁵⁴ Tierney, Brian. *The Crisis of Church and State, 1050-1300*. No. 21, University of Toronto Press, 1964, pp.97-98, 138, pg. 98.

⁹⁵⁵ Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30 2008: 375, p.385.

⁹⁵⁶ *Ibid*, p.384-387.

⁹⁵⁷ Merry, Sally Engle. “Legal Pluralism.” *Law & Society Review* 22.5, 1988: 869-896. Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30, 2008: 375.

⁹⁵⁸ Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30 2008: 375, p.385.

took centuries to move from this state of unregulated pluralism to the establishment of sovereign states with centralised legal systems and the creation of a strong ‘public’ dimension to the practice and exercise of law.⁹⁵⁹ It is not possible here to give a full history of how this transition occurred, but three important developments are certainly key to the story.⁹⁶⁰ Firstly, the Reformation broke the hegemony of the Catholic Church and allowed sovereigns to seize church assets and to remove themselves from obligations arising under church and papal law.⁹⁶¹ This led to the Treaty of Augsburg in 1555, which established the principle that sovereigns could decide the religion of citizens within their territory.⁹⁶² Finally, the most important development was the signing of the Treaty of Westphalia of 1648, which divided Europe into separate, secular territories under the authority of sovereigns.⁹⁶³ Where, prior to this, various forms of political organisation had thrived (mostly functioning along the pluralist lines described), the treaty of Westphalia organised states into hierarchal, territorial entities whereby all ‘legal’ authority lay with the state.⁹⁶⁴ Consolidation of law in the hands of the state was an ‘essential part of the state building process.’⁹⁶⁵ The various forms of pluralist law were absorbed into the overarching administrative and legal framework of the state.⁹⁶⁶ As Marc Bloch noted, ‘the consolidation of societies into great states or principalities favoured not

⁹⁵⁹ Loughlin, Martin. “The Idea of Public Law.” Oxford University Press, 2003, pp.8-11. Philpott, Daniel. “Sovereignty: An Introduction and Brief History.” *Journal of International Affairs*, 1995: 353-368.

⁹⁶⁰ Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30 2008: 375, p.385.

⁹⁶¹ Ibid.

⁹⁶² Ibid.

⁹⁶³ Ibid.

⁹⁶⁴ Gross, Leo. “The Peace of Westphalia, 1648–1948.” *American Journal of International Law* 42.1, 1948: 20-41. Philpott, Daniel. “Sovereignty: An introduction and Brief History.” *Journal of International Affairs*, 1995: 353-368.

⁹⁶⁵ Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30 2008: 375, p.380.

⁹⁶⁶ Ibid, p.381.

only the revival of legislation but also the extension of a unifying jurisprudence over vast territories'.⁹⁶⁷ Sovereigns naturally preferred a centralised form of law which would both accord them control and lessen the chances of inter-territorial conflict, something that was a continual risk in the highly pluralist pre-state era.⁹⁶⁸ Thus, customary norms, religious laws, and other pluralistic practices did not disappear in the transition to an era of sovereign, territorial states. What they did lose was their 'equal and autonomous' legal status.⁹⁶⁹ Once considered independent, applicable bodies of law, orders such as *lex mercatoria* and Canon Law became dependent on state law for validity and legitimacy and, thus, fundamentally carried a lesser status.⁹⁷⁰ Resultantly, law, which had previously existed more to reflect an enduring order, custom, or natural principle, instead became a centralised instrument that was used to 'further social objectives and structure and order the government and its affairs'.⁹⁷¹

2.1 Pluralism in Colonial Societies

As we have seen from the above, legal pluralism in the state was certainly 'reduced' by the creation of the nation state, although not eradicated, as I will discuss in the next section. However, while this relative decline in pluralism *within* European states was on-going, a 'new' form of pluralism, premised in colonial rule, was emerging through processes of colonisation in Asia, Africa, and across the world.⁹⁷² States that had been colonised by European countries naturally had in

⁹⁶⁷ Bloch, Marc. *The Feudal World* in Cantor and Wertham (eds) *Medieval Society*, 1967, p.42.

⁹⁶⁸ Asch, Ronald G. "Introduction." *The Thirty Years War*. Macmillan Education UK, 1997. 1-8.

⁹⁶⁹ Tamanaha, Brian Z. "Understanding Legal Pluralism: Past to Present, Local to Global." *Sydney L. Rev.* 30, 2008: 375, p.381.

⁹⁷⁰ *Ibid.*

⁹⁷¹ *Ibid.*

⁹⁷² Merry, Sally Engle. "Legal Pluralism." *Law & Society Review* 22.5, 1988: 869-896. Goh, Daniel PS. "From Colonial Pluralism to Postcolonial Multiculturalism: Race, State Formation and the Question of Cultural Diversity in Malaysia and Singapore." *Sociology Compass* 2.1, 2008: 232-252. Tamanaha, Brian Z. "Understanding Legal Pluralism: Past to Present, Local to Global." *Sydney L.*

place their own legal systems, some of them highly developed. For example, India under Mughal law already existed in a state of ‘complex legal pluralism’, comprising of a mix of Muslim and Hindu laws and institutions, as well as ‘secular’ laws which governed aspects such as taxation.⁹⁷³ At the same time, other territories, including the Cape of Africa, had less developed systems, but rather relied on indigenous law and custom for social control. It was the study of these colonial administrations that garnered interest from some of the early and seminal legal pluralists, notably Sally Falk Moore, Sally Engle Merry, John Griffiths, and Brian Tamanaha.⁹⁷⁴

As Engle Merry argues, colonial powers did not usually attempt to directly transplant their entire legal systems on to the subordinate nations they had conquered.⁹⁷⁵ As colonialists sought first and foremost to gain economically from their territorial expansions, it was expedient for them in terms of cost and manpower to have as minimal a legal presence as possible.⁹⁷⁶ On the whole, European powers were reluctant to accept full legal jurisdiction over subject people, and the general preference was to mostly leave indigenous legal institutions alone unless they directly affected European traders, missionaries, settlers, or officials.⁹⁷⁷ In general, indigenous law would be applied to indigenous people, while European law would

Rev. 30, 2008: 375. Moore, Sally Falk. “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study.” *Law & Society Review* 7.4, 1973: 719-746.

⁹⁷³ Benton, Lauren. “Historical Perspectives on Legal Pluralism.” *Hague Journal on the Rule of Law* 3.1, 2011: 57-69, pp. 61-62. Benton, Lauren. *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*. Cambridge University Press, 2002.

⁹⁷⁴ Merry, Sally Engle. “Legal Pluralism.” *Law & Society Review* 22.5, 1988. Griffiths, John. “What is Legal Pluralism?” *The Journal of Legal Pluralism and Unofficial Law*. 18.24, 1986: 1-55.

Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30, 2008: 375. Moore, Sally Falk. *Law as Process: An Anthropological Approach*. LIT Verlag Münster, 2000.

⁹⁷⁵ Merry, Sally Engle. “Legal Pluralism.” *Law & Society Review* 22.5, 1988: 869-896, p.873.

⁹⁷⁶ Benton, Lauren. *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*. Cambridge University Press, 2002, pp.60-65.

⁹⁷⁷ Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30, 2008: 375, p.382.

be applied to matters concerning European settlers, or in mixed cases.⁹⁷⁸ When colonial powers wished to exert greater legal authority, this was normally accomplished through indirect rule, which involved relying on pre-existing sources of political authority through the creation of ‘native courts’ or through the use of indigenous leaders that enforced religious or customary laws.⁹⁷⁹ As a result of this, although *supremacy* lay with the coloniser in terms of their capacity of use of force, policing, and other similar matters, the colonial powers did not legally ‘rule’ over their colonial subjects in the same manner in which they ruled at home through the centralised Westphalian state.⁹⁸⁰ Thus, although colonial law and the colonial powers were certainly ‘above’ indigenous laws and courts in terms of social and political status, this often did not translate into traditional forms of legal hierarchy.⁹⁸¹

There was often then a ‘hodgepodge of co-existing legal institutions and norms operating side by side, with various points of overlap conflict, and mutual influence’.⁹⁸² In this regard, colonial systems could be not too dissimilar from medieval ones. Lauren Benton, for example, describes the sheer degree of plurality and overlap in the British administration of India. She notes that, in just two districts in Calcutta, India, ‘civil courts would apply civil law to Muslims, while Hindu law was applied to Hindus. Criminal courts applied Muslim law universally’.⁹⁸³ Although British officials sometimes presided over these courts, systems were built on formal and informal role for Mughal officials who possessed substantial

⁹⁷⁸ Ibid.

⁹⁷⁹ Ibid. p.383

⁹⁸⁰ von Benda-Beckmann, Franz. “Who’s Afraid of Legal Pluralism?” *The Journal of Legal Pluralism and Unofficial Law* 34.47, 2002: 37-82, pp.38, 46.

⁹⁸¹ Ibid.

⁹⁸² Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30, 2008: 375, p.382.

⁹⁸³ Benton, Lauren. *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*. Cambridge University Press, 2002. p. 134.

influence over eventual outcomes. At the level of petty disputes, the Zamindari (local noblemen and landowners) were allowed to maintain their jurisdiction, despite holding no formal legal authority.⁹⁸⁴ On the other hand, criminal country courts continued to be entirely operated by Mughal officers with almost no oversight or legal involvement from their British overlords.⁹⁸⁵ The example of the imperial administration in Calcutta is one example of a plethora that ran throughout British India and its other territories in which the law of the colonisers only ‘overlay’ the indigenous law which preceded it, rather than replacing it, leading once again to fundamentally pluralist governance in which a number of different, overlapping legal orders existed within one system without one referent legal source to decide disputes.⁹⁸⁶

The relatively brief account of legal pluralism within colonial societies given here is not intended to be a holistic one, or to downplay or ignore more nuanced views of legal pluralism in colonial times. Many scholars have dedicated papers or indeed large parts of their academic canon to the study of legal pluralism within colonial societies.⁹⁸⁷ It is not possible to address all of these arguments here, and therefore my description of the orders within these states as being ‘parallel’ and autonomous is not an absolute one. Clearly, with the presence of overarching power in the form of a colonial government, some aspects of legal governance within imperial or colonial administrations were more hierarchal and some less, while indigenous, informal forms of governance doubtlessly exerted influence without

⁹⁸⁴ Benton, Lauren. *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*. Cambridge University Press, 2002, p.135.

⁹⁸⁵ Ibid.

⁹⁸⁶ Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30, 2008: 375, p.382.

⁹⁸⁷ For further Leonard Pospisil, MB Hooker, and Sally Falk Moore all give in depth accounts about the interactions between legal orders in colonial society.

explicitly possessing the full structural characteristics of legal orders in terms of codification, courts, and legal professionals. As a result of this, some of the characteristics relating to informal and semi-autonomous plural orders in the proceeding section are also pertinent to aspects of colonial pluralism.⁹⁸⁸ I particularly highlighted the existence of ‘autonomous and parallel’ orders within colonial systems to draw a clear parallel with discussions of legal pluralism in the more bounded up hierarchal nation state, in which multiple ‘semi-autonomous’ legal orders operate within the more overarching framework of the modern constitutional state.⁹⁸⁹ This difference will become extremely important in forthcoming discussions on the relationship between global legal pluralism and global constitutionalism, and, therefore, it is important to broadly delineate here between these different types of pluralism.

3. The ‘New’ Legal Pluralism: Legal Pluralism in the Modern state.

Sally Engle Merry describes the study of the two previous forms of legal pluralism described here – medieval pluralism and colonial pluralism – as belonging to what she describes as a ‘classical’ approach to legal pluralism.⁹⁹⁰ This approach broadly focuses on systems where multiple definably ‘legal’ orders existed within one social space. While custom and informal norms played a substantial role in outcomes, particularly in indigenous populations and medieval Europe, these organisations can nonetheless be termed as legally pluralistic in the most basic sense. Within such a pluralist paradigm, a number of clear and separate legal orders can be ascertained as operating autonomously without the broader framework of an

⁹⁸⁸ Cambridge University Press, 2002.

⁹⁸⁸ Merry, Sally Engle. “Legal Pluralism.” *Law & Society Review* 22.5, 1988.

⁹⁸⁹ Moore, Sally Falk. *Law as Process: An Anthropological Approach*. LIT Verlag Münster, 2000, pg. 78.

⁹⁹⁰ Merry, Sally Engle. “Legal Pluralism.” *Law & Society Review* 22.5, 1988, p.872.

overarching legal hierarchy.⁹⁹¹ Thus, the core characteristics of plural orders within such a classical paradigm are their autonomous and heterarchical nature.⁹⁹²

Although, of course, medieval orders were ‘more’ pluralistic than colonial ones as they lacked even the co-ordinating or hierarchical factor of the ruling power,⁹⁹³ sufficient similarities can be observed between these two forms of pluralism to distinguish them from what Engle Merry describes as ‘new legal pluralism’,⁹⁹⁴ a term she utilises to refer to the study of legal pluralism within the broader social and legal matrix of the state.

I have discussed above the two historical forms of pluralism that Engle describes or associates with the idea of ‘classic legal pluralism’.⁹⁹⁵ Contemporary scholars of legal pluralism have, however, sought to offer a deeper and more nuanced analysis of the concept, seeking to maintain the value of the concept even in more holistic legal systems like the modern-day state. Important scholars in this field include Sally Falk Moore, John Griffiths, Leonard Pospisil, and MB Hooker.⁹⁹⁶ Such scholars seek to move beyond the purely ‘formal’ legal order of the state and focus on other forms of both codified and uncodified regulation that exist within the state, and create ‘compliance pull’ similar to that of official, state-based or sanctioned legal orders.⁹⁹⁷

⁹⁹¹ Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30, 2008: 375, p.382.

⁹⁹² Ibid.

⁹⁹³ Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30, 2008: 375.

⁹⁹⁴ Merry, Sally Engle. “Legal Pluralism.” *Law & Society Review* 22.5, 1988, p.872.

⁹⁹⁵ Merry, Sally Engle. “Legal Pluralism.” *Law & Society Review* 22.5, 1988, p.872.

⁹⁹⁶ Hooker, Michael Barry. “Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws. Clarendon Press, 1975. Pospisil, Leopold. “Legal Levels and Multiplicity of Legal Systems in Human Societies.” *Journal of Conflict Resolution* 11.1, 1967: 2-26. Moore, Sally Falk. “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study.” *Law & Society Review* 7.4, 1973: 719-746.

⁹⁹⁷ Moore, Sally Falk. *Law as Process: An Anthropological Approach*. LIT Verlag Münster, 2000, pg.56. Moore, Sally Falk. “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study.” *Law & Society Review* 7.4, 1973: 719-746.

The previous section of this chapter demonstrated that the creation of the Westphalian state went a long way to curbing the unrestrained legal pluralism that preceded it by subjecting what previously existed as ‘parallel and autonomous’ legal systems to the control of a central, state-based order which comprised the ‘hierarchically superior’ law of the state. As a result, previous independent and autonomous legal orders such as the *lex mercatoria* of the merchants and the Canon Law of the church were ‘relegated to the private sphere’, and lost their independent legal authority and parallel status with ‘state’ law.⁹⁹⁸ Such developments led to the emergence of what John Griffiths describes as the philosophy of ‘legal centralism’.⁹⁹⁹ Strong legal centralists, such as Austin, would thus suggest that, for all intents and purposes, this move fundamentally degraded the importance of legal pluralism by instituting the hierarchy of state sovereignty and law.¹⁰⁰⁰ Indeed, it was on this ‘legally centralist’ conception of law that European civilisation claimed to be built and to distinguish itself as ‘civilised’ – the imposition of a ‘sovereign law’ which possessed normative and legal supremacy and brooked no opposition from within the state.¹⁰⁰¹

However, a host of influential scholars have also emerged, who challenge this legal centralist approach speaking to the demise of legal pluralism in the wake of the emergence of the unified state. The core assumption of the view of these legal pluralists is that ‘many phenomena that are not directly premised in state law are nonetheless ‘law like’, and thus not all phenomena that are law-like have their

⁹⁹⁸ Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30, 2008: 375, p.377.

⁹⁹⁹ Griffiths, John. “What is Legal Pluralism?” *The Journal of Legal Pluralism and Unofficial Law* 18.24, 1986: 1-55, pg.3.

¹⁰⁰⁰ Austin, John, and Sarah Austin. *The Province of Jurisprudence Determined*. Vol. 2. J. Murray, 1861.

¹⁰⁰¹ Schwöbel, Christine EJ. *Global Constitutionalism in International Legal Perspective*. Vol. 4. Martinus Nijhoff Publishers, 2011, pg. 79.

source in government'.¹⁰⁰² As a result, the state may enjoy a special status among the legal orders within a polity, but does not have a monopoly on the idea of law.¹⁰⁰³ According to this position, despite the presence of an overarching legal framework in the form of the state, all sorts of normative orders not attached to the state are nevertheless law and deserve to be studied within the paradigm of legal pluralism as they exert, if not identical, similar influence to more formalised state law. These non-state 'legal' orders can range from regional pockets within state legal systems where indigenous norms continue to exert social control, to the rule-making and enforcement power of social institutions including university disciplinary boards, sports organisations such as FIFA, and employment tribunals, to the law-making capacity of devolved administrations in particular regions or states.¹⁰⁰⁴ Corporate codes and private forms of arbitration are also often considered to offer an alternative or 'shadow' legal system within the broader state system, regulating important sectors within the social matrix of the state through both codified regulations and mutual understandings.¹⁰⁰⁵

As well as this, despite not possessing the legal autonomy they possessed in pre-state times, scholars like Griffiths have suggested that 'moral orders' such as the church still maintain a level of social control that, within day-to-day lives, must operate in a manner resembling law.¹⁰⁰⁶ Eugen Ehrlich describes these lived rules of normative order as 'living law' as opposed to the law of the state,¹⁰⁰⁷ whereby Sally Falk Moore describes the rule-generating and enforcing power of social groups or

¹⁰⁰² S. F. Moore, 'Legal Systems of the World' in *Law and the Social Sciences*, eds. L. Lipson and S. Wheeler, 1986, p.15.

¹⁰⁰³ *Ibid.*

¹⁰⁰⁴ Merry, Sally Engle. "Legal Pluralism." *Law & Society Review* 22.5, 1988, pp.875-880.

¹⁰⁰⁵ Merry, Sally Engle. "Legal Pluralism." *Law & Society Review* 22.5, 1988, pp.878-879.

¹⁰⁰⁶ Griffiths, John. "What is Legal Pluralism?" *The Journal of Legal Pluralism and Unofficial Law* 18.24, 1986: 1-55.

¹⁰⁰⁷ Ehrlich, E *Fundamental Principles of the Sociology of Law*, Cambridge, Harvard University Press, 1913.

internal orders as ‘semi-autonomous social fields’.¹⁰⁰⁸ These ‘semi-autonomous social fields’ exist in a plurality within the ‘broader social matrix of the state.’¹⁰⁰⁹ Moore designates these fields only as ‘semi-autonomous,’ as they are influenced internally and externally by the broader institutional hierarchy of the state, yet nonetheless have strong and independent ‘rule-making capacity’ in the way they can influence individuals and entities within the state.¹⁰¹⁰

A number of different subsets of rules exist in the domestic state which resemble Falk Moore’s conception of a ‘semi-autonomous’ order. Macaulay, for example, proposes the idea of ‘private government’, which he defines as a ‘layer of governance underlying state governance, but hardly less important.... such a term refers to the host of self-regulating bodies that exist in the private sector include practices of such institutions such as the disciplinary bodies, boards, councils of industrial and commercial organizations, and professional and trade unions’.¹⁰¹¹ Many of these organisations have codified guidelines, arbitration bodies, and other factors, which means that, at a day-to-day level, they operate in ways that very much resemble legal bodies. As Engle Merry states ‘it is true that the autonomy of these orders is not absolute and at many points intersects with the overarching state order’.¹⁰¹² Nonetheless, ‘while such orders are vulnerable to rules, decisions and other forces emanating from the larger world that surrounds it, they still possess and retain a considerable power to set rules internally which affect those individuals or entities who fall within the ambit of those orders’.¹⁰¹³

¹⁰⁰⁸ Moore, Sally Falk. “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study.” *Law & Society Review* 7.4, 1973: 719-746., p.720.

¹⁰⁰⁹ Ibid.

¹⁰¹⁰ Ibid.

¹⁰¹¹ Macaulay *Private Government*, in Lipson, Leon, and Stanton Wheeler, eds. *Law and the Social Sciences*. Russell Sage Foundation, 1986, pp.445-519.

¹⁰¹² Merry, Sally Engle. “Legal Pluralism.” *Law & Society Review* 22.5, 1988, p.873.

¹⁰¹³ Moore, Sally Falk. “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study.” *Law & Society Review* 7.4, 1973: 719-746., p.720.

Thus, such legal pluralists agree that certain forms of legal pluralism continue to exist within the holistic nation state. Nonetheless, they nevertheless vary substantially on a number of issues regarding its character. In particular, disagreement exists on the nature of the hierarchy between state law and unofficial orders, and also on what does and does not constitute a 'legal order',¹⁰¹⁴ which could be incorporated into further debate on legal pluralism. Perhaps the strongest manifestation of the 'pluralist' mind-set can be found in John Griffiths' seminal paper 'What is Legal Pluralism?'. Although many scholars since have challenged Griffiths' viewpoint, and indeed Griffiths himself has accepted that the uncompromising and 'combative nature' of his article were perhaps misplaced, it is nonetheless an important piece in understanding a particular viewpoint on the nature of legal pluralism, and informed many of the views on legal pluralism that proceeded it.

Griffiths, with the direct intention of countering 'legal centralist' views of law offers an extremely expansive definition of law, legal order, and legal pluralism. Griffiths makes the assertion that 'legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, and an illusion'.¹⁰¹⁵ According to Griffiths' logic, all forms of social ordering that engender compliance and follow a specific set of rules must be considered to be law, and part of a dynamically pluralist order.¹⁰¹⁶ Resultantly, 'legal pluralism is not a theory but the 'name of a social state of affairs, and refers to the normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, overlapping, 'semi-autonomous' fields.'¹⁰¹⁷

¹⁰¹⁴ Tamanaha, Brian Z. *The Folly of the Social Scientific Concept of Legal Pluralism*, *Journal of Law and Society*, 1993, outlines some of these debates with great clarity.

¹⁰¹⁵ Griffiths, John. "What is Legal Pluralism?" *The Journal of Legal Pluralism and Unofficial Law* 18.24, 1986: 1-55. Pg.5.

¹⁰¹⁶ *Ibid.*

¹⁰¹⁷ *Ibid.*

Griffiths' perspective of legal pluralism goes well beyond that of earlier scholars including Sally Falk Moore and, as a result, has generated controversy and disagreement. Indeed, Falk Moore herself questioned Griffiths' attribution of law to all forms of normative ordering within a given social field. In the same vein, scholars such as Brian Tamanaha feel that certain thresholds of formality and recognition should be respected before particular normative orders can be considered legal.¹⁰¹⁸ Tamanaha argues that while there is a 'compelling intuitive impulse to describe as law or law-like' certain institutions and norms found in the modern state, such as corporate rules or private arbitration panels, attributing legal status to uncodified, abstract, and ill-defined orders such as normative relations within the family, garment industry, or local communities waters down the concept to the point where it maintains little empirical value as an analytical tool.¹⁰¹⁹

Tamanaha's viewpoint is shared by a number of scholars, including Franz Von Benda Beckmann, who argues that ultimately, defining all forms of normative order as law leads to a process of infinite regression, whereby it is impossible to distinguish between law and any other type of social behaviour.¹⁰²⁰ Doing so ignores the substantial historical pedigree of the phenomenon, as well as its crucial importance in a number of important conceptions, of which constitutionalism is certainly among the most important. Thus, Tamanaha argues that while ultimately it is reasonable to assume the existence of some form of legal pluralism even within the holistic constitutional state, a certain threshold of formality should be considered

¹⁰¹⁸ Tamanaha, Brian Z. "The Folly of the 'Social Scientific' Concept of Legal Pluralism." *Journal of Law and Society* 20.2, 1993: 192-217. pp.193-194.

¹⁰¹⁹ Tamanaha, Brian Z. "The Folly of the 'Social Scientific' Concept of Legal Pluralism." *Journal of Law and Society* 20.2, 1993: 192-217. p.211.

¹⁰²⁰ von Benda-Beckmann, Franz. "Who's Afraid of Legal Pluralism?" *The Journal of Legal Pluralism and Unofficial Law* 34.47, 2002: 37-82, pp.45-48.

necessary.¹⁰²¹ Thus, for many scholars, the process of delineation remains important and a certain ‘threshold’ of legal characteristics in terms of both institutionalisation and compliance pull might be required to define a system of rules as a ‘legal order’.¹⁰²²

As we can see from the snapshot presented above, legal pluralism has a rich and diverse history, and appears in many different forms both in the period before the rise of the nation state and after. We can also see that substantial differences have emerged within discourse on the subject as to what, in particular, can and should be described as ‘law, or as legal orders’, and thus, of course, the composition of legal pluralism. What we can broadly witness, nonetheless, is an acceptance from these legal pluralists that even within the state system bounded up by the constitution, more than one legal system can operate within the same polity.

The next section of this chapter will go on to look at how legal pluralism interacted with constitutionalism, as well as the methods which the latter utilised to channel the former, with the intention of creating a framework for the forthcoming chapter on global legal pluralism and global constitutionalism.

Before moving on to this section, it is worth briefly noting some of the definitional issues relating to legal pluralism, in order to more effectively create a framework for the study of both constitutionalism and legal pluralism. It has probably not been lost on the reader that I did not begin this snapshot of legal pluralism with an extensive definition of the concept. This was a deliberate choice. As the above analysis of the concept shows, legal pluralism is both historically and analytically complex. Thus, more basic definitions from scholars which tend to view

¹⁰²¹ Tamanaha, Brian Z. “The Folly of the ‘Social Scientific’ Concept of Legal Pluralism.” *Journal of Law and Society* 20.2, 1993: 192-217. p.211.

¹⁰²² Ibid.

legal pluralism as simply ‘the existence of multiple legal orders within one social space ‘fail to take into account the full complexities and nuances that surround the concept.’¹⁰²³ Struggles over what constitutes ‘law’ and ‘legal order’ within the pluralist paradigm often make such singular definitions difficult to square with empirical reality.¹⁰²⁴ As I will go on to discuss in the next chapter, this problem becomes even more acute in the international system. An encompassing ‘catch-all’ definition for the concept of legal pluralism is therefore extremely difficult to realise, and attempting to create one serves little practice purpose.¹⁰²⁵ Resultantly, legal pluralism is best viewed as an analytical tool utilised in many disciplines to assess paradigms which relate to the existence of plural normative orders existing within one social space.¹⁰²⁶

Tamanaha supports such a utilitarian definition of legal pluralism because although it ‘may be possible to create broad categorisations as to what constitutes law, legal order, and legal pluralism,’ ultimately such disputes ‘have never been resolved due to the wide and disparate objectives of scholars studying the phenomena’.¹⁰²⁷ For legal anthropologists hoping to better understand how and why societies comply with norms, taking a more expansive view on the nature of law is likely to be conducive to study, and thus they may include many unofficial forms of normative ordering, such as relations between families and within local industries. Similarly, black letter legal scholars seeking to understand the interactions between regulation in the private sector and state law might take a less expansive definition

¹⁰²³ Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30, 2008: 375, p.400.

¹⁰²⁴ Tamanaha, Brian Z. “The Folly of the ‘Social Scientific’ Concept of Legal Pluralism.” *Journal of Law and Society* 20.2, 1993: 192-217. p.211.

¹⁰²⁵ Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30, 2008: 375 pp.392-394.

¹⁰²⁶ *Ibid*, p.392-395.

¹⁰²⁷ Tamanaha, Brian Z. “The Folly of the ‘Social Scientific’ Concept of Legal Pluralism.” *Journal of Law and Society* 20.2, 1993: 192-217. p.210.

of law and restrict perspectives on ‘legal order’ codified documentation in which specific regulations and dispute settlement procedures are set down.¹⁰²⁸ Therefore, it is not intellectually lazy or incoherent to assess legal pluralism ‘instrumentally rather than holistically’, and indeed is likely a necessary expedient to ensure focus on a particular analytical paradigm or problem.¹⁰²⁹

4. Legal Pluralism and Constitutionalism

The purpose of this thesis is to assess global constitutionalism, and the purpose of the forthcoming chapter is to look at how the pluralistic nature of the international system might affect the potentiality for a single global constitution. Thus, it is important for this thesis to focus on the features of legal pluralism that interact with and might affect the operation of the constitution. Resultantly, I will now go on to look back at some of the core characteristics of pluralism which are pertinent to constitutionalism, and the way in which constitutions have sought to discipline, or channel, those features to continue to allow for its effective operation.

As we demonstrated in depth in the first and second chapters, constitutionalism is founded on the desire to create a ‘comprehensive and legitimate framework for the exercise of public power’.¹⁰³⁰ Clearly, in order to do so, constitutional government expresses a ‘centralising philosophy’, whereby society is organised according to a set of ‘higher law’ norms, with the legal codification and institutionalisation put in place to enforce these norms and laws.¹⁰³¹

¹⁰²⁸ von Benda-Beckmann, Franz. “Who’s Afraid of Legal Pluralism?” *The Journal of Legal Pluralism and Unofficial Law* 34.47, 2002: 37-82, pp.40-47.

¹⁰²⁹ von Benda-Beckmann, Franz. “Who’s Afraid of Legal Pluralism?” *The Journal of Legal Pluralism and Unofficial Law* 34.47, 2002: 37-82, pp.40-47. Merry, Sally Engle. “Legal Pluralism.” *Law & Society Review* 22.5, 1988.

¹⁰³⁰ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pg.64.

¹⁰³¹ This framework is set out in detail in Chapters 1 and 2 of this thesis.

As a result, the idea of any form of ‘extra-constitutional’ authority is extremely problematic to the idea of constitutionalism, as its existence may well undermine the constitution’s claim to offer the basal order described above.¹⁰³² Resultantly, the existence of ‘legal’ pluralism in the sense of multiple orders existing within one social space or polity that is ‘governed’ by a constitution may similarly be problematic if these orders are not in some way subsumed into this broader constitutional framework.¹⁰³³ Referring back to the analysis above, I will look at two core characteristics of constitutionalism that are pertinent to their capacity to either function in tandem with, or undermine, the constitution’s claim to offer a comprehensive and legitimate framework for the exercise of public power. The first of these characteristics is the *autonomy* of the ‘plural orders’ operating within the constitutional system, and the second related concept is the degree of recognition of the plural orders by the system itself.¹⁰³⁴

The potential autonomy of plural orders operating within a constitutional order is of considerable importance because of the nature of what the constitution itself claims to do. If the constitution claims to offer a comprehensive framework for public power, then the potential for autonomous orders operating within it might undermine that objective if those orders can act autonomously from the overarching normative and legal system.¹⁰³⁵ As we have seen, pluralism exists in a continuum in terms of the autonomy of legal orders that can exist within a singular social system.

¹⁰³² As above. Built on in the international context in Chapters 3 and 4.

¹⁰³³ Koskenniemi, Martti. “Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought.” *Presentation at Harvard Law School* 5, 2005, p.10-15. Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010.

¹⁰³⁴ Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30, 2008: 375. Fischer-Lescano, Andreas, and Gunther Teubner. “Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law.” *Mich. J. Int’l L.* 25, 2003: 999.

¹⁰³⁵ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pp.64-66. Grimm, Dieter. *The Achievement of Constitutionalism, In Twilight of Constitutionalism*, Oxford University Press, pg. 7.

At one end of the spectrum, pre-state pluralism in medieval times comprised of a system of autonomous orders on to which authority could normally only be imposed via the use of superior military or political force, without an overarching legal structure or sovereign to define overarching principles and institutions to decide on disputes and settle conflicts. Given that constitutionalism's need to offer legitimate and comprehensive government naturally entails certain aspects of hierarchy and supremacy, legal orders within such system cannot possess this form of complete autonomy from any constitutional authority, otherwise the constitution's claim to form the basal normative and legal authority of a societal order would be seriously undermined.¹⁰³⁶

The form of legal pluralism that existed in colonial societies would also be extremely problematic for constitutionalism, for two reasons. Firstly, although a 'sovereign' did exist within colonial systems in terms of the colonial power, this sovereign cannot be compared to the idea of the 'constitutional sovereign', whose authority is grounded in a rule of law system derived from a particular set of formal and material rules.¹⁰³⁷ The two-tier legal system governing colonies in which entirely different legal systems were applied to different individuals or entities residing within the same geographical territory undermines the core purposes of constitutionalism in a number of ways. The rule of law system inherent in constitutional doctrine, and underpinned by the hierarchy of norms which define the core principles under which it operates almost universally preclude the idea that different fundamental rights can be applied to different individuals governed under

¹⁰³⁶ Loughlin, Martin. What is Constitutionalisation? in *Twilight of Constitutionalism*, Oxford University Press 2010, pp.49-55.

¹⁰³⁷ Grimm, Dieter. *The Achievement of Constitutionalism*, In *Twilight of Constitutionalism*, Oxford University Press, pg. 7. Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012.

the same sovereign.¹⁰³⁸ Offering almost complete autonomy, thus, to systems extraneous to a core constitutional system directly contravenes the constitution's claim to govern within a particular set of 'superior' normative and institutional rules. While different orders can operate within a singular constitutional system, these need to possess at least a broad degree of normative homogeneity and cannot widely differ in terms of fundamental tenants.¹⁰³⁹

The above demonstrates that types of legal pluralism such as the ones embodied by medieval or colonial orders are clearly not compatible with constitutionalism's aims. Legal orders within such systems cannot possess absolute or almost absolute autonomy from the constitutional system and hierarchy without undermining the core constitutional claim to create a legitimate and comprehensive framework for the exercise of public power.¹⁰⁴⁰ Nor can the existence of these orders fundamentally contain or create different rights for individuals or entities supposedly existing within the constitutional order. The autonomy of plural orders operating in a singular system must therefore be restrained in certain key ways to operate in tandem with a constitutional system.¹⁰⁴¹

Thus, 'autonomous and parallel' plural orders cannot exist within a constitutional order as they undermine the core precepts of the concept. Nonetheless, as we have seen, many of the 'semi-autonomous' legal orders which we discussed in the previous section clearly both exist with and interact dialectically

¹⁰³⁸ Glenn, Patrick. *The Cosmopolitan State*, Oxford University Press, Chapter 1. Grimm, Dieter. *The Achievement of Constitutionalism*, In *Twilight of Constitutionalism*, Oxford University Press, pp.7-10. Rogoff, Martin A. "A Comparison of Constitutionalism in France and the United States" *Me. L. Rev.* 49, 1997: 21.

¹⁰³⁹ Lane, Constitutions and Political Theory, Manchester: Manchester University Press, 1996, 6. Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010. Teitel, Ruti. "The Constitutional Canon: The Challenge Posed by a Transnational Constitutionalism." *Const. Comment.* 17, 2000: 237.

¹⁰⁴⁰ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pp.63-68.

¹⁰⁴¹ *Ibid.*

with broader constitutional systems. As populations and societies have grown more complex, even at the level of the state, clearly, semi-autonomous or ‘quasi-legal’ organisations have grown up to regulate a host of different areas within governance, with particularly notable examples existing in the private sector in terms of private arbitration, corporate codes, and other forms.¹⁰⁴² As we have seen, such entities possess a degree of independent law-making capacity, although they are situated within the broader social matrix, which has the capacity to influence and shape these orders from the outside.¹⁰⁴³

Resultantly, these semi-autonomous orders possess, or should possess, particular characteristics that broadly allow them to operate within a constitutional order without undermining its fundamental tenets. Firstly, semi-autonomous orders must operate in a way that their judgements and actions do not fundamentally contravene law derived from constitutional precepts, whether those be rights laid down in the constitution itself, or derived through state law which premises its validity on its link to the broader constitutional structure.¹⁰⁴⁴ Therefore, ‘semi-autonomous’ regimes which possess certain kinds of legal authority must nonetheless be constrained by the overarching constitutional structure. For example, private arbitration panels cannot issue judgements that would contravene state employment law, while corporate codes regarding disciplinary procedures for work infractions and other matters must still work within core rights protections stipulated in constitutions, or derived from constitutional precepts in those areas, or become

¹⁰⁴² Moore, Sally Falk. *Law as Process: An Anthropological Approach*. LIT Verlag Münster, 2000, pp.26-30.

¹⁰⁴³ Berman, Paul Schiff. “Global Legal Pluralism.” *S. Cal. L. Rev.* 80, 2006: 1155.

¹⁰⁴⁴ Moore, Sally Falk. *Law as Process: An Anthropological Approach*. LIT Verlag Münster, 2000, pg.56.

invalid.¹⁰⁴⁵ Thus, constitutional law, and certain forms of ‘state law’, as a result of its direct connection to the legitimating framework and processes that emanate from the constitution, still possess a fundamentally different character from the ‘semi-autonomous legal systems’ which might operate within them.¹⁰⁴⁶ While these semi-autonomous systems do have ‘rule-making capacity and authority’, that authority is ultimately constrained by the more overarching norms of the wider social matrix within which they sit.¹⁰⁴⁷

To accommodate for difference in sometimes widely diverse societies, constitutions and constitutionalism have sought different solutions to allow for the inevitable societal pluralism and diverse range of private and semi-private standard setting institutions that emerge within complex societies. At the core of these strategies has been for the constitution to attribute ‘recognition’ to diversity.¹⁰⁴⁸ In terms of institutional orders, such as corporate orders and forms of private arbitration, overarching legal orders have often offered these forms of dispute resolution direct recognition within the legal system, as well as through outlining legally the circumstances in which disputes might be settled within these bodies rather than within broader legal systems.¹⁰⁴⁹ Such systems can be found across developed constitutional systems. For example, federal law in the United States recognises the capacity for university disciplinary boards and bodies to handle certain matters relating to Title IX of the US of the Education Amendments Act of

¹⁰⁴⁵ Moore, Sally Falk. “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study.” *Law & Society Review* 7.4, 1973: 719-746, p.725.

¹⁰⁴⁶ Tamanaha, Brian Z. “The Folly of the ‘Social Scientific’ Concept of Legal Pluralism.” *Journal of Law and Society* 20.2, 1993: 192.

¹⁰⁴⁷ Moore, Sally Falk. *Law as Process: An Anthropological Approach*. LIT Verlag Münster, 2000, pg.56.

¹⁰⁴⁸ Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30 2008: 375, p.381.

¹⁰⁴⁹ Van Caenegem, Raoul Charles. *An Historical Introduction to Private Law*. Cambridge University Press, 1992, Chapter 1. Tamanaha, Brian Z. “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney L. Rev.* 30 2000: 375.

2006, particularly as it relates to sexual assault.¹⁰⁵⁰ UK law, similarly, allows for many different matters to be settled through private arbitration, particularly if both parties agree in areas like education and employment. These systems are often created as a result of the recognition of the difficulty of imposing state or constitutional law into all matters of discipline and regulation, while still recognising that such activity can only be legally legitimate if, at some level, a broader link to the main system of law exists.

The methods via which constitutionalism has sought to accommodate other forms of plural order which existed prior to the state and then indeed the constitutional state, such as religious or regional orders have been more diverse.¹⁰⁵¹ Nico Krisch outlines two related strategies that constitutional orders have utilised to allow for pluralism while still not undermining the foundational basis for governance which constitutionalism provides. The first of these he describes as *consociationalism*, which seeks to manage certain entrenched cultural positions or disagreements through the creation of veto positions for minority groups, to ensure that one dominant group cannot impose its will on others through its social primacy.¹⁰⁵² Within such a paradigm, societal groups are granted particular autonomy rights for their own cultural and linguistic affairs and also often enjoy a protected position within centralised systems.¹⁰⁵³ Examples of consociationalism can be found at several points within the Constitution of India. Articles 29 and 30 of the Constitution of India allow minorities to set up educational institutions in their

¹⁰⁵⁰ <https://www.knowyourix.org/college-resources/title-ix/> – Accessed 12th November 2017.

¹⁰⁵¹ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pp.61-64.

¹⁰⁵² Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, p.62.

¹⁰⁵³ *Ibid.*

own chosen language¹⁰⁵⁴ and offer minorities an ‘unrestricted right to the promotion and preservation of their own cultures’.¹⁰⁵⁵ This flexibility also extends to particular legal matters such as laws on inheritance which can be decided under either Hindu or Muslim personal law – although in these cases, both parties to the dispute need to agree to use the Muslim or Hindu personal law rather than rely on the state law.

Smaller central European nations such as Belgium and Luxembourg, which have, as a result of historical factors, encompassed a broad range of ethnicities, cultures, and languages, also offer strong protections for particular languages and cultures in their constitutions as well as specific protections or allocations in these groups.¹⁰⁵⁶ For example, articles 115-140 of the Belgian constitution offer substantive powers to parliaments of different linguistic and regional groups, including a French-, Flemish-, and German-speaking parliament.¹⁰⁵⁷ These parliaments are responsible for linguistic issues, matters relating to education, and relations between employers and personnel as well as certain economic powers. Methods of consociationalism are often based on considerations of historical injustice or inequality, and seek to ensure minority rights which have previously been abused or ignored are structurally protected through official recognition.¹⁰⁵⁸ Such strategies can also be seen as a recognition of the difficulty of using entirely homogenous systems of law to govern vast and diverse territories, such as in India,

¹⁰⁵⁴ Constitution of India Article 29 – <http://indiacode.nic.in/coiweb/welcome.html>- Accessed 22 Oct 2017.

¹⁰⁵⁵ Constitution of India Article 30 – <http://indiacode.nic.in/coiweb/welcome.html>- Accessed 22 October 2017.

¹⁰⁵⁶ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, p.62.

¹⁰⁵⁷ Constitution of Belgium – www.partylaw.leidenuniv.nl/party-law/4c8b5e51-c490-454c-8582-16387287acdc.pdf- Accessed 23rd October 2017.

¹⁰⁵⁸ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pp.62-64.

and an acceptance that excessive top-down imposition of law may lead to resistance which could then undermine the operational efficacy of the broader order.

Relatedly, many constitutions utilise varying degrees of federalism to accommodate for regional diversity. Federalist approaches devolve particular state functions to the territorial units that cumulatively make up the broader state.¹⁰⁵⁹ Such a system allows for greater local control over matters affecting individuals and groups within these territories, which, advocates of federalism would argue, offers citizens more direct control over their own affairs, and thus, in a sense, greater direct democracy and potentially more legitimate local government.¹⁰⁶⁰ The most notable case of what might be considered a fully ‘federalised’ constitutional system lies, of course, in the United States, whereby, according to Article 10 of the constitution ‘all powers not delegated to the federal government by the Constitution are reserved to the states’.¹⁰⁶¹ This system thus entrenches pluralism substantively into the system itself, whereby different regional territories can live according to different laws and rules, as long as they are fundamentally adhered together by the ‘higher law’ of the US Constitution and do not contravene the fundamental rights offered therein.¹⁰⁶² Similarly, degrees of federalism exist in Germany, India, Spain, and a host of other important constitutional nations.¹⁰⁶³

The above examples demonstrate that despite the constitution’s claim to provide a ‘legitimate and comprehensive framework for the exercise of public power’, constitutionalism nonetheless has had to accommodate for pluralism, given

¹⁰⁵⁹ Ibid, p.62

¹⁰⁶⁰ Stepan, Alfred. “Federalism and Democracy: Beyond the US Model.” *Theories of Federalism: A Reader*. Palgrave Macmillan US, 2005. 255-268.

¹⁰⁶¹ US constitution, Article 10 – <https://www.whitehouse.gov/1600/constitution> – Accessed 21st October 2017.

¹⁰⁶² Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010.

¹⁰⁶³ Ibid.

the pluralistic nature of any complex political entity including the nation state. To do so, constitutional orders have often offered considerable autonomy and recognition to plural orders, whether they be semi-autonomous regulatory systems or more informal, yet influential, groups within society, such as regional, religious, or linguistic subgroups.¹⁰⁶⁴

Thus, rather than trying to eradicate pluralism, constitutional orders have tried to discipline and channel it by offering varying degrees of recognition and autonomy to the differing forms of institutional and societal pluralism which operate within one social matrix. By providing this official recognition, constitutionalism sought to transform the messy, disordered, and often dangerous pluralism that was present in the medieval and early modern periods into a more ordered system where plural orders could channel their interests through formal legal and political channels. However, unlike in earlier systems, the autonomy of these sub-systems is only legitimate because of direct recognition from the overarching constitutional order. These autonomous orders do not possess independent or self-reinforcing authority, as, ultimately, their authority to act is contingent on the constitution.

Constitutionalism thus allows for pluralistic orders to operate, but limits them to operating within certain normative and legal boundaries, enclosing their operation within a broader framework of rights and governance. In this way, a hierarchal relationship exists within these systems which prevents conflict that might undermine the broader coherence of the system. The core point, then, is that legal pluralism can, and does, operate within constitutional orders, but their

¹⁰⁶⁴ Barry, Brian. "Political Accommodation and Consociational Democracy", *British Journal of Political Science*, 1975. 477-505.

autonomy is fundamentally predicated on *recognition* from the broader hierarchy engendered by the constitution itself.

Conclusion

This chapter, which focused on legal pluralism, sought to set up an analytical foundation on which the forthcoming chapter on global legal pluralism and global constitutionalism can build. To do so, it outlined core debates within legal pluralism and pluralist scholarship before looking at how the phenomenon of legal pluralism interacted with the concepts of constitutionalism discussed earlier.

This chapter began by offering a historical analysis of legal pluralism within two core contexts: Medieval pluralism and colonial pluralism. The first section, which focused on pluralism during the ancient and medieval eras, demonstrated that prior to the creation of the modern Westphalian state, legal pluralism was the *de facto* state of affairs. As was demonstrated through an analysis of medieval Europe, this form of pluralistic governance was comprised of a great number of parallel, autonomous legal regimes, each claiming jurisdiction over a host of issues without any particular normative or legal hierarchy that could settle disputes between them. As a result of this, this form of pluralism was ‘chaotic and disordered’, with legal authority over individuals and jurisdiction often contested by many different ‘legal orders’. This section went on to demonstrate that the creation of the Westphalian state played a critical role in the creation of hierarchy within the polity, centralising power in the sovereign state and relegating many orders – including the Canon Law of the church and the *lex mercatoria* of merchants – to the private sphere, and lost the ‘autonomous and equal’ status which they had previously enjoyed. The chapter then examined a slightly different form of legal pluralism which emerged during colonial rule. Such a system, as we saw, was more centralised than the pluralism of

the medieval period because of the presence of the overarching colonial power, but was still fundamentally pluralistic insofar as ‘colonial’ and ‘indigenous’ systems frequently operated in a ‘parallel and autonomous’ fashion without clear recourse to where definitive legal authority lay.

After looking at these historical forms of legal pluralism, the chapter studied more contemporary arguments regarding legal pluralism, seeking to analyse legal pluralism within the more holistic modern state. This section suggested that because of the existence of many ‘semi-autonomous social fields’ within contemporary states, it is reasonable to suggest that the phenomena of legal pluralism remains existent in this context, albeit stripped of the more autonomous and equal nature it had enjoyed previously. This section of the chapter also looked at some divergences within scholarship as to what might be considered a legal order. Ultimately, as we saw here, no ‘agreed upon’ definition of law, legal order, or legal pluralism can be distinguished, and, as a result, the concept is best used in the way that fits with the purposes undergirding the analytical paradigm of the scholar using it.

The final and most important section of this chapter focused on the relationship between legal pluralism and the idea of constitutionalism. As we saw, legal pluralism can potentially threaten constitutionalism’s claim to create a ‘legitimate and comprehensive’ framework for the exercise of public power through the potentiality of autonomous orders operating outside this framework. This section of the chapter demonstrated that constitutional orders have understood the risks of excessive pluralism while still recognising their *de facto* existence. As a result, constitutions often utilised methods of *consociationalism* and *federalism*, whereby the constitution would officially recognise the relative autonomy of cultural, linguistic, or regional groups to prevent conflict that could undermine the

constitution's coherence. Ultimately though, as was demonstrated, plural orders can only operate with a degree of autonomy from central forms of constitutionalism if that autonomy is officially recognised by the constitution. Thus, the legitimacy of these orders emanates from the constitution and cannot exist independently from it. Fundamentally, then, this type of pluralism differs from medieval or colonial pluralism in that the *autonomy* of these orders is ultimately circumscribed by this fundamental rule.

Moving on from this assessment of the relationship between legal pluralism and constitutionalism, the proceeding chapter will now extrapolate this debate to the international level, focusing on the relationship between global legal pluralism and global constitutionalism.

Chapter 6: Global Legal Pluralism and Global Constitutionalism

Introduction

The previous chapter described in some detail the phenomenon of legal pluralism, its history, features, and how it interacted with constitutionalism at the state level. It demonstrated that while legal pluralism can reasonably be said to operate within the constitutional state, ultimately the autonomy of legal orders within it must be limited and disciplined by the constitutional order. With this framework in mind, this chapter will seek to transpose this debate to the international level, and look at how the intensely pluralistic nature of the global system interacts with, and might affect, the potentiality for present or future global constitutionalism. It will argue that despite the potentially dynamic and beneficial qualities that pluralism can engender within a system, the enormously complex and often-antagonistic nature of global legal pluralism means that it is unlikely to provide a suitable template onto which a more overarching form of global constitutionalism can be drawn.¹⁰⁶⁵

To make this argument, this chapter begins by looking more deeply at the concept of global legal pluralism itself. Through an assessment of practice and scholarship, it will demonstrate that the international system is a ‘dense tapestry of pluralism’.¹⁰⁶⁶ It will suggest that the phenomenon of exponential globalisation in almost all societal sectors has led to the existence of a vast plethora of autonomous and semi-autonomous legal systems existing within the same global social space.¹⁰⁶⁷

¹⁰⁶⁵ Fischer-Lescano, Andreas, and Gunther Teubner. “Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law.” *Mich. J. Int’l L.* 25, 2003: 999, Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010.

¹⁰⁶⁶ Berman, Paul Schiff. “Global Legal Pluralism.” *S. Cal. L. Rev.* 80, 2006: 1155, p.1155-1157.

¹⁰⁶⁷ Teubner, Gunther. “*Fragmented Foundation*”. in Dobner and Loughlin (eds) *The Twilight of Constitutionalism*, Oxford University Press. 2010. Berman, Paul Schiff. “A Pluralist Approach to International Law.” *Yale J. Int’l L.* 32, 2007: 301.

It will demonstrate that as well as traditional ‘inter-state’ legal orders such as the United Nations (UN) and World Trade Organisation (WTO), a host of other semi-formal or informal orders have emerged at the ‘periphery of the global system’ which are fundamentally detached from the broader legal order, yet nonetheless have significant impact on the system at large, in particular a global ‘*lex mercatoria*’ driven by the increasing influence of multinational corporations within the broader global polity.¹⁰⁶⁸

Developing from this assessment of global legal pluralism, this chapter will assess whether it might be possible for a form of global constitutionalism to emerge within this pluralistic order, suggesting that, ultimately, the emergence of a global constitution is unlikely in the radically decentralised global system. To make this argument, this chapter will, with reference to the framework provided by Gunther Teubner, suggest that creating sufficient harmonisation within the international system will be extremely difficult as a result of fundamental ‘rationality’ and ‘regime’ conflicts between the various orders in the international system.¹⁰⁶⁹ This section will draw on two cases studies, both relating to ‘regime conflicts’ between the WTO and the Convention for Biological Diversity. Through an assessment of these case studies, it will demonstrate the difficulty of creating the unity and centralisation necessary for any effective form of global constitutionalism, and also the importance of power in such regime conflicts, which ultimately could undermine the rule of law vision espoused by global constitutionalists.

¹⁰⁶⁸ Appelbaum, Richard, William Felstiner, and Volkmar Gessner, eds. *Rules and Networks: The Legal Culture of Global Business Transactions*. Bloomsbury Publishing, 2001. Stone Sweet, Alec. “The New Lex Mercatoria and Transnational Governance.” *Journal of European Public Policy* 13.5, 2006: 627-646.

¹⁰⁶⁹ Teubner, Gunther. “Global Bukowina: Legal Pluralism in the World-Society.” *Social Science Research Network*, 1996, pg.5. Fischer-Lescano, Andreas, and Gunther Teubner. “Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law.” *Mich. J. Int’l L.* 25, 2003: 999.

Finally, this chapter will demonstrate that the idea of global constitutionalism is also substantially challenged by non-state actors in the global ‘periphery’, particularly by the increasing influence of transnational corporations in the international system.¹⁰⁷⁰ As this section will demonstrate, the existence and actions of transnational corporations within the international system might seriously undermine prospects for global constitutionalism. This is as a result of the particular nature of these organisations, which have the capacity to substantially influence the global polity, yet are fundamentally not regulated by its institutions or structures. Resultantly, the existence and operation of these ‘extra-constitutional’ entities pose a threat to the idea of the constitution as a ‘legitimate and comprehensive framework for the exercise of public power’, as these organisations potentially undermine the unity of the whole which is required within a constitutional system, further limiting the utility of global constitutionalism as an overarching method for ordering the international system.

Before beginning the chapter, one substantial explanatory caveat is necessary. The purpose of this chapter is to, in keeping with the objectives of the main research question, to understand the operation of global legal pluralism *specifically* regarding its potential impact on visions of a holistic global constitution and with regards to the relationship between legal pluralism and constitutionalism outlined in the previous chapter. It therefore focuses on the empirical characteristics of global legal pluralism which practically impact on constitutionalism’s potentiality in the international system, rather than on the theoretical attributes and arguments of what might broadly be termed a ‘global pluralist approach’ to international law.

¹⁰⁷⁰ Teubner, Gunther. “The Anonymous Matrix: Human Rights Violations by ‘Private’ Transnational Actors.” *The Modern Law Review* 69.3, 2006: 327-346, pg.327.

Such visions broadly accept global pluralism on its own terms as a necessary (and in some cases superior given the nature of the international system) alternative to constitutionalism and seek to better channel the virtues of this global pluralism whilst ameliorating its more dangerous tendencies.¹⁰⁷¹ Perhaps the most influential example of such a vision is that espoused by Niko Krisch in the latter chapters of 'Beyond Constitutionalism', in which, through detailed case studies, Krisch discusses and demonstrates some of the more positive dynamics of pluralism in order to present an alternative to constitutionalism, which he (for similar reasons to those discussed at various points in this thesis and indeed this chapter) believes to be implausible in the international system.¹⁰⁷² Whilst Krisch is referenced throughout this thesis and indeed significantly in the previous and next chapter, this is with specific regard to his discussion of the direct relationship between pluralism and constitutionalism, which is spelt out primarily in the first four chapters of his book, rather than on this more latterly analysis of the potential benefits of a global pluralism. This is to maintain methodological rigour, as the purpose of this chapter is not to test the value of global pluralism as an alternative to global constitutionalism but instead to understand the impact of this pluralism on the *potentiality* of a global constitutionalism emerging in the international system. Therefore, the focus here will be on the empirical interactions of global legal pluralism on the critical aspect of 'comprehensiveness' in the international system, (which as chapter 1 demonstrated is a vital component of the wider symbiotic

¹⁰⁷¹ See Berman, Paul Schiff. "A pluralist approach to international law." *Yale J. Int'l L.* 32 (2007): 301, and in particular Krisch, Nico. *Beyond constitutionalism: the pluralist structure of postnational law*. Oxford University Press, USA, 2010, Chapters 3 and 9 for the explicit virtues Krisch perceives from a pluralist international order. Chapters 6 and 8 offer case studies which Krisch utilises to support his argument.

¹⁰⁷² Krisch, as above.

paradigm which comprises constitutionalism), rather than on the wider theoretical discussions of global pluralism espoused in these ‘global pluralist’ approaches to international law. With this caveat in mind, this chapter will now begin by looking at the emergence of global legal pluralism.

1. Going beyond the State: The Emergence of Global Legal Pluralism

The previous chapter focused on the relationship between legal pluralism and constitutionalism, and demonstrated that for pluralistic orders to legitimately operate within a constitutional system, this authority must ultimately emanate from, and be legitimised by, the broader constitutional structure. This requirement does not, however, prevent particular orders within the broader structure from possessing considerable autonomy from the overarching system in practice. We saw that federalised systems such as the United States and Belgium allow a wide divergence of different governmental practices and rules while still fundamentally operating under one constitutional system. A constitutional order does not have to continuously and comprehensively govern every aspect of social and political life. Rather it is sufficient for the constitution to ‘provide the framework for public power’, which can then be delegated to other organs of governance to fulfil.¹⁰⁷³ Thus, several different forms of pluralist accommodation might exist within any form of prospective global constitution as long as the existence of these orders does not fundamentally undermine the broader constitutional values and laws which lie at the heart of such a system.¹⁰⁷⁴

¹⁰⁷³ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pg.64.

¹⁰⁷⁴ *Ibid*, pp.62-64.

To understand whether the pluralistic order that exists in the international system can offer a similar backdrop for some form of global constitutionalism, it is critical to see whether the current system might be able to provide a centralising locus that could, in turn, engender modest global constitutionalism.¹⁰⁷⁵ Since such a constitutionalism would require the binding together of plural orders into one framework, the prospect of *harmonisation* between the many orders that exist in the international system becomes of key importance.¹⁰⁷⁶ Even if the multitude of legal orders existing within the international system cannot now be seen as resembling a global constitution, trends toward harmonisation might indicate the possibility of an emergent global constitution arising in the future. On the other hand, if trends within the global system tend towards decentralisation and fragmentation, then it is likely that the opposite would be true and efforts to forge a centralising ‘constitutional’ consensus within the pluralism of the international system would be extremely difficult to realise.¹⁰⁷⁷ As we have seen in Chapters 2 and 3, global constitutionalists including De Wet, Fassbender and Anne Peters seek to identify either institutional or normative hierarchies within the international system that stand as ‘hierarchically superior’ to other international forms of law and organisation.¹⁰⁷⁸ We also saw that such scholars often advocate the idea of a ‘multi-level’ constitution, whereby core constitutional features related to rights protection and dispute settlement would be

¹⁰⁷⁵ Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures.” *Leiden Journal of International Law* 19.3. 2006: 579-610., pp.580-585. Peters, Anne. “The Merits of Global Constitutionalism.” *Indiana Journal of Global Legal Studies* 16.2, 2009: 397-411.

¹⁰⁷⁶ Dunoff, Jeffrey L., and Joel P. Trachtman, eds. *Ruling the World? Constitutionalism, International Law, and Global Governance*. Cambridge University Press, 2009, p.14. Raustiala, Kal. “The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law.” *Va. J. Int’l L.* 43, 2002: 1, pp.1-10.

¹⁰⁷⁷ Fischer-Lescano, Andreas, and Gunther Teubner. “Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law.” *Mich. J. Int’l L.* 25, 2003: 999, pp. 999-1000, 1008-1017. del Moral, Ignacio de la Rasilla. “The unsolved riddle of international constitutionalism.” *International Community Law Review* 12.1, 2010: 81-110.

¹⁰⁷⁸ See Chapters 2 and 3 for full discussion on these scholars.

delegated to a centralised institution while leaving the broad swathe of international governance to nation-states or specialised international organisations.¹⁰⁷⁹ What these visions ultimately seek to posit is the existence of, or potentiality of, some form of legal framework or hierarchy that could bind together the pluralism of legal orders and organs that exist within the international order.

The forthcoming sections of this chapter will seek to test these centralising ideas offered by global constitutionalists against the pluralist reality of the international system. Chapters 2 and 3 assessed visions of global constitutionalism at an internal level, challenging key arguments that the UN or WTO might present a sound framework for an emerging global constitution by looking at the specific internal characteristics of these institutions. This chapter, conversely, will seek to look at what might be described as ‘external’ prospects for a global constitution, focusing not on the internal contents of international regimes, but rather on where and how a global constitution might sit within the structures of the broader international system.¹⁰⁸⁰ It will argue that the current form of ‘global legal pluralism’ that exists in the international system shows a considerable number of ‘anti-constitutionalist trends’ which seriously undermine the prospects for global constitutionalism.¹⁰⁸¹ In particular, it will demonstrate that the current shape of global pluralism holds within it the potential for substantial and unregulated conflict, and, further to this, the diverging interests and ideologies of major powers

¹⁰⁷⁹ Giegerich, Thomas. “The Is and Ought of International Constitutionalism: How Far Have We Come on Habermas’ Road to a Well-Considered Constitutionalization of International Law?” *German LJ* 10 2009: 31. Habermas, Jürgen. “*Does the Constitutionalization of International Law Still have a Chance?*” *The postnational constellation: Political essays.* 2001.

¹⁰⁸⁰ Walker, Neil. “The Idea of Constitutional Pluralism.” *The Modern Law Review* 65.3, 2002: 317-359. pp334-339.

¹⁰⁸¹ Fischer-Lescano, Andreas, and Gunther Teubner. “Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law.” *Mich. J. Int’l L.* 25, 2003: 999, pp.999-1001. Walker, Neil. “Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders.” *International Journal of Constitutional Law* 6.3-4, 2008: 373-396.

in the international system has also often contributed to the sometimes chaotic and decentralised nature of international law and governance.¹⁰⁸² Resultantly, the nature of the pluralism in the international system means it is extremely difficult to posit a global framework within which global constitutionalism could comfortably sit.

Before entering this detailed discussion of global legal pluralism and its relationship with global constitutionalism, it worth looking more deeply at the idea of global legal pluralism and what might be considered its core components. Given the complexity of the topic, this is no easy task. The dense thicket of global governance arrangements existent in the contemporary international system clearly include a vast profusion of norms, laws, and institutions, which constantly interact with each other at a number of levels.¹⁰⁸³ To better understand this paradigm, it is worth offering something of an overview of how global legal pluralism emerged in both practice and into academic consciousness. To better analyse the impact of global pluralism on prospects for global constitutionalism, it is thus first necessary to understand *how and why* the international legal system is pluralistic, with a view to then understanding how this form of pluralism might interact with the harmonising tendencies of constitutionalism.

Early scholars of public international law, such as Alfred Verdross, did not pay great heed to the idea of global legal pluralism. Classical approaches to public international law and international relations which pre-dominated in the late 19th and early 20th century focused almost exclusively on inter-state relations whereby

¹⁰⁸² Krisch, Nico. "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order." *European Journal of International Law* 16.3, 2005: 369-408. Benvenisti, Eyal, and George W. Downs. "The Empire's New Clothes: Political Economy and the Fragmentation of International Law." *Stanford Law Review*, 2007: 595-631.

¹⁰⁸³ Berman, Paul Schiff. *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*. Cambridge University Press, 2012, pg. 4. Walker, Neil. "Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders." *International Journal of Constitutional Law* 6.3-4, 2008: 373-396.

international law emphasised bilateral and sometimes multilateral treaties between states.¹⁰⁸⁴ Within such a worldview, international law was seen exclusively as a contractual process between sovereign states.¹⁰⁸⁵ The modern vision of international law as something which binds together a broader ‘global society’ through processes of global governance and institutionalisation was born later, largely in the wake of the Second World War and the creation of the UN and the Bretton Woods institutions.¹⁰⁸⁶ It was within this later paradigm that scholarship on global legal pluralism began to emerge as a salient part of the discourse on global governance.

As we saw from the previous chapter, an exact definition of the concept of legal pluralism is difficult to attain, and, as we will see, in many ways transplanting the concept into the substantially more complex international system further exacerbates this problem. Nonetheless, it is reasonable to suggest that global legal pluralism, in a similar way to its domestic counterpart, certainly has to do with the existence of multiple legal orders operating within one social matrix or space.¹⁰⁸⁷ At the international level, the emergence of a genuine global social space has been dependent on two core developments: Firstly, an increasing focus on individuals and non-state bodies as potential subjects and objects of international law created an increasing cross-border desire to protect these rights and to institutionally order particular facets of governance relating to them.¹⁰⁸⁸ Secondly, exponential globalisation ‘internationalised’ almost every aspect of human economic and social

¹⁰⁸⁴ Berman, Paul Schiff. *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*. Cambridge University Press, 2012, p.50.

¹⁰⁸⁵ Ibid.

¹⁰⁸⁶ Ibid.

¹⁰⁸⁷ Roseveare, Caroline. “Rule of Law and International Development.” 2013. DFID Research and Evidence Report – https://assets.publishing.service.gov.uk/media/57a08a0be5274a27b20003c7/Literature_Review_RoL_DFID-GSDCH-PEAKS_FINAL.pdf

¹⁰⁸⁸ Brown, Chris. *Sovereignty, Rights and Justice: International Political Theory Today*. Polity Press, 2002.

existence, not exhaustively including cross border trade, communication, conflict, and legal discourse.¹⁰⁸⁹ In doing so, it brought together previously disconnected global individuals and institutions which possessed mutual or similar interests in disciplining or regulating particular areas of interaction in the international system.¹⁰⁹⁰ In this way, a genuine global ‘social and legal space’ was created within the overarching global order.

Resultantly, a multitude of legal and quasi-legal orders emerged to govern this global space. These regimes have increasingly sought to regulate every aspect of the emergent global agora described above.¹⁰⁹¹ Patrick Glenn describes this as part of a process of legal ‘debordering’, whereby ‘triggering devices in the international system have become ‘functional, technical, or regime-based’ rather than simply territorial’.¹⁰⁹² As a result of the creation of this global, debordered social space, new flows become established and institutionalised.¹⁰⁹³ Regimes dedicated to ‘particular goals and purposes have constituted legal and normative conceptual space for themselves’ within the broader global social space and seek to attain recognition with the system for their regulatory or legal vision.¹⁰⁹⁴ Many of these regimes have broad global purposes, such as attempting to ensure global security or free trade. Equally, many have emerged to regulate more specific, functional, or technical arenas within the international system, such as investment and banking practices, the regulation of the internet and internet domain names,

¹⁰⁸⁹ Beck, Ulrich. *What is Globalization?* John Wiley & Sons, 2015, See Chapter 1. Scholte, Jan Aart. *Globalization: A Critical Introduction*. Palgrave Macmillan, 2005.

¹⁰⁹⁰ Finnemore, Martha, and Kathryn Sikkink. “International Norm Dynamics and Political Change.” *International Organization* 52.4, 1998: 887-917, p.909.

¹⁰⁹¹ Teubner, Gunther. “Global Bukowina: Legal Pluralism in the World-Society.” 1996, pp 2-5 – <https://core.ac.uk/download/pdf/14504125.pdf>

¹⁰⁹² Glenn, Patrick H. *The Cosmopolitan State*, Oxford University Press, 2013, p.170.

¹⁰⁹³ *Ibid*, pp.170-172.

¹⁰⁹⁴ Teubner, Gunther *Fragmented Foundations in Twilight of Constitutionalism*, Oxford University Press, 2010, p.330. Teubner, Gunther “Global Law Without a State” 1997 – <https://philpapers.org/rec/TEUGLW>

food safety regulations, and a host of others. Berman, for example, identifies more than 100 legal tribunals and court systems, not to mention a much greater profusion of quasi-legal organisations which create codes that exist outside of traditional structures of international law, yet nonetheless have a substantial impact on outcomes within it.¹⁰⁹⁵

The vast multitude of legal and quasi-legal orders that have emerged from this process can be said to constitute a condition of ‘global legal pluralism’, in which ‘multiple and differentiated legal orders’ exist within the same (global) social space.’¹⁰⁹⁶ This is global legal pluralism in the ‘descriptive’ sense, outlining an existent phenomenon clearly perceivable in the international system rather than what Nico Krisch refers to as a ‘global pluralist mindset’, which rejects the potentiality or benefits centralised or constitutionalised law in favour of a more dynamic, pluralist system whereby outcomes are best achieved through dynamic contestation.¹⁰⁹⁷

According to Van Waeyenberge, this ‘global legal pluralism’ diverges from its domestic counterpart in several important ways. Firstly, and most importantly, global legal pluralism by its very nature breaks away from the monistic claim that all law derives from the state.¹⁰⁹⁸ According to Gunther Teubner, within the pluralist international order, the key components of a developed political, legal, and military

¹⁰⁹⁵ Berman, Paul Schiff. *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*. Cambridge University Press, 2012, p.35.

¹⁰⁹⁶ Roseveare, Caroline. “Rule of Law and International Development.” 2013. DFID Research and Evidence Report- https://assets.publishing.service.gov.uk/media/57a08a0be5274a27b20003c7/Literature_Review_RoL_DFID-GSDCH-PEAKS_FINAL.pdf (accessed 20 December 2017).

¹⁰⁹⁷ See discussion in introduction.

¹⁰⁹⁸ Van Waeyenberge, Arnaud. “Mapping Global Legal Pluralism.” https://s3.amazonaws.com/academia.edu.documents/38003185/Mapping_Global_Legal_Pluralism.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1516904227&Signature=i6QiWtZrprURzHGqwk7y7zg3hgk%3D&response-content-disposition=inline%3B%20filename%3DMapping_Global_Legal_Pluralism.pdf,pg.1. Accessed 12th November 2017.

complex which both creates and legitimises' law and then enforces it in the nation-state is fundamentally absent.¹⁰⁹⁹

The previous chapter looked at three forms of pluralism that existed within domestic states and demonstrated that pluralistic orders within an overarching constitutional system could ultimately only be 'semi-autonomous' without undermining the fabric and claim of the constitution to possess supreme normative and legal authority, with the constitutional order being facilitated by the regulatory capacity of the centralised state. However, rather than being situated within the regulatory structures of the state, 'global legal pluralism' is instead situated in the decentralised international system which lacks the harmonising and centralising qualities of the domestic state.¹¹⁰⁰ The question of whether this pluralistic international system has an apex or a centre which can emulate these qualities and thus support an emergent global constitution is key for any assessment of the prospect.¹¹⁰¹

Previous chapters have discussed, specifically, whether the internal structures of international organisations might provide a framework for global constitutionalism. However, an overarching global constitution would require not only the capacity for the 'internal' or regime specific legal stabilisation of particular international organisations, but also a degree of 'external' stabilisation that would create something of a common and authoritative reference point, both in terms of normativity and in terms of dispute settlement between different orders.¹¹⁰² Such a

¹⁰⁹⁹ Teubner, Gunther. "Global Bukowina: Legal Pluralism in the World-Society." 1996 – <https://core.ac.uk/download/pdf/14504125.pdf> [Accessed 12th November 2017], pg.1.

¹¹⁰⁰ Teubner, Gunther. *Constitutional Fragments: Societal Constitutionalism and Globalization*. Oxford University Press, 2012, p.6.

¹¹⁰¹ Prandini, *The Morphogenesis of Constitutionalism in Twilight of Constitutionalism*, Oxford University Press 2010.

¹¹⁰² Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, p.63.

legal and organisational structure would importantly be required to ameliorate the potential conflict that could be caused by the existence of a host of different legal orders and regimes, each with different and possibly conflicting fundamental aims. Any form of global constitution would have to achieve these aims without the many unifying resources available to the state in terms of shared territory, resources, culture, and ultimately, the capacity to use force to impose ‘constitutional will’ on their legal subjects.¹¹⁰³ A global constitution, however pluralistic or multilevel, would thus ultimately need to possess supremacy over the multitude of legal orders operating within it at least at the level of its own competence. Without this important characteristic, any global constitution would not be able to claim for itself the mantle of providing any form of ‘comprehensive’ or ‘legitimate’ framework for the exercise of public power and would ultimately simply exist as one more legal order within a plurality of equal and autonomous legal orders.¹¹⁰⁴

Thus, to assess the potentiality for global constitutionalism within a pluralist international order, and find out whether a locus for broader constitutionalism can be identified, we need to assess the potentiality of ‘anchoring the multitude of global legal orders to a broader social matrix or system whereby an authoritative source for dispute resolution and enforcement within the pluralism of the international system might be identified’.¹¹⁰⁵ This chapter will assess whether the emergence of such an order is likely, given the current state of the global system. It will suggest that an assessment of the current condition of global legal pluralism *vis-à-vis* the

¹¹⁰³ Ibid, pp.61-66.

¹¹⁰⁴ Ibid. Also, Habermas *Does the Constitutionalization of International Law Still have a Chance, in The Divided West*, 2006.

¹¹⁰⁵ This is a key objective for the Liberal Global Constitutionalists discussed in Chapter 3. For example, in De Wet, Erika. “The International Constitutional Order.” *International & Comparative Law Quarterly* 55.1, 2006: 51-76 and Fassbender, Bardo. “The United Nations Charter as Constitution of the International Community.” *Colum. J. Transnat’l L.* 36, 1998: 529.

potentiality for global constitutionalism does not, for the moment, suggest a positive outcome in this regard. It will argue that the sheer diffusion of ‘legal orders’ in the global system, both in type and objective creates a broad potentiality for ‘rationality conflicts’ between the different orders, a trend which does not appear to be resolvable, at least in the framework of contemporary international governance, and is exacerbated by power relations within that system.¹¹⁰⁶ To make this argument, this chapter will first look at the different forms of plural order that have arisen in the international system before analysing their relationship within the context of constitutionalism’s centralising tenets to see whether sufficient potentiality for a constitutional locus can be found within this set of orders.

1.2 Core and Periphery: The Structure of Global Legal Pluralism

As we have seen, a multitude of different types of international legal regime and organisation exist in the rapidly expanding ‘social space’ provided for by exponential globalisation and legal globalism, resulting in a condition of complex global plurality.¹¹⁰⁷ However, not all of these regimes have the same structure, and some broad divisions are useful in ascertaining a better understanding of the multifaceted nature of this system. Gunther Teubner suggests that within the international system, two frames of ordering can be observed to operate, which

¹¹⁰⁶ Whilst, as Identified in Chapter 4, there exist a limited set of norms that have gained some acceptance as *Jus Cogens*, in practice, the formal existence of such norms within public international law has had little, if any impact on the phenomenon of regime conflict which forms the core of the critical analysis within this section in terms of engendering mutually agreeable solutions between conflicting orders in the international system, particular in cases (most) where there exists no formal mechanism to decide on the legal validity of the claim. Also, as these norms apply broadly only to state conduct and within public international law, they are of little use in regulating ‘external’ post-state forces, particularly transnational corporations which are also key to the problems of fragmentation identified in later sections of this chapter. As the objective of this thesis is to look at extrapolating the empirical benefits of constitutionalism into the international system, the mere existence of these formal norms cannot be seen as a counter to the overarching forces of fragmentation I describe.

¹¹⁰⁷ Berman, Paul Schiff. *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*. Cambridge University Press, 2012. Perez, Oren. “Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law.” *Indiana Journal of Global Legal Studies* 10.2, 2003: 25-64.

possess certain distinct qualities yet often overlap with each other. Teubner describes these frames as the core and the periphery of the international legal system,¹¹⁰⁸ although other terms have been used by scholars such as Schiff Berman, who utilises the terms ‘international’ and ‘transnational’ to refer to these differentiated orders.¹¹⁰⁹

Broadly speaking, within this paradigm the ‘core’ or ‘international’ regimes remain, at least to some extent, tethered to the more conventional or historical perspective of international law in which state consent and the role of the state maintain a relatively dominant role. This ‘core’ of the international legal system is what has been primarily focused on in the previous chapters of this thesis and comprises broadly of public international law and the largest International Institutions and treaties that make up the rules and norms of the system, as well as playing a role in enforcing them. These organs rely for their legitimacy on their grounding within the ‘Westphalian’ system of international law, whereby the power of these organisations is premised on their link to large, multilateral, foundational treaties.¹¹¹⁰

Such organisations have usually grown up with the intention of regulating wide swathes of the international system such as global security (in the case of the UN) international trade (in the case of the WTO) or to handle particular regional issues, such as the European Union (EU), ASEAN, or the Organisation for American States. Many of these organisations (although certainly not all) emerged

¹¹⁰⁸ Teubner, Gunther. *Constitutional Fragments: Societal Constitutionalism and Globalization*. Oxford University Press, 2012 pp.54-59.

¹¹⁰⁹ Berman, Paul Schiff. *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*. Cambridge University Press, 2012.

¹¹¹⁰ Teubner, Gunther, ed. *Global law without a state*. Vol. 18. Aldershot: Dartmouth, 1997, pp.45-49. Fraser, Nancy. “Special Section: Transnational Public Sphere: Transnationalizing the public sphere: On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World.” *Theory, Culture & Society* 24.4, 2007: 7-30.7.

in the wake of the Second World War as a result of the massive expansion in international governance that occurred during this period.¹¹¹¹ Resultantly, many of them have direct or indirect links to the UN system, such as the WHO or International Labour Organisation (ILO).¹¹¹² Alongside these core organisations, a number of important multilateral treaties also play a significant role in outlining or defining particular ‘rules of the international legal system’ and the structure of interactions within a framework governed by public international law and state consent.¹¹¹³ Many of these treaties are also linked to the broader UN system. For example, the Vienna Convention on the Law of Treaties is particularly important in the interpretation of this broader system of public international law and international governance, as well as the International Convention on the Law of the Sea, the International Covenant on the Rights of the Child and many others.¹¹¹⁴ The WTO and associated institutions, as we have seen in Chapter 4, whilst not directly connected to the UN are nonetheless premised in a similar, world-scale treaty. Much of our previous discussion of global constitutionalism has, naturally, focused on this system and the most important organisations that operate within it. It is, therefore, unnecessary for this chapter to re-iterate these discussions in great depth, merely to identify this particular ‘core’ system and to differentiate it from the ‘periphery’ of global regulation which we will discuss below.

The above regimes are broadly premised on a notion of international law based on state consent and treaty law governed perhaps more broadly under what

¹¹¹¹ Collins, Richard, and Nigel D. White, eds. *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order*. Routledge, 2011.

¹¹¹² *Ibid.*

¹¹¹³ Bassiouni, M. Cherif. “International Crimes: Jus Cogens and Obligatio Erga Omnes.” *Law & Contemp. Probs.* 59 1996: 63.

¹¹¹⁴ Alvarez, José E. *International Organizations as Law-Makers*. Vol. 586. Oxford: Oxford University Press, 2005.

might be termed ‘public international law’. However, many scholars would contend that contemporary global governance and global law goes well beyond these traditional regimes that many international lawyers associate with the idea of international law and international governance.¹¹¹⁵ Resultantly, a focus on these organisations alone is insufficient to make broader assertions pertaining to global constitutionalism.¹¹¹⁶ According to these scholars, enormous swathes of regulation and governance have now become transnational, increasingly undermining the dominance of the state as the key player in a broader global system.¹¹¹⁷ According to Zumbansen, for example, ‘transnational legal pluralism seeks to understand the evolution of global law with regards to world society, as a non-territorially confined, functionally differentiated system constituted by the co-evolution of a multitude of different rationalities’¹¹¹⁸ in the global system, both in terms of norms and organisation. Such a vision moves away from the state as foundational to any vision of global order to it simply existing as one vital component among many.

In light of this, Teubner identifies a rapidly developing ‘periphery’ in the international system which comprises a truly ‘global’ or ‘transnational’ form of law, fundamentally divested from the nation-state itself and premised on a fluid global agora which is constantly growing in both importance and complexity.¹¹¹⁹

Accordingly, this periphery is increasingly detached from the more traditional rules

¹¹¹⁵ Teubner, Gunther, ed. *Global law without a state*. Vol. 18. Aldershot: Dartmouth, 1997, pp.45-49. Berman, Paul Schiff. “A Pluralist Approach to International Law.” *Yale J. Int’l L.* 32, 2007: 301. Fischer-Lescano, Andreas, and Gunther Teubner. “Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law.” *Mich. J. Int’l L.* 25, 2003: 999.

¹¹¹⁶ Teubner, Gunther. *Fragmented Foundations in Twilight of Constitution*, Oxford University Press, 2006, pp.335-336. Berman, Paul Schiff. “Global legal pluralism.” *S. Cal. L. Rev.* 80, 2006: 1155.

¹¹¹⁷ Zumbansen, Peer. “Transnational Legal Pluralism.” *Transnational Legal Theory* 1.2, 2010: 141-189, pp.141-143. Teubner, Gunther. “Global Bukowina: Legal Pluralism in the World-Society” 1996.

¹¹¹⁸ Zumbansen, Peer. “Transnational Legal Pluralism.” *Transnational Legal Theory* 1.2, 2010: 141-189. p.149

¹¹¹⁹ Teubner, Gunther. *Constitutional Fragments: Societal Constitutionalism and Globalization*. Oxford University Press, 2012.

of international governance, yet at the same time growing increasingly important as, territorially, boundaries between states lessen in functional terms.¹¹²⁰ This peripheral form of global law is not entirely detached from the more traditional forms of international law listed above, and indeed, it intersects and interacts at many different points with inter-state organisations.¹¹²¹ Nonetheless, the true ‘globality’ of these forms of international norm-creation and regulation is worth noting as a separate and emerging form of global governance. As demonstrated in the previous chapter, legal orders which have the capacity to affect the external system must be simultaneously regulated and governed by it within a constitutional system, otherwise, as we have seen, the fundamental purposes of constitutionalism are defeated. Thus, if global constitutionalism is to operate effectively, it must discipline not only traditional forms of international law, but also reach into the periphery to ensure that orders operating within it cannot undermine the broader constitutional structure.¹¹²² This study will discuss some of the ways in which this ‘global periphery’ operates, in particular highlighting the existence of a global *lex mercatoria* and the potential impact of this order on the idea of the global constitution.¹¹²³

Much of the global periphery has been driven by the capacity of non-state actors to interact with and influence the international system, as well as the incapacity of traditional international law to effectively regulate these bodies in the

¹¹²⁰ Ibid.

¹¹²¹ Teubner, Gunther. *Constitutional Fragments: Societal Constitutionalism and Globalization*. Oxford University Press, 2012, pp.54-59.

¹¹²² The final section of the previous chapter makes this point in detail, with particular reference to the work of Nico Krisch.

¹¹²³ Michaels, Ralf. “The True Lex Mercatoria: Law beyond the State.” *Indiana Journal of Global Legal Studies* 14.2, 2007: 447-468, 449-452. Berman, Paul Schiff. “Global Legal Pluralism.” *S. Cal. L. Rev.* 80, 2006: 1155.

absence of the clear legal parameters offered by the state.¹¹²⁴ The tremendous expanded reach of multinational corporations, many of which now rival medium-sized states in terms of financial and material resources has been at the centre of this advance. The rise of non-governmental organisations (NGOs) of all types has also been a critical component in the transnationalisation of international governance.¹¹²⁵ Other loosely affiliated ‘transnational policy networks, and ‘transnational policy communities’ have also played a substantial role in standard-setting.¹¹²⁶ What these actors have in common is they are ‘embedded in globality’, and ‘detached from the Westphalian model of international law which premises its legitimacy in state consent’. Rather than simply being international treaties or state law, the source of these transnational or global regulations can be international ‘soft law’, privately created codes of conduct, a separate or foreign legal model promoted by transnational actors, or a combination of the above.¹¹²⁷ In a sense then, these orders resemble in some regards the semi-autonomous orders that exist within domestic law. Unlike these orders, it is not clear at all whether they are fundamentally governed by any form of ‘higher law’ which could allow them to become part of a broader global constitution.¹¹²⁸

Examples of these more ‘peripheral’ or transnational international organisations abound, particularly within what Bermann terms as a ‘global *lex mercatoria*’ whereby a multitude of informal or semi-formal organisations have

¹¹²⁴ Singer, Peter W. “War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law.” *Colum. J. Transnat’l L.* 42, 2003: 521. Stephens, Beth. “The Amorality of Profit: Transnational Corporations and Human Rights.” *Berkeley J. Int’l L.* 20, 2002: 45.

¹¹²⁵ Spiro, Peter J. “New Global Communities: Nongovernmental Organizations in International Decision Making Institutions.” *Washington Quarterly* 18.1, 1995: 45-56, pp.45-50.

¹¹²⁶ Stone, Diane. “Global Public Policy, Transnational Policy Communities, and their Networks.” *Policy Studies Journal* 36.1, 2008: 19-38., p.20-21.

¹¹²⁷ *Ibid.*

¹¹²⁸ Cutler, A. Claire. *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy*. Vol. 90. Cambridge University Press, 2003.

grown up to regulate the movement of global finance and many other aspects of the global economy.¹¹²⁹ One example of such a body is the ‘Joint Forum on Financial Conglomerates’. This ‘forum’ consists of the Basel Committee on Banking Supervision, along with the International Organisation of Security Commissions, and the International Association of Insurance Supervisors.¹¹³⁰ The purpose of the organisation is to set common, global standards of practice for the supervision of these three key areas.

The most important of these institutions is the Basel Committee on Banking Supervision which was set up in 1973 with the intention of supervising and improving the global banking system.¹¹³¹ The Basel Committee is not a traditional multilateral organisation as ‘it has no founding treaty’ and is not premised on an official legal agreement between states.¹¹³² Instead, the Basel Committee is governed by various experts and representatives from financial institutions in attendant countries who cumulatively decide on policy, which is then put forward in the ‘Basel Accords’.¹¹³³ Although the Basel Accords do not have binding force in terms of hard, treaty law, they are nonetheless almost universally implemented into state law upon recommendation, thus creating a strong compliance pull in much the same way as the ‘semi-autonomous’ orders within nation states that we discussed in the previous chapter.¹¹³⁴ As Kern argues, such arrangements are endemic of a wider trend within the global *lex mercatoria* to set standards outside of the traditional

¹¹²⁹ Berman, Paul Schiff. “Global Legal Pluralism.” *S. Cal. L. Rev.* 80, 2006: 1155, pg.1162.

¹¹³⁰ Website of the Bank for International Settlements

http://www.bis.org/list/jforum/tid_140/index.htm- Accessed 26th October 2017.

¹¹³¹ *Ibid.*

¹¹³² Wood, Duncan Robert. *Governing Global Banking: the Basel Committee and the Politics of Financial Globalisation*. Gower Publishing, Ltd., 2005.

¹¹³³ Website of the Bank for International Settlements

http://www.bis.org/list/jforum/tid_140/index.htm- Accessed 26th October 2017.

¹¹³⁴ Alexander, Kern. “Global Financial Standard Setting, the G10 committees, and International Economic Law.” *Brook. J. Int’l L.* 34, 2008: 861. pp 861-862.

environs of public international law within self-created ‘technical’ bodies, staffed not by state representatives but by functional experts in a field, who possess considerable technical knowledge within the subject and often an agenda in furthering the efficiency and profitability of these bodies.¹¹³⁵ Another example of a prominent international network which has substantial influence on the practices of global corporations worldwide is the International Corporate Governance Network (ICGN), whose codes of conduct, set out in the ‘Statement on Global Corporate Governance Framework’, remain extremely influential in modern corporate governance, and offer a concrete set of guidelines and recommendations which corporations are strongly advised to follow.¹¹³⁶ Core principles underpinning the statement focus on profitability and the protection of shareholders as key principles for corporations involved with the ICGN.¹¹³⁷

To further strengthen this picture of an increasingly self-sufficient and self-regulating global regime, disputes between corporations within the global *lex mercatoria* are increasingly being resolved not by state courts or international organisations, but rather within influential global arbitration organisations such as the London Court of International Arbitration, the New York Board of International Arbitration, or the International Chamber of Commerce in Paris.¹¹³⁸ These bodies are now seen as core venues for resolving legal disputes by actors in the international economic system and contribute to the formation of a global *lex mercatoria*.¹¹³⁹ As Teubner points out, such processes have resulted in the transfer

¹¹³⁵ Ibid.

¹¹³⁶ International Corporate Governance Network – <https://www.icgn.org/> – Accessed 6th November 2017.

¹¹³⁷ Ibid.

¹¹³⁸ Redfern, Alan. *Law and Practice of International Commercial Arbitration*. Sweet & Maxwell, 2004.

¹¹³⁹ Berman, Paul Schiff. “Global Legal Pluralism.” *S. Cal. L. Rev.* 80, 2006: 1155, pg.1234.

of core facets of law into fundamentally global systems, creating definitive breaks from the traditional vision of international law as founded in treaties between states.¹¹⁴⁰

The above organisations and networks, while informal in many ways and separated from broader international treaties, demonstrate the existence of a multitude of semi-formal or customary codes that underwrite many aspects of global corporate governance. The corporate codes which inform much of the wider *lex mercatoria* of the global marketplace are often detached from the direct legal oversight of international organisations or from states.¹¹⁴¹ Stone Sweet further argues that these rules often uphold greater degrees of compliance in the international system than traditional inter-state law because they are ‘internalised’ by the global actors as being legitimate.¹¹⁴² This is a result of the functional nature of many of these global legal sub-systems, whereby legal codes, instead of being formulated by distant state officials or the secretariat of international organisations, are instead often more broadly formed by networks of individuals and bodies with direct expertise in the pertinent area.¹¹⁴³ As well as expertise, the networks responsible for creating these ‘internal’ regime rules are also particularly invested with the success of that particular regime. Thus, the ‘rules of the game’ that they identify are more often aligned with the direct objectives of the organisations or individuals they purport to govern.¹¹⁴⁴ As Koskienemmi suggests, many of the bodies creating regulation in the global agora are ‘intensely focused on singular

¹¹⁴⁰ Teubner, Gunther *Fragmented Foundations in Twilight of Constitutionalism*, Oxford University Press, 2010, pp.330-335.

¹¹⁴¹ Stone Sweet, Alec. “The New Lex Mercatoria and Transnational Governance.” *Journal of European Public Policy* 13.5, 2006: 627-646., p.627. Berger, Klaus Peter. *The Creeping Codification of the New Lex Mercatoria*. Kluwer Law International, 2010.

¹¹⁴² Stone Sweet, Alec. “The New Lex Mercatoria and Transnational Governance.” *Journal of European Public Policy* 13.5, 2006: 627-646, pp.627-630.

¹¹⁴³ *Ibid.*

¹¹⁴⁴ *Ibid.*

rationalities'.¹¹⁴⁵ This is particularly true in the emerging global *lex mercatoria*, and will become a key point in the upcoming discussion on whether sufficient centralisation can be found within global pluralism to posit the potential existence of global constitutionalism. Resultantly, the combination of binding corporate codes and the increasing movement towards private dispute settlement suggest that the global *lex mercatoria* is beginning to write its own laws, interpreted and enforced through a self-contained legal system.¹¹⁴⁶

Before discussing how this multitude of orders affects global constitutionalism, it is worth noting that these transnational regimes and regulations are not solely confined to the rapidly emerging global *lex mercatoria*. Several other forms of important and influential standard-setting organisations can be found within the international system. The governance of global health has become increasingly transnationalised, moving beyond the core international organisation into the transnational sphere on a host of issues.¹¹⁴⁷ Good examples of this include the Global Alliance for Vaccination and Immunisation (GAVI). GAVI is a coalition of international organisations, national governments, foundations, communities, NGOs and co-operating pharmaceuticals that seeks to introduce new vaccines into countries, to disseminate knowledge and to ensure that vaccinations occur.¹¹⁴⁸ GAVI is extremely 'regime-specific' in its operation, but nonetheless influential within its own sphere, being key in implementing its standards and

¹¹⁴⁵ Koskenniemi, Martti. "The Fate of Public International Law: Between Technique and Politics." *The Modern Law Review* 70.1, 2007: 1-30, p.23.

¹¹⁴⁶ Appelbaum, Richard, William Felstiner, and Volkmar Gessner, eds. *Rules and Networks: The Legal Culture of Global Business Transactions*. Bloomsbury Publishing, 2001. Stone Sweet, Alec. "The New Lex Mercatoria and Transnational Governance." *Journal of European Public Policy* 13.5, 2006: 627-646, pg.627.

¹¹⁴⁷ Fidler, David. "Architecture Amidst Anarchy: Global Health's Quest for Governance." *L Global Health Governance*, 2007. Hale, Thomas, and David Held, eds. *Handbook of Transnational Governance*. Polity, 2011.

¹¹⁴⁸ Global Alliance for Vaccinations and Immunisation – <http://www.gavi.org/about/>

policies in 130 countries.¹¹⁴⁹ The funding and control of the organisation is multifaceted and comes from corporations, individuals, states, and multinational organisations.¹¹⁵⁰

Similarly to GAVI, the Global Water Partnership is another example of a ‘hybrid form of organisation’, which draws its legitimacy and funding from a host of state and non-state actors. Experts play a significant role in agenda-setting as ‘norm-entrepreneurs’ and then these standards are imposed or re-imposed into nation systems or into the law of international organisations.¹¹⁵¹ While these types of organisation can sometimes be more mixed and cleave to or rely on states to enforce their norms, they are nonetheless clear examples of globality, and the emergence of global regulation and norm-creation that goes beyond traditional perspectives of international law that focus primarily on public international law and major Intergovernmental institutions.¹¹⁵² They also show the international laws and norms can originate from diverse places in the broader global sphere and thus an excessive focus on ‘formal’ aspects of international law might miss some of the important norm and rule generating processes which occur elsewhere.¹¹⁵³

As seen from the examples above, the international system is a dense tapestry of pluralism. Many different regimes operate within the same ‘social space’, each with different outcomes, aims, and structures.¹¹⁵⁴ Importantly, these pluralistic regimes have different degrees of interconnectedness to any sort of

¹¹⁴⁹ Stone, Diane. “Transfer Agents and Global Networks in the ‘Transnationalization’ of Policy.” *Journal of European Public Policy* 11.3, 2004: 545-566, pp.560-561.

¹¹⁵⁰ Ibid.

¹¹⁵¹ Global Water Partnership – <http://www.gwp.org/> – Accessed 27/10/2017.

¹¹⁵² Stone, Diane. “Transfer Agents and Global Networks in the ‘Transnationalization’ of Policy.” *Journal of European Public Policy* 11.3, 2004: 545-566.

¹¹⁵³ Zumbansen, Peer. “Transnational Legal Pluralism.” *Transnational Legal Theory* 1.2, 2010: 141-189, pp.141-155. Perez, Oren. “Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law.” *Indiana Journal of Global Legal Studies* 10.2, 2003: 25-64.

¹¹⁵⁴ Berman, Paul Schiff. “Global Legal Pluralism.” *S. Cal. L. Rev.* 80, 2006: 1155.

‘broader legal structure’, in terms of public international law and the major international organisations.¹¹⁵⁵ While some orders operate within the more traditional Westphalian frame, others are emerging in the post-state, transnational sphere and are increasingly self-regulating and operating outside the state-based system.¹¹⁵⁶ The global *lex mercatoria*, in particular, is increasingly self-constituting outside recognised structures of public international law. The existence of these multiple legal orders which operate externally from a broader system could pose a challenge to visions of global constitutionalism or global governance that seek to find unity in the international system.

As a result, such a dense and complex global pluralism could pose substantial problems for visions of global constitutionalism, which, at least to some extent, rely on a centralising vision whereby the constitution offers an overarching framework for dispute settlement within the polity, as well as a normative and legal hierarchy to ensure that society is governed broadly through law rather than simply by power.¹¹⁵⁷ This does not mean, as seen in the previous chapter, that a constitutional system cannot accommodate extensive pluralism so long as the autonomy of the orders operating within the system does not fundamentally undermine the cohesion of the overall constitutional structure.¹¹⁵⁸ The key question for scholars of global constitutionalism is whether the international system can provide a foundation for such a constitutional structure. The next section will assess the *interactions* of the multitude of plural orders to see if some form of harmonising locus can be identified allowing for a global constitution to emerge.

¹¹⁵⁵ Teubner, Gunther. *Constitutional Fragments: Societal Constitutionalism and Globalization*. Oxford University Press, 2012, pp. 54-59.

¹¹⁵⁶ Berman, Paul Schiff. “Global Legal Pluralism.” *S. Cal. L. Rev.* 80, 2006: 1155.

¹¹⁵⁷ In particular, Chapters 1 and 4 demonstrate this paradigm.

¹¹⁵⁸ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010.

2. Congruence or Conflict? Gunther Teubner, Fragmentation, and Rationality Conflicts

Having established the plural nature of global governance and legal order, this chapter will assess the relationship between this form of global legal pluralism and global constitutionalism. It will assess whether a locus for normative or institutional co-ordination might be identifiable, and will suggest that creating some form of overarching constitutional locus in the international system is extremely difficult because of what Gunther Teubner describes as ‘regime-conflicts’ based on the inherently different ‘rationalities’ of the plural orders operating in the international system.¹¹⁵⁹ As will be demonstrated, these ‘conflicting rationalities,’ combined with the absence of an overarching structure for enforcement, make the possibility of emergent global constitutionalism relatively remote for the time being.

The particular global pluralist paradigm discussed in the section above, where a multitude of legal and quasi-legal orders have emerged within the international system without a necessary connection to a broader, overarching, legal system, has led many scholars to discuss this particular form of global pluralism in terms of ‘fragmentation’.¹¹⁶⁰ Fragmentation refers to the ‘move away from the idea of a ‘coherent, central legal order’, and into a system based on functional

¹¹⁵⁹ Fischer-Lescano, Andreas, and Gunther Teubner. “Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law.” *Mich. J. Int’l L.* 25, 2003: 999, p.1005. Teubner, Gunther, and Peter Korth. “Two kinds of legal pluralism: Collision of transnational regimes in the double fragmentation of world society.” *Social Science Research Network* (2009), pg. 5.

¹¹⁶⁰ Hafner, Gerhard. “Pros and cons ensuing from fragmentation of international law.” *Mich. J. Int’l L.* 25 (2003): 849. Koskenniemi, Martti, and Päivi Leino. “Fragmentation of international law? Postmodern anxieties.” *Leiden Journal of International Law* 15.3 (2002): 553-579. Pauwelyn, Joost. “Bridging fragmentation and unity: International law as a universe of inter-connected islands.” *Mich. J. Int’l L.* 25 (2003): 903.

differentiation.¹¹⁶¹ It refers to the ‘diffusion of legal authority from the centre to the periphery’, where rather than ultimately drawing legal authority from a centralised source (such as a constitution), regimes within a system draw on ‘specialised and relatively autonomous’ systems of rules, some of which may be mutually exclusive.¹¹⁶² Whilst the two concepts of fragmentation and pluralism are undoubtedly related, they are not synonymous. As we saw in the previous chapter, legal pluralism has existed and continues to exist in a multitude of forms, and the degree of interconnection and convergence between different systems and between these systems and any wider social matrix or rule system depends specifically on the nature of the plural orders and the extent to which they are recognised by any overarching structure. Fragmentation, on the other hand, refers to an explicit process of decentralisation where regimes seek to stake out an autonomous space for themselves within a given system, operating as self-contained systems apart from any wider legal order.¹¹⁶³ The above analysis of global legal pluralism does seem to support the idea, that, at least to some degree, global pluralism is underpinned by this process, a contention which will be supported later in the chapter with reference to specific case studies.

Given the centralising tendencies of global constitutionalism both normatively and institutionally, the phenomenon of fragmentation within the international system could pose considerable problems. As seen from Chapter 3,

¹¹⁶¹ O’Donoghue, Aoife. *Constitutionalism in Global Constitutionalisation*. Cambridge University Press, 2014, pp.94-95. Klabbers, Jan. *Setting the Scene*. Klabbers, Jan, Anne Peters, and Geir Ulfstein. *The Constitutionalization of International Law*. Oxford University Press, 2009, pp.11-12.

¹¹⁶² Fischer-Lescano, Andreas, and Gunther Teubner. “Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law.” *Mich. J. Int’l L.* 25, 2003, pp1009-1017. Hafner, Gerhard. “Pros and cons ensuing from fragmentation of international law.” *Mich. J. Int’l L.* 25 (2003): 849, pp.849-851.

¹¹⁶³ Teubner, Gunther. *Constitutional fragments: societal constitutionalism and globalization*. Oxford University Press, 2012, p.156. Hafner, Gerhard. “Pros and cons ensuing from fragmentation of international law.” *Mich. J. Int’l L.* 25 (2003): 849, pp.849-851.

most visions of a ‘singular’ global constitution focus on the ‘emergence of a normative hierarchy’, which is broadly premised on public international law and anchored by the UN system, which reflects the same kind of system. However, if, instead, the international system is comprised of ‘functionally differentiated’ and autonomous legal orders, then the ‘comprehensiveness’ of any constitutional system could be fatally undermined.

Nonetheless, as Anne Peters suggests, the existence of a certain degree of fragmentation need not be fatal, at least to aspirational visions of global constitutionalism. If the sometimes chaotic and decentralised nature of the international legal system is simply a result of the ‘legal framework’ of the global system being insufficiently developed to manage the enormous profusion of regulation that has become necessary because of exponential sectorial globalisation,¹¹⁶⁴ the creation of a ‘sound legal order’ might be welcomed by the host of regulatory bodies in the international system as beneficial both to their interactions and for the predictability and the efficacy of the overarching system.¹¹⁶⁵ Given the absence of an overarching, state-like mechanism, the question of whether common interest can be garnered between these orders thus becomes extremely important for any concept of global constitutionalism.¹¹⁶⁶ Advocates of a constitutional or unified vision of global law, including Oscar Schacter, have suggested that ‘public international law might provide the highways between other,

¹¹⁶⁴ Sweet, Alec Stone. “Constitutionalism, Legal Pluralism, and International Regimes.” *Indiana Journal of Global Legal Studies* 16.2, 2009: 621-645. Peters, Anne. “The Merits of Global Constitutionalism.” *Indiana Journal of Global Legal Studies* 16.2, 2009: 397-411.

¹¹⁶⁵ Peters, Anne. “Compensatory Constitutionalism: the Function and Potential of Fundamental International Norms and structures.” *Leiden Journal of International Law* 19.3, 2006: 579-610, pp.602-605.

¹¹⁶⁶ Peters, Anne. “Compensatory Constitutionalism: the Function and Potential of Fundamental International Norms and structures.” *Leiden Journal of International Law* 19.3, 2006: 579-610.

isolated villages of international law'.¹¹⁶⁷ From this perspective, the multiplicity of international legal regimes might be disciplined under some form of 'global constitutionalism'.¹¹⁶⁸ Such a perspective assumes that a certain unity of purpose and principle might be brought among the multitude of global regimes, as any conflict between them is simply a result of the *absence* of an overarching legal framework. Such a view draws parallels with the way in which autonomous or semi-autonomous legal orders in pre-state societies were eventually inveigled into broader constitutional structures. Global constitutionalism is therefore seen as a solution to the problem of 'fragmentation', envisaged as an opposing force which might re-order the many heterarchical and functional organisations that have grown up as a result of globalisation and bring them together under a wider rule of law.¹¹⁶⁹

However, Gunther Teubner and Andreas Fischer Lescano disagree with this perspective, arguing that it fundamentally misunderstands certain key features of global legal pluralism. Teubner suggests the idea that the fragmentation of global law is not simply a natural manifestation of a globalising world society which could be disciplined through a singular vision of global law; in particular, it does not consider the whole picture regarding global legal fragmentation.¹¹⁷⁰ Rather than simply being a natural and organic process, Teubner suggests that global legal pluralism has its origins in contradictions between 'society-wide institutionalised' rationalities.¹¹⁷¹ In the absence of an overarching framework to resolve disputes and

¹¹⁶⁷ Schachter, Oscar. *International Law in Theory and Practice*. Vol. 13. Martinus Nijhoff Publishers, 1991, p.1. See also Pauwelyn, Joost. "Bridging Fragmentation and Unity: International Law as a Universe of Inter-connected Islands." *Mich. J. Int'l L.* 25, 2003: 903.

¹¹⁶⁸ Pauwelyn, Joost. "Bridging Fragmentation and Unity: International Law as a Universe of Inter-connected Islands." *Mich. J. Int'l L.* 25, 2003: 903, pp.906-910.

¹¹⁶⁹ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010.

¹¹⁷⁰ Teubner, Gunther. "*Fragmented Foundations*." *Twilight of Constitutionalism*, Oxford University Press, 2010.

¹¹⁷¹ Fischer-Lescano, Andreas, and Gunther Teubner. "Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law." *Mich. J. Int'l L.* 25, 2003, p.1004.

authorise judgements, global functional systems create a sphere for themselves where they are free to ‘intensify their own rationality’ without regard to other social systems.¹¹⁷² Importantly, these regimes frequently claim legitimacy not from being situated in a wider global order, but rather from their own internal rationality or legal norms.¹¹⁷³ Resultantly, many of these organisations produce their own internal rules of law-making, legal recognition, and legal sanctions. These organisations, rather than acting as ‘discrete heterarchies in a wider legal order’ have sought to establish themselves as ‘autonomous legal orders at the global level’.¹¹⁷⁴ In this light, Teubner suggests that many of the phenomena identified, in Chapter 4 for example, regarding the alleged violations of individual rights by transnational corporations are not simply conflicts between individual rights or disputes between particular international organisations, states, or corporations, but are instead ‘collisions of institutionalised rationalities’, which are embodied in the different policies of different regimes, and are manifestations of a wider fragmentation of global society.¹¹⁷⁵ This wider societal fragmentation has resulted in organisations that are both functionally differentiated and ‘fragmented, operationally closed and functionally differentiated systems of a global society’.¹¹⁷⁶ According to this viewpoint, the arguments made by global constitutionalists that the ‘islands of specialised international law’ might effectively be bound together by highways of ‘public’ international law are fundamentally flawed, as these regime-specific organisations do not wish to operate within a cohesive whole as working within a

¹¹⁷² Ibid, p.1006.

¹¹⁷³ Ibid.

¹¹⁷⁴ Teubner, Gunther. *Constitutionalising Polycontextuality* Social and Legal Studies, 19, 2010, pp.5-8. Teubner, Gunther. “*Fragmented Foundations*” In *Twilight of Constitutionalism*, Oxford University Press, 2010, p.330.

¹¹⁷⁵ Ibid, *Fragmented Foundations*, p.330-334.

¹¹⁷⁶ Teubner *Fragmented Foundations in Twilight of Constitutionalism*, Oxford University Press, 2010, p.331.

collective framework that would undermine their capacity to pursue their own rationalities and attempts to stake themselves out as the only legitimate framework within a particular area.¹¹⁷⁷

This, inevitably, according to Teubner, will lead to continuous regime collisions and relationships that are anything but harmonious.¹¹⁷⁸ According to this logic, the *autonomous nature* of these organisations is not simply a result of the absence of an overarching legal framework, but part of a broader conceptual problem relating to the fact that submission to and recognition of broader constitutional frameworks would undermine the capacity of these orders to ‘self-constitute’ and ‘self-govern’ according to their own rationalities.¹¹⁷⁹ If this is the case, this is clearly substantially problematic for visions of global constitutionalism. As seen from the previous chapter, the autonomy of legal orders within a constitutional system is, at least to some degree, predicated on the recognition of the order by the broader constitutional system. In the absence of a clear overarching framework to govern this multitude of orders, a certain degree of voluntary compliance and connection to a potential broader constitution would be necessary. This would be substantially challenged if Teubner’s hypothesis regarding the fierce internal rationality of regimes and the inevitable regime conflict this leads to turns out to be true.

As well as making a functional claim that the ‘functionally differentiated’ and ‘closed’ nature of global pluralism undermines the potentiality for overarching

¹¹⁷⁷ Ibid.

¹¹⁷⁸ Teubner, Gunther, and Peter Korth. "Two kinds of legal pluralism: Collision of transnational regimes in the double fragmentation of world society." In *Regime Interaction in International Law: Facing Fragmentation*, Margaret Young, ed., Oxford University Press, 2010; see in particular section 4 for different forms of regime conflict.

¹¹⁷⁹ Fischer-Lescano, Andreas, and Gunther Teubner. "Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law." *Mich. J. Int'l L.* 25, 2003, p.1004.

global constitutionalism, Teubner goes further to make certain normative claims regarding this highly functionally differentiated, yet potentially conflicting, form of global pluralism.¹¹⁸⁰ He claims that not only is this ‘fragmenting global system’ undermining any possibility for an overarching global constitutionalism, but also that the breakdown of the international system into this multitude of autonomous and self-contained regimes is at the heart of many of the core problems faced by the international community.¹¹⁸¹ He suggests that the inability of the international system to deal with fundamental issues relating to, for example, the violation of human rights by transnational enterprises, or the rising problem of global climate change, is premised on the ‘rationality maximisation’ of orders within the global plurality.¹¹⁸² Similarly, Luhmann argues that powerful regimes premised in a global economic rationality have damaging consequences within other areas of life which are at least equally important to global society, such as the maintenance of equitable ecological and environmental conditions as they seek to benefit their own economic rationality above other concerns which Luhmann considers critical for the general well-being of humanity.¹¹⁸³ Further to this, Teubner claims that in a situation where self-contained regimes are constantly in conflict with each other, ultimately disputes are decided not by rule of law systems, but by power – by the material ability of hegemonic regimes to dominate the global social space.¹¹⁸⁴ This claim is an important one, and will be assessed in the next section of the chapter.

¹¹⁸⁰ Teubner, Gunther. *Constitutionalising Polycontextuality* Social and Legal Studies, 19, 2010, pp.1-3. Fischer-Lescano, Andreas, and Gunther Teubner. “Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law.” *Mich. J. Int’l L.* 25, 2003, pp.1004-1008.

¹¹⁸¹ *Ibid.* Also Teubner, Gunther. “*Fragmented Foundations*” In *Twilight of Constitutionalism*, Oxford University Press, 2010, pp.336-338.

¹¹⁸² *Ibid.*

¹¹⁸³ Luhmann, Niklas. *Grundrechte als Institution*. Berlin: Duncker & Humblot, 1965, p.24.

¹¹⁸⁴ Teubner, Gunther. “*Constitutionalising Polycontextuality*.” *Social and Legal Studies*, 19, 2010, pp.3-4

This ‘normative’ claim will be addressed in more detail in the next chapter, and will include more substantive reference to Nico Krisch, who poses an alternative argument presenting pluralism as a more viable alternative in the international system.¹¹⁸⁵ However, it is worth noting here that Teubner’s arguments are not merely descriptive, but also normative, as this will become relevant in the final chapter of the thesis, which will seek to assess if constitutionalism can still be a useful tool for creating better outcomes in the international system.¹¹⁸⁶

If Teubner’s hypotheses regarding regime conflict and rationality maximisation in the international system are true, then the nature and level of conflict between norms within the global pluralist order could well make the sort of harmonisation required for global constitutionalism extremely difficult to realise. If the chaotic nature of global legal pluralism is not simply a manifestation of functional differentiation within a globalised system, but instead a manifestation of deeper ‘rationality conflicts’ within global society, then, in the absence of an overarching government to govern these concepts, a ‘bottom-up’ form of global constitutionalism whereby the various orders within the international system organise or harmonise voluntarily seems extremely unlikely. Through looking at several case studies of conflict within the international order, I will suggest that although Teubner’s hypothesis may not be universally true for interactions between global orders, there are enough substantive ‘rationality conflicts’ between different orders in which legal orders tend to work in an intensively ‘regime-driven’

¹¹⁸⁵ This argument is made in the final chapters of Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law.* Oxford University Press, USA, 2010.

¹¹⁸⁶ Gunther Teubner. “Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law.” *Mich. J. Int’l L.* 25, 2003, pg.1007. Teubner, Gunther. “*Constitutionalising Polycontextuality.*” *Social and Legal Studies*, 19, 2010, pp.1-2.

fashion.¹¹⁸⁷ Rather than referring to wider global principles or seeking compromise with other potentially equally valid positions through effective resolution of conflict law, conflict in the international system is becoming increasingly defined and driven by the often widely diverging rationalities of ‘functionally closed’ international regimes.¹¹⁸⁸ I will begin by looking at what might be considered more ‘traditional’ forms of regime conflict in the international system involving treaty-based regimes and laws, before moving on to the potential for clashes between ‘private’ international regimes and broader structures of international and state law.

2.1 The GMO dispute

The first relevant case study which I will analyse below involves a conflict between the norms of the World Trade Organisation and the Convention on Biological Diversity, facilitated through disagreement between the United States (US) and WTO on one hand and the European Union on the other. It is often referred to in academic literature as the ‘GMO dispute’.¹¹⁸⁹ The conflict has centred around the conflict between the two regimes’ conflicting perspectives on whether it was acceptable or lawful for the EU to place an import moratorium on genetically modified crops from the US, a position the US and WTO itself claimed was not legitimate under WTO law. The dispute fundamentally centred on a ‘rationality’ conflict between the EU (supported by the CBD) and the US, supported by the WTO.¹¹⁹⁰

¹¹⁸⁷ Fischer-Lescano, Andreas, and Gunther Teubner. “Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law.” *Mich. J. Int’l L.* 25, 2003: 999. Teubner, Gunther. “The Anonymous Matrix: Human Rights Violations by ‘Private’ Transnational Actors.” *The Modern Law Review* 69.3, 2006: 327-346.

¹¹⁸⁸ *Ibid.*

¹¹⁸⁹ Krisch, Nico. “*Beyond Constitutionalism: The Pluralist Structure of Postnational Law.*” Oxford University Press, USA, 2010, p.191. Winham, Gilbert R. “International Regime Conflict in Trade and Environment: The Biosafety Protocol and the WTO.” *World Trade Review* 2.2, 2003: 131-155.

¹¹⁹⁰ *Ibid.*

The ‘GMO dispute’ was, as Nico Krisch suggests, premised on ‘fundamentally opposing and deeply held convictions about risk, nature, and scientific progress’.¹¹⁹¹ On the one hand, the US currently holds a more ‘permissive’ approach to the issue of food safety, which sees restrictions on the sale and production of food as permissible only when concrete scientific proof exists that risks threaten human health, the environment, or other important goods.¹¹⁹² In the absence of such proven risks, the use of food and feed for commercial purposes is free. Resultantly, as tests on GMO food have not revealed ascertainably higher risks than for other products, the US position is that they should not be restricted, and thus any moratoriums are not justified.¹¹⁹³ In a sense, the US logic is that the environmental aspects of trade and food and feed are a component of free trade law, merely a consideration that must be taken into account when deliberating about the sale of these foodstuffs.

On the other hand, the EU favours what might be described as a ‘precautionary’ approach when it comes to the sale, production, and use of foodstuffs.¹¹⁹⁴ This approach emphasises that in conditions of scientific uncertainty and potentially serious risk, it is contingent upon producers and regulators to err on the side of caution.¹¹⁹⁵ Resultantly, because of the relatively untested nature of GMO products, and the difficulty of testing them within entire ecosystems, EU institutions in effect operated a de facto moratorium on the use of GMOs.¹¹⁹⁶ As the US produces 68% of the world’s genetically modified crops, the blocking of these

¹¹⁹¹ Krisch, Nico. “*Beyond Constitutionalism: The Pluralist Structure of Postnational Law.*” Oxford University Press, USA, 2010, p.190.

¹¹⁹² Ibid.

¹¹⁹³ Ibid.

¹¹⁹⁴ Ibid. Also Dickson, Barney, and Rosie Cooney, eds. *Biodiversity and the Precautionary Principle: Risk and Uncertainty in Conservation and Sustainable Use.* Routledge, 2005. 27.

¹¹⁹⁵ Ibid. p.191.

¹¹⁹⁶ Ibid.

crops by the EU had substantial economic impact on particular areas of the US economy.¹¹⁹⁷

As Winham argues, there was a fundamental ‘rationality conflict’ between the EU and US on this issue.¹¹⁹⁸ The approaches taken reflect different priorities with regards to risk in scientific progress and, in particular, to alterations of nature and its potential consequences.¹¹⁹⁹ The differential here is partially based on previous experiences of the EU regarding safety, but also partly based on divergences in deeper domestic roots, where European citizens have consistently opposed GMOs on the premise of possible although as yet unspecified harm.¹²⁰⁰ On the other hand, majorities in the US favour the use of GMOs for commercial purposes or otherwise. Because of this, a fundamental ‘rationality conflict’ between these two viewpoints was likely when it came to global trade in GMOs with regard to the selling of GMOs in European markets.¹²⁰¹

The conflict between the precautionary principle of the EU and the more permissive view upheld by the US ultimately resulted in conflict at the international level as the two powerful institutions each sought to impose their own rationality as the pre-eminent one at the international level.¹²⁰² Basing their argument on the previous *Beef Hormones* case of 1997, the US argued that the precautionary principle employed by the EU in its decision to impose a de facto moratorium on GMOs was not in line with the broad legal framework relating to scientific risk

¹¹⁹⁷ <https://gmoinquiry.ca/wp-content/uploads/2015/03/where-in-the-world-gm-crops-foods.pdf> – Accessed 2nd November 2017.

¹¹⁹⁸ Winham, Gilbert R. “International Regime Conflict in Trade and Environment: The Biosafety Protocol and the WTO.” *World Trade Review* 2.2, 2003: 131-155., pg.131.

¹¹⁹⁹ Krisch, Nico. “*Beyond Constitutionalism: The Pluralist Structure of Postnational Law.*” Oxford University Press, USA, 2010, p.191.

¹²⁰⁰ *Ibid.*

¹²⁰¹ *Ibid.*

¹²⁰² Winham, Gilbert R. “International Regime Conflict in Trade and Environment: The Biosafety Protocol and the WTO.” *World Trade Review* 2.2, 2003: 131-155, pp.135-136.

assessment vis-à-vis trade.¹²⁰³ To make this claim, the US cited the WTO's 'Application of Sanitary and Phytosanitary Measures' protocol, which is designed to ensure that measures undertaken to ensure food safety are not carried out in a trade discriminatory manner or 'otherwise constitute a disguised restriction on trade'.¹²⁰⁴ The agreement thus adopted a scientific basis for assessing the permissibility of trade limiting measures on account of food safety, and suggested that such restrictions can only be justified if there is 'sufficient and clear scientific evidence'.¹²⁰⁵ The position of the WTO was thus much closer to the viewpoint or 'rationality' of the US than of the EU, as was made clear in the *Beef Hormones* case, where the EU's arguments for the precautionary principle were given 'short shrift' by the WTO board. The latter consistently interpreted them as in abrogation of the Application of Sanitary and Phytosanitary Measures clause of the WTO agreement.¹²⁰⁶

The response of the EU to this measure begins to demonstrate, at a practical level, some of the concerns raised by Teubner regarding the problem, at least from a constitutional perspective, relating to regime and rationality conflicts in the pluralistic international legal system.¹²⁰⁷ In response to pressure from the US and WTO, the EU sought to entrench its own preferences in a separate legal instrument, the Convention for Biodiversity, which was part of the important 'Rio Process' that

¹²⁰³ Ibid, p.132. Krisch, Nico. "*Beyond Constitutionalism: The Pluralist Structure of Postnational Law.*" Oxford University Press, USA, 2010, pp.195-200.

¹²⁰⁴ World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures, Article 2- https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm – Accessed 2nd November 2011.

¹²⁰⁵ Ibid.

¹²⁰⁶ Winham, Gilbert R. "International Regime Conflict in Trade and Environment: The Biosafety Protocol and the WTO." *World Trade Review* 2.2, 2003: 131-155, p.140.

¹²⁰⁷ Fischer-Lescano, Andreas, and Gunther Teubner. "Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law." *Mich. J. Int'l L.* 25, 2003: 999.

has been key to global environmental regulation.¹²⁰⁸ In doing so, it sought to ‘establish a legal counterweight to WTO rules’.¹²⁰⁹ Given the wide membership of the CBD, the EU sought to utilise it as an ‘alternative treaty-regime’ which might legitimise the more restrictive vision on food safety preferred by the EU.¹²¹⁰ To this end, the EU ensured that, through the Cartagena protocol, its own preference was entrenched within a legally-binding protocol that operated outside the sphere of the WTO.¹²¹¹ Thus, the Cartagena protocol, under the pretext of protecting human health and the environment more broadly, specifically states that ‘lack of scientific certainty shall not prevent importers from taking appropriate action.... Where they believe a significant risk to public health or the environment may exist’.¹²¹² Indeed, the preamble of the Cartagena protocol states that the core purpose of the protocol was to ‘ensure an adequate level of protection in the field of safe transfer of living organisms.... In accordance with the precautionary principle laid down in Article 15 of the Rio Declaration on Environmental Protection’.¹²¹³ Because of this protocol, the EU claimed that its use of the precautionary principle, which had been widely discredited by the WTO as fundamentally contrary to the free trade principles espoused within, was legitimate as it operated within the core Rio framework for environmental protection.

As Krisch argues, the principles enshrined within these two international instruments appear to be fundamentally incompatible. The relationship with WTO

¹²⁰⁸ Winham, Gilbert R. “International Regime Conflict in Trade and Environment: The Biosafety Protocol and the WTO.” *World Trade Review* 2.2, 2003: 131-155, p.132.

¹²⁰⁹ Krisch, Nico. “*Beyond Constitutionalism: The Pluralist Structure of Postnational Law.*” Oxford University Press, USA, 2010, p.194.

¹²¹⁰ Winham, Gilbert R. “International Regime Conflict in Trade and Environment: The Biosafety Protocol and the WTO.” *World Trade Review* 2.2, 2003: 131-155, pg.131.

¹²¹¹ *Ibid*, p.141.

¹²¹² Cartagena Protocol, Convention for Biological Diversity, 2000, Article 11 – <https://www.cbd.int/doc/legal/cartagena-protocol-en.pdf>.

¹²¹³ *Ibid*, Article 2 – <https://www.cbd.int/doc/legal/cartagena-protocol-en.pdf>

law is ultimately not spelt out in the protocol.¹²¹⁴ Both treaties are entrenched with substantial historical pedigree and are ‘regimes in their own right’.¹²¹⁵ Thus, the core question of where obligation lies is challenged by the conflicting views of these two bodies. Ultimately, attempts to create greater regulatory convergence failed as a result of the distance between these two positions because of firm, yet conflicting, rationalities on both sides, which both claimed to possess sound legal authority for their actions.¹²¹⁶ Although the WTO ruled again on the GMO dispute in 2004 ruling against the moratorium, in practice the EU continued to refer to the rules outlined in the biosafety protocol and even after ‘officially’ lifting the moratorium in 2004, the EU continued to de facto impose it, partly as a result of sustained resistance among member states and within the council of ministers to allowing the US use of GMOs.¹²¹⁷ As one senior EU official stated in 2006, despite the WTO’s ruling, it would be ‘business as usual’ within the EU as far as GMOs were concerned, and indeed, the problem remains broadly unresolved today.¹²¹⁸

The GMO dispute demonstrates some clear problems with regard to the potentiality of global constitutionalism within the paradigm of ‘rationality’ and ‘regime-conflicts’ outlined by Teubner. Both the Biosafety Protocol and the WTO claim for themselves the right to define their status *vis-à-vis* other regimes.¹²¹⁹ This results in a ‘regime complex with a multiplicity of interacting sites of governance, each of which insists on determining its relationship with the outside’.¹²²⁰ At this

¹²¹⁴ Krisch, Nico. “*Beyond Constitutionalism: The Pluralist Structure of Postnational Law.*” Oxford University Press, USA, 2010, p.195.

¹²¹⁵ Winham, Gilbert R. “International Regime Conflict in Trade and Environment: The Biosafety Protocol and the WTO.” *World Trade Review* 2.2, 2003: 131-155, p.132.

¹²¹⁶ Krisch, Nico. “*Beyond Constitutionalism: The Pluralist Structure of Postnational Law.*” Oxford University Press, USA, 2010, pp.196-197.

¹²¹⁷ Ibid.

¹²¹⁸ Ibid.

¹²¹⁹ Winham, Gilbert R. “International Regime Conflict in Trade and Environment: The Biosafety Protocol and the WTO.” *World Trade Review* 2.2, 2003: 131-155, pg.143.

¹²²⁰ Teubner, *Constitutionalising Polycontextuality*, Social and Legal Studies, 19, 2010, p.12.

level, therefore, it is reasonable to posit the existence of autonomous, parallel orders operating in the international system without clear hierarchy.¹²²¹ As we can also see from this paradigm, in situations where these orders are ‘free to intensify their own rationalities’ without regard to other orders in the international system, the situation can be conflict which is close to unresolvable using ordinary legal or constitutional mechanisms.¹²²² In the instance described above, there existed relative parity in terms of global power of the two core actors (the US) and the EU). The end result of the conflict was a form of stalemate, as each interested party and their associated convention were unable to utilise political power to attempt to force the other party to comply through coercive measures.¹²²³

Clearly, such an outcome is deeply unsatisfactory to a constitutional mindset, whereby in situations of conflict between multiple legal orders, the centralised constitutional system should provide both the normative and legal hierarchy as well as the institutional structure to at least determine where solutions to these problems might be found. Krisch suggests that the dispute represents the ‘limits of legal co-operation and centralisation in a highly pluralistic world’.¹²²⁴ The fact that the GMO dispute had important consequences for both EU and US markets makes the fact that a definite conclusion between the two sides could not be reached all the more concerning for advocates of global constitutionalism, where conflicts on important matters, at least, should be decided under the broader principles and laws enshrined in the constitution.

¹²²¹ Teubner, Gunther. “*Fragmented Foundations*” in *Twilight of Constitutionalism*, Oxford University Press, 2010.

¹²²² Teubner, Gunther. “*Fragmented Foundations*” in *Twilight of Constitutionalism*, Oxford University Press, 2010, p.330.

¹²²³ Winham, Gilbert R. “International Regime Conflict in Trade and Environment: The Biosafety Protocol and the WTO.” *World Trade Review* 2.2, 2003.

¹²²⁴ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, p.213.

2.2 TRIPS, CBD, and Biopiracy: Rationality Conflicts and Power

Differentials

The above case is an example of regime conflict where the two powers supporting the opposing regimes were of roughly equivalent power. Resultantly, neither side of the dispute was ultimately able to force the other to accept their point of view. The second dispute to be analysed refers, similarly, to a dispute between Trade-Related Aspects of Intellectual Property (TRIPS) and the CBD, which has certain similar characteristics, with the exception being that one particular ‘rationality’ was backed by considerably more power and compliance pull than the other. The dispute and conflict has been largely over the issue of patenting genetic material and biodiversity, into which the scope of Intellectual Property Rights (IPR), supported by powerful neoliberal states and pharmaceutical national corporations has increasingly moved, arguably in direct contravention with protections provided by the Convention on Biological Diversity.¹²²⁵ As Haunss and Shadlen suggest, this practice has ‘increasingly brought the IPR regime into conflict with other laws and norms regarding the protection of biodiversity, ensuring food security, and other core matters for both national and international human rights regimes.’¹²²⁶ However, in this instance, there has been a broad power disparity between the developed states and multinational corporations pushing for stronger IPR regimes, and developing countries pushing for greater protection of biodiversity.¹²²⁷ As will be demonstrated, this has substantial implications for the regime-conflict paradigm within the

¹²²⁵ Adhikari, Ratnakar. “Emerging Issues Relating to Conflicts between TRIPS and Biodiversity: Development Implications for South Asia.” *South Asian Yearbook of Trade and Development*, 2005: 261-288., pp.264-270.

¹²²⁶ Haunss, Sebastian, and Shadlen, Kenneth. C. “Politics of Intellectual Property”, paper presented at Workshop for the Joint Sessions of the European Consortium for Political Research (EPCR), 2008. Available at: www.ecprnet.eu/ecpr/rennes/Workshop/14.pdf (accessed 11 Nov 2017).

¹²²⁷ *Ibid.*

international system, which in turn affects the ‘rule of law’-based order desired by constitutionalists. We will also see how the interplay between the two regimes supports Teubner’s wider conception of rationality maximisation, and how this affects global constitutionalism. The scope of this section is not sufficient to describe the entirety of the conflict between the regimes, and will therefore focus on the most important points and those most salient to the ways in which global constitutionalism might be impacted by these rationality conflicts.

The question of patenting genetic materials has been seen as one of the most controversial aspects of the TRIPS agreement, partially as a result of its apparent contradiction to rights embodied in the CBD.¹²²⁸ From the perspective of the CBD, the patenting of genetic or biological materials would appear to be fairly definitively banned. The CBD clearly states that ‘nation-states have sovereign public rights over their natural resources’¹²²⁹ and that ‘the use or exploitation of biological resources must give rise to equitably shared resources’.¹²³⁰ On top of this, the CBD states that ‘access to biological resources can only be attained with the consent of host state and requires the involvement and consent of local communities’.¹²³¹ Overall, the focus on national sovereignty and the right of communities and nations to utilise the benefits of their natural resources strongly implies that countries have the rights in particular situations to prevent and prohibit the use of IPR on life forms that exist

¹²²⁸ Ansari, Abdul Haseeb, and Lekha Laxman. “The Interface between TRIPS and CBD: Efforts Towards Harmonization.” *Journal of International Trade Law and Policy* 11.2, 2012: 108-132, pp.108-113. Ni, Kuei-jung. “The Incorporation on the CBD Mandate on Access and Benefit-Sharing into TRIPS Regime: An Appraisal of the Appeal of Developing Countries with Rich Genetic Resources.” *Asian J. WTO & Int’l Health L & Pol’y*, 2006: 433.

¹²²⁹ Convention for Biological Diversity, Article 3 – https://treaties.un.org/doc/Treaties/1992/06/19920605%2008-44%20PM/Ch_XXVII_08p.pdf – Accessed 2nd November 2017.

¹²³⁰ Convention for Biological Diversity, Preamble – https://treaties.un.org/doc/Treaties/1992/06/19920605%2008-44%20PM/Ch_XXVII_08p.pdf – Accessed 2nd November 2017.

¹²³¹ Convention for Biological Diversity, Article 8 – https://treaties.un.org/doc/Treaties/1992/06/19920605%2008-44%20PM/Ch_XXVII_08p.pdf

within their sovereign territory.¹²³² This is based on customary principles of international law relating to both sustainable development and sovereign rights to a country's natural resources.¹²³³

However, once again, a clear regime conflict can be identified with the TRIPS component of the WTO regime. Article 27 (3) of the TRIPS agreement allows for the patenting of micro-organisms, microbiological patents, and requires patents or sui generis protections on plant varieties.¹²³⁴ The principles of such a system would seem to be in direct contravention, or at least contradiction, to the principles set out in the CBD, as the WTO system would seem to allow biodiversity native to particular states to be patentable by foreign corporations, thus fundamentally stripping the state of its inherent right to benefit from biodiversity.¹²³⁵ As a result of this, the inclusion of this agreement was extremely controversial among developing countries at the time of its inclusion, and many developing countries strenuously objected. However, enormous pressure was brought to bear on these nations by the combined geopolitical weight of the western powers and associated multinational corporations, particularly in pharmaceuticals, which resulted in the protocol being included within the TRIPS agreement.¹²³⁶

As Lekha and Ansari argue, there is a compelling argument to be made that, once again, the principles enshrined in each of these two international regimes are

¹²³² Adhikari, Ratnakar. "Emerging Issues Relating to Conflicts between TRIPS and Biodiversity: Development Implications for South Asia." *South Asian Yearbook of Trade and Development*, 2005: 261-288, pg.266.

¹²³³ Duruigbo, Emeka. "Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law." *Geo. Wash. Int'l L. Rev.* 38, 2006: 33.

¹²³⁴ Agreement on Trade and Related Aspects of Intellectual Property Right (TRIPS), 1994, Article 27 (3).

¹²³⁵ Laxman, Lekha, and Abdul Haseeb Ansari. "The Interface between TRIPS and CBD: Efforts towards Harmonisation." *Journal of International Trade Law and Policy* 11.2, 2012: 108-132., pp.109-110.

¹²³⁶ Koskenniemi, Martti. "International law and hegemony: A reconfiguration." *Cambridge Review of International Affairs* 17.2, 2004: 197-218.

fundamentally incompatible with each other.¹²³⁷ While the core purpose, or rationality, of the CBD in this regard is to ensure national sovereignty over biodiversity and natural resources, the TRIPS agreement is intended to widen IPR rights as much as possible to allow multinational corporations maximum profitability through their use. Whilst the CBD seeks to uphold particular rights relating to this sovereignty to sufficiently ensure that a country's natural resources and biodiversity can be used for the benefits of the population as intended, the TRIPS agreement seeks to transfer as much as possible into its own regime-complex by making biological organisms patentable.¹²³⁸

A number of scholars have expressed substantial concern at the practices of TRIPS and the WTO regarding its attempts to subsume the regulation and patenting of biodiversity and micro-organisms into their regime.¹²³⁹ As they suggest, the IPR regimes have gradually increased their jurisdiction by seeking to transfer findings that previously would have been considered 'discoveries' into the category of inventions which can then be patented.¹²⁴⁰ A number of methods have been used by TRIPS to make this substantive transfer, which have caused consternation regarding the sovereign rights of nations over their own biodiversity. Increasingly, the global intellectual property regime, with TRIPS at its forefront, has sought to move biodiversity from being primarily a matter of environmental and sovereign rights

¹²³⁷ Laxman, Lekha, and Abdul Haseeb Ansari. "The Interface between TRIPS and CBD: Efforts towards Harmonisation." *Journal of International Trade Law and Policy* 11.2, 2012: 108-132, pg.122.

¹²³⁸ Ibid. Also, Adhikari, Ratnakar. "Emerging Issues Relating to Conflicts between TRIPS and Biodiversity: Development Implications for South Asia." *South Asian Yearbook of Trade and Development*, 2005: 261-288.

¹²³⁹ Zerbe, Noah. "Contested Ownership: TRIPS, CBD, and Implications for Southern African Biodiversity." *Perspectives on Global Development and Technology* 1.3. 2002: 294-321. Lettington, Robert. "The International Undertaking on Plant Genetic Resources in the Context of TRIPS and the CBD." *Bridges*, Year 5, 2001: 11.

¹²⁴⁰ Laxman, Lekha, and Abdul Haseeb Ansari. "The Interface between TRIPS and CBD: Efforts towards Harmonisation." *Journal of International Trade Law and Policy* 11.2, 2012: 108-132, pg.118.

into one of global trade.¹²⁴¹ They have done so by inferring that, if the life-form is altered in some perceptible way, such as inserting something into it (i.e. a gene), removing something from it (purifying it), or by altering its structure in some other way, it can then reasonably be counted as an invention and thus patented.¹²⁴² It is difficult to dispute that the above methods for ‘inventing’ bio-organisms or processes related to their industrial application goes against both the letter and spirit of the convention for biological diversity insofar as the convention seeks to prevent the privatisation and exploitation of biodiversity.

As well as ensuring sovereignty over biodiversity and natural resources, the CBD also seeks to ensure that any benefits attained from biodiversity are ‘equitably shared, particularly with regards to the use or exploitation of ‘traditional knowledge, innovations, and practices’.¹²⁴³ It is clear here again then that the purpose of this convention is to prevent the transfer of these resources into the private sphere for private or corporate gain. However, the TRIPS agreement does not contain effective provisions for sharing benefits between a patent holder in one country and the donor of the material from the other country in which the owner is derived, yet still allows many forms of biological organism to be patented.¹²⁴⁴ Several scholars suggest that through the use of the TRIPS regime, entities within the international system, primarily multinational corporations, are engaging in the ‘practice of biopiracy, whereby transnational corporations in the north make use of their scientists to seek out new genes located in the poorer south, genetically alter them and then patent the

¹²⁴¹ Ibid.

¹²⁴² Ibid.

¹²⁴³ Convention on Biological Diversity, Article 8-

https://treaties.un.org/doc/Treaties/1992/06/19920605%2008-44%20PM/Ch_XXVII_08p.pdf

¹²⁴⁴ Adhikari, Ratnakar. “Emerging Issues Relating to Conflicts between TRIPS and Biodiversity: Development Implications for South Asia.” *South Asian Yearbook of Trade and Development*, 2005: 261-288, pg.266.

new gene as an invention'.¹²⁴⁵ In this way, proprietary rights are transferred to corporations without any equitable sharing of benefits.

In doing so, these organisations are utilising the provisions in TRIPS to legally bypass the principles entrenched in the CBD.¹²⁴⁶ These processes have been assisted greatly by the advantages possessed by northern countries over southern ones in terms of technical, legal, and financial superiority.¹²⁴⁷ On top of this, the WTO, of which TRIPS is an important part, possesses an independent and effective system of jurisdiction and can employ sanctions against members judged to be non-compliant. This has meant that, in practice, states are reluctant to engage in practices that might result in expensive WTO procedures and possible sanctions even when they believe that their rights under the CBD might have been affected by the patenting of biotechnology from within their territory.¹²⁴⁸ This has allowed the IPR under the guise of TRIPS to 'maximise its own rationality in the international system without regard for other regimes', much in the way that Teubner describes in his thesis on the topic.¹²⁴⁹

As can be seen from the above, in reality the TRIPS agreement has had substantial capacity to impose its own preferences on the international system and

¹²⁴⁵ Adhikari, Ratnakar. "Emerging Issues Relating to Conflicts between TRIPS and Biodiversity: Development Implications for South Asia." *South Asian Yearbook of Trade and Development*, 2005: 261-288, pg.267. Aoki, K. "Neocolonialism, Anticommons Property and Biopiracy in the (not-so-brave) New World Order of International Intellectual Property Protection", *Indiana Journal of Global Legal Studies Journal*, Vol. 6 No. 11, 1998, pp.11-58.

¹²⁴⁶ Adhikari, Ratnakar. "Emerging Issues Relating to Conflicts between TRIPS and Biodiversity: Development Implications for South Asia." *South Asian Yearbook of Trade and Development*, 2005: 261-288. Aoki, K. 1998, "Neocolonialism, Anticommons Property and Biopiracy in the (not-so-brave) New World Order of International Intellectual Property Protection", *Indiana Journal of Global Legal Studies Journal*, Vol. 6 No. 11, pp. 11-58.

¹²⁴⁷ Adhikari, Ratnakar. "Emerging Issues Relating to Conflicts between TRIPS and Biodiversity: Development Implications for South Asia." *South Asian Yearbook of Trade and Development*, 2005: 261-288, p.267.

¹²⁴⁸ Adhikari, Ratnakar. "Emerging Issues Relating to Conflicts between TRIPS and Biodiversity: Development Implications for South Asia." *South Asian Yearbook of Trade and Development*, 2005: 261-288.

¹²⁴⁹ Fischer-Lescano, Andreas, and Gunther Teubner. "Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law." *Mich. J. Int'l L.* 25, 2003, p.1006.

other global regimes as a result of fundamentally being tied to a (at least in this instance) more powerful international regime than the CBD and supported by more powerful actors. This is of substantial concern, in that, while TRIPS is fundamentally concerned with the promotion of property rights and benefiting transnational corporations, the ‘Convention for Biological Diversity’ under the auspices of the UN is rooted in a number of other fundamental customary rights which have not only substantive legal, but also normative and humanitarian implications.¹²⁵⁰ The purpose of the protections in the CBD is, to a considerable degree, to provide a degree of balance and fairness in the production and sale of agricultural products between developing and developed countries, and to ensure that less financially endowed farmers are still able to benefit from the natural resources within their territories. It is thus premised on fundamental welfare rights for farmers in underdeveloped countries. If vastly wealthy multinational corporations are legally able to seize intellectual property from farmers in developing countries, then fundamental questions about justice and core human rights must be asked.¹²⁵¹

Numerous practical examples exist as to where plant material from a particular country has been patented by and profited from by major corporations under these premises, despite the supposed protections the CBD offers for genetic resources. Two relatively global and famous examples particularly stand out. Thus, under the guise of the TRIPS agreement, patents were granted by the EU and US on

¹²⁵⁰ Helfer, Laurence R. “Human Rights and Intellectual Property: Conflict or Coexistence.” *Minn. Intell. Prop. Rev.* 5, 2003: in Coombe, Rosemary J. “Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity.” *Indiana Journal of Global Legal Studies*, 1998: 59-115.

¹²⁵¹ Adhikari, Ratnakar. “Emerging Issues Relating to Conflicts between TRIPS and Biodiversity: Development Implications for South Asia.” *South Asian Yearbook of Trade and Development*, 2005: 261-288, pp.265-270.

the use of Karela on the assumption that scientists had isolated the protein for treating tumours. Despite the fact that this crop was native to India, and in the absence of a genuine creative step, patents have been granted almost universally for this product in the west on the basis of TRIPS 27 (3). At the same time, no real attempts have been made to ensure any equitable sharing to local communities who technically have sovereign rights over the product.¹²⁵² Similar paradigms have existed with the use of Quinoa, Basmati Rice, and Ayuhasca. In all of these cases, patents were awarded liberally across the developed world for the crop under the auspices of the TRIPS agreement, despite serious concerns about any real ‘inventive’ step taken by the corporation, which led a number of scholars to suggest that this was an almost flagrant case of biopiracy.¹²⁵³ Given that farmers in developing countries struggle to eke out a livelihood, even in the absence of this form of biopiracy from huge multinational corporations, the capacity of the WTO and associated multinationals to ‘maximise the rationality of Intellectual Property Rights’ through practices of biopiracy may violate their fundamental human rights.¹²⁵⁴ Such paradigms – whereby the economic rationale of developed states, multinational corporations, and the WTO have imposed norms that have often led to catastrophic, sometimes life threatening, personal consequences for individuals in the developing world – pose serious questions about whether it is morally justifiable for the policies of one particular regime within the international system to impose its own rationality despite clear clashes with other legal norms related to fundamental human rights and human welfare.¹²⁵⁵ This problem is, of course, exacerbated by the

¹²⁵² Adhikari, Ratnakar. “Emerging Issues Relating to Conflicts between TRIPS and Biodiversity: Development Implications for South Asia.” *South Asian Yearbook of Trade and Development*, 2005: 261-288, pp.266-267.

¹²⁵³ *Ibid*, p.268.

¹²⁵⁴ *Ibid*.

¹²⁵⁵ Teubner, Gunther. “Constitutionalising Polycontextuality”, *Social and Legal Studies*, 19, 2010.

absence of an overarching legal framework to regulate between disputes, and the much more developed system of enforcement that the WTO (and thus TRIPS) possesses compared to other regimes, which rely on voluntary compliance or state enforcement.

As the above examples highlight, the potentiality for regime conflict in the international system is considerable because of fundamental ‘rationality’ conflicts between different regimes, in which each regime seeks to maximise its own rationality within the international sphere and make it the dominant one. We have seen two conflicts, both relating to the WTO and the CBD, both of which challenge the potentiality for global constitutionalism in different, yet connected, ways. In the first case, where two regimes of relatively equal power are in conflict over norms in the WTO and CBD, the situation resulted in an impasse. This is problematic for advocates of global constitutionalism, since a constitutional system would, traditionally, have a mechanism for deciding on such cases particularly where important principles are at stake.¹²⁵⁶ The second case, in which we analysed a conflict between the WTO and the CBD over the patenting of biological organisms, is potentially even more concerning for advocates of global constitutionalism. In this case power rather than rule of law seems to have been key to the outcome of the dispute. Where regime conflicts and rationality conflicts become fundamental battles of power rather than settlement through the rule of law within the international system, a condition is created which is anathema to the very idea of constitutionalism as a comprehensive framework for the legitimate exercise of

¹²⁵⁶ Grimm, Dieter. *The Achievement of Constitutionalism*, In *Twilight of Constitutionalism*, Oxford University Press, 2010,pg.9. Also, Grimm *Integration by Constitution*, *International Journal of Constitutional Law*, *International Journal of Constitutional Law* 193.

public power.¹²⁵⁷ If conflict between different regimes interacting in the globally pluralistic international legal system are the result of conflict between ‘autonomous and parallel’ orders, we can see that such an order more closely resembles the more chaotic, fragmented pluralism that existed in pre-constitutional territorial entities than the more ordered, and holistic, structure of governance that allowed for the emergence of state constitutionalism.

The above section described conflicts between what might broadly be described as ‘international’ or official legal orders, whereby the legal frameworks involved are defined through international treaties and are therefore premised on the broader inter-state order for at least part of their legitimacy. As we have seen, the fragmented nature of the international legal system means that, even within these frameworks, serious conflict can emerge which has the potential to undermine any prospective unity within the international system that could allow for the emergence of global constitutionalism. We have seen that the use of political and material power by particular regimes to stake out and ensure their own dominance within a particular system, despite valid claims from opposing regimes, remains an impediment to a rule of law-based solution. As we have also seen, the capacity of certain regimes to impose themselves over others in this respect undermines the prospects for an effective system based on rule of law rather than rule of power. Thus, regime-conflict among international legal orders remains a substantial sticking point for any potential future global constitution.

3. The problem of the Periphery: Transnational Corporations and Global Constitutionalism

¹²⁵⁷ Teubner, Gunther. “*Fragmented Foundations*” in *Twilight of Constitutionalism*, Oxford University Press, 2010. Fischer-Lescano, Andreas, and Gunther Teubner. “Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law.” *Mich. J. Int’l L.* 25, 2003: 999.

The previous section assessed conflict within ‘international’ legal regimes, which ground much of their legitimacy on the consent of sovereign states. However, as noted earlier in the analysis of global legal pluralism, the plurality in the international system goes substantially deeper than this, with the emergence of multiple non-state entities as significant participants in global standard setting, norm creation, and regulation within the international system.¹²⁵⁸ Multinational corporations in particular are deeply involved in setting out their own spaces of rule and norm creation in the international system based on a very specific set of practices premised in the maximisation of profitability and shareholder return at a global level.¹²⁵⁹ As economic globalisation has ‘gone into hyperdrive’, these multinational corporations have gained unprecedented influence and power across the world, often rivalling small- to mid-sized states in terms of financial resources and global clout (for example, Exxon Mobil’s annual turnover in 2011 was \$467 billion, approximately one-and-a-half times the size of Denmark’s GDP).¹²⁶⁰ Indeed, of the 100 major economies of the world, 51 are corporations and only 49 are countries, demonstrating the paradigm shift in international governance caused by the emergence of these bodies¹²⁶¹. As these corporations are now truly ‘transjurisdictional’, operating in many countries outside of their main base (something that these corporations can also readily modify), these behemoths often exist somewhere between state and international law but are regulated fully by

¹²⁵⁸ Berman, Paul Schiff. *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*. Cambridge University Press, 2012. Walker, Neil. “Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders.” *International Journal of Constitutional Law* 6.3-4, 2008: 373-396.

¹²⁵⁹ See, for example, International Corporate Governance Network *Statement on Global Corporate Governance Principles*, July 9, 1999.

¹²⁶⁰ <https://www.statista.com/statistics/264119/revenue-of-exxon-mobil-since-2002/> – Accessed 3rd November 2017.

¹²⁶¹ Amnesty International- <https://www.amnesty.org/en/what-we-do/corporate-accountability> – Accessed 3rd November 2017.

neither, but instead by their own internal set of rules and norms.¹²⁶² In this respect, Teubner suggests, transnational corporations form a ‘closed, non state system’ that is hierarchally structured within itself, with the ‘company constitution’ at the top of this system, followed by the ‘provisions for implementation in the middle, while the lower rungs offer the specific behavioural instructions for staff.’¹²⁶³ In practice thus, these private forms of ordering create their own set of rules which are directly applicable on employees and enforceable through explicit sanction, thus making them, in many ways ‘self-contained orders’.¹²⁶⁴ The exponential growth of these self-contained orders both in number and influence can be seen to substantially enhance the ‘wider societal fragmentation’ which I have described in the previous section.¹²⁶⁵ As Teubner suggests, transnational corporations possess a singular rationality in the creation of profit for employees and shareholders, which holds the potential for substantial regime conflict with other established norms of the international order.¹²⁶⁶

Despite their power, the fact that transnational corporations broadly stand outside key structures of international law poses a substantial threat to ideas of global constitutionalism, since such corporations are not externally regulated by the global system, yet still have the capacity to enormously affect that system from within. As Deva argues, the existing international framework for the regulation of multinational corporations relies on states to ensure that multinational corporations

¹²⁶²Chandler, Alfred D., and Bruce Mazlish, eds. *Leviathans: Multinational corporations and the new global history*. Cambridge University Press, 2005, pp.219-236. Calliess, Galf-Peter, and Jens Mertens. “Transnational Corporations, Global Competition Policy, and the Shortcomings of Private International Law.” *Indiana Journal of Global Legal Studies* 18.2, 2011: 843-872.

¹²⁶³ Teubner, Gunther. *Constitutional fragments: societal constitutionalism and globalization*. Oxford University Press, 2012, pg.49.

¹²⁶⁴ *Ibid*, pp.48-50.

¹²⁶⁵ *Ibid*, pg. 141.

¹²⁶⁶ Teubner, Gunther. “The Anonymous Matrix: Human Rights Violations by ‘Private’ Transnational Actors.” *The Modern Law Review* 69.3, 2006: 327-346, pg.340.

are not in violation of their duties towards human and environmental rights either at a national or international level.¹²⁶⁷ However, such a method is flawed on a number of levels. Firstly, the parent company is often ‘headquartered’ overseas, making it difficult for states, particularly if they are weaker than the company’s parent state, to ensure reparations are made and accountability restored. Secondly, the corporation is often stronger than the state itself.¹²⁶⁸ As Teubner points out, multinational corporations have, on numerous occasions, damaged ecosystems and violated human rights on a massive scale.¹²⁶⁹ Almost invariably, these abuses take place in the developing world, where the capacity of the state in which the abuses have been committed is insufficient to fully control them, or, alternatively, there is sufficient corruption within the system for the corporations to ensure they can continue to commit activities that endanger human rights or the environment with the goal of maximum profitability.

Many substantial abuses of human rights and environmental standards by transnational corporations can be identified across the world. For example, in Bodo Creek, Nigeria, two oil spills from a Shell pipeline destroyed thousands of lives and livelihoods, utterly wrecking the ecosystem and causing enormous problems regarding livestock and sanitation. In 2006, 100,000 people sought medical treatment for a range of health problems after toxic waste was dumped around the city of Abidjan in the Cote D’Ivoire.¹²⁷⁰ Unocal Corporation in Myanmar was found to be complicit with the Burmese military in such egregious crimes such as murder,

¹²⁶⁷ Deva, Surya. “Human Rights Violations by Multinational Corporations and International Law: Where from Here?” *Conn. J. Int’l L.* 19, 2003: 1, pg.1.

¹²⁶⁸ Ibid. Stiglitz, Joseph E. "Regulating multinational corporations: Towards principles of cross-border legal framework in a globalized world balancing rights with responsibilities." *Am. U. Int'l L. Rev.* 23 (2007): 451, pg.476.

¹²⁶⁹ Teubner, Gunther. “The Anonymous Matrix: Human Rights Violations by ‘Private’ Transnational Actors.” *The Modern Law Review* 69.3, 2006: 327-346, p.330-333.

¹²⁷⁰ Amnesty International – <https://www.amnesty.org/en/what-we-do/corporate-accountability/> – Accessed 3rd November 2017.

torture, rape, and forced labour when involved in the building of a pipeline.¹²⁷¹

These three examples are, of course, just a tiny snapshot of the multitude of human rights abuses which multinational corporations have been involved in. Frequently, these corporations have been headquartered in developed countries while the abuses have taken place in the developing ones. Human rights that multinational national corporations have been accused of violating include ‘the right to enjoy life; freedom from torture and cruel, inhuman, or degrading treatment; freedom from forced or slave labour; freedom from arbitrary detention or deprivation of security of person; freedom to enjoy property; freedom from deprivation of or injury to health; enjoyment of a clean and healthy environment – the latter also implicating interrelated international law recognising private responsibility for pollution; and freedom from discrimination.’¹²⁷² As Deva points out, this roster is not too dissimilar from accusations levelled against states.¹²⁷³ Although the degree of involvement of transnational corporations within particular human rights abuses varies, from directly violating the rights of individuals to merely being complicit in abuses by government forces or other non-governmental organisations, TNCs have been involved, as holistic entities, in the abuse of human rights.¹²⁷⁴

Such a development is problematic for advocates of global constitutionalism for a number of reasons. As we saw in the previous chapter, ‘extra-constitutional’ orders which impinge on the constitutional and human rights of other citizens within a constitutional order may undermine it, if mechanisms cannot be found within the

¹²⁷¹ Amnesty International – <https://www.amnesty.org/en/what-we-do/corporate-accountability/> – Accessed 3rd November 2017.

¹²⁷² Deva, Surya. “Human Rights Violations by Multinational Corporations and International Law: Where from Here?” *Conn. J. Int’l L.* 19, 2003, pg.4.

¹²⁷³ *Ibid.*

¹²⁷⁴ *Ibid.*

system to control them.¹²⁷⁵ In the case of transnational corporations, we can see that these organisations, which do not fit into international laws' traditional state-based paradigm, might similarly hold the potential to undermine the integrity of any form of global constitutionalism. These organisations have the power and influence to affect the system itself, but, equally, they are not fully regulated by it. The issue of transnational corporations within the broader global legal order is one which has not been lost on many of the architects of the international order.¹²⁷⁶ However, because of both the amorphous and non-state nature of the organisations, and their sheer power and influence, any resolution has been extremely difficult to attain in the international system. A concerted effort was made within the UN system during the 1970s and 1980s to create a comprehensive framework which would incorporate transnational corporations into a wider legal framework with the potential for globally enforceable sanctions for corporations that breached core principles relating to human rights or other important matters. A second attempt was made in 2003 to create a supranational body with legally binding and sanctioning powers over corporations.¹²⁷⁷ However, attempts to create a legally binding framework have ultimately failed as a result of substantial lobbying by multinational corporations as well as reticence on the part of developed states to fully regulate them in this manner.¹²⁷⁸ Resultantly, attempts to regulate transnational corporations have

¹²⁷⁵ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford University Press, pp.62-66. Also, Grimm *Integration by Constitution*, International Journal of Constitutional Law, International Journal of Constitutional Law 193.

¹²⁷⁶ Ramasastry, Anita. Corporate Complicity: From Nuremberg to Rangoon – An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations, 20 Berkeley J. Int'l L. 91, 131-36. Deva, Surya. "Human Rights Violations by Multinational Corporations and International Law: Where from Here?" *Conn. J. Int'l L.* 19, 2003.

¹²⁷⁷ Teubner, Gunther. *Constitutional fragments: societal constitutionalism and globalization*. Oxford University Press, 2012, pg.48. Deva, Surya. "Human Rights Violations by Multinational Corporations and International Law: Where from Here?" *Conn. J. Int'l L.* 19, 2003, pg.19.

¹²⁷⁸ Ibid. Also, Robinson, William I. "Global Capitalism Theory and the Emergence of Transnational Elites." *Critical Sociology* 38.3, 2012: 349-363, pp.343-353.

primarily come about through the creation of voluntary ‘code of conduct mechanisms such as those spelled out in the OECD Declaration on Investment and Multinational Firms, the ILOs tripartite declaration and in the United Nations Global Compact’.¹²⁷⁹

However, these mechanisms have proven woefully inadequate, and this inadequacy also impinges substantially on prospects for global constitutionalism, which relies on the existence of a fundamental structure of rights and governance that regulates all entities within it, at least within the level of its purview. The first reason for this inadequacy feeds back into Teubner’s perspective on rationality conflicts. The creation of ‘voluntary codes of conduct’ for corporations assumes that multinational corporations would, or might have, an inherent interest in protecting or at least not violating human rights and that such a culture could be fostered within them without recourse to official sanction or preventative measures.¹²⁸⁰

However, Teubner suggests that this misunderstands the fundamental core rationality of multinational corporations, which operate on a rationality of profit maximisation and will thus not voluntarily follow human rights norms, particularly if competition chooses not to and is thus at some level more efficient and profitable.¹²⁸¹ There is a fundamental rationality conflict between the human rights norms espoused in the various global instruments and the core rationality of global corporations. As we have seen, if the corporations sit alongside human rights norms as ‘autonomous and parallel orders’, there is a strong likelihood that power rather than rule of law will become the peremptory tool for interaction between these two

¹²⁷⁹ Deva, Surya. “Human Rights Violations by Multinational Corporations and International Law: Where from Here?” *Conn. J. Int’l L.* 19, 2003, pg.5.

¹²⁸⁰ Teubner, Gunther. “*Fragmented Foundations*” in *Twilight of Constitutionalism*, Oxford University Press, 2010, pp.335-337. Teubner, Gunther. “The Anonymous Matrix: Human Rights Violations by ‘Private’ Transnational Actors.” *The Modern Law Review* 69.3, 2006: 327-346.

¹²⁸¹ *Ibid.*

orders.¹²⁸² Given the enormous wealth and ever increasing global influence of transnational corporations, without a paradigm shift in global governance, this issue seems likely only to increase in severity.

More broadly, voluntary codes of conduct for transnational corporations also conflict with the core idea of constitutionalism as providing a comprehensive and legitimate framework for the exercise of public power. Since human rights are assumed by almost all advocates of global constitutionalism to be a fundamental aspect of a potential global constitution, they cannot be seen as voluntary requirements, but are rather essential and non-optional to the legitimate operation of entities within that order.¹²⁸³ Therefore, if corporations were to be fully incorporated within any form of global constitutionalism, they would be *required* to at least act within the ambit of the core constitutional norms. If these codes were voluntary, this would undermine the fundamental ability of the constitution to form the fundamental order for whichever aspects of global society it claimed to regulate and give ‘constitutional’ norms an inferior or voluntary status vis-à-vis other international practices, particularly those related to the acquisition of profit.¹²⁸⁴ An ‘indirect and dialogue-focused’ approach to the regulation of transnational corporations ultimately surrenders global human rights to the power of global business.¹²⁸⁵ Claims that ultimate authority for regulation of these organisations could be undertaken at state level is, as we have seen, undermined substantially by

¹²⁸² Krisch, Nico. “International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order.” *European Journal of International Law* 16.3, 2005: 369-408, see sections 1, 2.

¹²⁸³ Deva, Surya. “Human Rights Violations by Multinational Corporations and International Law: Where from Here.” *Conn. J. Int’l L.* 19, 2003, pg.9. Grimm *Integration by Constitution*, International Journal of Constitutional Law, International Journal of Constitutional Law 193.

¹²⁸⁴ Garcia, Frank J. The Global Market and Human Rights: Trading Away the Human Rights Principle, 25 *Brook. J. Int’l L.* 51, 64-76 pp.64-70.

¹²⁸⁵ Deva, Surya. “Human Rights Violations by Multinational Corporations and International Law: Where from Here?” *Conn. J. Int’l L.* 19, 2003, pg.10.

the fact that these corporations are often more powerful than the states in which they operate.¹²⁸⁶ Moreover, as seen from our analysis above, transnational corporations are increasingly behaving in a 'state-like' fashion both in their ability and capacity to coerce states and influence the international order, as well as in the multiple and in many cases egregious abuses of human rights in which they have been involved, meaning that, much like states, more broad international regulation would be required to stymie these abuses and bring these orders into a meaningful constitutionalism framework.¹²⁸⁷

Thus, for global constitutionalism to achieve its stated aims of achieving a 'comprehensive and legitimate framework for the exercise of public power', it is clear that it would have to go beyond simply regulating the inter-state order and public international law. The rapid onset of globalisation has posited a host of other powerful transnational actors into the international system, particularly transnational corporations. These organisations can have an enormous impact on outcomes in the international system, impinging on human rights and other facets of the system in a way similar to states themselves.

As the previous chapter of this thesis demonstrated, within a constitutional system, orders that substantially affect the internal operation of a polity must also be regulated externally by it. If this is not the case, then the coherence of the constitution can be fatally undermined. Thus, if transnational corporations are not effectively and externally controlled by external constitutional mechanisms, any form of global constitutionalism would not be worthy of the name. In reality, we

¹²⁸⁶ Stiglitz, Joseph E. "Regulating multinational corporations: Towards principles of cross-border legal framework in a globalized world balancing rights with responsibilities." *Am. U. Int'l L. Rev.* 23 (2007): 451, pg.476.

¹²⁸⁷ Backer, Larry Catá. "Multinational corporations as objects and sources of transnational regulation." *ILSA J. Int'l & Comp. L.* 14 (2007): 499, pp.502-505.

have seen that attempts to regulate transnational corporations and their potentially deleterious impact on human rights have, by and large, failed insofar as they have relied on voluntary ‘codes of conduct’, which corporations have frequently breached because their profit-based rationality often fundamentally clashed with the rationality of global human rights regimes. Thus, for global constitutionalism to operate effectively, it would need not only to harmonise the conflicts between ‘international’ legal orders like the WTO and CBD, but also to ensure that non-state actors external to that system were brought within its ambit. As the above demonstrates, the current trajectory for such a development is not promising, as there appears to be both substantial conflict between established ‘inter-state’ orders as well as between ‘extra-constitutional’ entities such as multinational corporations and more established human rights and other norms which might have provided the basis for a global constitution.

Conclusion

Following from the previous chapter, which outlined the relationship between legal pluralism and constitutionalism, this chapter extrapolated that analysis into the international system to assess the relationship between global legal pluralism and global constitutionalism. It began this assessment by looking more deeply into the idea of global legal pluralism itself with a view to providing a framework for comparison. The first section of this chapter demonstrated that exponential globalisation in the international system has created a condition of substantive global plurality with multiple autonomous and semi-autonomous legal orders operating within the same system. The second section offered more in-depth description and analysis of this global pluralism. It suggested that the pluralist order had two sets of overlapping yet distinct forms of legal order operating with it. The

first of these were the ‘core’ international organisations, premised on large multilateral treaties and founded in conceptions of public international law, and had been discussed at length in previous chapters. More importantly, perhaps, though, it demonstrated the existence of a second, more ‘global’ form of law, which existed in the ‘peripheries’ of the global system and was fundamentally divested from the nation-state. In particular, through looking at the existence of organisations such as the Basel Committee as well as at the creation of global corporate codes, it demonstrated the existence of an emerging *lex mercatoria* in the international system which has increasingly become the preserve of multinational corporations rather than states.

Having established the pluralistic and multifaceted nature of the global system, this chapter assessed the prospects for global constitutionalism within it through the framework of Gunther Teubner’s ‘rationality conflict’ thesis. It argued that, as a result of fundamental rationality conflicts in the international system, the harmonisation required for a form of global constitutionalism would ultimately be hard to attain. To make this argument, this section of the thesis focused on two key case studies relating to clashes between the WTO and CBD. The first of these studies focused on the dispute between the EU and US over the sale of GMOs, while the second focused on clashes between TRIPS and the CBD. As we saw from this study the absence of a clear legal hierarchy in the international system leads to ‘rationality’ conflicts in the international system whereby autonomous legal orders seek to make their preference dominant in the international system. As we saw, these conflicts are unresolvable through constitutional mechanisms and, in reality, the variance in power between the conflicting organisations is often the defining factor in the outcomes of such regime or rationality conflict. Such a situation is

clearly anathema to the idea of constitutionalism, which seeks to provide a legitimate and comprehensive framework for the exercise of public power. Finally, this chapter demonstrated how the existence of powerful transnational corporations operating in the periphery of the global system also creates substantial problems for ideas of global constitutionalism, as these ‘extra-constitutional’ orders are able to substantially affect the international system without an appropriate mechanism to regulate them within it. This clearly would undermine the cohesiveness of any form of global constitutionalism.

This chapter argued that the complex form of global legal pluralism is potentially subject to considerable ‘rationality conflicts’, which could seriously undermine the prospect for any form of global constitution to emerge in the international system. The following, and final, chapter of this thesis will look at – in the light of the previous chapters outlining the difficulties involved in global constitutionalism – whether constitutional parlance still has value in the international system, or whether the terminology should be entirely discarded.

Chapter 7 - The Future for Global Constitutionalism

Introduction

The previous chapters have looked in great detail at the existence of, and prospects for, global constitutionalism. They have demonstrated two key flaws, which make the idea difficult to realise. Firstly, it is extremely difficult to identify an existent or potential 'constituent' power in the international system which could sufficiently legitimise the power required to govern under a form of global constitutionalism. Secondly, it would be tremendously challenging for a singular global constitution to bind together the multitude of legal orders and regimes that exist in the international system because of substantial regime and rationality conflicts.

This final chapter will look at whether, in the face of these challenges, ideas of global constitutionalism might still have heuristic value as a subject of academic study and practice. It will suggest that, although overarching visions of a singular global constitution seem extremely unlikely, post-state constitutionalism might still have value if imagined in a more modest pluralistic sense.¹²⁸⁸ To make this argument, the chapter will be divided into two main parts. The first will address arguments that the international system might be able to sufficiently reform to allow for the emergence of a legitimate global constitution. It will, however, suggest that such a development is highly unlikely for two reasons.

The first section will suggest that the absence of any form of societal frame in the international system which might provide the social energy to empower a global form of constituent power or representative democracy is seriously

¹²⁸⁸ Walker, Neil. "The Idea of Constitutional Pluralism." *The Modern Law Review* 65.3, 2002: 317-359. Walker, Neil. "Taking Constitutionalism beyond the State." *Political Studies* 56.3, 2008: 519-543.

problematic for the emergence of any singular global constitution. With reference to Habermas' conception of 'constitutional patriotism'¹²⁸⁹ it will demonstrate that there is very little to suggest that an appropriate form of 'collective selfhood' might emerge in the contemporary international system.¹²⁹⁰ In particular, it will suggest that the refusal of Russia and China to join a more 'liberal, democratic' global order, as well as the rise of nationalist movements and the move away from global identity even among developed western states also bode ill for the emergence of any form of genuine collective selfhood in the international system.¹²⁹¹

The second section of this part of the chapter will look at arguments that sufficient political will could be created to bind together the host of disparate orders in the international system to form a global constitution. It will suggest, through examining the conduct of dominant powers, in particular the US, that the behaviour of these powerful states does not support such developments. It will begin by looking at the practice of the hegemonic power, the US, and demonstrate that the US only co-operates and supports broad global treaties when it can be sure its material or geopolitical interests will not be in any way adversely affected, and that such a mentality similarly bodes ill for any form of global constitution which would often require short-term sacrifices for the sake of the wider global agreement that would be needed.¹²⁹² Following on from this, it will, by looking at the work of Benvenisti and Downs, suggest that powerful states and bodies, including the US

¹²⁸⁹ For example, see Habermas, Jürgen. Habermas, Jürgen. *The divided west*. Polity, 2006, pp.53-78.

¹²⁹⁰ Lindahl, H. K., Martin Loughlin, and Neil Walker. "Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood." *The Paradox of Constitutionalism*, 2007: 9-24.

¹²⁹¹ Krisch, Nico. "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order." *European Journal of International Law* 16.3, 2005: 369-408.

Koskeniemi, Martti. "International law and hegemony: A reconfiguration." *Cambridge Review of International Affairs* 17.2, 2004: 197-218.

¹²⁹² Krisch, Nico. "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order." *European Journal of International Law* 16.3, 2005. See in particular section 3.

and EU, often resort to ‘fragmentation’ strategies to undermine potentially egalitarian global organisations when they cannot use their material power to influence outcomes.¹²⁹³ This practice further undermines the possibility that overarching global co-operation could be secured to a sufficient degree to allow for the emergence of a global constitution.

The second part of this chapter will look at whether constitutional parlance remains a useful tool in the discussion of international governance, given that the emergence of a singular global constitution is extremely unlikely. It will suggest, with considerable reference to the work of Neil Walker, that, given the increasing porosity of borders as a result of globalisation, it might be appropriate to reimagine constitutionalism in a more ‘pluralist’ way in the international system.¹²⁹⁴ However, it will also argue that a sufficient link must remain with the domestic context of constitutionalism to ensure that the conceptual currency of the idea does not become debased, and thus an element of constituent power must remain in any form of post-state constitutionalism.¹²⁹⁵ It will argue that the emergence of genuine ‘global communities’, in the form of an emerging global civil society manifested particularly in the form of NGOs and global communities of interest, might provide a societal source for any future form of international constituent power.¹²⁹⁶ To demonstrate how this might be possible, it will look at certain developments in the global health sphere, in particular the SDGS (sustainable development goals) and

¹²⁹³ Benvenisti, Eyal, and George W. Downs. “The Empire’s New Clothes: Political Economy and the Fragmentation of International Law.” *Stanford Law Review*, 2007: 595-631.

¹²⁹⁴ Walker, Neil. “The Idea of Constitutional Pluralism.” *The Modern Law Review* 65.3, 2002: 317-359. Walker, Neil. “Taking Constitutionalism beyond the State.” *Political Studies* 56.3, 2008: 519-543.

¹²⁹⁵ Walker, Neil. “The Idea of Constitutional Pluralism.” *The Modern Law Review* 65.3, 2002: 317-359, pg.340.

¹²⁹⁶ Spiro, Peter J. “New Global Communities: Nongovernmental Organizations in International Decision Making Institutions.” *Washington Quarterly* 18.1, 1995: 45-56. Hasmath, Reza, and Jennifer YJ Hsu. “Communities of Practice and the NGO Sector in China” 2016.

GAVI (Global Alliance on Vaccinations and Immunisation), which demonstrate that in areas of broad global agreement, the participation of wider aspects of civil society in international organisations can bring about greater legitimacy and compliance.¹²⁹⁷

It will thus suggest that the use of constitutionalism as a heuristic tool to understand and encourage developments in the international system is still valuable; nonetheless, scholars should be aware of the considerable hurdles and limits that forms of post-state constitutionalism face in the contemporary global order.

1. Can the International System Change to Accommodate for the Global Constitution?

The previous chapters have looked in detail at the prospects for the emergence of a singular global constitution that could provide a ‘comprehensive and legitimate framework for the exercise of public power’ in the international system.¹²⁹⁸ Chapters 2 and 3 looked at the ‘internal’ characteristics of specific regimes within the international system. These chapters demonstrated that the current major international organisations have substantial ‘legitimacy deficits’ which would undermine their capacity to operate as the foundations for a nascent form of global constitutionalism. It was noted that the absence of ‘constituent power’ – in terms of a legitimating link between the government and the governed – posed serious problems for the global constitutionalist argument.¹²⁹⁹ As Chapter 3 demonstrated, in the absence of such a factor, the risk of simply formalising or

¹²⁹⁷ Held, David. *Gridlock*, Polity Press, 2017.

¹²⁹⁸ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pg.64.

¹²⁹⁹ This narrative is key to the first four chapters.

elevating hegemonic and unfair practices through the symbolic value of a constitution is considerable.

Chapters 4 and 5 conversely sought to assess the ‘external’ prospects for global constitutionalism by assessing whether a singular global constitution could bind together the multitude of global orders which exist in the international system. These chapters demonstrated that the sheer profusion of international orders, as well as the fierce ‘rationality’ conflicts that exist between many of them, meant that the emergence of a global constitution which could provide the normative and legal binding for these many orders seems unlikely.¹³⁰⁰

Thus, our analysis from previous chapters suggested the existence of serious impediments to the emergence of a singular global constitution in the international system. Nonetheless, these impediments may not necessarily be fatal to the cause of global constitutionalists, or at least to the prospect of some form of emerging global constitution. As the emergence of a more institutionalised order after the Second World War demonstrated, paradigm shifts are possible in international law in particular circumstances.¹³⁰¹ Further to this, constitutional development, such as that which transpired within the United Kingdom, need not necessarily be tied to a singular ‘constitutional moment’, but can instead occur as a series of incremental changes which eventually leads to the existence of a broadly constitutional entity.¹³⁰² Thus, it is not unreasonable to make the suggestion that the international system might be able to make such a transition in the future, particularly given the increasing interconnectedness that has been created through globalisation.

¹³⁰⁰ Fischer-Lescano, Andreas, and Gunther Teubner. “Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law.” *Mich. J. Int’l L.* 25, 2003: 999.

¹³⁰¹ Vidmar, Jure. “Norm Conflicts and Hierarchy in International Law.” De Wet, Erika, and Jure Vidmar, eds. *Hierarchy in International Law: The Place of Human Rights*. OUP Oxford, 2012, pp.15-17.

¹³⁰² See Chapter 1 for more of the history on this.

However, to make such a transition, any form of global constitution would, as we have seen from our previous analyses, have to overcome two key problems. Firstly, some form of constituent power would be necessary to directly link the ‘subjects’ of the global constitution (in the form of some type of global citizenry), to the institutions and government that enforced the norms and laws of the constitution.¹³⁰³ Secondly, substantial and consistent co-operation would be required by the many pluralistic entities within the international system, including powerful states, international organisations, and non-state organisations to create and make coherent the institutional and normative mechanisms that would be required for the effective functioning of such a global constitution.¹³⁰⁴ In the absence of this sustained and continuous co-operation to provide the means of enforcing and ensuring the integrity of the global constitution, any global constitution would surely be a paper tiger.

The following two sections will look at whether such changes are likely, based on an observation of current developments in the international system. They will suggest, while not ruling out some form of radical change in the future, that such developments are unlikely in the foreseeable future. In terms of the creation of an effective ‘constituent’ power, I will argue that the absence of any form of global identity which might allow for the emergence of a necessary ‘constitutional patriotism’ in the international system substantially limits the possibility for the emergence of a global constituent power. Secondly, I will suggest that the behaviour of major international actors, at least for the moment, does not seem to be geared

¹³⁰³ Grimm, Dieter. “*The Achievement of Constitutionalism*”, in *The Twilight of Constitutionalism*, Oxford University Press, 2010. Cohen, Jean L. *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*. Cambridge University Press, 2012, see Chapter 1.

¹³⁰⁴ Hale, Thomas, David Held, and Kevin Young. *Gridlock: Why Global Cooperation is Failing When We Need it Most*. Polity, 2013.

towards the kind of sustained and continuous co-operation that would be required. Therefore, the changes needed to allow for the emergence of this singular global constitution do not seem likely for the foreseeable future. I will now begin this analysis by looking at the prospects for an emergent constituent power in the international system.

1.1 Constitutionalism Patriotism and the Problem of a Global Constituent Power

As was demonstrated in Chapters 2 and 4, the conception of ‘constituent power’, manifested as some form of representative democracy which then creates a chain of legitimation between the governed and government is necessary to create the legitimate framework for public power that constitutionalism requires.¹³⁰⁵ In the absence of this legitimating chain, governing bodies are fundamentally not accountable to those substantially affected by their decisions, which could simply result in the imposition of particular hegemonic interests or the emergence of arbitrary or tyrannical government.¹³⁰⁶ In particular, we saw in Chapter 4 how, in the absence of such mechanisms, institutions responsible for global governance may simply reflect the will of dominant powers, unfairly favouring these hegemonic interests over other interests who are equally or more affected by the actions of the organisations themselves. Resultantly, for a singular global constitution to exist, some form of global democracy would be needed to legitimise the practice of the powerful set of norms and institutions that would be required to regulate the global constitutional system. A number of scholars have posited potential models of global

¹³⁰⁵ Brunkhorst, Hauke. “Globalising democracy without a state: Weak public, strong public, global constitutionalism.” *Millennium* 31.3, 2002: 675-690. Grimm, Dieter. “*The Achievement of Constitutionalism*”, in *The Twilight of Constitutionalism*, Oxford University Press, 2010

¹³⁰⁶ Brown, Garrett Wallace. “The constitutionalization of what?” *Global Constitutionalism* 1.2, 2012: 201-228, pp.218-230.

democracy,¹³⁰⁷ from more limited ‘deliberative models’, such as the one offered by Dryzek¹³⁰⁸ to visions of a full global democracy within a nascent world government, such as the vision offered by Zolo,¹³⁰⁹ to more ‘multilevel’ visions, such as that offered by Jurgen Habermas.¹³¹⁰

Despite the existence of such theoretical models, in reality, the creation of such a global democracy would likely to be hard to realise. Given the sheer scale of such an undertaking, the potentiality of tyranny of imposing it top down, and the need for at least relatively broad participation to legitimise the actions of the global constitution, there would have to be, broadly, a considerable degree of voluntary participation within the global constitution from all affected parties.¹³¹¹ This includes not only states, but also, importantly, individuals from across the globe who would be required to participate and legitimise the enormously preponderant power a global constitution would inevitably possess over its subjects within the global order.

The emergence of this bottom-up voluntarist global democracy might well be problematic because of what Neil Walker describes as the ‘powerful interconnection between the popular and societal frames of constitutionalism’.¹³¹² What Walker refers to when discussing the ‘popular’ frame of constitutionalism is,

¹³⁰⁷ The idea of global democracy here links back to ‘World Government’ literature, once again showing a tangible link between the two disciplines. Whilst I have explained, that, for methodological reasons, I will not address World Government in this thesis, the literature does demonstrate the value of future interdisciplinary research between these two important global governance concepts.

¹³⁰⁸ Dryzek, John S. *Deliberative Global Politics: Discourse and Democracy in a Divided World*. Cambridge: Polity, 2006.

¹³⁰⁹ Zolo, Danilo. *Cosmopolis: Prospects for World Government*. John Wiley & Sons, 2013.

¹³¹⁰ Habermas, Jürgen. “The Postnational Constellation: Political Essays.” 2001.

¹³¹¹ Smith, Jackie. “The World Social Forum and the Challenges of Global Democracy.” *Global Networks* 4.4, 2004: 413-421. Zürn, Michael. “Global Governance and Legitimacy Problems.” *Government and Opposition* 39.2, 2004: 260-287.

¹³¹² Walker, Neil. “Beyond the Holistic Constitution” in *The Twilight of Constitutionalism*, Oxford University Press, 2010, p.299.

indeed, what has been discussed earlier as the necessity for constituent, not simply constituted, power within a constitutional order. This frame of constitutionalism refers to the dimension of ‘we the people’, and so to the ‘idea of a specialised and integrated public institutional realm being underpinned, not just by the autonomy of the political, but also by its democratic self-constitution and self-authorship.’¹³¹³ This, of course, is also crucial to the constitution’s ability to change and adapt without re-imposing hegemony or tyranny on the population, as the dialectical and interactive processes of democracy allow for legitimate political and institutional change.¹³¹⁴

However, as Walker suggests, for the ‘popular frame’ of constitutionalism to effectively operate, citizens and subjects of the constitutional order are likely to require something more than a simple formal electoral process to voluntarily form together as a constitutional whole.¹³¹⁵ In this light, a ‘societal’ frame is also needed to provide the ‘social energy’ necessary to power the popular frame of the constitution.¹³¹⁶ Lindahl refers to this aspect as the ‘symbolic-aesthetic’ component of the constitution’ that refers to the idea that the constitution ‘pertains to a particular society, self-understood and self-identified as such’.¹³¹⁷ It is, according to Lindahl, this sense of ‘collective selfhood’ that allows for the necessary reciprocity that allows and engenders the voluntary participation of individuals within a constitutional polity.¹³¹⁸ This ‘symbolic’ element of the constitution within which

¹³¹³ Ibid.

¹³¹⁴ The second section of Chapter 1 goes into depth about why this is required.

¹³¹⁵ Walker, Neil. “Beyond the Holistic Constitution” *The Twilight of Constitutionalism*, Oxford University Press, 2010, p.299-301.

¹³¹⁶ Ibid, pp.294-295.

¹³¹⁷ Lindahl, H. K., Martin Loughlin, and Neil Walker. “Constituent power and reflexive identity: Towards an Ontology of Collective Selfhood.” *The Paradox of Constitutionalism*, 2007: 9-24. Walker, Neil. “Beyond the Holistic Constitution” *The Twilight of Constitutionalism*, Oxford University Press, 2010,p.299

¹³¹⁸ Lindahl, H. K., Martin Loughlin, and Neil Walker. “Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood.” *The Paradox of Constitutionalism*, 2007: 9-24, p.19

subjects of the polity regard themselves as part of a wider whole allows these individuals to participate in civic activity for the benefit of the wider constitutional ‘society’.¹³¹⁹ This idea is strongly connected to the more ancient concept of the need for a ‘demos’ within a political society. The concept of demos refers to ‘a group of people, the majority of whom feel sufficiently connected to one another to voluntarily commit to a democratic discourse and to a related decision-making process’.¹³²⁰ According to such a logic, mutual identification brings shared objectives and coherence which allows for a certain propensity towards solidarity and collective action. In circumstances where no mutual or social identification exists, building the confidence, recognition, or solidarity necessary for genuine democratic processes becomes difficult, if not impossible.¹³²¹

In relation to this symbolic sense of societal framing, Habermas utilised the term ‘constitutional patriotism’ to describe the ‘feeling of belonging or togetherness’ requisite for citizens to work together within a constitutional framework.¹³²² For such an order to be created, Habermas believed that a population must have a ‘conscious sharing of attachment to a ‘concrete political community’ inspired by the community’s attachment to some perceived ethical or moral good and in the light of principles and ideals acceptable to all as reasonable and rational.’¹³²³ Habermas here was primarily referring to the forms of ‘civic, liberal nationalism’ that he saw emerging in Germany and other parts of Europe, which he perceived as being premised on a more transcendental notion of collective selfhood

¹³¹⁹ Ibid.

¹³²⁰ Innerarity, Daniel. “*Does Europe Need a Demos to be Truly Democratic?*”, LSE Europe Discussion Papers, 2014, p.1.

¹³²¹ Ibid, pp.1-2.

¹³²² Habermas, Jürgen. *The Postnational Constellation: Political Essay*, Cambridge: Polity, 2001, pg.75. See also Habermas, Jürgen. *The divided west*. Polity, 2006, pp.53-78.

¹³²³ Ibid

that allowed for the form of common living, but the concept has since been widely applied in discussions on both domestic and international constitutionalism.¹³²⁴

Although Habermas' conception of constitutional patriotism has been criticised at times for being both too utopian and simultaneously too nationalistic and exclusivist, some of the core points he makes appear to be salient to understanding the requirements for effective constitutionalism.¹³²⁵ Mueller, developing further the idea of constitutional patriotism, suggests that at its core the concept asks the question 'who and how do we want to be, as far as political rule over ourselves is concerned?'¹³²⁶ The answer to this question must clearly play a substantial role in the creation of or reinforcement of constitutional practice within a given polity in terms of the formation of political institutions and democratic processes. Without any collective selfhood that might be able to identify any form of 'common good.... inspired by the community's attachment to some perceived ethical or moral good in the light of principles and ideals acceptable to all as reasonable or rational', it would be difficult to see how common institutions and democratic processes could be built.¹³²⁷

While reasonable disagreement can be expected, given the diverse and plural nature of any complex polity, sufficient normative homogeneity must exist at least on the fundamentals to build the constitutional polity in the first place.

Constitutional patriotism thus 'conceptualises the beliefs and dispositions required

¹³²⁴ For Habermas' broader views on these forms of requirement, see Habermas, Jurgen. *Citizenship and National Identity*. Sage Publishing, 1990.

¹³²⁵ Müller, Jan-Werner. "A General Theory of Constitutional Patriotism." *International Journal of Constitutional Law* 6.1, 2007: 72-95.

¹³²⁶ *Ibid*, p.77

¹³²⁷ Lindahl, H. K., Martin Loughlin, and Neil Walker. "Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood." *The Paradox of Constitutionalism*, 2007: 9-24, pp.14-18. Grimm, Dieter. "*The Achievement of Constitutionalism*", in *The Twilight of Constitutionalism*, Oxford University Press, 2010.

for citizens to maintain a particular form of political rule.’¹³²⁸ The mutual bonds of identity and selfhood which bind together citizens of a constitutional order recognise that while disagreements will inevitably occur within such a polity, at least the methods for conflict resolution can broadly be agreed upon by calling on certain principles which are broadly amenable to members of that particular order.¹³²⁹

Conflicts exist within scholarship about the precise requirements of the ‘social’ dimension of a constitutional system that might engender some form of necessary constitutional patriotism. For example, early scholars within the French constitutional system like Sieyes believed this ‘social’ dimension in the form of the nation must exist prior to constitutional creation.¹³³⁰ A similar view was held by Carl Schmitt.¹³³¹ These scholars believed that the social dimension in terms of a collectively identifying ‘people’ was prior to the physical and institutional existence of the constitution, which was broadly a manifestation of this social dimension. Other scholars, notably Martin Loughlin, see the social sphere as something that can develop more incrementally, citing more ‘graduated’ examples of constitutionalism – particularly the British Constitution – where the creation of a people and a constitution operated more dialectically.¹³³² Scholars have also disagreed about whether the bonds of collective selfhood must be ‘thick’ in terms of a strong cultural

¹³²⁸ Müller, Jan-Werner. “A general theory of constitutional patriotism.” *International Journal of Constitutional Law* 6.1, 2007: 72-95, p.77

¹³²⁹ Laborde, Cécile. “From Constitutional to Civic Patriotism.” *British Journal of Political Science* 32.4, 2002: 591-612.

¹³³⁰ Sieyes, Abbe Emmanuel Joseph. *What is the Third Estate?*, 1789, – <http://pages.uoregon.edu/dluebke/301ModernEurope/Sieyes3dEstate.pdf>, pg.12

¹³³¹ For example, C. Schmitt, *The Crisis of Parliamentary Democracy* [1923] E. Kennedy, trans. (Cambridge, MA: MIT Press, 1985, pg. 91.

¹³³² Loughlin, Martin. “The Concept of Constituent Power.” *European Journal of Political Theory* 13.2, 2014: 218-237. Also Loughlin, Martin. *Constituent Power Subverted: From English Constitutional argument to British Constitutional Practice*. Oxford University Press, 2007.

and national identity and solidarity or whether a thinner conception based more on simply an allegiance to certain universal values might be sufficient.¹³³³

Nonetheless, regardless of difference, prevailing consensus would suggest that a certain baseline of mutual identification, or at least respect for a certain set of common values and institutional practices, is necessary for the emergence of the ‘societal’ frame of constitutionalism which could then provide the ‘social energy’ required for the form of common living and democratic practice inherent in popular sovereignty.¹³³⁴ Thus, for the ‘missing’ element of constituent power to emerge in the international system, we would have to see, in parallel, the emergence of some form of global identity which could provide the common bonds which would then engender the creation of global popular constitutionalism. This section will now look at the contemporary global system to see if we can identify sufficient trends towards the emergence of a genuine global identity.

With the demise of the USSR at the end of the Cold War, many scholars assumed that, in keeping with the idea of the victorious west, the values of liberal democracy would spread rapidly across the globe.¹³³⁵ They argued that this victory would lead to the emergence of an identity that genuinely transcended states, where human beings could connect with each other as ‘free and equal’ global citizens

¹³³³ For an important defence of the centrality of strong national bonds, see Miller, David. “In Defence of Nationality.” *Journal of Applied Philosophy* 10.1, 1993: 3-16, or Miller, David. “On Nationality.” *Nations and Nationalism* 2.3, 1996: 409-421. Habermas’ conception of constituent power, conversely, relies on a thinner allegiance towards universal values of liberalism and democracy.

¹³³⁴ Walker, Neil. “Beyond the Holistic Constitution” in *The Twilight of Constitutionalism*, Oxford University Press, 2010, pp.299-300. Habermas, Jurgen. *Citizenship and National Identity*. Sage Publishing. 1990. Müller, Jan-Werner. “A General Theory of Constitutional Patriotism.” *International Journal of Constitutional Law* 6.1, 2007: 72-95.

¹³³⁵ Tomuschat, Christian. “International Law as the Constitution of Mankind.” *International Law on the Eve of the Twenty-First Century*, New York, NY, 1997: 37-50. Lebow, Richard Ned. “The Long Peace, the End of the Cold War, and the Failure of Realism.” *International Organization* 48.2, 1994: 249-277.

linked through the values of liberal democracy and universal human rights.¹³³⁶ As well as this, the enormous interconnectedness provided by globalisation appeared to offer avenues for new forms of global communication which might bring people closer together, by using the virtual world to reduce physical space and help form an international community based on values.

However, despite the lofty ideals of many scholars and the undoubted and enormous uptick in virtual communication between then and now, it is difficult to identify any kind of baseline global identity or demos that could form the basis for an overarching global constitution, or indeed any substantively measurable trend towards one.¹³³⁷ Firstly, the envisaged global, ‘liberal democratic’ order which would provide citizens with common bonds of identity has broadly failed to materialise within the international system. Despite certain market-related reforms, Russia and China – perhaps the two most influential states outside of what might broadly be termed the ‘western liberal order’ – remain stubbornly resistant to liberal democratic ideals.¹³³⁸ In fact, at least within China, many have argued that under Xi Jinping the country has become less open to democratic reform and thus to any form of emergent liberal, global identity.¹³³⁹ Similarly, despite the collapse of the Soviet Union, Russia under Vladimir Putin has also stubbornly resisted any shifts towards genuine engagement with the ideas of global democratisation and liberalisation,

¹³³⁶ See, for example, Qizhe, He Christian, ed. “The Crucial Role of the United Nations in Maintaining Peace and Security in *The United Nations at Age Fifty: A Legal Perspective*. Vol. 23. Martinus Nijhoff Publishers, 1995, where he argues for an emerging ‘universality’ of norms and rights embodied in a liberated United Nations.

¹³³⁷ Keohane, Robert O. “Accountability in World Politics.” *Scandinavian Political Studies* 29 (2): 75–87. 2006.

¹³³⁸ Larson, Deborah Welch, and Alexei Shevchenko. “Status Seekers: Chinese and Russian Responses to US Primacy.” *International Security* 34.4, 2010: 63-95, pp.63-68. Gat, Azar. “The Return of Authoritarian Great Powers.” *Foreign Affairs*, 2007: 59-69, See sections 2,3.

¹³³⁹ Economy, Elizabeth C. “China’s Imperial President: Xi Jinping Tightens His Grip.” *Foreign Aff.* 93, 2014: 80. Buckley, Chris. “China Takes Aim at Western Ideas.” *The New York Times* 19, 2013.

which were so prevalent amongst theorists in the 1990s.¹³⁴⁰ The enduring popularity of both nationalist leaders, particularly Vladimir Putin, also suggests that the argument that rapid increases in global technology and cross border communications would lead to a more global, liberal identity also appear to be fundamentally flawed.¹³⁴¹ As a result, conceptions that domestic pressure engendered by wider exposure to western societal norms would lead to a ‘natural transition’ into a western led ‘globalist’ order, also appear equally wanting. Indeed, it has been argued that Russia under Putin is substantially more nationalistic and less cosmopolitan than it had been as the Soviet Union, where the imposition of ‘socialist’ values had at least inculcated a more open perspective on who might or might not belong to the polity itself.¹³⁴²

As well as the presence and resilience of long-term geopolitical and cultural antagonisms between the ‘liberal’ west and the ‘illiberal’ great powers, such as Russia and China, it is difficult to identify any measurable trend towards a post-national or global identity even within the liberal, democratic west. It is certainly arguable that there was a shift towards a more global identity in the early to mid-1990s. A number of scholars have argued that there was a broad shift towards a less nationalistic and more global outlook than in the preceding decades, with the emergence of a broader cultural globalisation which to some degree engendered the idea of a wider global society of obligations.¹³⁴³ The election and re-election of Bill Clinton and Tony Blair, for example, as well as a host of social democratic and

¹³⁴⁰ Roxburgh, Angus. *The Strongman: Vladimir Putin and the Struggle for Russia*. IB Tauris, 2013.

¹³⁴¹ Vice, Margaret. *President Putin, The Russian Perspective*, Pew Research Centre – <http://www.pewglobal.org/2017/06/20/president-putin-russian-perspective> – Accessed 02/12/2017.

¹³⁴² Roxburgh, Angus. *The Strongman: Vladimir Putin and the Struggle for Russia*. IB Tauris, 2013, pp.10-15.

¹³⁴³ Tomuschat, Christian. “International Law as the Constitution of Mankind.” *International Law on the Eve of the Twenty-First Century*, New York, NY, 1997: Simma, Bruno, and Andreas L. Paulus. “The ‘International Community’: Facing the Challenge of Globalization.” *European Journal of International Law* 9.2, 1998: 266-277.

globalist parties in mainland Europe, also demonstrated a general willingness among Europeans and Americans to engage in a more harmonious and constructive way with the world. ‘One world’ rhetoric became increasingly popular among both politicians and within rapidly emerging social, non-governmental movements. This movement led scholars such as Tomuschat and Simma to declare that the preoccupation with nationalism and the nation state may be increasingly moving aside toward a new, cosmopolitan and global identity.¹³⁴⁴

However, despite what might be termed as a ‘high-point’ of global identity and optimism in the 1990s, particularly in the West, an assessment of the contemporary state of any form of global collective selfhood or identity does not point towards a positive trajectory. Indeed, recent events have shown the fragility of even ‘thin’ or ‘secondary’ forms of global identity. The financial crisis, in particular, has demonstrated how substantial international events or crises can undermine any potential trajectory toward a global identity.¹³⁴⁵ There is considerable evidence that the backlash against globalisation that has occurred within the developed world in the wake of the crisis has not been simply aimed at the processes of economic globalisation, but also appears to have entailed a substantive backlash against cultural and social globalisation as well.¹³⁴⁶ Clearly the overt rise of nationalism in Europe is one example of this. Parties and views advocating isolationism and independence which were once considered ‘fringe’ to the more globalist and outward-looking parties have made substantial advances at all levels.¹³⁴⁷ The rise of

¹³⁴⁴ Ibid.

¹³⁴⁵ Lazaridis, Gabriella. *Security, Insecurity and Migration in Europe*. Routledge, 2016, Chpt 12 in particular. Brands, Hal. “US Grand Strategy in an Age of Nationalism: Fortress America and its Alternatives.” *The Washington Quarterly* 40.1, 2017: 73-94.

¹³⁴⁶ Ibid. Also, Walker, Neil. “Teleological and Reflexive Nationalism in the New Europe” 2017, EU Borders Working Paper 2- http://www.euborders.com/download/WorkingPaper_02_Walker.pdf. Accessed 10th Jan 2018.

¹³⁴⁷ de Jonquières, Guy. “The World Turned Upside Down: The Decline of the Rules-Based International System and the Rise of Authoritarian Nationalism.” *International Politics* 54.5, 2017:

isolationist, anti-immigrant parties such as UKIP, the AFD, Front National and others across Europe demonstrate the fragility of any form of global identity and the continuous potentiality of nationalist, anti-globalist revival.¹³⁴⁸ Indeed, in Eastern Europe these isolationist nationalist parties have won power, as can be seen from the governing coalitions of the Law and Justice party in Poland and the ascendance of Viktor Orban in Hungary.¹³⁴⁹

Moreover, it is also fairly clear that even among ‘mainstream’ political parties there has been an increasing sentiment away from internationalism, open borders, and a ‘one world’ philosophy towards a more closed rhetoric of nationalism and anti-immigration. Both the Brexit vote and the election of Donald Trump in the US showed a substantive transformation from the more open, globalist mentality of both Britain and the US which predominated in the 1990s and the early 2000s.¹³⁵⁰ Surveys have increasingly demonstrated that nationalist issues such as immigration and sovereignty have moved from peripheral to primary concerns in many developed countries, sometimes even superseding economic issues as primary motivations for political allegiance.¹³⁵¹ While there are doubtlessly many complex and interconnected reasons for this move away from globalism and towards a more nationalistic outlook, it is undoubted that the financial crash in 2008 and proceeding

552-560, pp.552-555. Postelnicescu, Claudia. “Europe’s New Identity: The Refugee Crisis and the Rise of Nationalism.” *Europe’s Journal of Psychology* 12.2, 2016: 203.

¹³⁴⁸ Postelnicescu, Claudia. “Europe’s new identity: The Refugee Crisis and the Rise of Nationalism.” *Europe’s Journal of Psychology* 12.2, 2016: 203.

¹³⁴⁹ Cooper, Alexis, and Gabriel Davis. “‘Trumpian’ Attitudes in Central Europe: Causes for Hungary’s, Germany’s and Poland’s Attitudes Towards Transatlantic Trade.” *Claremont-UC Undergraduate Research Conference on the European Union*. Vol. 2016. No. 1. 2016.

¹³⁵⁰ Kobrin, Stephen J. “Bricks and Mortar in a Borderless World: Globalization, the Backlash, and the Multinational Enterprise.” *Global Strategy Journal* 7.2, 2017: 159-171, pp.159-161. Van Reenen, John. *Brexit and the Future of Globalization?* No. 35. Centre for Economic Performance, LSE, 2017.

¹³⁵¹ Ipsos Mori Economy and Immigration Key Factors in Brexit Vote- <https://www.ipsos.com/ipsos-mori/en-uk/economy-and-immigration-key-issues-britons-eu-referendum> – Accessed 02/12/2017. Gallup, One in Six Say Immigration Main Problem Facing United States, Tops Chart – <http://news.gallup.com/poll/173306/one-six-say-immigration-important-problem.aspx> – Accessed 1st December 2017.

economic difficulties played a key role in the more nationalist, less globalist outlook that has emerged within many of the populations in the developed world.¹³⁵²

The above has demonstrated two key developments in the international system that have impeded, and perhaps even regressed in some ways, the potential for an emergent global identity or a ‘collective selfhood’ that could provide the social energy which would allow for the emergence of a genuine global constitution. Firstly, the failure to move powerful authoritarian states like Russia and China towards a liberal, democratic and globalist outlook substantially impacts on the possibility of creating a global societal frame. Secondly, we can see that, even within developed, liberal states, which have been considered the key potential progenitors of any form of global demos, there has been a substantive move away from globalism and toward nationalism. These factors bode ill for the prospects of creating a form of an overarching form of collective selfhood, or at least a sufficient allegiance to a set of universal values which would allow for the emergence of a ‘societal’ sphere in the international system which could then engender some form of global democracy.

What has been said thus far is obviously not a comprehensive analysis of all the developments regarding forms of identity that might be transboundary or global. Rather, my goal was to demonstrate that, in general, despite the great advancement of globalisation in terms of communications and transborder interactions, there has not been a consistent trend towards an emergent global identity or towards a greater global ‘collective selfhood’ tied to a particular set of universal values. I also pinpointed the fragility of any form of emerging global consciousness, as transpires

¹³⁵² Inglehart, Ronald, and Pippa Norris. “Trump, Brexit, and the Rise of Populism: Economic Have-nots and Cultural Backlash.” 2016.

from the rise of cultural nationalism and the move away from globalism among many populations and governments within the developed world. Given, therefore, that we cannot identify a trajectory towards such a global identity or demos, and indeed in many cases the opposite can be seen, it is unlikely that such a social sphere could emerge which would then give rise to genuine forms of constituent power and global democracy within an overarching constitutional order.

1.2. Hegemonic Behaviour and the ‘Binding’ of the Global Constitution: Co-operation or Co-option?

The above has demonstrated the difficulty of creating an effective constituent power in the international system by highlighting the fragility of any move towards any form of collective selfhood or global identity. Thus, legitimising any specific international organisation to act as a vehicle for global constitution would be difficult. As well as identifying issues with the ‘legitimacy’ of any global constitution, our second key concern is with the idea of an emerging global constitutionalism related to the problem of positing a singular, dominant legal structure within the pluralistic international system. As Chapter 5 confirmed, the ‘conflicting rationalities’ between the multitude of global orders as well as the conflict between ‘external’ orders, such as transnational corporations, cause substantial issues for those seeking to homogenise international governance through global constitutionalism.¹³⁵³

Nonetheless, much like in the case of the creation of constituent power, substantial and radical change is possible within any given polity which might allow for greater congruence between the multiple orders within the international system.

¹³⁵³ Berman, Paul Schiff. “Global Legal Pluralism.” *S. Cal. L. Rev.* 80, 2006: 1155. Fischer-Lescano, Andreas, and Gunther Teubner. “Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law.” *Mich. J. Int’l L.* 25, 2003: 999.

It took hundreds of years for domestic orders to move from almost fully pluralistic systems to centralised states and then ultimately, constitutional entities.¹³⁵⁴ Thus, a radical transition in the international system towards a similar paradigm cannot be ruled out. Nonetheless, for that to occur, certain transitions would need to be observable within the international system. Firstly, there would have to be substantial congruence and convergence between major powers and interests within the international system. Given the herculean task of bringing together the multitude of interests, powers, and states towards finding sufficient common ground, at the very least, significant and sustained co-operation would be required between the most powerful states in the international system.¹³⁵⁵ To create a global constitution that would serve the international community at large, states would have to undoubtedly forgo certain short-term economic and geopolitical objectives to serve the purpose of forging the wider global constitution. To this end, then, states would have to work towards the creation of holistic global institutions, even when doing so might engender some short-term cost.¹³⁵⁶

This section of the chapter will look at whether sufficient trends towards these forms of co-operative behaviour can be identified in the international system. It will suggest, through an assessment of the current behaviour of major international powers, that such a transition is unlikely. Firstly, the US, as the dominant power has been extremely reluctant to involve itself in any major global institutions or projects that might deleteriously, even in the short-term, affect its

¹³⁵⁴ Merry, Sally Engle. "Legal Pluralism." *Law & Society Review* 22.5, 1988: 869-896. Tamanaha, Brian Z. "Understanding Legal Pluralism: Past to Present, Local to Global." *Sydney L. Rev.* 30, 2008: 375, p.384-386.

¹³⁵⁵ Grimm, Dieter. "*The Achievement of Constitutionalism*", in *The Twilight of Constitutionalism*, Oxford University Press, 2010, pp.18-19.

¹³⁵⁶ Kuo, Ming-Sung. "Between Fragmentation and Unity: The Uneasy Relationship between Global administrative law and global constitutionalism." *San Diego Int'l LJ* 10. 2008: 439. Benvenisti, Eyal, and George W. Downs. "The Empire's New Clothes: Political Economy and the Fragmentation of International Law." *Stanford Law Review*, 2007: 595-631.

material interests in the international system.¹³⁵⁷ Secondly, powerful states often use ‘fragmentation strategies’ to undermine global organisations that they cannot bend to their will through the use of material or geopolitical power. Together, I will demonstrate, these factors make it difficult to suggest that an emergent form of global constitution might be engendered in the international system.

The approach major powers have taken with regard to international organisations has been a major subject of study for a number of scholars of both international law and international relations. Clearly, the participation of the major global powers was a key factor in the emergence of the most important international organisations, particularly the UN. The significant influence of these states in the forging of international organisations, with the ostensible purpose of engendering greater global co-operation, led scholars including David Held to suggest that these same major powers might be able to utilise their geopolitical influence to bring together the varying interests in the international system towards a global constitution, much in the way they drove the creation of the initial post-war order.¹³⁵⁸

However, the assumption that powerful states will support the creation of an egalitarian, global institution is not necessarily an accurate one. Nico Krisch suggests that rather than unconditionally supporting the creation of wider global institutions, powerful states have instead had a ‘push-pull’ relationship with them,

¹³⁵⁷ Koskeniemi, Martti. “International Law and Hegemony: A Reconfiguration.” *Cambridge Review of International Affairs* 17.2, 2004: 197-218. Krisch, Nico. “International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order.” *European Journal of International Law* 16.3, 2005: 369-408.

¹³⁵⁸ See, for example, Held, David. *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*. Stanford University Press, 1995. While Held’s more recent work, including ‘Gridlock’ and ‘Beyond Gridlock’, increasingly accept the limitations of a western-led liberal order, much of his earlier scholarship appears to promote the idea of a western-led, liberal global order.

an argument supported by Marti Koskeniemi.¹³⁵⁹ Krisch argues that ‘powerful states tend to use international law as a means of regulation as well as of pacification and stabilisation of their dominance; in other areas, faced with the hurdles of equality and stability that international law erects, they withdraw from it’.¹³⁶⁰ In effect, according to Krisch’s theory, rather than working towards common, egalitarian international institutions, hegemonic states in the international order seek to ‘use these institutions to reflect and accommodate superior power.’¹³⁶¹ Krisch suggests that such a paradigm exists because, unlike weaker states, more powerful or hegemonic states often have ‘alternative means for solving co-operation and collaboration problems not available to other states.’¹³⁶²

According to such a view, multilateral global institutions are viewed through two opposing lenses by hegemonic powers – both as an opportunity to entrench their dominance in the international system but also, importantly, as a limit on that same capacity. If it is true that hegemonic powers in the international system view international institutions in this relatively instrumentalist fashion rather than as long-term investments for the overarching health of the global system, then this may well threaten the idea of creating a global constitution that could bind together the multitude of pluralistic, often conflicting regimes in the international system. As iterated above, the degree of co-operation required for such an undertaking would be very considerable, and more dominant powers in the international system would have to, at least to a broad extent, sacrifice short-term material interests for a more

¹³⁵⁹ Koskeniemi, Martti. “International Law and Hegemony: A Reconfiguration.” *Cambridge Review of International Affairs* 17.2, 2004: 197-218. Krisch, Nico. “International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order.” *European Journal of International Law* 16.3, 2005: 369-408.

¹³⁶⁰ Krisch, Nico. “International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order.” *European Journal of International Law* 16.3, 2005: 369-408, pg.371.

¹³⁶¹ *Ibid.*

¹³⁶² Krisch, Nico. “International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order.” *European Journal of International Law* 16.3, 2005: 369-408, pg. 373.

long-ranging view of a legitimate and comprehensive framework for the exercise of public power in the global system. I will now look at the conduct of the US, the key post-war hegemon towards the construction of major global institutions, suggesting that its behaviour in this regard lends substantial credence to the ‘push-pull’ theory espoused by Krisch.¹³⁶³

By looking at the behaviour of the US towards major international organisations, it becomes apparent that the US, while extremely willing to participate in and further multilateral treaties in its own interest, is extremely resistant to participating in these same agreements if it feels even its short-term interests are threatened. As Krisch argues, the US has primarily only ‘thrown its full weight’ behind treaties relating to trade and investment, which are almost invariably aligned with its own economic interests.¹³⁶⁴ The US has been a willing and enthusiastic sponsor and advocate of the WTO, International Monetary Fund (IMF), and a host of treaties relating to international investment.¹³⁶⁵ However, when it comes to other important treaties relating to ‘social’ or ‘humanitarian’ issues such as human rights, and the environment, the US has been remarkably reticent despite international rhetoric to the opposite effect.¹³⁶⁶ The US frequently refuses to sign or ratify major treaties in these areas, which are almost universally committed to by other developed, and even most developing states. The US has, in the past, refused to ratify a host of important treaties, including the Convention on Biological Diversity, the Statute of the International Criminal Court, and the Kyoto Protocol

¹³⁶³ Krisch, Nico. “International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order.” *European Journal of International Law* 16.3, 2005: 369-408.

¹³⁶⁴ *Ibid.*, pp. 384-385.

¹³⁶⁵ *Ibid.*

¹³⁶⁶ Krisch, Nico. ‘Weak as Constraint, Strong as Tool: The Place of International Law in U.S. Foreign Policy’, in D. M. Malone and Y. F. Khong (eds.), *Unilateralism and U.S. Foreign Policy*, 2003, at 41, pp. 45–53.

and the Comprehensive Test Ban Treaty.¹³⁶⁷ On each occasion, the US perceived some short- or medium-term interest to be in jeopardy and had the geopolitical power to evade or ignore international pressure that might have driven another state to sign.¹³⁶⁸

Indeed, average ratification of significant treaties by the US is lower not only than the other major G8 economies, but also substantially below the global average. Over the years 1945-2005, the US became party to only 60% of treaties registered with the UN secretary general that have been signed by more than 50% of states. By contrast, on average, states have signed 79% of these treaties and other members of the G8 have signed 93% of the treaties.¹³⁶⁹ This disparity has been particularly emphasised by the fact that the US often gives vocal support to the virtuousness of particular multilateral treaties, while not actually joining itself.¹³⁷⁰ This can be particularly perceived with its attitudes to the ICC, which was praised repeatedly by successive US administrations as a beacon of global justice.¹³⁷¹ However, once it was made clear that US soldiers might potentially be criminally liable under the provisions of the treaty and no ‘reservation’ or ‘opt out’ was offered, the US refused to ratify this broad multilateral treaty.¹³⁷² Indeed, this has often been the case where ‘reservations’ are not provided for the US in the treaty. Another example can be

¹³⁶⁷ Krisch, Nico. “International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order” *European Journal of International Law* 16.3, 2005: 369-408, p.385. Krisch’s article was written in 2005, but, as of today, the US has still not ratified the CBD, the Statute of the ICC, or the Comprehensive Test Ban Treaty.

¹³⁶⁸ Ibid.

¹³⁶⁹ Krisch, Nico. “International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order.” *European Journal of International Law* 16.3, 2005: 369-408, pg.388.

¹³⁷⁰ Scott, Shirley. ‘Is There Room for International Law in Realpolitik? Accounting for the US “Attitude” towards International Law’, 30 *Review of Int’l Studies*, 2004 , 71, pp. 73-75.

¹³⁷¹ Jain, Neha. “A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court.” *European Journal of International Law* 16.2, 2005: 239-254. Schabas, William A. *An Introduction to the International Criminal Court*. Cambridge University Press, 2011.

¹³⁷² Krisch, Nico. “International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order.” *European Journal of International Law* 16.3, 2005: 369-408.

seen in the refusal of the US to ratify the Landmine Convention after being refused exemptions. Indeed, as Krisch argues, even in treaties that the US does sign, it often insists on so many reservations as to seriously undermine its commitment and, indeed, the integrity of the treaties themselves.¹³⁷³

As the US remains the most powerful global state, particularly militarily, its willing and consistent participation would be required to forge the kinds of compromises that could bring together the plural and sometimes conflicting regimes and states in the international system. However, as we have seen, the US, as the dominant power, has generally supported the creation of global multilateral institutions only in instances where it perceived tangible material benefits for itself or its immediate allies. In other instances, it has been remarkably reticent to make even short-term material or geopolitical sacrifices for the benefit or creation of a more egalitarian, global order. This clearly undermines the potentiality for an emerging form of global constitutionalism for reasons which have been outlined in detail above.

Moving on from a specific analysis of US policy alone, and its frequent refusal to enter into binding global agreements, Benvenisti and Downs suggest that, in particular situations, powerful states actively undermine the creation of global institutions through the use of ‘fragmentation strategies’.¹³⁷⁴ These scholars suggest that, at times, hegemonic powers utilise deliberate strategies of fragmentation to ensure they are not bound by ‘rules of the game’ that might make them act against their own interests.¹³⁷⁵ According to Benvenisti and Downs, these strategies are often used to limit political co-ordination between weaker states and less powerful

¹³⁷³ Ibid.

¹³⁷⁴ Benvenisti, Eyal, and George W. Downs. “The Empire’s New Clothes: Political Economy and the Fragmentation of International Law.” *Stanford Law Review*, 2007: 595-631.

¹³⁷⁵ Ibid.

actors, and thus to force them to accept agreements that unreasonably discriminate against them.¹³⁷⁶ If this hypothesis is true, such strategies might seriously undermine the prospects for global constitutionalism, as they would undercut the capacity of actors to create the substantive mechanisms for global co-operation needed.¹³⁷⁷ Several examples of the use of fragmentation strategies in the international system give credence to these claims.

Benvenisti and Downs suggest that if powerful states find themselves unable to frame organisations and institutions in a way that does not impinge on their ability to utilise their superior outcome-based powers for material or political advantage, they frequently seek to undermine them. In these situations, powerful states often engage in practices of ‘regime exit’ or ‘forum shopping’ to undermine organisations that might more reasonably balance the interests of less powerful actors.¹³⁷⁸ Thus, one of the more prominent aspects of hegemonic behaviour has been that the ‘same powerful states who employ the law as their handmaiden to formalise or legitimise their own interests often withdraw from them or undermine them when the rules of these organisations run contrary to them’.¹³⁷⁹ In such a situation, powerful interests exploit their agenda-setting power to move the debate into a more favourable venue.¹³⁸⁰ This in turn undermines the capacity of weaker states to co-operate and undermines any more egalitarian, rule-based structures that these actors have sought to utilise to create appropriate channels for co-ordination

¹³⁷⁶ Ibid, pg.610

¹³⁷⁷ Ibid.

¹³⁷⁸ Drezner, Daniel W. “The Power and Peril of International Regime Complexity.” *Perspectives on Politics* 7.1, 2009: 65-70.

¹³⁷⁹ Benvenisti, Eyal, and George W. Downs. “The Empire’s New Clothes: Political Economy and the Fragmentation of International Law.” *Stanford Law Review*, 2007: 595-631, p.614.

¹³⁸⁰ Benvenisti, Eyal, and George W. Downs. “The Empire’s New Clothes: Political Economy and the Fragmentation of International Law.” *Stanford Law Review*, 2007: 595-631, p.618.

and co-operation. A number of examples of such practices can be identified in the post-war global order.

Much of the negotiating strategies utilised by powerful western states during the negotiations on the UN Convention of the Law of the Sea are a case in point. In the initial stages, drafts of the UN Convention contained substantive redistributive procedures designed to help benefit developing states, particularly those that were landlocked, with adjudicatory measures in place to ensure these measures were maintained.¹³⁸¹ However, the Reagan administration, upon entry into office, was dissatisfied with these measures as they were seen to be incongruent with US preferences.¹³⁸² After failing to renegotiate the terms of UNCLOS because of a strong coalition of developing and smaller states, the US undermined the agreement by leaving and seeking to form a new organisation with the major European powers.¹³⁸³ The resulting conflict had to be resolved through negotiations which substantially watered down the protections for developing states and privileged the position of the US and its allies. Similar tactics were utilised when negotiating international investment rules under the auspices of the OECD.¹³⁸⁴ When southern states and NGOs successfully united to thwart an agreement they considered to be unfair, the US and EU, rather than negotiate a more egalitarian rule-based treaty, sought instead to undermine these negotiations through the use of the Bilateral Investment Treaties.¹³⁸⁵ By creating bilateral agreements with smaller states, rather than acceding to a more homogenous multilateral agreement, powerful states sought to limit the capacity for smaller states to co-operate and co-ordinate, which might

¹³⁸¹ *Ibid*, p.615.

¹³⁸² *Ibid*.

¹³⁸³ *Ibid*, p.616.

¹³⁸⁴ *Ibid*, p.616.

¹³⁸⁵ Salacuse, Jeswald W. and Nicholas P. Sullivan, Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, 46 HARV. INT'L L.J. 67, 2005. pg.89.

create fairer or more egalitarian regimes with some mode of independent dispute settlement.¹³⁸⁶

Finally, a similar strategy can be identified in the creation of the WTO itself. In particular, the EU and US used these strategies to ensure that the TRIPS agreement was entrenched into the WTO despite substantial resistance. When the EU and US realised that the Uruguay round, as a negotiation open to all members and subject to the tradition of consensus, would never agree to produce the kind of agreement they wanted on intellectual property rights, and in particular TRIPS, the two powers set up the WTO and made it clear that the remaining GATT members would have to join the new organisation or ‘lose the legal basis for continuing access to the enormous European and US markets.’¹³⁸⁷ As planned by the western powers, less powerful states were forced to acquiesce to the new regime, and in doing so lost the collective bargaining power they had possessed. Powerful global corporations, particularly pharmaceutical companies which benefited strongly from these enhanced and arguably unfair (according to many developing states) protections, heavily lobbied the EU and US to exit from the Uruguay round when they felt their interests were not being sufficiently protected.¹³⁸⁸

As can be seen from both the reluctance of the US to enter into binding global agreements as well as the use of ‘fragmentation’ strategies, powerful states often ‘seek to find sufficient flexibility within a rapidly changing global policy environment to ensure their concerns remain pre-eminent and they are not forced to play by rules of the game if they deem those rules to be deleterious to their short

¹³⁸⁶ Ibid.

¹³⁸⁷ Richard H. Steinberg, “Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints”, 98 *AM. J. INT’L L.* 247, pg.269.

¹³⁸⁸ Benvenisti, Eyal, and George W. Downs. “The Empire’s New Clothes: Political Economy and the Fragmentation of International Law.” *Stanford Law Review*, 2007: 595-631.

term material or political interests'.¹³⁸⁹ Clearly, the persistence of such behaviour in the international system suggests that the required levels of international co-operation to create global constitution would be extremely difficult to achieve. As discussed above, the creation of such a constitution would require considerable long sightedness and short-term material or geopolitical sacrifices would certainly have to be made. Given what we have seen above, this trajectory does not seem particularly likely for the foreseeable future.

Part 2: Constitutional Pluralism: A Future for Global Constitutionalism?

2.1 Nico Krisch, Neil Walker, and the 'Idea of Constitutional Pluralism'

The previous chapters, as well as the previous sections of this chapter, have highlighted a great number of hurdles that would have to be overcome for a singular global constitution to emerge in the international system. As witnessed, surmounting these challenges in the foreseeable future seems extremely unlikely, particularly given certain trends relating to global identity and global co-operation.

The question remains, therefore, after outlining the improbability of a singular global constitution, whether constitutionalist discourse can still have value when discussing developments in the international legal system. This section will now look at whether constitutionalism can be re-imagined in a more partial, pluralistic way, or whether to do so would 'debase the conceptual currency of constitutionalism' to the point where it becomes so far removed from its original purposes and structures as to have no real meaning as a tool for organising societies.¹³⁹⁰ To this end, I will look at more contemporary scholarship on 'constitutional pluralism' which seeks to detach the concept from its statist, holistic

¹³⁸⁹ Benvenisti, Eyal, and George W. Downs. "The Empire's New Clothes: Political Economy and the Fragmentation of International Law." *Stanford Law Review*, 2007:

¹³⁹⁰ Walker, N.. "The Idea of Constitutional Pluralism" EUI Working Paper 2002/1 – <http://cadmus.eui.eu/bitstream/handle/1814/179/law02-1.pdf?sequence=1&isAllowed=y>. 2008.

moorings and transplant an adapted version of the concept into the international system.¹³⁹¹

A model of constitutional pluralism accepts the pluralistic nature of the international system, yet nonetheless argues that, ultimately, this form of pluralism is not entirely antagonistic to a reimagined and more modest idea of constitutionalism that takes sufficient quality from the state source to remain authentically constitutional. Scholarly advocates of a constitutionally pluralist method suggest that specific regimes or organisations might be able to possess constitutional attributes while still existing in a fundamentally decentred global system without a single global decision maker.¹³⁹²

This chapter will now explore this debate. Given the difficulty of creating a singular global constitution, the idea of constitutional pluralism is critical if we are continue to apply constitutional ideas in the international system. In keeping with previous chapters, this section of the chapter will assess the extent to which the two core facets of constitutionalism, ‘comprehensiveness’ and ‘legitimacy’, might be loosened from their statist moorings to provide some foundation for global constitutional pluralism. It will suggest, with reservations, that, in a rapidly globalising world where even the absolute constitutional integrity of states is being threatened, a certain modest form of global constitutional pluralism might be perceivable as a reasonable response to a transformed global society.¹³⁹³

Nonetheless, it will argue that many contemporary visions of constitutional

¹³⁹¹ Avbelj, Matej, and Jan Komárek. “Four Visions of Constitutional Pluralism.” *European Constitutional Law Review* 4.3, 2008: 524-527. Walker, Neil. “Constitutionalism and Pluralism in Global Context.” *Constitutional Pluralism in the European Union and Beyond*. Portland: Hart Publishing, Portland, 2012.

¹³⁹² Sweet, Alec Stone. “Constitutionalism, Legal Pluralism, and International Regimes.” *Indiana Journal of Global Legal Studies* 16.2, 2009: 621-645.

¹³⁹³ Walker, Neil. “The Idea of Constitutional Pluralism.” *The Modern Law Review* 65.3, 2002: 317-359. Walker, Neil. “Taking Constitutionalism beyond the State.” *Political Studies* 56.3, 2008: 519-543.

pluralism pay insufficient attention to the internal legitimacy of the ‘plural’ constitutions that exist in the international system; much greater care would need to be devoted to this aspect for even such a modest global constitutionalism to operate.¹³⁹⁴ It will thus suggest that while constitutionalism might be perceived as an aspirational tool for advocates of the international system to attempt to improve and better legitimise global governance, it must still remain sufficiently close to its historical counterpart not to lose all conceptual and normative value.¹³⁹⁵ Thus, it must retain a fundamental link to its source and core characteristics, although it might be possible to appropriately loosen these conditions to take into account a new, international context while still not losing their core constitutional quality.¹³⁹⁶ Questions regarding the prospects of constitutional pluralism clearly rest heavily on the extent to which constitutionalism can be reconceptualised to fit a new, pluralistic mindset. This section of the chapter, unlike its more empirical antecedents in the thesis, will be exploratory in nature, seeking to further debate the potential for engendering a modest constitutional pluralism rather than setting out a specific set of empirical characteristics for its foundation and operation.

The view of constitutional pluralists that global pluralism and constitutionalism are not entirely incompatible is certainly not shared universally. Nico Krisch has certainly been one of the most prominent scholars on global pluralism today, and his work *Beyond Constitutionalism* has doubtless had a substantive impact on debates about both pluralism and constitutionalism.¹³⁹⁷ In this

¹³⁹⁴ Wiener, Antje, et al. “Global Constitutionalism: Human Rights, Democracy and the Rule of Law.” *Global Constitutionalism* 1.1, 2012: 1.

¹³⁹⁵ Walker, Neil. “The Idea of Constitutional Pluralism.” *The Modern Law Review* 65.3, 2002: 317-359, pp.318

¹³⁹⁶ Walker, Neil. “Constitutionalism and Pluralism in Global Context.” *Constitutional Pluralism in the European Union and Beyond*. Portland: Hart Publishing, Portland, 2012. Walker, Neil. “Taking Constitutionalism beyond the State.” *Political Studies* 56.3, 2008: 519-543.

¹³⁹⁷ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010.

work, Krisch sees a ‘pluralist’ approach to global governance to be fundamentally antagonistic to a constitutional one. Krisch’s approach to constitutionalism focuses on its centralising and ‘foundational’ aspects.¹³⁹⁸ Thus, according to Krisch, a constitutional approach is only possible at the state level as only the state has the capacity to create the normative, institutional, and political structures to sustain fully-fledged constitutionalism. Krisch hence sees ‘constitutionalism and pluralism’ as ‘competing mechanisms’.¹³⁹⁹ According to Krisch

Constitutionalism and Pluralism are distinguished...by the different extent to which [each] formally link[s] the various spheres of law and politics.

While pluralism regards them as separate in their foundations, global constitutionalism, properly understood, is a monist conception that integrates those spheres into one. As a result, rules about the relationship of national, regional, and global norms are immediately applicable in all spheres, and neither political nor judicial actors can justify any form of non-compliance on legal grounds.¹⁴⁰⁰

According to such a model, global constitutionalism can only emerge as a ‘strong form of hegemonic monism’, something in essence not too distinguishable from a type of global federalism.¹⁴⁰¹ As our previous analyses of the concept demonstrate, Krisch’s rejection of this federalist model of global constitutionalism is probably correct. However, as Walker points out, Krisch fundamentally appears to see the rejection of this form of constitutionalism as de facto ending any further

¹³⁹⁸ Ibid. See in particular Chapter 3.

¹³⁹⁹ Sweet, Alec Stone. “The Structure of Constitutional Pluralism: Review of Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*.” *International Journal of Constitutional Law* 11.2, 2013: 491-500, p.491.

¹⁴⁰⁰ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pg.242.

¹⁴⁰¹ Sweet, Alec Stone. “The Structure of Constitutional Pluralism: Review of Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*.” *International Journal of Constitutional Law* 11.2, 2013: 491-500.

debate on some form of constitutionalism beyond the state.¹⁴⁰² Indeed, the explicit rejection by Krisch of ‘break’ theories of international constitutionalism, which seek to redefine the idea of constitutionalism for a post-state world, strongly support this. It must be noted that Krisch does not necessarily see pluralism as such a negative form for the post-national order to take and indeed offers several examples of where a pluralist approach to particular international situations has led to positive outcomes or compromises.¹⁴⁰³ Nonetheless, there is certainly a reticence to expanding the idea of the constitutional beyond the state – indeed, Krisch explicitly states that a pluralist approach shows ‘the limits of co-operation and co-ordination in a decentred world’.¹⁴⁰⁴

A number of scholars fundamentally differ from Krisch on this issue and suggest that a modest form of ‘constitutional pluralism’ might be engendered through certain forms of international practice. At its core, the idea of constitutional pluralism holds that ‘multiple sites of constitutional authority and discourse’ might operate synonymously within the international system.¹⁴⁰⁵ One ‘strong’ version of constitutional pluralism is offered by Alec Stone Sweet. Stone Sweet argues that, given the many ‘constitutional’ characteristics of particular international organisations that exist in the international system, the latter may already be considered constitutionally pluralistic.¹⁴⁰⁶ Stone Sweet’s argument focuses on the legal aspects of these organisations, highlighting in particular the ‘higher law’, and ‘limiting’ aspects of organisations including the EU, ECHR, WTO, and UN. Stone

¹⁴⁰² Walker, Neil. *Beyond the Holistic Constitution?* In *Twilight of Constitutionalism*, Oxford University Press 2010, pg.307.

¹⁴⁰³ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, Chapter 9.

¹⁴⁰⁴ *Ibid*, p.39.

¹⁴⁰⁵ Walker, Neil. "The idea of constitutional pluralism." *The Modern Law Review* 65.3 (2002): 317-359, pp.340-343.

¹⁴⁰⁶ *Ibid*, p.622-625. Sweet, Alec Stone, and Jud Mathews. "Proportionality Balancing and Global Constitutionalism." *Colum. J. Transnat'l L.* 47, 2008: 72.

Sweet claims that these organisations possess ‘internal autonomy’, while still being bound by the broad thickets of customary and public international law, and as a result form a pre-existing constitutional pluralism in the international system.¹⁴⁰⁷ In a sense, then, this form of constitutional pluralism seeks to place the ‘constitutionalisation’ thesis offered by scholars such as Loughlin into the ‘pluralist’ form of international governance. It suggests that the key is to focus on independent processes of constitutionalisation within the international system, which might then be bound together by overarching structures of international law in a constitutionally meaningful way.¹⁴⁰⁸

This thesis will not seek to address debates surrounding European constitutionalism because of the *lex specialis* nature of the European Union, as well as the fact that such deep arrangements have not been replicated elsewhere in the international system. With regard to the other organisations referenced by Stone Sweet within his ‘strong view’ of constitutional pluralism such as the WTO, the UN, and other ‘global’ institutions, previous chapters dealt with the difficulty of viewing these institutions as fundamentally constitutional either internally or externally, at least at the level of providing a comprehensive and in particular legitimate framework for public power. Chapters 3 and 4 demonstrate the ‘internal’ legitimacy-based problems of these regimes, while Chapter 6 exhibited the coordination problems posed by conflicting rationalities within the international system. Thus, the model of constitutional pluralism posed by Stone Sweet, where the pre-existing primary global ‘constitutional’ regimes like the WTO and the UN, would operate within a broader, holistic normative framework for constitutionalism

¹⁴⁰⁷ Sweet, Alec Stone. “Constitutionalism, Legal Pluralism, and International Regimes.” *Indiana Journal of Global Legal Studies* 16.2, 2009: 621-645, pp.625-635.

¹⁴⁰⁸ *Ibid.*

provided by public international law has widely been challenged in the previous chapters of this thesis on the basis of providing insufficient legitimising mechanisms. Indeed, when discussing the more ‘global’ aspects of his constitutional pluralist vision, Stone Sweet hardly refers to constituent power or democratic legitimacy at all, instead seeking to posit his model of ‘constitutional pluralism’ as simply a set of legal orders bound by hierarchal structures operating within a broader global framework.¹⁴⁰⁹ Clearly, such a vision is problematic if we accept the requirement of a certain legitimising link between governed populations and constitutional government which, as we have seen earlier, is critical to preventing arbitrary government in the international system.

Thus, if a ‘constitutionally pluralist’ method is to save the idea of post-state constitutionalism, it is likely necessary to take a different and more nuanced approach. In this regard, Neil Walker is perhaps the pre-eminent scholar offering a more exploratory, aspirational vision of international constitutionalism. Walker begins his argument for constitutional pluralism by challenging the conception that any vision of international constitutionalism can be fully comprehensive and holistic so as to perceive the constitutional entity as a ‘black box’, without any forms of vulnerability to external forces.¹⁴¹⁰ Walker suggests that in an increasingly globalised world, global, external forces impact on all polities, including states.¹⁴¹¹ As we discussed in the second chapter of this thesis, this breakdown has led to the migration of constitutional functions into the international system.¹⁴¹² Walker points out that this migration of constitutional function means that the ‘high point of

¹⁴⁰⁹ Ibid.

¹⁴¹⁰ Walker, Neil. *Beyond the Holistic Constitution?* In *Twilight of Constitutionalism*, Oxford University Press, 2010, pg.304.

¹⁴¹¹ Ibid.

¹⁴¹² Klabbbers, Jan, Anne Peters, and Geir Ulfstein. *The Constitutionalization of International Law*. Oxford University Press, 2009, See Chapter 1.

holistic state constitutionalism' is long gone.¹⁴¹³ As we have earlier discussed, this domestic 'deconstitutionalisation' has been a key factor in bringing forward the idea of global constitutionalism into mainstream discourse.¹⁴¹⁴ Although international institutionalisation has, to a certain degree, sought to perpetuate certain forms of hegemonic power, it is also true that these efforts have also been a response to the insufficiency of the old 'black box' model of state constitutionalism in the globalised international system, where co-ordination and collective action problems clearly cannot simply be addressed within the state paradigm.¹⁴¹⁵ To this end, as Walker points out, the 'new' state constitutionalism is not identical to the old. Although state constitutionalism may still remain 'holistic' in a certain sense, in that its political, judicial and societal frames remain fundamentally integrated, this holism must be qualified to the extent it can no longer aspire to an 'all-embracing quality'.¹⁴¹⁶ Rather, state constitutionalism has now itself become a more 'open, or 'relational' form of constitutionalism, which must engage as a matter of necessity with hybrid or non-holistic spheres of government in the international system.¹⁴¹⁷ Thus the 'norms, institutions, demoi, and societal objects of the state constitutional order overlap with the hybrid and non-holistic spheres of governance which exist in the international system'.¹⁴¹⁸

Resultantly, with state constitutionalism becoming 'heavily qualified and already affected by pluralistic forces in the international system',¹⁴¹⁹ Walker

¹⁴¹³ Walker, Neil. *Beyond the Holistic Constitution?* In *Twilight of Constitutionalism*, Oxford University Press, 2010, pg.304.

¹⁴¹⁴ Peters, Anne. "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures." *Leiden Journal of International Law* 19.3, 2006: 579-610.

¹⁴¹⁵ *Ibid.*

¹⁴¹⁶ Walker, Neil. *Beyond the Holistic Constitution?* In *Twilight of Constitutionalism*, Oxford University Press, 2010, pg.304.

¹⁴¹⁷ *Ibid.*

¹⁴¹⁸ *Ibid.*, p.305.

¹⁴¹⁹ *Ibid.*

suggests that we are already at the stage where constitutionalism must be considered in a ‘more-or-less’ way to continue to have credence as a container for public power in the contemporary international system.¹⁴²⁰ Previous chapters of this thesis have suggested that ‘comprehensiveness’, along with legitimacy has been, historically, a core component of constitutionalism, which has undoubtedly been the case at the state level. Walker’s argument submits that in a transnationalised world where *all* forms of constitutional governance are subjected to outside influences and therefore not fully comprehensive, the imaginative prospective of constitutionalism should not be held entirely in thrall to the state but might also be appropriate for certain pluralistic forms of postnational governance.¹⁴²¹ As Teubner suggests, problems in the international system are presenting themselves very much in a constitutional manner, insofar as the absence of broader frameworks of legitimate governance may well be contributing to the capacity for both state and non-state organisations to abuse human rights at both a domestic and international level.¹⁴²²

Given this, Walker contends that the quality of full ‘comprehensiveness’ may not be sustainable within any form of constitutional discourse, even that of the state, but the idea of constitutional pluralism might remain pertinent in finding solutions to those problems. Thus, the ‘normative arsenal’ of constitutionalism might still be used to improve forms of governance in the international system.¹⁴²³ Here, Walker perceives constitutionalism as an ‘aspirational tool’ to balance between what he describes as ‘oversteering’ and ‘understeering’ in the international

¹⁴²⁰ Walker, Neil. “Taking Constitutionalism beyond the State.” *Political Studies* 56.3, 2008: 519-543., pp.524-525.

¹⁴²¹ *Ibid*, p.523.

¹⁴²² Teubner, Gunther, et al. “Debate and Dialogue: Constitutionalizing Polycontextuality.” *Social & Legal Studies* 20.2, 2011. 209-252, p210.

¹⁴²³ Walker, Neil. “Taking Constitutionalism beyond the State.” *Political Studies* 56.3, 2008: 519-543, pp.524-525, p.520.

arena.¹⁴²⁴ If sufficient links between the various frames of constitutionalism, particularly between the legal and the popular, can be identified, then they might help to find a balance between the anarchy of a governance-free global system and the dangers of the imposition of hegemony on the international order in a system not controlled by mechanisms of legitimation.¹⁴²⁵

Walker thus posits some form of constitutional mindset or mentality as possible and indeed desirable within a pluralistic international system. However, aside from at the European level, Walker is cautious to highlight the limitations of the argument in the international system and not to necessarily ascribe the full characteristics of constitutionalism to pre-existing organisations in the international system.¹⁴²⁶ Indeed, Walker argues that for a true constitutional pluralism to emerge, a ‘serious attempt’ must be made to ‘layer the frames’ globally by seeking to source greater legitimacy into these organisations through democratic process.¹⁴²⁷ Walker suggests that the significant strides made towards legalisation in the international system can thus perhaps be seen as the first steps of a process onto which conditions of greater legitimacy can eventually be layered.

In the light of the current absence of such ‘mutual framing’, Walker accepts that such conceptions ‘operate at a high level of abstraction’, requiring careful translation and analysis and ‘do not lead to any easy conclusions’.¹⁴²⁸ Nonetheless, he argues that if the problem presents itself in constitutional terms, then it seems unreasonable to remove constitutionalism as a heuristic tool for imagining potential

¹⁴²⁴ Walker, Neil. “Constitutionalism and Pluralism in Global Context.” *Constitutional Pluralism in the European Union and Beyond*. Portland: Hart Publishing, Portland, 2012, pg.32.

¹⁴²⁵ Ibid.

¹⁴²⁶ Walker, Neil. “The Idea of Constitutional Pluralism”, EUI Working Paper 2002/1 – <http://cadmus.eui.eu/bitstream/handle/1814/179/law02-1.pdf?sequence=1&isAllowed=y>. 2008.

¹⁴²⁷ Ibid, p.25.

¹⁴²⁸ Walker, Neil. *Beyond the Holistic Constitution?* In *Twilight of Constitutionalism*, Oxford University Press, 2010, p.306.

solutions. Equally, Walker accepts that while certain aspects of international governance might eventually feed into some kind of constitutional pluralism, equally, others may remain tethered to more traditional forms of international law or inter-state action.¹⁴²⁹ Walker thus does not set out any form of global constitutionalism or international constitutional pluralism as a catch-all panacea for the many problems in the international system. Rather, he sees it as one, potentially useful, tool, both to understand the failings of the international system and to offer potential solutions.¹⁴³⁰ Constitutionalism, thus, might be seen as simply one way of seeking to make sense of the legal landscape, the insights it offers in explaining, and its value in lending authority to international governance limited by its lack of holism and comprehensiveness.¹⁴³¹

Given the ever-expanding plethora of global institutions, problems, and opportunities, as well as the decline of the national state as a holistic constitutional entity, Walker's idea that constitutional discourse still possesses value in the international system through some form of 'constitutionally pluralist' paradigm should not be discounted. Nonetheless, given that Walker does not clearly posit the manner in which this constitutional pluralism would look, questions remain. In particular, the question of where democratic legitimacy might come from remains pertinent. As we saw in previous chapters, the potentiality for hegemonic behaviour is substantial even in specific international institutions which do not necessarily govern the entirety of the international system.

¹⁴²⁹ Ibid, pp.306-307.

¹⁴³⁰ Walker, Neil. "Taking Constitutionalism beyond the State." *Political Studies* 56.3, 2008: 519-543. ¹⁴³⁰ Walker, Neil. "Constitutionalism and Pluralism in Global Context." *Constitutional Pluralism in the European Union and Beyond*. Portland: Hart Publishing, Portland. 2012.

¹⁴³¹ Walker, Neil. "Taking Constitutionalism beyond the State." *Political Studies* 56.3, 2008: 519-543. p.526.

As Walker himself agrees, even a modest, partial form of constitutional pluralism must still maintain a ‘plausible and recoverable causal connection with its historical continuity’¹⁴³² and ‘thus impose a discipline of connection from the socio political outside’.¹⁴³³ This ‘requirement of discursive continuity imposes a discipline of connection from the ‘ideational inside’ of constitutionalism’.¹⁴³⁴ Thus, although particular aspects of constitutionalism might be loosened with regard to its comprehensiveness, a purposive link must remain between the old ‘established’ forms of constitutionalism and any new form of constitutionalism that might emerge in the international system. Without this link, constitutionalism’s ‘conceptual currency would become debased’, so as not to have effective use as a tool for furthering or improving different forms of post national governance. As Walker states, a ‘middle ground’ global constitutionalism should be defined in a ‘sufficiently open way so as not to militate in favour of some and against other constitutional aspirations, while, at the same time, minimum constitutional standards should be coherent within this inclusive approach so as not to undermine the concept altogether.’¹⁴³⁵ A similar argument is made by Jan Klabbbers in his article ‘Constitutionalism Lite’. Klabbbers suggests that instead of seeking ‘fully fledged constitutionalism’ in the international system, it might be better simply to advocate a ‘constitutional approach’ to international governance.¹⁴³⁶ Such an approach would again seek to balance the dynamic between stability and flexibility within international governance so as to seek to tame its more disparate and dangerous

¹⁴³² Walker, Neil. “The Idea of Constitutional Pluralism”, EUI Working Paper 2002/1 – <http://cadmus.eui.eu/bitstream/handle/1814/179/law02-1.pdf?sequence=1>, 2008, pg.23.

¹⁴³³ Ibid.

¹⁴³⁴ Ibid.

¹⁴³⁵ Ibid, p.24.

¹⁴³⁶ Klabbbers, Jan. “Constitutionalism Lite.” *Int’l Org. L. Rev.* 1, 2004: 31., pg.37

elements while still seeking to allow sufficient flexibility to prevent the emergence of tyrannical government.¹⁴³⁷

2.2 Constituent Power in the International System: The Emergence of Global Communities?

As we can see, then, visions of constitutional pluralism still seem to require some fundamental link with the original concept. In particular, if the concept of constitutionalism beyond the state is to maintain this fundamental link, then issues of legitimacy and democracy remain at the forefront. While many scholars – Walker among them – accept the importance of some form of constituent or representative power in maintaining this vital link, these scholars rarely delve into precisely how this link can be maintained given the absence of the organising structures of the state.¹⁴³⁸ Earlier in this section, we saw, at least at an overarching global level, how a lack of global identity would likely prevent the emergence of a global constituent power. The question thus remains as to where such a constituent power might be found for an alternative form of constitutionalist pluralism, or whether the conditions necessary for such a form of constituent power are possible beyond the nation-state. This chapter will now look at whether such a constituent power might be possible beyond the confines of the state, suggesting that through exponential processes of cultural and social globalisation, the possibility for identifying some form of modest societal frame is best located in the rapidly emerging global social spaces created by globalisation.¹⁴³⁹

¹⁴³⁷ Klabbers, Jan. “Constitutionalism Lite.” *Int’l Org. L. Rev.* 1, 2004: 31.

¹⁴³⁸ Walker, Neil. “Taking Constitutionalism beyond the State.” *Political Studies* 56.3, 2008: 519-543. ¹⁴³⁸ Walker, Neil. “Constitutionalism and Pluralism in Global Context.” *Constitutional Pluralism in the European Union and Beyond*. Portland: Hart Publishing, Portland, 2012.

¹⁴³⁹ Taylor, Peter J. 12 “Relocating the Demos?” *Transnational Democracy: Political Spaces and Border Crossings*, 2002: 236. Archibugi, Daniele. “Demos and Cosmopolis.” *New Left Review* 13, 2002: 24.

As we saw from analysis earlier in this chapter, the ‘societal’ frame of constitutionalism pertains to the idea that certain forms of civic activity, particularly participation in democratic process, are only viable within the context of a society that ‘self identifies’ as such.¹⁴⁴⁰ This societal aspect of constitutionalism, as we saw, is very similar to the conception of a demos, which refers to ‘a group of people, the majority of whom feel sufficiently connected to one another to voluntarily commit to a democratic discourse and to a related decision making process’.¹⁴⁴¹ Clearly, this societal ‘frame’ of constitutionalism has its roots in the nation-state as, historically, the sole container of this particular form of collective selfhood. The concept of the constitutional society has been, as Ulrich Preuss points out, historically ‘concomitant with the modern, broadly territorial state’.¹⁴⁴²

Definitional issues and terminology become substantially important when seeking to understand whether a necessary relationship exists between constituent power and territory. Patrick Glenn distinguishes between the ‘state’ as an empirical concept describing a set of affairs relating to bounded territorial rule and the ‘nation’, which rather exists as an ‘intangible communal element referring to the idea of a society of shared beliefs, normative values, and common practices’.¹⁴⁴³ Benedict Anderson describes the nation as an ‘imagined’ community in the sense that a sufficient belief in shared values allows for imagining of extended and shared connections, which in turns allows individuals to identify with each other in the

¹⁴⁴⁰ Walker, Neil. *Beyond the Holistic Constitution*” The Twilight of Constitutionalism, Oxford University Press, 2010, p.299.

¹⁴⁴¹ Innerarity, Daniel. *“Does Europe Need a Demos to be Truly Democratic?”* p.1. 2014.

¹⁴⁴² Preuss, Ulrich. *“Disconnecting Constitutions from Statehood”*, Dobner and Loughlin: The Twilight of Constitutionalism, Oxford University Press, p.25.

¹⁴⁴³ Glenn, Patrick, H. *The Cosmopolitan State*. OUP Oxford, 2013, pp.94-98.

absence of genuine interpersonal connections. It is this sense of identity which then allows for civic activity to take place.¹⁴⁴⁴

Thus, some form of ‘nation-hood’ in terms of an ‘intangible, societal element’ is necessary, but not sufficient, for the inception of constitutionalism. Constitutionalists thus sought to utilise the social energy of the ‘nation’ to legitimise the empirical and institutional components of the constitutional state which were also required.¹⁴⁴⁵ Preuss argues that it is this connection and self-understood shared identity that was at the core of the constitutional revolutions of the 18th and 19th century which released the raw social energy of constitutionalism.¹⁴⁴⁶ The idea of binding together such groups with certain shared normative principles and ideals about the social good was certainly of at least comparable centrality to the constitutional idea than that of a homogenous territory bound together under a sovereign.¹⁴⁴⁷ Such rhetoric is eminent in discourses from both the French and American constitutions, often taken to be paradigmatic of the phenomenon. This intangible notion of peoples was most explicitly invoked in Article 3 of the Declaration of the Rights of Man and Citizen, which states that the ‘principle of all sovereignty resides essentially in the nation. No body or individual may exercise any authority which does not proceed directly from the nation.’¹⁴⁴⁸ Similarly, while in the US, the language of the ‘nation’ never took hold, it was replaced by ‘we the

¹⁴⁴⁴ Anderson, Benedict. *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. London: Verso, 2004, pp.6-7.

¹⁴⁴⁵ Preuss, Ulrich. “*Disconnecting Constitutions from Statehood*”, Dobner and Loughlin: *The Twilight of Constitutionalism*, Oxford University Press. Walker, Neil. *Beyond the Holistic Constitution?* In *Twilight of Constitutionalism*, Oxford University Press, 2010.

¹⁴⁴⁶ Preuss, Ulrich. “*Disconnecting Constitutions from Statehood*,” Dobner and Loughlin: *The Twilight of Constitutionalism*, Oxford University Press, 2010, pp.36-38.

¹⁴⁴⁷ Ibid. Also, Grimm, Dieter. “*The Achievement of Constitutionalism*”, in *The Twilight of Constitutionalism*, Oxford University Press, 2010.

¹⁴⁴⁸ Declaration of the Rights of Man, 1789. Article 3 – http://avalon.law.yale.edu/18th_century/rightsof.asp Accessed 4th December 2017.

people’, who existed as a necessary, separate component to the institutional state.¹⁴⁴⁹

Citizenry depended not so much on location but on a shared commitment to certain ideas and goals. Thus, this imaginary of a people, bound together by concepts that transcend pragmatic co-operation and territorial boundaries can be seen as foundational to the idea of a constitutional entity.¹⁴⁵⁰

Preuss suggests that the shared imaginary of the constitution allows for the ‘loosening of the connection between territory and people’. Indeed, we can identify several cases that demonstrate the separation of territory and identity. One example is the unique ‘Britishness’ of the Falkland Islands and their perception of themselves as a British community, voting 95% to remain British. Another example is the US state of Hawaii.¹⁴⁵¹ While vastly removed from the American mainland, Hawaii considers itself to be distinctly American in terms of cultural, social, and economic norms. Clearly, neither territory is linked to mainland states, yet each distinctively believes itself to be part of a shared culture of norms, identity, values and governance. It is these values that are then enshrined and protected in constitutional texts and procedures. Preuss thus contends that constitutions do not necessarily relate to a geographic territory. Rather, they bind citizens to each other and to the constitutional government by providing a common normative framework and self-referential paradigm which these individuals can relate too, not just territorially, but symbolically.¹⁴⁵²

¹⁴⁴⁹ Constitution of the United States, 1781, Preamble – <https://www.archives.gov/founding-docs/constitution-transcript>, Accessed 3rd December 2017.

¹⁴⁵⁰ Glenn, Patrick, H. *The Cosmopolitan State*. OUP Oxford, 2013. Preuss, Ulrich “*Disconnecting Constitutions from Statehood*,” Dobner and Loughlin: *The Twilight of Constitutionalism*, Oxford University Press.

¹⁴⁵¹ Falklands Referendum: Voters Choose to Remain UK territory, Website of the BBC – <http://www.bbc.co.uk/news/uk-21750909> – Accessed 3rd December 2017.

¹⁴⁵² Preuss, Ulrich. “*Disconnecting Constitutions from Statehood*”, Dobner and Loughlin: *The Twilight of Constitutionalism*, Oxford University Press, 2010, p.36. Lindahl, H. K., Martin Loughlin, and Neil Walker. “Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood.” *The Paradox of Constitutionalism*, 2007: 9-24.

Thus, if the societal element of constitutionalism – which, as we have seen, provides the ‘social energy’ for the popular frame of constitutionalism – is not inextricably tied to the territorial or institutional state, but rather to a people, then it seems reasonable to seek out this prospect in the international system.¹⁴⁵³ The question thus is, whether a ‘people’ with a sufficiently strong sense of collective selfhood and mutual loyalty to a particular set of norms and values can be identified beyond the confines of the state, and whether sufficiently strong ‘imagined communities’ can emerge to legitimise a global society. I will now suggest that, given exponential processes of globalisation and the emergence of a multitude of nascent ‘global communities’, such a development may indeed be possible, although such a trajectory is by no means guaranteed.¹⁴⁵⁴

Previous chapters have demonstrated how globalisation can, in fact, operate as a force of fragmentation, breaking down previously established institutional or constitutional arrangements. Conversely, however, the enormous increase in transboundary interactions caused by economic, cultural, and virtual globalisation can also act as a conduit for significantly more meaningful interaction between disparate groups and individuals located in the global polity.¹⁴⁵⁵ These processes have been termed by Anthony Giddens as societal globalisation. He defines societal globalisation as, simply, ‘the intensification of world-wide social relations’, taken to mean the capacity of individuals or groups to pursue meaningful social and normative relationships with individuals at enormous physical distance.¹⁴⁵⁶ This

¹⁴⁵³ Walker, Neil. “*Beyond the Holistic Constitution*”. *The Twilight of Constitutionalism*, Oxford University Press, 2010.

¹⁴⁵⁴ Brunkhorst, Hauke. “Globalising Democracy without a State: Weak Public, Strong Public, Global Constitutionalism.” *Millennium* 31.3, 2002: 675-690, pp.685-690.

¹⁴⁵⁵ Della Porta, Donatella, and Sidney G. Tarrow, eds. *Transnational Protest and Global Activism*. Rowman & Littlefield, 2005. Finnemore, Martha, and Kathryn Sikkink. “Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics.” *Annual Review of Political Science* 4.1, 2001: 391-416.

¹⁴⁵⁶ Giddens, A. *The Consequences of Modernity*. Stanford: Stanford University Press, 1990.

‘despatialisation’ of social relationships has had profound effects on the capacity of individuals and groups to identify and seek to promote common interests in the international system as well as to identify with one another in a meaningful way that was almost impossible prior to the exponential rise of globalisation.¹⁴⁵⁷ As we saw from the previous section of this thesis, the emergence of a common normative framework which might allow for collective selfhood or mutual identification is a key element for the emergence of a wider ‘society’ in terms of a framework for common living.¹⁴⁵⁸

Much of the contemporary scholarship on this wider societal element in international relations has focused on the idea of emergent ‘communities of interest’ or ‘global communities’ forming in the international system. The term global ‘community’ has been used relatively loosely in global sociological studies and international relations, but has commonly come to be understood as ‘groups of individuals with diverse characteristics by a particular set of shared normative practices, such that they identify and seek to operate as a cohesive whole rather than simply as individuals co-operating towards a particular shared empirical goal’.¹⁴⁵⁹ To take the definition provided above, a form of mutual identity is undoubtedly crucial to the formation of community. Community in this regard can be distinguished from society in both its scale and thickness. While a community simply refers to a group who possess common identity and aims, a society implies a

¹⁴⁵⁷ Ivanov, Dmitri V. “Globalization Shifted for a Virtualization Recent Trends in Society and Theory.” *Information Technology, Education and Society* 10.1, 2009: 79-90., p.85. Beck, Ulrich. “Reframing Power in the Globalized World.” *Organization Studies* 29.5, 2008: 793-804.

¹⁴⁵⁸ Walker, Neil. “*Beyond the Holistic Constitution*” in *The Twilight of Constitutionalism*, Oxford University Press, 2010.

¹⁴⁵⁹ This definition is a conglomerate, taken from Linklater, Andrew. *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era*. Univ of South Carolina Press, 1998, pg. 32. MacQueen, Kathleen M., et al. “What is Community? An Evidence-Based Definition for Participatory Public Health.” *American Journal of Public Health* 91.12, 2001: 1929-1938., pp.1929-1930.

thicker degree of institutionalisation, such that the collective selfhood can organise into a frame for common living and are governed by common rules.¹⁴⁶⁰ Nonetheless, communities are certainly clearly linked, and often antecedent to the emergence of societies, and thus their genuine existence within any polity may offer evidence of the emergent global social sphere required to activate an emerging constituent power, if not for the entirety of the global system then at least for particular regimes and organisations.

With regard to the emergence of these communities Diane Stone posits the emergence of what she describes as a ‘global agora’ as a key factor.¹⁴⁶¹ The term ‘agora’ is taken by Stone from the Ancient Greek idea of a public space for social, economic and political interaction. In Ancient Greece, the agora was a physical place, presenting an accessible public sphere for individuals to come together in emergent social groupings and seek to direct or influence public life.¹⁴⁶² Stone utilises this concept to identify a ‘growing global public space of fluid, dynamic, and intermeshed relations of politics, markets, culture, and society. This public space is shaped by the interactions of its actors, multiple publics, and plural institutions’.¹⁴⁶³ Globalisation and the recent onset of instant and virtual communication through the medium of the Internet has led many scholars to speak of the emergence of a ‘virtual commons’, within which actors are constantly

¹⁴⁶⁰ The terms community and society are heavily contested by multitudes of interdisciplinary scholars. Thus, the distinction made above is taken from the definitions provided by the Blackwell Encyclopaedia of Sociology and are clearly ‘broad brush’. ‘Society’ by Larry Ray at – <http://www.sociologyencyclopedia.com/public/search?query=society> and ‘Community’ by Graham Crow at <http://www.sociologyencyclopedia.com/public/search?query=community> at 12th December 2017

¹⁴⁶¹ Stone, Diane. “Global Public Policy, Transnational Policy Communities, and their Networks.” *Policy Studies Journal* 36.1, 2008: 19-38, p.20.

¹⁴⁶² Ibid.

¹⁴⁶³ Ibid, p.21.

communicating, organising and making decisions in a wide array of different spheres.¹⁴⁶⁴

As Spiro claims, over the previous four decades of exponential globalisation, ‘environmentalists, human rights activists, women, children, animal rights advocates, consumers, homosexuals, indigenous people and countless others have ‘gone global’, seeking to identify commonality between themselves and other individuals in the global agora, and, simultaneously, seek to utilise their cumulative political, economic, and cultural resources to promote those interests’.¹⁴⁶⁵ Moreover, as Katherine Sikkink suggests, although one singular global identity or collective selfhood cannot be identified in the international system, it is undoubted that multiple separate ‘global identities’ exist in the international system, which can sometimes supersede or equal national identities in the minds of members.¹⁴⁶⁶ Of course, this can become vital when members of the said community are oppressed or not given sufficient rights within their own countries. This is particularly true of both homosexuals and women, both of whom can face substantial inequality, and in the case of homosexuals, often violent, persecution in many countries.¹⁴⁶⁷

The emergence of the global virtual commons, allowing information to be relayed instantly, has strengthened the capacity for individuals and groups to feel a sense of global solidarity. Community among such groups can be very strong, and can be identified through the practices of marches, demonstrations, and economic and social sacrifices made by members of a community in one country for the

¹⁴⁶⁴ Noonan, Douglas S. “Charting a New Cultural Commons Research Agenda.” *Journal of Cultural Economics* 38.3, 2014: 287-290. Colley, Don, and S. Aitken. “The “Right to the Internet” is a Right to the City: Public Spheres, Virtual Commons and Social Movements Online and in the Street.” *Annual Meetings of the Association of American Geographers, Los Angeles*. 2013.

¹⁴⁶⁵ Spiro, Peter J. “New Global Communities: Nongovernmental Organizations in International Decision Making Institutions.” *Washington Quarterly* 18.1, 1995: 45-56.

¹⁴⁶⁶ Keck, Margaret E., and Kathryn Sikkink. *Activists beyond Borders: Advocacy Networks in International Politics*. Cornell University Press, 2014, p.199-205.

¹⁴⁶⁷ *Ibid*, see Chapter 5.

benefit of another.¹⁴⁶⁸ At the loosest societal level, global communities increasingly manifest in the form of global social movements such as the World Social Forum and the ‘Occupy’ movements, both of which seek to organise globally to challenge inequality they perceive as being a manifestation of global policies of neoliberalism.¹⁴⁶⁹

The existence of these ‘global communities’, at a formal and organisational level, manifest themselves most apparently in the existence of NGOs and in particular transnational advocacy networks.¹⁴⁷⁰ These global ‘communities of interest’ exist in almost every sphere and area, and, in many instances, their memberships can run into the millions, rivalling those of small to medium-size states, and form organised entities with explicit policy goals.¹⁴⁷¹ The huge amounts of money raised by such organisations also demonstrate the substantial commitment of members of these specific ‘global communities’ to their cause. For example, eight NGOs (World Vision International, Oxfam International, Plan International, Save the Children, Care, Caritas, Medicines Sans Frontières, and Actionaid) raised a combined revenue of 11.8 billion dollars in 2011.¹⁴⁷² Estimates of overall endowments to transnational advocacy networks are estimated at some 500 billion dollars and provide 20% of global assistance worldwide.¹⁴⁷³ The fact that these

¹⁴⁶⁸ Ibid.

¹⁴⁶⁹ Cohen, Robin, ed. *Global Social Movements*. A&C Black, 2004. O’Brien, Robert. *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements*. Vol. 71. Cambridge University Press, 2000. Moghadam, Valentine M. *Globalization and Social Movements: Islamism, Feminism, and the Global Justice Movement*. Rowman & Littlefield, 2012.

¹⁴⁷⁰ Spiro, Peter J. “New Global Communities: Nongovernmental Organizations in International Decision Making Institutions.” *Washington Quarterly* 18.1, 1995: 45-56. Keck, Margaret E., and Kathryn Sikkink. *Activists beyond Borders: Advocacy Networks in International Politics*. Cornell University Press, 2014.

¹⁴⁷¹ Spiro, Peter J. “Nongovernmental Organizations in International Decision Making Institutions.” *Washington Quarterly* 18.1, 1995, p.51.

¹⁴⁷² Morton. *An Overview of NGOs in Development Co-operation*, United Nations Development Programme, 2011. [http://www.cn.undp.org/content/dam/china/docs/Publications/UNDP – CH11%20An%20Overview%20of%20International%20NGOs%20in%20Development%20Cooperation.pdf](http://www.cn.undp.org/content/dam/china/docs/Publications/UNDP%20CH11%20An%20Overview%20of%20International%20NGOs%20in%20Development%20Cooperation.pdf)

¹⁴⁷³ Ibid.

organisations have many millions of members and contributors, as well as sometimes billions of dollars in revenue demonstrates the strength of a global civic identity within these organisations.

Furthermore, as Castells suggests, these global communities are ‘energetic’ in terms of seeking to influence policy decisions taken by other forces in the international system¹⁴⁷⁴. The largest and most powerful NGOs have been instrumental in bringing particular issue-areas into the limelight and thus can be key players in initiating transnational policy process. An example of this was the role of Greenpeace in the drafting and eventual implementation of the Moratorium on International Whaling. In this instance, Greenpeace utilised its considerable resources and manpower to effectively lobby the governments of several key states, including Japan and Iceland, who were originally averse to the moratorium.¹⁴⁷⁵ Thus, NGOs can also be instigators in the process of creating global public policy and legislation as well as participants in the process.¹⁴⁷⁶ The fact that these organisations are neither state-based nor based on state-consent and are broadly seen as independent advocates of usually normatively positive causes offers them a broad degree of legitimacy and international public support, which has led in the previous 25 years to an almost 200% increase in the number of NGOs and an even larger increase in the membership of these organisations.¹⁴⁷⁷

Therefore, it appears that the transnational space provided by globalisation has allowed for these types of ‘public’ global communities to form, organise, and to

¹⁴⁷⁴ Castells, Manuel. “The New Public Sphere: Global Civil Society, Communication Networks, and Global Governance.” *The Annals of the American Academy of Political and Social Science* 616.1, 2008: 78-93. p.86

¹⁴⁷⁵ Ibid. 2008. p.85.

¹⁴⁷⁶ Spiro, Peter J. “New Global Communities: Nongovernmental Organizations in International Decision Making Institutions.” *Washington Quarterly* 18.1, 1995: 45-56.

¹⁴⁷⁷ Toke, Dave. “*Epistemic Communities and Environmental Groups*”, *Politics*, 19: 97-102. 1999.

influence the policy process at the international level. Thus, the emergence of transnational advocacy networks demonstrates how globalisation has allowed geographically disconnected individuals from across the globe to form identity bonds that might lend weight to constitutional patriotism in terms of norm selection and their codification into international policy and law.¹⁴⁷⁸ In this sense, then, transnational advocacy networks could be a key aspect for ‘legitimising’ any form of international constitution by allowing those affected and their interests to become involved in a pluralistic and participatory process on particular global or transnational issues.

Nonetheless, NGOs and transnational advocacy networks can often be imperfect vehicles or containers for the interests of any form of global public or publics. The majority of substantive NGOs still have their roots in western countries and resultantly the way in which they utilise their influence can be affected by a western liberal and cultural bias.¹⁴⁷⁹ As Rajagopal points out, NGOs are frequently formed by cosmopolitan, English-speaking donors, who often have substantive ties to particular fundraising organisations or states, and are governed by these same individuals.¹⁴⁸⁰ This often gives particular large donors or states substantial influence over the NGO, which results in a particular policy agenda, not necessarily reflecting the overarching interests of the members of the global social movement or community which it claims to represent. The participation of the poorest and most vulnerable – which these NGOs often claim to represent – can therefore be spotty at best in many cases.¹⁴⁸¹ Rajagopal also points out that NGOs which claim a holistic

¹⁴⁷⁸ Habermas, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. John Wiley & Sons, 2015.

¹⁴⁷⁹ Rajagopal, Balakrishnan. *International Law from Below: Development, Social Movements and Third World Resistance*. Cambridge University Press, 2003.

¹⁴⁸⁰ *Ibid*, p.35.

¹⁴⁸¹ *Ibid*, p.157.

approach to tackling global poverty, often seem to spend a great proportion of their resources championing causes which have received substantial press in their own country or whose people are in political alignment with their respective governments or donors.¹⁴⁸² Writing in the Guardian, the Bill and Melinda Gates Foundation discusses the phenomenon of ‘flag-raising’ among NGOs. They give the example of the Haiti earthquake, where only after the US military became substantially involved in relief efforts did a consortium of US NGOs get involved, largely on the back of press coverage on the event.¹⁴⁸³ Similarly, such NGOs were remarkably reticent to pour resources into non-politically aligned disasters such as the one in Haiti.¹⁴⁸⁴ Thus, while NGOs can often act as a container for the wider global community, these biases can often undermine the claim of NGOs to speak as champions and representatives of the social movements they claim to represent.

Despite these problems, the existence and exponential growth of both global social movements and NGOs cannot be discounted as a significant indicator of the increasing importance of post-state communities in the international system, and also as an indication of the emergence of a global societal sphere. While this sphere, as we have discussed, is certainly not globally holistic, there is increasing evidence of individuals and groups beginning to feel a genuine sense of collective selfhood that reaches beyond state boundaries. Therefore, if we are to seek the ‘societal energy’ necessary to complement some form of constituent power for a modest form of constitutional pluralism, the ‘global communities’ in the ‘global agora’ would seem to be the most favourable potential location. I will now go on to look at one

¹⁴⁸² Ibid.

¹⁴⁸³ Bill and Melinda Gates Foundation. “*Media Distortion and Western Bias: Why Do Some Disasters Attract More Cash?*”, The Guardian, Dec 2, 2014 – <https://www.theguardian.com/global-development/2014/dec/02/students-speak-media-distortion-western-bias-disasters> – Accessed 5th December 2017.

¹⁴⁸⁴ Ibid.

area where trends towards such developments may be favourable, the sector of global health.

2.3 Global Communities in Health Governance

The above section has demonstrated that while one global public identity cannot be said to exist or even to be developing, the emergence of global communities may demonstrate, at a pluralistic level, that ‘societal’ elements might be identified in the international system. The existence of the societal elements identified in this global agora thus probably offer the best potential locus for identifying the ‘social energy’ which might allow for the creation of any form of constituent power in the international system.

As Walker suggests, the advancement of global constitutionalism in the international system faces substantial hurdles and perils, may well be partial, and offers ‘no easy answers’.¹⁴⁸⁵ Sectors in which such a form of constitutionalism might emerge would likely require a broad degree of homogeneity and agreement among affected parties. Thus, it is possible that in particular areas of high politics, where disagreement between major parties and entities is continuous and affects perceivable major interests, any form of genuine constitutionalism, even at a plural level, might be difficult to realise.¹⁴⁸⁶ To the same degree, it is likely to be worth looking at areas where greater degrees of mutual agreement and goals can be identified.

Some nascent developments in the sphere of global health may indicate the kinds of conditions necessary to engender a modest form of constitutional pluralism. As Brown and Held argue and has been demonstrated at various points in this thesis,

¹⁴⁸⁵ Walker, Neil. *Beyond the Holistic Constitution?* in *Twilight of Constitutionalism*, Oxford University Press, 2010. p.306.

¹⁴⁸⁶ *Ibid.*

the ‘co-operative properties’ of globalisation have, by and large, not kept pace with globalisation.¹⁴⁸⁷ However, these scholars also argue that such a prognosis does not seem to accurately apply to the sphere of global health, which has rather seen a ‘governance boom’.¹⁴⁸⁸ Global health has had an ‘explosion of new international health actors, development assistance for health (DAH), multisectoral bodies, private foundations, private-public partnerships, bilateral initiatives, multilateral initiatives and new policy directives channelled through traditional UN mechanisms’.¹⁴⁸⁹

Some examples of important and effective global health organisations that have emerged over the past 15 years include the Global Fund to Fight AIDS, Tuberculosis and Malaria (GFATM), the GAVI Alliance, the Vaccine Alliance, and the 2005 International Health Regulations (IHR), as well as the addition of a number of major private organisations such as the Bill and Melinda Gates Foundation.¹⁴⁹⁰ These organisations are diverse in their structure, organisation, and in terms of their connections to wider global institutions and states. Although Brown and Held do not explicitly tie the advance of global public health to the idea of global constitutionalism, they do offer a number of examples where global health governance shows increased constituent participation from affected communities, NGOs, and other organisations, as well as much co-operation among a wide range of different international actors and states.¹⁴⁹¹ Resultantly, global health governance could provide a template for some form of modest global, pluralistic

¹⁴⁸⁷ Brown G. and Held D., *Gridlock and Beyond in Global Health* in Held et al *Beyond Gridlock*, Wiley, 2017, p.1.

¹⁴⁸⁸ Ibid. p.2.

¹⁴⁸⁹ Ibid. p.1.

¹⁴⁹⁰ Ibid. p.2.

¹⁴⁹¹ Swanson, Robert, et al. Strengthening Health Systems in Low-Income Countries by Enhancing Organizational Capacities and Improving Institutions. *Globalization and Health*, 5. 2015. ¹⁴⁹¹ Brown and Held. *Gridlock and Beyond in Global Health* in Held et al. *Beyond Gridlock*, Wiley, 2017.

constitutionalism. I will now look at two examples in the governance of global health which demonstrate these phenomena. Firstly, I will look at the approach that has been taken to achieving the Sustainable Development Goals (SDGs), and secondly at GAVI (the Global Alliance for Vaccination and Immunisation).

The SDGs comprise 17 objectives set out by the United Nations Development Programme (UNDP), with the aim of substantially reducing a host of developmental problems by the year 2030, and as such forms the main component of the UN's post-2015 development agenda.¹⁴⁹² As Brown and Held argue, 'in terms of providing additional overarching policy uniformity, one of the great innovations of the SDGs is that it situates all global development activities within its 17 development goals and 169 targets. In this way, if taken seriously, the potential for institutional pluralism to act as a mechanism for gridlock could be diminished by the SDGs'.¹⁴⁹³ The recent inclusion of SDG 3.8, which identifies universal health coverage as an overarching objective of the SDGs, further reinforces this. The norm is defined as the objective that 'all people can use the promotive, preventive, curative, rehabilitative and palliative health services they need, of sufficient quality to be effective, while also ensuring that the use of these services does not expose the user to financial hardship'.¹⁴⁹⁴

As well as having this 'organisational norm', the SDGs also possess a number of characteristics that might allow for more co-ordinated and legitimate government. One of the most important aspects of the SDGs, as opposed to their

¹⁴⁹² Website of the United Nations, *Sustainable Development Goals* – <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> – Accessed 1st December 2017.

¹⁴⁹³ Brown and Held, *Gridlock and Beyond in Global Health* in Held et al. *Beyond Gridlock*, Wiley, 2017, p.15.

¹⁴⁹⁴ United Nations Sustainable Development Goal 3.8. – <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> – Accessed 1 December 2017.

predecessors, the Millennium Development Goals (MDGs), is their focus on a more genuinely inclusive and consultative process which seeks to give voice not just to elites within states and NGOs but also to a wider range of communities in both the developed and developing world affected by the practices of the organisation.

Resultantly, the SDGs have had a ‘long and inclusive deliberative process that included an Open Working Group of 70 countries, a series of UN sponsored ‘Global Conversations’, 11 thematic consultations, 83 national consultations and several door to door surveys so as to capture population preferences’.¹⁴⁹⁵ Thus, the SDGs ‘enjoy a perceived sense of legitimacy and self-legislation’, that has the effect of improving compliance.¹⁴⁹⁶

This is further engendered by the more holistic participatory mechanisms of the UNDP programme which widely incorporates aspects of civil society into its decision-making and implementation mechanisms, with governments, private actors, NGOs, domestic civil society groups and others all having substantive roles in the implementation process.¹⁴⁹⁷ As a result, although the SDGs are not strictly binding, there is ‘considerable evidence that developing countries are already incorporating the SDGs into their national health strategies, with India and Brazil being notable examples’.¹⁴⁹⁸ Thus, the normative co-ordination provided by the SDGs, as well as the greater participatory mechanisms offered through both consultation and through the implementation mechanisms of the SDGs demonstrate

¹⁴⁹⁵ Brown and Held, *Gridlock and Beyond in Global Health* in Held et al. *Beyond Gridlock*, Wiley, 2017, p.15.

¹⁴⁹⁶ Ibid, p.16.

¹⁴⁹⁷ Lee, Bandy X., et al. “Transforming our World: Implementing the 2030 Agenda through Sustainable Development Goal Indicators.” *Journal of Public Health Policy* 37.1, 2016: 13-31. Biermann, Frank, Norichika Kanie, and Rakhyun E. Kim. “Global Governance by Goal-setting: The novel approach of the UN Sustainable Development Goals.” *Current Opinion in Environmental Sustainability* 26, 2017: 26-31.

¹⁴⁹⁸ Brown and Held. *Gridlock and Beyond in Global Health* in Held et al. *Beyond Gridlock*, Wiley, 2017, p.12.

that in areas where there is considerable global agreement, the inception of more participatory, civil society-based mechanisms can help to engender a sense of legitimacy to organisational norms in the international level.¹⁴⁹⁹ While this falls short of the full forms of constituent power and democratic participation that most forms of constitutionalism require, it demonstrates certain impulses into the international system that might, in the long run, help engender more genuine methods of democracy. Such practices might thus create also create a locus for further study on what Klabbers describes as the ‘constitutional method’, which falls short of fully-fledged constitutionalism yet can still utilise its normative arsenal to advocate and advance better practices of global governance.¹⁵⁰⁰

As well as the SDGs, one other organisation demonstrates a similar trend toward a more participatory form of global governance which might offer the roots for a modest constitutional pluralism. GAVI has been the key vehicle for ensuring and implementing vaccinations at a global level. GAVI exists as a coalition of UN organisations, national governments, foundations, communities, NGOs and pharmaceutical companies. The core purpose of the organisation is to introduce new vaccines to countries, to disseminate knowledge and to ensure vaccinations occur.¹⁵⁰¹ It is funded by private actors, states and NGOs, while implementation is left to a similarly diverse group of actors with substantial participation from affected communities community leaders, and local civil society.¹⁵⁰² The strong participation of local communities and transnational advocacy has led to the GAVI framework

¹⁴⁹⁹ Lee, Bandy X., et al. “Transforming our World: Implementing the 2030 Agenda through Sustainable Development Goal Indicators.” *Journal of Public Health Policy* 37.1, 2016: 13-31. Biermann, Frank, Norichika Kanie, and Rakhyun E. Kim. “Global Governance by Goal-setting: The novel approach of the UN Sustainable Development Goals” *Current Opinion in Environmental Sustainability* 26, 2017: 26-31.

¹⁵⁰⁰ Klabbers, Jan. “Constitutionalism Lite.” *Int’l Org. L. Rev.* 1, 2004: 31, pg.37.

¹⁵⁰¹ Website for the Global Alliance for Vaccination and Immunisation – <http://www.gavi.org/about> – Accessed 3rd December 2017.

¹⁵⁰² *Ibid.*

being perceived with a ‘degree of societal legitimacy’, which has engendered strong compliance in more than 130 countries. Notably, there is a particular increase in the uptake of vaccinations in developing countries, with more than half a billion extra children vaccinated.¹⁵⁰³ GAVI has often been held up as paradigmatic of what can be achieved when the ‘social energy’ of global civil society can effectively be harnessed into more institutional, mixed structures which can be perceived as both legitimate and effective.¹⁵⁰⁴

The two examples above certainly do not embody ‘fully constitutional’ structures in the sense of possessing a legitimating link between those affected by policy and those doing the governing, which is then embodied in some form of representative democracy. Nonetheless, what they do demonstrate is the significant impact that global civil societies and global communities of interest may have in forging more effective and legitimate forms of governance. Thus, if we are to continue to seek to use the normative arsenal of constitutionalism as a useful heuristic tool to better organise and legitimise global governance, the area of global health, where substantial common will exists, may be a good place to provide such roots.

The above section sought to examine if, given the tremendous hurdles posed to the emergence of a holistic global constitutionalism, the term could still be usefully applied to governance in the international system. It demonstrated, through looking at the work of Neil Walker, that, given the overarching breakdown of the

¹⁵⁰³ Kanya, Carol, et al. “Evaluating Global Health Partnerships: A Case Study of a Gavi HPV Vaccine Application Process in Uganda.” *International Journal of Health Policy and Management* 6.6, 2017: 327. Shen, Angela K., et al. “Country Ownership and GAVI Transition: Comprehensive Approaches to Supporting New Vaccine Introduction.” *Health Affairs* 35.2, 2016: 272-276.

¹⁵⁰⁴ Stone, Diane. “Transfer Agents and Global Networks in the *Transnationalization of Policy*”, *Journal of European Public Policy*, 11.3, 2004, 545-566, p.555

constitutional ‘black box’ of the state as well as exponential globalisation and transnationalisation, constitutionalism in general may have to be reimagined in the international system in a somewhat less comprehensive and more pluralistic way.¹⁵⁰⁵ Resultantly, the normative arsenal of constitutionalism might still retain value in assessing developments in the international system through the lens of a certain form of constitutional pluralism, while being aware of the limitations provided by its non-holistic nature.¹⁵⁰⁶ As we saw, the emergence of genuine global communities of interest might provide a focal point for a nascent ‘societal frame’ to emerge beyond the state. From our analysis of certain developments in the sphere of global health, it was demonstrated that in areas with high degrees of global homogeneity, wider aspects of global civil society might be channelled to allow for more legitimate global governance. Such developments may provide some form of foundation for a modest constitutional pluralism at the international level.

Nonetheless, it is by no means a certainty that the trajectory of international governance will move in this direction. While it may well be possible to view constitutionalism in a more pluralistic light in the wake of developments in the international system, it may equally be the case that the trajectory of that system does not move towards such forms of organisation. Equally, challenges relating to buffering ‘plural’ constitutional orders against the substantial regime-conflict and headwinds from an otherwise sometimes chaotic international system remain. Therefore, in its current manifestation, any form of post-state constitutionalism can only be an offer – or a normative tool – to seek to better understand and encourage

¹⁵⁰⁵ Walker, Neil. “The Idea of Constitutional Pluralism.” *The Modern Law Review* 65.3, 2002: 317-359. Walker, Neil. “Taking constitutionalism beyond the State.” *Political Studies* 56.3, 2008: 519-543.

¹⁵⁰⁶ Walker, Neil. “The Idea of Constitutional Pluralism.” *The Modern Law Review* 65.3, 2002: 317-359.

particular developments in the international system, rather than an empirical description of unfolding events. In this regard, while the continued study of constitutionalism remains valuable, it is important to understand the considerable limits of its application in the contemporary international system.¹⁵⁰⁷

Conclusion

The preceding five chapters offered a broad critique of the conception that a singular global constitution existed or might emerge in the international system. This chapter, conversely, sought to see if, despite the critiques offered in earlier chapters, the concept of constitutionalism beyond the state might still have value to scholars of different disciplines. To this end, it was separated into two core parts, each of which was divided into a number of appropriate sections. The first part of this chapter attempted to discover if particular developments in the international system might be able to overcome the two core problems with global constitutionalism identified in this thesis: Firstly, the absence of any form of constituent power which might legitimise the global constitution and, secondly, the uncoordinated and often conflictual nature of global pluralism.

The first section of this part of the chapter argued that a global constituent power is unlikely to emerge as the result of the absence of a genuine ‘societal frame’ in the international system. It argued that current global trends do not support the idea of an emerging global identity or collective selfhood, in particular by reference to the refusal of Russia and China to join a ‘liberal, democratic’ global order and also to the move away from globalism and towards nationalism in the developed western world. The second section of this part of the chapter sought to assess

¹⁵⁰⁷ Walker, Neil. “The Idea of Constitutional Pluralism.” *The Modern Law Review* 65.3, 2002: 317-359. Walker, Neil. “Taking Constitutionalism beyond the State.” *Political Studies* 56.3, 2008: 519-543.

whether sufficient shifts might occur in international practice to provide the considerable co-operation needed to bind together the highly pluralist global order. It suggested that such developments are unlikely as a result of the behaviour of powerful states in the international system. Such states exhibit a 'push-pull' relationship with international organisations, co-operating and supporting them when they support their geopolitical or economic interests, but withdrawing from them or even undermining them when they do not. Thus, powerful states have historically demonstrated an insufficient commitment to engendering the considerable and consistent degree of global co-operation that would be required to bind together the plurality of actors in the global system.

The second part of this chapter sought to examine, in the light of the considerable hurdles faced in enacting any form of singular global constitution, whether constitutionalism might still remain a useful tool for understanding and advancing developments in the international system. This part of the chapter broadly argued that constitutionalism might still remain a valuable tool if reimagined in a more pluralistic way. Drawing on the work of Neil Walker, it suggested that, given the decline of any form of constitutional holism or comprehensiveness, even at the state level, it might well be possible to understand constitutionalism in a more partial, pluralistic way as a useful heuristic tool for understanding and promoting particular developments in the international system. Following on from this, it suggested that the emergence of genuine global communities might provide the source for a modest 'societal frame' in the international system from whence organisations might draw legitimacy. Finally, it studied how the participation of a wider number of societal elements in the governance of global health organisations appears to be resulting in more legitimate and effective governance. Thus, the study

of global constitutionalism might still maintain considerable value as a subject of study, as long as it is understood in a pluralistic way and the substantial hurdles in its application are properly understood.

Thesis Conclusion

Searching for Order in Chaos: What Future for Global Constitutionalism?

Given both the need to limit and ameliorate the more dangerous and dialectical properties of globalisation as well as to protect and enforce the emerging global human rights discourse, this thesis sought to assess the prospects for global constitutionalism in solving these global, collective action problems. To do so, it sought to first better understand the arguments of key global constitutionalists, such as Erika De Wet, Anne Peters, and Bardo Fassbender, who suggest that many of the benefits of domestic constitutionalism, in particular the limitation of power through law and the protection of human rights, can be extrapolated into the international system through some form of global constitutionalism.

Such scholars argue that this global constitutionalism would provide a legitimising basis for global government, and reduce the prospect of arbitrary or hegemonic expressions of power in the international system. In this way, they hope to usher in a more harmonious and egalitarian international order in which the common action required to solve global problems can be more easily undertaken.

This thesis sought to critically analyse these claims within the context of the contemporary international order. To do so, it examined these arguments both ‘internally’ by assessing the organisations and systems posited as global constitutions against the core features of constitutionalism, as well as ‘externally’ by probing them within the broader context of the pluralistic international system. At the broadest level, this thesis has argued that the global constitutionalist argument does not appear to hold water at either level. As we saw, although some ‘global’, higher law norms might be identifiable in the international system, the contemporary structures that have been posited for their institutionalisation and

enforcement (primarily the UN and WTO) are not appropriately constructed to ensure that the core objectives of a constitutional order are met. At the same time, the radically decentralised and fragmented global order also poses substantial challenges to any vision of global constitutionalism due to the decentralised and fragmented nature of the former, which has led to the emergence of many 'autonomous' and conflicting regimes which substantially undermine the coherence that would be needed for any form of genuine 'global' constitution. Further, contemporary developments in the international system, in particular the increasingly 'anti-globalist' mentality in many important countries, and the self-interested conduct of major global players, do not indicate that the radical transformations that would be required for such a global constitution to emerge are likely to occur in the foreseeable future. As such, any form of post-state constitutionalism would have to be reimagined in a much more modest, pluralistic way.

To offer this comprehensive analysis of the idea of global constitutionalism, this thesis was separated into seven chapters. The first sought to create a definition of constitutionalism by outlining its core characteristics. It suggested that the two key foundations of constitutionalism were the limitation of public power through law and the existence of some form of popular sovereignty, which together provide the foundational pillars for constitutionalism *qua* 'establishment of a legitimate and comprehensive framework for the exercise of public power'.¹⁵⁰⁸ The second chapter looked at the empirical characteristics required for this legitimate and comprehensive framework to operate, demonstrating that for constitutionalism to

¹⁵⁰⁸ Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, USA, 2010, pg.64.

achieve its goals, legislative, executive, and judicial power must be separated, and the constituent power of the people must be channelled through some form of representative democracy. The third chapter sought to address mainstream or 'liberal' visions of global constitutionalism. It argued that although some 'higher law' potentially 'constitutional' norms do exist in the international system, the UN does not provide an appropriate institutional structure for enforcing these norms as a result of the Security Council's dominance and related absence of a genuine separation of powers or other effective power limiting mechanisms within the UN system. The fourth chapter assessed the 'constitutionalisation thesis'. It demonstrated, through an assessment of the core organs of the 'global economic order', the Bretton Woods organisations and the WTO, that processes of constitutionalisation might simply entrench unfair or hegemonic practices into the international system and cannot thus be necessarily considered normatively desirable.

Moving on from analysis of specific international organisations, Chapter 5 sought, with an eye towards the proceeding chapter on global legal pluralism and global constitutionalism, to assess the concept of legal pluralism and its relationship with constitutionalism. It demonstrated that while constitutionalism and pluralism often co-exist through the recognition of the semi-autonomy of plural orders by the wider constitutional system, ultimately the authority of the plural order is predicated on the 'higher' authority of the constitution itself. Chapter 6 assessed the relationship between global legal pluralism and global constitutionalism. It demonstrated that the vastly complex decentralised and fragmented nature of the global legal system poses substantial challenges for any overarching vision of global constitutionalism as a result of fundamental 'rationality conflicts' between

the host of autonomous orders existing within the system. Finally, Chapter 7 sought to assess whether discussions of global or post-state constitutionalism might still have value in the light of the substantial obstacles posed in the previous chapters. It suggested that shifts toward global constitutionalism are unlikely as a result of the absence of a global ‘societal frame’, as well as the fact that major powers seem unlikely to sufficiently co-operate to engender such radical change in the international system. However, it suggested that global constitutionalism might still have value if reimagined in a more modest, pluralistic way, and might seek legitimacy from the wider global communities emerging in the international system, with global health governance providing a potential pioneer for this more modest constitutional idea.

Below, I will attempt to offer some tentative thoughts as to what the conclusions garnered above might mean for the discipline of global constitutionalism as well as some areas within the debate that would benefit from further study.

The problem with partial processes: Constitutionalism and constitutionalisation

Our opening analysis in Chapter 1 demonstrated that constitutionalism is primarily concerned with ‘legitimacy’, or ‘rightful rule’. As we saw from our analysis of the concept in this chapter, the emergence of constitutionalism was primarily a response to the ‘arbitrary’ rule of an unchecked sovereign, a form of rule the founding fathers of constitutionalism such as Montesquieu, Rousseau, and Sieyes, sought fundamentally to unbind, and thus to replace tyranny with rightful government. To achieve this legitimate form of government, a constitution must both ‘comprehensively’ limit the exercise of public power through the creation of a

strong 'higher' rule of law framework, as well as ultimately place the locus of sovereignty with the people, not the government. Within such a constitutional system, the government is only a 'creature of the constitution', with ultimate sovereignty lying with the principles and laws of the constitution as well as with the people themselves. As we saw in Chapter 2, to ensure that such a system operates in conformity with these principles, two key characteristics are required. Firstly, governmental power must be 'separated' between the executive, judicial, and legislative. Secondly, the constituent power of the people, which embodies the active, legitimising link between the people and the government, must be channelled through some form of representative democracy.

Importantly, the characteristics described in Chapters 1 and 2 cannot be unbound without affecting the legitimacy and coherence of the wider constitutional order, and the empirical characteristics of the constitution are critical to achieving its normative objective of legitimate government. Without an effective separation of powers, there can be no guarantee that government will not exercise public power arbitrarily, or in abrogation of the constitutional norms, and therefore infringe on the fundamental constitutional rights of the governed. The 'constituent power' of the people is similarly required in order to ensure ultimate governmental accountability to the governed and to guarantee that the subjects of the law are also its authors and shapers. Without this direct legitimising link, which furnishes the governed with final authority over their government, there is little, once again, to stop governments from exercising power arbitrarily. Thus, the characteristics outlined in Chapters 1 and 2 are symbiotic, and by removing any one of them from the broader constitutional framework, the overall coherence and legitimacy of the constitution could be seriously undermined.

It is in accepting and manifesting this symbiotic relationship between the various frames of constitutionalism that mainstream visions of global constitutionalism seem most suspect. As we saw in Chapter 3, key visions of global constitutionalism such as those espoused by Christian Tomuschat, Erika De Wet, Jurgen Habermas, and Bardo Fassbender focus on a ‘power-limiting’ vision of global constitutionalism. Such scholars suggest that the identification of certain ‘higher law’ or ‘hierarchically superior’ norms and laws in the international system, as well as a nascent substantive home for the entrenchment and enforcement of these norms in the form of the UN, provides a model for present or future global constitutionalism.

Although – as we saw in this chapter – there may well exist certain ‘higher-law’ norms in the international system manifested through *Jus Cogens* and entrenched in the UN Charter and wider system, it appears that the UN does not fulfil other important requirements of constitutionalism. In particular, the UN system does not sufficiently limit the power of its pre-eminent organ, the Security Council. Unlike the more holistic systems of constitutionalism outlined in Chapters 1 and 2, there are no clear legal limits within the UN system on the Security Council’s capacity to ‘determine a threat to peace or security’ or an effective separation of powers that might ensure that the council does not exercise its fundamentally political power arbitrarily or selectively. Importantly, the council’s pre-eminence and privilege in the international system is based not on legal or moral precepts, but on overwhelming military power, a Hobbesian trait that constitutionalism consistently sought to overturn. The example of the differing approach taken to ‘determining a threat to peace and security’ by the Security Council with regard to situations in Rwanda and Haiti, demonstrated that the council

often ‘determines’ and ‘enforces’ threats to peace and security based on the geopolitical interests of its most powerful members. Such a practice is clearly anathema to the power limiting vision that constitutionalism espouses. Indeed, we saw how the capacity of the Security Council to define its own competences without checks or balances has also meant that it has increasingly moved into a ‘legislating’ phase through the use of terror lists and associated Security Council resolutions. The council’s ‘terror lists’ sought to impose restrictions on the fundamental rights of individuals, such as the right to private property and the right to a fair trial without any reasonable recourse to due process, a situation that would likely be unacceptable to the power-limiting, rule of law aspects of constitutionalism, which, as we saw in Chapter 1, are critical to its operation, resulting in the council’s actions ultimately being challenged successfully within the European legal system by Yusuf Kadi. Further, we saw that the UN system is also substantially lacking in the element of ‘constituent power’. Although the Charter expresses itself in the form of ‘we the peoples’, it is extremely difficult to find any genuine participatory mechanisms via which the ‘constituent power’ of these peoples is represented in the decision-making organs of the UN, with the dominant Security Council unrepresentative of entire continents as well as the majority of the world’s population at any one time, and tremendously ‘over-represented’ by European and North American states. Thus, there seem few of the legal and institutional checks and balances within this system such as would be expected within an order defined by the principles of constitutionalism. Moreover, there is no ‘constituent’ power to ensure that organs of government are ultimately accountable to those they govern as legal subjects. As such, the UN is unlikely to offer the full benefits of constitutionalism, insofar as it is

still subject to many of the problems of arbitrary power that might be associated with ‘non-constitutional’ orders.

We can see similar, but not identical, issues in the ‘constitutionalisation thesis’ addressed in Chapter 4, which analyses Anne Peters’ claim that ‘domestic deconstitutionalisation could and should be compensated for by the ‘constitutionalisation of international law’.¹⁵⁰⁹ This idea, as we saw, differs from global constitutionalism in that it does not necessarily assume or advocate for the existence of a singular ‘global constitutionalism’, but can also refer to regime- or institution-specific processes. Such a thesis implies a narrative that ‘constitutionalisation’ necessitates progress, a constitutionalising world order being one that moves towards better and more just forms of global governance. The international economic order and associated norms and institutions are often seen as prime candidates for such a process because of their concretisation through the World Trade Organisation as well as broader influence and acceptance within the global system.

However, once again the processes of ‘constitutionalisation’ focused on by most key advocates of the philosophy tend to be ‘partial’, focusing specifically on subjecting processes in the international system to the legal tenets of constitutionalism while offering at best peripheral consideration to other core legitimising aspects, such as popular sovereignty, constituent power, and democracy, as well as insufficient consideration to the *content* of the norms and laws being constitutionalised in terms of whether they are suited to the processes of global justice which they endorse. As was demonstrated in Chapter 4 through an

¹⁵⁰⁹ Peters, Anne. “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures.” *Leiden Journal of International Law* 19.3, 2006: 579-610 pg. p580.

analysis of the core international institutions responsible for the regulation of the international economic order, it is not at all clear that processes of constitutionalisation necessarily work towards global justice. Through looking at the actions of the IMF, and particularly the WTO, I demonstrated that these organisations possess a substantial ‘hegemonic bias’ in that their organisational and legal structures advantage certain powerful western states and multinational corporations aligned with the neoliberal global economic order while at times substantially disadvantaging developing states and other weaker actors. Thus, ‘constitutionalising’ these organisations in the manner suggested may simply reinforce or ‘lock in’, these negative pathways, perpetuating an unjust system rather than solving the global problems it purports to do.

We can thus note certain broadly similar flaws in both the ‘global constitutionalism’ debate on the UN and the ‘constitutionalisation’ debate. In both instances, we can see that scholars advocating such visions rely, to varying extents, on ‘partial’ visions of constitutionalism, particularly focusing on formal legal characteristics often without sufficient attention to: a) the actual character of these norms and b) the surrounding institutional and empirical structures required to ensure the wider legitimacy of the constitutional order, such as separation of powers and representative democracy. As we saw from our analysis of both the UN and international economic order, without these characteristics, it would seem overly hasty to assume that these partial processes can extrapolate the genuine benefits of constitutionalism into the international system to solve the most pressing collective action problems. It would thus seem that if scholars such as De Wet, Fassbender, and Peters seek to utilise contemporary international organisations as potential candidates for creating a genuine global constitutionalism, they must ask and answer

difficult questions relating to reorganising the normative and institutional structures of these organisations to better accord with the purposes of constitutionalism outlined in Chapters 1 and 2. Given the geopolitical realities outlined in Chapters 3, 4, and 7, which document a considerable reluctance among major powers to reform international organisations accordingly, this seems improbable for the time being. It thus appears that seeking to extrapolate the benefits of constitutionalism into the international system in this manner seems unlikely to offer a suitable solution for the current collective action problems in our globalised world.

Global Legal Pluralism and Global Constitutionalism

The first broad analytical section of the thesis situated in Chapters 3 and 4 focused on analysing the ‘internal’ arguments of global constitutionalism by focusing on core institutions seen as prospective candidates for global constitutionalism or constitutionalisation. Moving on from this analysis, the thesis sought to test the global constitutionalist argument ‘externally’, by analysing against the conditions of radical plurality that exist in the international system. This section of the conclusion will propose some conjectures and offer some further conclusions as to how this interaction affects wider debates on global constitutionalism.

As we saw in Chapters 1 and 2, constitutionalism requires the establishment of a ‘comprehensive’ and legitimate framework for the exercise of public power. This quality of comprehensiveness is extremely important. If legal or political orders can exert material power outside of the legitimising normative and empirical framework of the constitution, then the constitution’s claim as the coherent foundation of legitimate power is undermined. A system of constitutionalism cannot thus be one of several orders operating within the same territory or social space, but must be pre-eminent, with all other orders ultimately operating within the

framework of norms and laws provided by the constitution. Identifying, or at least engendering, a fundamental locus of authority within the international system would thus likely be a requirement for a singular ‘global constitutionalism’ to manifest itself. Given that, unlike in domestic systems, it is difficult to identify such an apex or centre, this could pose problems to aspirational visions of global constitutionalism, as it is clear that a multitude of different legal orders, many with widely differing purposes, do exist in the international system.

To understand how this ‘global’ legal pluralism might interact with and affect prospects for global constitutionalism, it was required to provide a framework for analysis by better understanding the relationship between constitutionalism and legal pluralism. Chapter 5, focusing on this particular relationship, demonstrated that legal pluralism, in terms of the ‘existence of multiple legal orders’ operating within one territory or social space has been a defining characteristic of governance stretching back into antiquity, and indeed, was the predominant mode of governance for most of human history, at least until the emergence of the modern, sovereign state, which bound the multitude of plural orders into a more vertical, hierarchical form, in which the law of the state became pre-eminent over other orders. Ultimately, as was demonstrated, the centralisation required by constitutionalism ensures that while plural orders can exist and operate within a constitutional system, they can do so with only ‘semi’-autonomy, that autonomy being ultimately predicated on broader recognition from the constitutional order. As has been discussed above, if a legal or political order could exercise autonomous power that infringed upon or violated rights or laws entrenched in the constitutional system itself, then the fundamental authority of that order would be undermined.

As we saw in Chapter 6, the global system is vastly plural and diverse with legal and quasi-legal regimes emerging to deal with almost every aspect of international governance in the wake of exponential globalisation, with orders emerging both at the ‘inter-state’ as well as truly ‘global’ level. Such legal orders transcend state boundaries and seek to regulate genuine sites of post-state governance, with a global *lex mercatoria* of corporations and other financial organisations increasingly eminent in the international sphere. The question of whether such orders might be bound under a single global constitution is, of course, a key question when assessing constitutionalism’s value in dealing with global collective action problems. However, it appears that the idea of a global constitutionalism does not sit well with global legal pluralism because of the nature of the latter phenomenon. Given the absence of a genuine, material, central enforcement system in the international system, there would have to be a broad degree of voluntary compliance from this vast plethora of global orders for a global constitution to effectively operate and transplant the benefits of constitutionalism into the global system

It does not seem likely that such a system could be easily engendered. As we saw, the global legal system is undergoing a process of ‘fragmentation’, in which, rather than verticalising into a coherent central authority, it is instead dispersing, with specialist regimes seeking to stake out an autonomous space for themselves within the global system. If this functional differentiation was simply a result of the ‘legal framework’ of the global system being insufficiently developed to manage the enormous profusion of regulation that has become necessary because of exponential sectoral globalisation, the creation of a ‘sound legal order’ might be welcomed by the host of regulatory bodies, as it would be beneficial both to their interactions and

the predictability and the efficacy of the overarching system, therefore creating space for a system of global constitutionalism to bind together these orders and ameliorate any conflicts between them. However, as Gunther Teubner argues, this fragmentation also has its origins in contradictions between ‘society-wide institutionalised’ rationalities, making conflict between different orders likely as each order seeks to impose its own laws and norms on the wider global space, leading inevitably to conflict between different orders.¹⁵¹⁰ This is true at all levels of international governance. Looking at two conflicts between the WTO and CBD, we saw that, when no ultimate authority exists between two orders, material power is usually the key factor in deciding which order ultimately manages to exert dominance and ‘maximise its own rationality’ at the expense of the other. This is clearly problematic from the point of view of constitutionalism, which seeks to govern conflicts within a broader legal and normative framework that removes the role of material power in determining outcomes within a particular system.

Finally, we saw how multinational corporations, through sheer economic and resource advantage, seek to stake out their own rationality, based almost purely on profit, as dominant in the international system. These ‘transjurisdictional’ entities have tremendous power to affect the international system, yet are not bound by any broad, enforceable international system of rules. Given their enormous power and ability to affect individuals, economies, and human rights in every corner of the globe, the actions of these corporations, unbound by any specific, overarching legal framework, also substantially undermines the idea of the international legal order as an integrated whole that might be bound by an overarching form of global

¹⁵¹⁰ Fischer-Lescano, Andreas, and Gunther Teubner. “Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law.” *Mich. J. Int’l L.* 25, 2003, p.1004.

constitutionalism. As we saw, there seems little international will to create such a framework, with the ‘voluntary’ codes suggested by the UN and others appearing woefully inadequate to the task.

Thus, the particular *form* of global legal pluralism in the international system, premised as it is to a large degree on fragmentation and ‘rationality conflicts’, makes the idea of an overarching global constitution relatively unlikely without a radical shift in the behaviour of actors in the international system. Such a shift does not seem likely for the time being.

Thus, visions of ‘global’ constitutionalism are problematic both internally and externally. For such visions to become realisable, fundamental reform would need to occur in the international system. This would need to happen to ensure that structures of decision making did not unreasonably offer unfair advantage to major powers and thus entrench hegemony in the international system, as ultimately such practices undermine constitutionalism’s goal of replacing arbitrary power with ‘constitutionally’ legitimate rule. Moreover, candidates for global constitutionalism would need to become more open to the active presence of a ‘constituent power’, whereby governmental authority and exercise of power would ultimately need to become based on the ‘consent of the governed’, through some form of representative democracy. Without these qualities, it is unlikely that the benefits of constitutionalism in providing a ‘legitimate and comprehensive framework for the exercise of public power’ could be realised in the international system.

Looking at the geopolitical and empirical realities of the international system, it seems that such a transition is unlikely for the time being. Firstly, we have seen considerable reluctance to reform international organisations, particular the

UN, to fairer and more participatory organisational structures. Despite tremendous shifts in global power and population, the Security Council has fundamentally not reformed since 1965, as the presence of veto-yielding states prevents any reform which might affect the dominance of the 'Permanent Five' members within the organisation. Reforms have been planned, but ultimately scuppered by this seemingly insurmountable roadblock. Without fundamental reform to this particular institution, which as we have seen from our analysis in Chapter 3, is not limited in constitutionally appropriate ways, it is hard to see how the UN, the primary global organisation, could offer the genuine benefits of 'global' constitutionalism.

Secondly, there has been remarkable reticence on the part of the dominant power, the United States, to engage with the global order, or to create global organisations when doing so might in any way affect the material interests of that state. In order for a global constitution to be more than a paper tiger, it would need the active and willing participation of such a significant state. Nonetheless, the US frequently fails to engage with ideas of 'trading off' its own temporary, material interests to support institutions working toward protections of wider global welfare or to solve wider global problems that may not directly touch on its interests. Further to this, by looking at the analysis provided by Benvenisti and Downs, we saw that not only do powerful states sometimes not participate in creating wider and fairer structures for global governance, but at times they actively undermine them when they see them as potentially deleterious to their own geopolitical interests. As a result of this 'push-pull' relationship that major powers have towards wider structures of international law and global governance, it seems hard to envisage that

the requisite degree of co-operation that would be required to create a genuine global constitution could be engendered any time soon.

Similarly, it appears that there are substantial problems with creating a genuine ‘constituent power’ in the international system. As Walker argues, the creation of such a power is generally dependent on the existence of a ‘societal frame’ within the broader constitutional polity.¹⁵¹¹ This is because such a frame requires a certain degree of mutual understandings and shared identity between people for them to participate in the civic process, particularly with regards to democracy. However, it is difficult to see where such a constituent power could be identified in the contemporary global system. Indeed, as was demonstrated in Chapter 7, particular geopolitical events, most significantly the global financial crisis, have indeed prompted a move away from more ‘global’ forms of identity and a strengthening of nationalism and isolationism. Such developments demonstrate the fragility of even the thinnest forms of global identity in the face of unforeseen global developments. Thus it seems unlikely, at least at a holistic, ‘global level’, that a genuine societal frame might emerge to provide the background conditions required for a global constituent power and democracy.

If constitutionalism is still to be of heuristic value as a tool for better understanding and organising international governance, it likely must move away from centralised visions whereby a singular, global constitution would regulate the entirety of the global system. Instead, as was suggested in Chapter 7, constitutionalism might need to be reimagined in a more pluralistic sense. Given Walker’s accurate contention that, in a globalised world, where all governance, even

¹⁵¹¹ Walker, Neil. *“Beyond the Holistic Constitution”* The Twilight of Constitutionalism, Oxford University Press, 2010, p.299-301.

that within the nation state is ultimately non-holistic and subject to outside forces, the imaginative prospect of some form of constitutional pluralism should not be removed from the ‘normative arsenal’ of potential solutions for better governance.¹⁵¹² This is particularly true given the seriousness of many of the collective action problems facing the world today. Such a ‘constitutional pluralism’, would nonetheless require sufficient connection to the source material, to ensure that, at least to a modest extent, the benefits of constitutionalism could be extrapolated to these plural systems. To do so, ensuring the ‘legitimacy’ of these constitutional orders would be critical.

As was argued, for constitutionalism to operate as intended, legal, and institutional structures must be buttressed by some form of ‘constituent power’, manifested through genuine participation by the governed people in their system of government and rooted in a ‘societal frame’ within the given polity. It may be that the beginnings of such a societal frame can be located in the emergence of ‘global communities’ in the international system, where we can identify existent and substantive communities of interest who possess a genuine post-state identity and work together towards achieving a particular normative or empirical objective in the international system through resource sharing and co-operation. In terms of a practical area where we can identify the wider constituent power of affected communities interacting with states and international organisations to form more legitimate governance, global health might provide a salient example. The promulgation of the WHO’s ‘Sustainable Development Goals’ increasingly bringing in participation from a much wider range of affected communities and grassroots level organisations which work in association with International Institutions and

¹⁵¹² Ibid.

states to create more legitimate and effective global health governance, might provide one nascent example, with GAVI providing another. Ultimately, such developments are in their infancy, but demonstrate that in particular areas where there exists a broad level of homogeneity in the objectives of actors in the international system, such as global health, it may well be possible to engender more effective participation which might ultimately build into some form of ‘constituent power’. This could provide the representational force to legitimise such organisations at the constitutional level.

Final Conclusions and Prospects for Further Study

As Walker suggests, the ‘debate on global constitutionalism operates at a high level of abstraction, requires careful translation, and does not admit any easy conclusions’. Our above analysis at the broadest level has suggested that while mainstream visions of an overarching global constitution to regulate the entirety of the international system seem improbable, it may be possible to engender some form of modest constitutional pluralism, particularly in areas where critical geopolitical differences are less frequent, such as global health governance. However, such visions at this stage are clearly aspirational and premised more on theoretical possibility than empirical, existent evidence. Indeed, rather than an overarching solution to the many collective action problems in the international system, the ‘normative arsenal’ of constitutionalism may be only one tool to enhance the potential legitimacy and effectiveness of international governance.

Further study into a number of areas might be beneficial for better identifying where and how such a constitutional pluralism might move from the realms of the theoretical to the practical. Firstly, a linked research agenda with wider research on global co-operation might be beneficial to identify areas in the

international system in which this more modest form of constitutional pluralism might find its initial roots and take shape. This might involve a study of global co-operation across wide ‘sectors’, (for example the environment, global health, international labour) of the international system with an eye on how particular actors within that sector operate regarding their ‘openness’ to ‘trade-offs’ and forms of wider co-ordination. In doing so, it might be possible to identify particular sectors within the international system where the normative arsenal of constitutionalism might be able to offer practical, workable solutions to international problems, and in which powerful global actors might be more amenable to improving structures of government through these more ‘constitutional’ structures. Should the emergence of this modest constitutional pluralism within these particular sectors be successful, it might engender change in broader areas of international governance.

These ‘constitutionally plural’ international orders would still have to exist within the wider international system, which, as we have seen, is often characterised by regime conflict. Thus, although to a certain degree it may be possible to ‘compromise’ the comprehensiveness of constitutional orders in the international system, ultimately, if the competence of such orders was continuously undermined from the outside, questions would once again arise as to whether any genuine benefits of constitutionalism could be achieved. Thus, ‘buffering’ these orders against one another would still be important. Further study into the sorts of meta-rules and arbitration processes that have historically been successful in ameliorating conflict between plural orders both nationally and internationally would therefore also be useful

Creating these balancing rules and norms would undoubtedly be a daunting challenge given current geopolitical conditions. On the other hand, a piecemeal,

pluralistic approach to post-state constitutionalism seems substantially more plausible than creating a single global constitution, given the background condition of radical and often conflicting plurality that exists within the international system. Indeed, the increased legitimacy granted to these 'plural' constitutional orders by the presence of a 'societal' frame and democratic community might allow for more balanced and discursive forms of negotiation between orders. Additional exploration of these two phenomena – firstly, which sectors might be best suited to contain this modest form of constitutional pluralism and, secondly, what means might be used to ameliorate and lessen conflict between the various orders – would thus be beneficial to the further study of global constitutionalism.

Thus, although mainstream visions of global constitutionalism appear extremely problematic, conceptions of post-state constitutionalism might still represent a useful tool for understanding developments in the international system. If we accept a clear-eyed vision of the pluralist condition of the international system, the normative and legitimising potential of constitutionalism might have a role to play through channelling the nascent social energy of global communities into more effective and legitimate vehicles for global governance. Certainly, such a vision would differ substantially from state constitutions or from the idea of a holistic world constitution. Nonetheless, in a world of increasingly globalised problems, the normative and heuristic qualities of constitutionalism may well have a role to play in the search for future solutions.

This is particularly salient if the scope of future calamities surrounding food scarcity, climate change, over-population, and resource scarcity is meant to increase as has been predicted. This thesis is not thus opposed to the idea of global constitutionalism, but seeks to act as a critical friend by remaining realistic as to its

immediate prospects. This is not only to temper false enthusiasm, but also to highlight key areas that need to be strengthened both in theory and in practice. Thus, rather than approaching the idea of global constitutionalism from a position of intellectual resignation, I do so in a spirit of reflective optimism that many of the benefits inherent within constitutionalism might one day be used for the creation of a better, more just, and fairer world.

Bibliography

Books

Alvarez, José E. *International Organizations as Law-Makers*. Vol. 586. Oxford: Oxford University Press, 2005.

Anderson, Benedict. *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. London: Verso, 2004.

Anghie, Anthony. *Imperialism, Sovereignty and the Making of International Law* (CUP, Cambridge 2008).

Appelbaum, Richard, William Felstiner, and Volkmar Gessner, eds. *Rules and Networks: The Legal Culture of Global Business Transactions*. Bloomsbury Publishing, 2001.

Aristotle (H. Rackham, trans.), *Politics* London, Heinemann, 1967.

Aristotle. *Politics*, Book 4. (Circa 350BC). MIT repository, Classics (Translation by Benjamin Jowett) – <http://classics.mit.edu/Aristotle/politics.4.four.html> Accessed 2nd Jan 2018.

Asch, Ronald G. "Introduction." *The Thirty Years War*. Macmillan Education UK, 1997. 1-8.

Austin, John, and Sarah Austin. *The Province of Jurisprudence determined*. Vol. 2. J. Murray, 1861.

Babb, Sarah, and Ariel Buira. "Mission creep, mission push and discretion: The case of IMF conditionality." *The IMF and the World Bank at Sixty* 59 (2005).

Barnett, Michael, and Raymond Duvall, eds. *Power in global governance*. Vol. 98. Cambridge University Press, 2004.

Beck, Ulrich. *What is Globalization?* John Wiley & Sons, 2015.

Bellamy, Richard. *Political constitutionalism: A republican defence of the constitutionality of democracy*, Oxford University Press, (2007).

Benton, Lauren. *Law and colonial cultures: Legal regimes in world history, 1400-1900*. Cambridge University Press, 2002.

Berger, Klaus Peter. *The Creeping Codification of the New Lex Mercatoria*. Kluwer Law International, 2010.

Berman, Paul Schiff. *Global legal pluralism: A jurisprudence of law beyond borders*. Cambridge University Press, 2012.

Billias, George Athan. *American constitutionalism heard round the world, 1776-1989: A global perspective*. NYU Press, 2009.

Bodin, Jean. *Bodin: On Sovereignty*. Cambridge University Press, 1992.

Bodin, Jean. *The Six Bookes of a Commonweal*. Trans. Richard Knolles. Ed. Kenneth Douglas McRae. Cambridge: Harvard University Press, 1962.

Boggs, Carl. *The end of politics: Corporate power and the decline of the public sphere*. Guilford Press, 2001.

Bourantonis, Dimitris. *The History and Politics of UN Security Council Reform*. Routledge, 2004.

Bull, Hedley. *The Anarchical Society: A Study of Order in World Politics*. Palgrave Macmillan, 2012.

Bracton. *De Legibus Et Consuetudinibus Angliæ c.1250*, Thorne Translation. Harvard School of Law, Bracton Online-
<http://bracton.law.harvard.edu/Unframed/English/v2/305.htm>-

Brown, Chris. *Sovereignty, Rights and Justice: International Political Theory Today*. Polity Press, 2002.

Cass, Deborah Z. *The constitutionalization of the World Trade Organization: legitimacy, democracy, and community in the international trading system*. OUP Catalogue, 2005.

Cicero, Marcus Tullius. *De Legibus (On the Laws)*, Book 3, at *Natural Laws, Natural Rights, and the American Constitution* –
<http://www.nlrac.org/classical/cicero/documents/de-legibus>

Cicero, Marcus Tullius. *The Republic: And, the Laws*. Oxford University Press, 1998.

Claessens, Stijn, and Kirsten Forbes, eds. *International Financial Contagion*. Springer Science & Business Media, 2013.

Cline, William R. *The Baker Plan: Progress, shortcomings, and future*. No. 250. The World Bank, 1989.

Cohen, Jean L. *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*. Cambridge University Press, 2012.

Cohen, Robin, ed. *Global Social Movements*. A&C Black, 2004.

Cohler, Anne M., and Comparative Politics. *Montesquieu and "The Spirit of American Constitutionalism."* Lawrence: University Press of Kansas, 1988.

Coicaud, Jean-Marc, and Veijo Aulis Heiskanen, eds. *The Legitimacy of International Organizations*. United Nations Publications, 2001.

Collins, Richard, and Nigel D. White, eds. *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order*. Routledge, 2011.

Cutler, A. Claire. *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy*. Vol. 90. Cambridge University Press, 2003.

De Bracton, Henry, and Samuel Edmund Thorne. *On the laws and customs of England*. Vol. 3. Published in association with the Selden Society [by] the Belknap Press of Harvard University Press, 1977.

Della Porta, Donatella, and Sidney G. Tarrow, eds. *Transnational Protest and Global Activism*. Rowman & Littlefield, 2005.

De Montesquieu, Charles. *Montesquieu: The spirit of the laws*. Cambridge University Press, 1989.

Dicey, Albert Venn. *The Law of the Constitution*. Vol. 1. OUP Oxford, 2013.

Dickson, Barney, and Rosie Cooney, eds. *Biodiversity and the Precautionary Principle: Risk and Uncertainty in Conservation and Sustainable Use*. Routledge, 2005. 27.

Dryzek, John S. *Deliberative global politics: Discourse and democracy in a divided world*. Cambridge: Polity, 2006.

Dunoff, Jeffrey L., and Joel P. Trachtman, eds. *Ruling the world? Constitutionalism, international law, and global governance*. Cambridge University Press, 2009.

Ehrlich, E *Fundamental Principles of the Sociology of Law*, Cambridge, Harvard University Press (1913).

Fassbender, Bardo. *The United Nations Charter as the constitution of the international community*. Vol. 51. Brill, 2009.

Fidler, David. "Architecture Amidst Anarchy: Global Health's Quest for Governance." *L Global Health Governance*, 2007.

Figgis, John Neville. *The divine right of kings*. University Press, 1922.

Friedrich, Carl Joachim. "Constitutional government and democracy; theory and practice in Europe and America." 1941.

Gerwith, A. Marsilius of Padua. *Defensor Pacis*, translated as *The Defender of Peace*, New York, (1951), Vol II.

Giddens, A. *The Consequences of Modernity*. Stanford: Stanford University Press, 1990.

Gill, S. (1990a) *American Hegemony and the Trilateral Commission*, Cambridge: Cambridge University Press.

Gilpin, Robert. *Global political economy: Understanding the international economic order*. Princeton University Press, 2011.

Gimbel, John. *The origins of the Marshall plan*. Stanford University Press, 1976.

Glenn, Patrick, H. *The Cosmopolitan State*. OUP Oxford, 2013.

Goldman, Michael. *Imperial nature: The World Bank and struggles for social justice in the age of globalization*. Yale University Press, 2006.

Goldsmith, Jack L., and Eric A. Posner. *The Limits of International Law*. Oxford University Press, 2005.

Gordon, Scott. *Controlling the State: Constitutionalism from Ancient Athens to Today*. Harvard University Press. 1999.

Gwyn, William B. *The Meaning of the Separation of Powers: An Analysis of the Doctrine from Its Origin to the Adoption of the United States Constitution*. Vol. 9. Tulane University, 1965.

Habermas, Jürgen *Does the Constitutionalization of International Law Still Have a Chance*, The Divided West, Polity, 2006.

Habermas, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. John Wiley & Sons, 2015.

Habermas, Jürgen. "The Postnational Constellation: Political Essays." 2001.

Habermas, Jürgen. *Citizenship and National Identity*. Sage Publishing. 1990.

Hale, Thomas, David Held, and Kevin Young. *Gridlock: Why global cooperation is failing when we need it most*. Polity, 2013.

Hall, Kermit L., William M. Wiecek, and Paul Finkelman. *American legal history*. Oxford University Press, 1996.

Hamilton, Alexander, James Madison, and John Jay. "Federalist no. 78." *The Federalist Papers*. Palgrave Macmillan US, 2009.

Hart, Herbert Lionel Adolphus, and Leslie Green. *The concept of law*. Oxford University Press, 2012.

Harvey, David. *The new imperialism*. Oxford University Press, USA, 2003.

- Held, David. *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*. Stanford University Press, 1995.
- Heyns, Christof H., and Frans Viljoen, eds. *The impact of the United Nations Human Rights Treaties on the Domestic Level*. Martinus Nijhoff Publishers, 2002.
- Himmelfarb, Gertrude. *The roads to modernity: The British, French, and American enlightenments*. Random House, 2008.
- Hinsley, F. H. *Power and the Pursuit of Peace: Theory and Practice in the History of Relations BETWEEN States*, 1963.
- Hobbes, Leviathan, ed. with an introduction by C. B. Macpherson Baltimore, 1968.
- Hobbes, Thomas. *Leviathan*. A&C Black, 2006.
- Hobbes, Thomas. *Leviathan*, 1651, Penguin 1982, ed. & Intr. by C.B. Macpherson.
- Hodges, Richard. *Dark Age Economics: Origins of Towns and Trade, AD 600-1000*. Bristol Classical Press, 1989
- Hooker, Michael Barry. *Legal pluralism: An introduction to colonial and neo-colonial laws*. Clarendon Press, 1975.
- Hostettler, John. *Sir Edward Coke: A force for freedom*. Barry Rose Law Publishers, 1997.
- Huggan, Graham, and Ian Law, eds. *Racism Postcolonialism Europe*. Vol. 6. Liverpool University Press, 2009.
- Hunt, Lynn. *Politics, Culture, and Class in the French Revolution: With a New Preface*. Vol. 1. Univ of California Press, 2004.
- Hurd, Ian. *After Anarchy: Legitimacy and Power in the United Nations Security Council*. Princeton University Press, 2008.
- Iriye, Akira, Petra Goedde, and William I. Hitchcock, eds. *The Human Rights Revolution: An International History*. Vol. 3. Oxford University Press, 2012.
- Jacobson, Harold Karan, and Michel Oksenberg. *China's participation in the IMF, the World Bank, and GATT: toward a global economic order*. University of Michigan Press, 1990.
- James, Stephen. *Human Rights*. John Wiley & Sons, Ltd, 2008
- Joerges, Christian, Inger-Johanne Sand, and Gunther Teubner, eds. *Transnational governance and constitutionalism*. Bloomsbury Publishing, 2004.
- Jordan, Terry L. *The US Constitution: And Fascinating Facts about it*. Oak Hill Pub, 1999.

Kant, Immanuel. *An Answer to the Question: 'What is enlightenment?'* Penguin UK, 2013.

Kant, Immanuel. *Perpetual Peace: A Philosophical Sketch*. Cambridge: Cambridge University Press, 1970.

Kant, Immanuel. *Kant: The Metaphysics of Morals*. Cambridge University Press, 1996.

Kaplan, E. Ann. *Looking for the other: Feminism, film, and the imperial gaze*. Psychology Press, 1997,

Kaplan, Harold. *Henry Adams and the American Naturalist Tradition*. Routledge, 2017.

Keck, Margaret E., and Kathryn Sikkink. *Activists beyond Borders: Advocacy Networks in International Politics*. Cornell University Press, 2014.

Kelsen, Hans. *General theory of law and state*. Vol. 1. The Lawbook Exchange, Ltd., 1945.

Kelsen, Hans. *The law of the United Nations: A critical analysis of its fundamental problems*. Vol. 11. The Lawbook Exchange, Ltd., 1950.

King, Anthony. *The British Constitution*. Oxford University Press, USA, 2007.

Klabbers, Jan, Anne Peters, and Geir Ulfstein. *The constitutionalization of international law* Oxford University Press, 2009.

Körner, Peter, et al. "*The IMF and the debt crisis. A guide to the Third World's dilemmas*". Zed Books, 1986.

Krisch, Nico. *Beyond constitutionalism: the pluralist structure of postnational law*. Oxford University Press, USA, 2010.

Lane, Gary. *Constitutions and Political Theory*. Manchester: Manchester University Press, 1996, 6.

Lewis, Peter Shervey. *Later medieval France: The polity* Minerva Atkinson, Alice: A Brief History of the Hundred Years War. 1968.

Lazaridis, Gabriella. *Security, Insecurity and Migration in Europe*. Routledge, 2016.

Linklater, Andrew. *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era*. Univ of South Carolina Press, 1998,

Locke, John. *Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government*. John Wiley & Sons, 2014.

Locke, John, Peter Laslett, (ed). *Two Treatise of Government*, CUP, Cambridge 1991.

Lopez, Steve. *Reorganizing the rust belt: An inside study of the American labor movement*. Univ of California Press, 2004.

Loughlin, Martin. *Constituent Power Subverted: From English Constitutional argument to British Constitutional Practice*. Oxford University Press, 2007

Loughlin, Martin. *The idea of public law*. Oxford University Press, 2003.

Loughlin, Martin, and Neil Walker. *The paradox of constitutionalism: constituent power and constitutional form*. No. 342.4. Oxford University Press, 2007.

Luck, Edward C. *UN Security Council: Practice and Promise*. Routledge, 2006.

Luhman, *Law as a Social System*, Oxford Universty Press, 2004.

Luhmann, Niklas. *Grundrechte als Institution*. Berlin: Duncker & Humblot, 1965.

Machiavelli, Niccolò, and Maurizio Viroli. *The prince*. Vol. 43. Oxford University Press, 2008

Mackinnon, Catherine. *Towards a Feminist Theory of the State* (HUP, Cambridge MA, 1989, 219.

Madison, (1750) Federalist Paper 47, Avalon Project-
http://avalon.law.yale.edu/18th_century/fed47.asp.- Accessed 29th Jan 2017.

Madison. Federalist no 51 Avalon Project-
http://avalon.law.yale.edu/18th_century/fed51.asp- accessed 12th July 2017.

Marshall, Geoffrey. *Constitutional theory*. Oxford Univ Pr, 1971.

Marston, Daniel. *The American Revolution 1774–1783*. Bloomsbury Publishing, 2014.

McIlwain, Charles Howard. *Constitutionalism: ancient and modern*. The Lawbook Exchange, Ltd, 2017.

Moghadam, Valentine M. *Globalization and Social Movements: Islamism, Feminism, and the Global Justice Movement*. Rowman & Littlefield, 2012.

Moore, Sally Falk. *Law as process: an anthropological approach*. LIT Verlag Münster, 2000.

Montesquieu. 1750. *The Spirit of Laws*, Translated 1752: Thomas Nugent, Batoche Books, 2001.

Morall, John *Political Thought in Medieval Times*, University of Toronto Press, 1980.

Morton. *An Overview of NGOs in Development Co-operation*, United Nations Development Programme, 2011.

[http://www.cn.undp.org/content/dam/china/docs/Publications/UNDP – CH11%20An%20Overview%20of%20International%20NGOs%20in%20Development%20Cooperation.pdf](http://www.cn.undp.org/content/dam/china/docs/Publications/UNDP-CH11%20An%20Overview%20of%20International%20NGOs%20in%20Development%20Cooperation.pdf) Accessed 12th Nov 2017.

O'Brien, Robert. *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements*. Vol. 71. Cambridge University Press, 2000.

O'Callaghan, Joseph F. *A history of medieval Spain*. Cornell University Press, 2013.

O'Donoghue, Aoife. *Constitutionalism in Global Constitutionalisation*. Cambridge University Press, 2014

Oman, Charles. *A history of England*. Jovian Press, 2017.

Paine, Thomas. *Common sense*. Broadview Press, 2004.

Paine, Thomas. *Rights of Man*, Mineola, NY: Dover Thrift Editions, 1999.

Panitch, Leo, and Martijn Konings, eds. *American empire and the political economy of global finance*. Springer, 2008.

Pennington, Kenneth. *The Prince and the Law, 1200-1600: Sovereignty and rights in the Western legal tradition*. Univ of California Press, 1993.

Pieterse, Jan Nederveen. *Globalization or Empire?* Routledge, 2004.

Rawls, John. *Political Liberalism [PL]*, New York: Columbia University Press. Paperback edition, 1996.

Redfern, Alan. *Law and Practice of International Commercial Arbitration*. Sweet & Maxwell, 2004.

Reinicke, Wolfgang H., et al. *Critical Choices: The United Nations, Networks, and the Future of Global Governance*. IDRC, Ottawa, ON, CA, 2000.

Rousseau, Jean Jacque, *The Social Contract*, 1762 – Archives of the University College, Cork – https://www.ucc.ie/archive/hdsp/Rousseau_contrat-social.pdf

Peet, Richard. *Unholy trinity: the IMF, World Bank and WTO*. Zed Books Ltd., 2009.

Rohr, John Anthony. *Founding republics in France and America: A study in constitutional governance*. Univ Pr of Kansas, 1995.

Rutherford, Samuel, and James Elliott Robb. *Lex, Rex*. John Field, 1977.

Saad-Filho, Alfredo, and Deborah Johnston. *Neoliberalism: A critical reader*. University of Chicago Press, 2005.

Sadler, John. *Rights of the Kingdom*. Kidgell, 1648.

Sarikakis, Katharine. *Ideologies of the Internet*. Hampton Press, Incorporated, 2005.

Schabas, William A. *An Introduction to the International Criminal Court*. Cambridge University Press, 2011.

Schachter, Oscar. *International Law in Theory and Practice*. Vol. 13. Martinus Nijhoff Publishers, 1991.

Schlesinger, Stephen C. *Act of creation: The founding of the United Nations*. Basic Books, 2003.

Schmitt, C. *The Crisis of Parliamentary Democracy* [1923] E. Kennedy, trans. (Cambridge, MA: MIT Press, 1985.

Schwöbel, Christine EJ. *Global constitutionalism in international legal perspective*. Vol. 4. Martinus Nijhoff Publishers, 2011.

Scott, Gordon. *Controlling the State: Constitutionalism from Ancient Athens to Today*. 1999.

Shaw, M. *Theory of the global state: Globality as an unfinished revolution*. Cambridge: Cambridge University Press. 2000.

Shelton, George. *Morality and Sovereignty in the Philosophy of Hobbes*. Springer, 2016.

Sklair, Leslie. *Transnational capitalist class*. John Wiley & Sons, Ltd, 2012.

Sieyès, Emmanuel Joseph. "What is the Third Estate?" trans. *SE Finer, introd. by Peter Campbell (New York, Washington, London 1964)* 51, 1789.

Sieyes, EJ. *What is the Third Estate?* University of Oregon, Archives, 1789. <http://pages.uoregon.edu/dluebke/301ModernEurope/Sieyes3dEstate.pdf>

Steiner, Henry J., Philip Alston, and Ryan Goodman. *International Human Rights in Context: Law, Politics, Morals: Text and Materials*. Oxford University Press, USA, 2008.

Tamanaha, Brian Z. *On the rule of law: History, politics, theory*. Cambridge University Press, 2004.

Teitel, Ruti. "The Constitutional Canon: The Challenge Posed by a Transnational Constitutionalism." *Const. Comment.* 17, 2000: 237.

Teubner, Gunther. *Constitutional fragments: Societal constitutionalism and globalization*. Oxford University Press, 2012.

Thompson, Alexander. *Channels of Power: The UN Security Council and US Statecraft in Iraq*. Cornell University Press, 2015.

Tierney, Brian. *The crisis of church and state, 1050-1300*. No. 21. University of Toronto Press, 1964.

Tomuschat, Christian, ed. *the United Nations at age fifty: a legal perspective*. Vol. 23. Martinus Nijhoff Publishers, 1995.

Tomuschat, Christian, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century" General Course on Public International Law, 1999, 281 *Recueil des Cours de l'Académie de Droit International* 237.

Tomuschat, Christian, ed. *Modern law and self-determination*. Vol. 16. Martinus Nijhoff Publishers, 1993.

Tomuschat, Christian, ed. *The United Nations at Age Fifty: A Legal Perspective*. Vol. 23. Martinus Nijhoff Publishers, 1995.

Tomuschat, Christian. *Obligations Arising for States without or Against Their Will*. Martinus Nijhoff, 1993.

Tomuschat, Christian. *International law: ensuring the survival of mankind on the eve of a new century: general course on public international law*. Martinus Nijhoff, 1999.

Tully, James. *Strange multiplicity: Constitutionalism in an age of diversity*. No. 1. Cambridge University Press, 1995.

UNCTAD Trade and Development Report, 2002 – http://unctad.org/en/Docs/tdr2002_en.pdf- Accessed 12th July 2017.

Van Dormael, Armand. *Bretton Woods: Birth of a monetary system*. Springer, 1978.

Verdross, Alfred. *Die Verfassung der Völkerrechtsgemeinschaft*. J. Springer, 1926, cited in Schwöbel, Christine EJ. "Situating the debate on global constitutionalism." *International Journal of Constitutional Law* 8.3 (2010): 611-635.

Verdross, Alfred. *Die Verfassung der Völkerrechtsgemeinschaft*. J. Springer, 1926.

Verdross, Alfred, and Bruno Simma. *Universelles Völkerrecht*. Duncker & Humblot, 1984.

Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012.

Waldron, Jeremy. *Liberal Rights: collected papers 1981-1991*. Cambridge University Press, 1993.

Walker, Neil. *Intimations of global law*. Cambridge University Press, 2014.

Walker, Neil. "Constitutionalism and Pluralism in Global Context." *Constitutional Pluralism in the European Union and Beyond*. Portland: Hart Publishing, Portland. 2012.

Waluchow, W. *A Common Law Theory of Judicial Review*, Cambridge University Press, 2009.

Weiss, Thomas George, and Sam Daws, eds. *The Oxford Handbook on the United Nations*. Oxford University Press, USA, 2007.

Wood, Duncan Robert. *Governing Global Banking: the Basel Committee and the Politics of Financial Globalisation*. Gower Publishing, Ltd., 2005.

WoodHouse, *ASP On the Putney Debates*, Puritanism and Liberty (1950).

Wormuth, Francis Dunham. *The origins of modern constitutionalism*. Harper, 1949.

Zolo, Danilo. *Cosmopolis: Prospects for World Government*. John Wiley & Sons, 2013.

Journal Articles

Archibugi, Daniele. "Demos and Cosmopolis." *New Left Review* 13, 2002: 24.

Adhikari, Ratnakar. "Emerging Issues Relating to Conflicts between TRIPS and Biodiversity: Development Implications for South Asia." *South Asian Yearbook of Trade and Development*, 2005: 261-288.

Allott, Philip. "The Emerging International Aristocracy." *NYUJ Int'l L. & Pol.* 35 2002: 309.

Alvarez, Jose E. "Judging the Security Council." *American Journal of International Law* 90.1, 1996: 1-39, pp.5-6.

Anderson, Kenneth. "Accountability as Legitimacy Global Governance, Global Civil Society and the United Nations." *Brook. J. Int'l L.* 36, 2010: 84.

Angela K., et al. "Country Ownership and GAVI Transition: Comprehensive Approaches to Supporting New Vaccine Introduction." *Health Affairs* 35.2, 2016: 272-276.

Aoki, K. 1998, "Neocolonialism, Anticommons Property and Biopiracy in the (not-so-brave) New World Order of International Intellectual Property Protection", *Indiana Journal of Global Legal Studies Journal*, Vol. 6 No. 11, pp. 11-58.

Avbelj, Matej, and Jan Komárek. "Four Visions of Constitutional Pluralism." *European Constitutional Law Review* 4.3, 2008: 524-527.

Bailey, Saki, and Ugo Mattei. "Social movements as constituent power: The Italian struggle for the commons." *Indiana Journal of Global Legal Studies* 20.2, 2013: 965-1013.

Balkin, Jack M. "Respect-Worthy: Frank Michelman and the legitimate constitution." *Tulsa L. Rev.* 39, 2003: 485.

Barnett, Michael N. "The UN Security Council, indifference, and genocide in Rwanda." *Cultural Anthropology* 12.4, 1997: 551-578.

Bandy, Lee X., et al. "Transforming our World: Implementing the 2030 Agenda through Sustainable Development Goal Indicators." *Journal of Public Health Policy* 37.1, 2016: 13-31.

Barry, B. Political Accommodation and Co-sociational Democracy, *British Journal of Political Science*, 1975, 477-505

Bassiouni, M. Cherif. "International Crimes: Jus Cogens and Obligatio Erga Omnes." *Law & Contemp. Probs.* 59, 1996: 63.

Beck, Ulrich. "Reframing Power in the Globalized World." *Organization Studies* 29.5, 2008: 793-804.

Benvenisti, Eyal, and George W. Downs. "The Empire's New Clothes: Political Economy and the Fragmentation of International Law." *Stanford Law Review*, 2007: 595-631.

Berman, Paul Schiff. "Global Legal Pluralism." *S. Cal. L. Rev.* 80, 2006: 1155.

Benton, Lauren. "Historical perspectives on legal pluralism." *Hague Journal on the Rule of Law* 3.1, 2011: 57-69.

Berdal, Mats. "The UN Security Council: Ineffective but Indispensable." *Survival* 45.2, 2003: 7-30.

Bergman, Matthew P. "Montesquieu's Theory of Government and the Framing of the American Constitution." *Pepp. L. Rev.* 18, 1990: 1.

Berman, Paul Schiff. "Global legal pluralism." *S. Cal. l. Rev.* 80, 2006: 1155.

Berman, Paul Schiff. "A Pluralist Approach to International Law." *Yale J. Int'l L.* 32, 2007: 301.

Bianchi, Andrea. "Human Rights and the Magic of Jus Cogens." *European Journal of International Law* 19.3, 2008: 491-508.

Biermann, Frank, Norichika Kanie, and Rakhyun E. Kim. "Global Governance by Goal-setting: The novel approach of the UN Sustainable Development Goals" *Current Opinion in Environmental Sustainability* 26, 2017: 26-31.

Brown, Garrett Wallace. "The constitutionalization of what?" *Global Constitutionalism* 1.2, 2012: 201-228.

Brunkhorst, Hauke. "Globalising Democracy without a State: Weak Public, Strong Public, Global Constitutionalism." *Millennium* 31.3, 2002: 675-690.

Burgess, Glenn. "The divine right of kings reconsidered." *The English Historical Review* 107.425, 1992: 837-861.

Butler, Richard. "Reform of the United Nations Security Council." *Penn St. JL & Int'l Aff.* 1, 2012.

Butlerichie, David T. 'Critiquing Modern Constitutionalism', 2004, 3 Appalachian JL.

Cannizzaro, Enzo. "A Machiavellian Moment – The UN Security Council and the Rule of Law." *Int'l Org. L. Rev.* 3, 2006: 189.

Caron, David D. "The Legitimacy of the Collective Authority of the Security Council." *American Journal of International Law* 87.4, 1993: 552-588.

Casper, Gerhard. "An Essay in Separation of Powers: Some Early Versions and Practices." *Wm. & Mary L. Rev.* 30, 1988: 211.

Cass, Deborah Z. "The 'constitutionalization' of international trade law: Judicial norm-generation as the engine of constitutional development in international trade." *European Journal of International Law* 12.1, 2001: 39-75.

Castells, Manuel. "The New Public Sphere: Global Civil Society, Communication Networks, and Global Governance." *The Annals of the American Academy of Political and Social Science* 616.1, 2008: 78-93.

Cerny, Philip G. "Embedding neoliberalism: The evolution of a hegemonic paradigm." *The Journal of International Trade and Diplomacy* 2.1 (2008): 1-46.

Chambers, Simone. "Democracy, popular sovereignty, and constitutional legitimacy." *Constellations* 11.2, 2004: 153-173.

Charlesworth, Hilary. "International Law: A Discipline of Crisis." *The Modern Law Review* 65.3, 2002: 377-392.

Chiba, Masaji. "Other phases of legal pluralism in the contemporary world." *Ratio Juris* 11.3, 1998: 228-245.

Chorev, Nitsan, and Sarah Babb. "The Crisis of Neoliberalism and the Future of International Institutions: A Comparison of the IMF and the WTO." *Theory and Society* 38.5, 2009: 459-484.

Clark, Bradford R. "Separation of Powers as a Safeguard of Federalism." *Tex. L. Rev.* 79, 2000: 1321.

Colley, Don, and S. Aitken. "The "Right to the Internet" is a Right to the City: Public Spheres, Virtual Commons and Social Movements Online and in the Street." *Annual Meetings of the Association of American Geographers, Los Angeles*. 2013.

Cronin-Furman, Kathleen Renée. "The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship." *Columbia Law Review*, 2006: 435-463.

Cronin-Furman, Kathleen Renée. "The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship." *Columbia Law Review*, 2006: 435-463.

Croxton, Derek. "The Peace of Westphalia of 1648 and the Origins of Sovereignty." *The International History Review* 21.3, 1999: 569-591.

del Moral, Ignacio de la Rasilla. "The unsolved riddle of international constitutionalism." *International Community Law Review* 12.1, 2010: 81-110.

De Wet, Erika. "The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law." *European Journal of International Law* 15.1, 2004: 97-121.

De Wet, Erika. "The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order." *Leiden Journal of International Law* 19.3. 2006: 611-632.

De Wet, Erika. "The international constitutional order." *International & Comparative Law Quarterly* 55.1, 2006: 51-76.

de Jonquières, Guy. "The World Turned Upside Down: The Decline of the Rules-Based International System and the Rise of Authoritarian Nationalism." *International Politics* 54.5, 2017: 552-560.

Deva, Surya. "Human Rights Violations by Multinational Corporations and International Law: Where from Here?" *Conn. J. Int'l L.* 19, 2003: 1

Drahos, Peter. "Global property rights in information: The story of TRIPS at the GATT." *Prometheus* 13.1, 1995: 6-19.

Dillon, Sara. "Opportunism and Trade Law Revisited: The Pseudo-Constitution of the WTO." *BC Int'l & Comp. L. Rev.* 36, 2013: 1005.

Dossa, Shiraz. "Liberal Legalism: Law, Culture and Identity." *The European Legacy* 4.3, 1999: 73-87.

Drezner, Daniel W. "The Power and Peril of International Regime Complexity." *Perspectives on Politics* 7.1, 2009: 65-70.

Duruigbo, Emeka. "Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law." *Geo. Wash. Int'l L. Rev.* 38, 2006: 33.

Elkin, Stephen L. "Constitutionalism: Old and new." *A New Constitutionalism. Designing Political Institutions for a Good Society*, Chicago, 1993: 32.

Elsig, Manfred. "The World Trade Organization's Legitimacy Crisis: What Does the Beast Look Like?" *J. World Trade* 41, 2007: 75.

Emmerich-Fritsche, Angelika. *Vom Völkerrecht zum Weltrecht*. Duncker & Humblot, 2007 (Short Summary in English) – cited in Schwöbel, Christine EJ. "Situating the debate on global constitutionalism." *International Journal of Constitutional Law* 8.3, 2010: 611-635.

Fallon Jr, Richard H. "Legitimacy and the Constitution." *Harvard Law Review*, 2005: 1787-1853.

Fassbender, Bardo. "The United Nations Charter as Constitution of the International Community." *Colum. J. Transnat'l L.* 36, 1998: 529.

Fassbender, Bardo. "Quis iudicabit? The Security Council, Its Powers and Its Legal Control (Review Essay)." *European Journal of International Law (EJIL)* 11.1, 2000: 219-232.

Feldstein, Martin. "Refocusing the IMF." *Foreign Affairs-New York* – 77, 1998: 20-33.

Finnemore, Martha, and Kathryn Sikkink. "Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics." *Annual Review of Political Science* 4.1, 2001: 391-416.

Fischer-Lescano, Andreas, and Gunther Teubner. "Regime-collisions: the vain search for legal unity in the fragmentation of global law." *Mich. J. Int'l L.* 25, 2003: 999.

Fraser, Nancy. "Special Section: Transnational Public Sphere: Transnationalizing the public sphere: On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World." *Theory, Culture & Society* 24.4, 2007: 7-30.7.

Fuller, Chris. "Legal anthropology: legal pluralism and legal thought." *Anthropology Today* 10.3, 1994: 9-12.

Fox, Paul W. "Louis XIV and the theories of absolutism and divine right." *Canadian Journal of Economics and Political Science/Revue canadienne de economiques et science politique* 26.1, 1960: 128-142.

Ford, G. "Adjudicating Jus Cogens". *Wisconsin Journal of International Law* 14.5, 1994.

Garcia, Frank J. The Global Market and Human Rights: Trading Away the Human Rights Principle, 25 *Brook. J. Int'l L.* 51, 64-76

Gat, Azar. "The Return of Authoritarian Great Powers." *Foreign Affairs*, 2007: 59-69.

Giegerich, Thomas. "The Is and Ought of International Constitutionalism: How Far Have We Come on Habermas's Road to a Well-Considered Constitutionalization of International Law." *German LJ* 10, 2009: 31.

Gill, Stephen. "The constitution of global capitalism." *International Studies Association Annual Convention, Los Angeles*. Vol. 15. 2000.

Glennon, Michael J. "Why the Security Council Failed." *Foreign Aff.* 82, 2003: 16

Goh, Daniel PS. "From colonial pluralism to postcolonial multiculturalism: Race, state formation and the question of cultural diversity in Malaysia and Singapore." *Sociology Compass* 2.1, 2008: 232-252.

Goldoni, Marco. "Two internal critiques of political constitutionalism." *International Journal of Constitutional Law* 10.4, 2012: 926-949.

Gordon, Joy. "The United Nations Security Council and the Emerging Crisis of Legitimacy." *Yale J. Int'l Aff.* 9. 2014: 40.

Gorski, Philip S. "Historicizing the secularization debate: Church, state, and society in late medieval and early modern Europe, ca. 1300 to 1700." *American Sociological Review*, 2000: 138-167.

Griffiths, John. "What is legal pluralism?" *The journal of legal pluralism and unofficial law* 18.24, 1986: 1-55.

Gross, Leo. "The peace of Westphalia, 1648–1948." *American Journal of International Law* 42.1, 1948: 20-41.

Green, Duncan. "Latin America: Neoliberal failure and the search for alternatives." *Third World Quarterly* 17.1, 1996: 109-122.

Grimm. "*Integration by Constitution*", *International Journal of Constitutional Law*, *International Journal of Constitutional Law* 193.

Guimarães, João PC, and Néstor Avendaño. "The Great Experiment: Testing the PRSP Approach in Nicaragua, 2000–2007." *The European Journal of Development Research* 23.2, 2011: 319-336.

Habermas, Jürgen. "Plea for a Constitutionalization of International Law." *Philosophy & Social Criticism* 40.1, 2014: 5-12.

Haass, Richard N. "The age of nonpolarity: What will follow US Dominance?" *Foreign Affairs*, 2008: 44-56.

Hafner, Gerhard. "Pros and Cons ensuing from Fragmentation of International Law." *Mich. J. Int'l L.* 25, 2003: 849.

Hannum, Hurst. "The Status of the Universal Declaration of Human Rights in National and International Law." *Ga. J. Int'l & Comp. L.* 25, 1995: 287, pp.287-291.

Hannikainen, Lauri. *Peremptory norms (Jus Cogens) in international law: Historical development, criteria, present status*. Vol. 1. Coronet Books Inc, 1988.

Hartman, Stephen W. "The WTO, the Doha Round Impasse, PTAs, and FTAs/RTAs." *The International Trade Journal* 27.5, 2013: 411-430.

Hasan, Md Mahmudul. "The Rohingya Crisis: Suu Kyi's False Flag and Ethnic Cleansing in Arakan." *Irish Marxist Review*, 6.19, 2017: 50-61.

Helfer, Laurence R. "Human Rights and Intellectual Property: Conflict or Coexistence." *Minn. Intell. Prop. Rev.* 5, 2003: in Coombe, Rosemary J. "Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity." *Indiana Journal of Global Legal Studies*, 1998: 59-115.

Heinze, Eric A. "The Rhetoric of Genocide in US Foreign Policy: Rwanda and Darfur Compared." *Political Science Quarterly*, 122.3, 2007: 359-383.

Herwig, Alexia. "Towards Normative Legitimacy of the World Trade Order." *Contrasting European and International Governance (RECON Report No 4, 2008)* (2008): 223-253.

Hill, Henry Bertram. "French Constitutionalism: Old Regime and Revolutionary." *The Journal of Modern History* 21.3, 1949: 222-227.

Hubbard, Heidi K. "Separation of Powers within the United Nations: A Revised Role for the International Court of Justice." *Stanford Law Review*, 1985: 165-194.

Hurtgen, James. "Hobbes's theory of sovereignty in Leviathan." *Reason Papers* 5 1979: 55-67.

Hutchison, Michael M., and Ilan Noy. "Macroeconomic effects of IMF-sponsored programs in Latin America: Output costs, program recidivism and the vicious cycle of failed stabilizations." *Journal of International Money and Finance*, 22.7 (2003): 991-1014.

Ivanov, Dmitri V. "Globalization Shifted for a Virtualization Recent Trends in Society and Theory." *Information Technology, Education and Society* 10.1, 2009: 79-90.

James M. "The Debt Crisis as "Opportunity" Strategies to Revive US Hegemony." *Latin American Perspectives* 16.1, 1989: 52-78.

Jahn, Egbert. "Should Germany Be a Permanent Member of the UN Security Council? On the Efforts to Reform the United Nations." *German Domestic and Foreign Policy*. Springer Berlin Heidelberg, 2015. 225-241.

Jia, Bing Bing. "The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System." 2007: 253-254.

Jackson, John H. "Global economics and international economic law." *J. Int'l Econ. L.* 1, 1998: 1.

Jain, Neha. "A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court." *European Journal of International Law* 16.2, 2005: 239-254.

Jens Mertens. "Transnational Corporations, Global Competition Policy, and the Shortcomings of Private International Law." *Indiana Journal of Global Legal Studies* 18.2, 2011: 843-872.

Johnstone, Ian. "Security Council deliberations: The power of the better argument." *European Journal of International Law*, 14.3, 2003: 437-480.

Johnstone, Ian. "Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit." *American Journal of International Law* 102.2, 2008: 275-308.

Kamya, Carol, et al. "Evaluating Global Health Partnerships: A Case Study of a Gavi HPV Vaccine Application Process in Uganda." *International Journal of Health Policy and Management* 6.6, 2017: 327.

Keohane, Robert O. "Accountability in World Politics." *Scandinavian Political Studies* 29 (2): 75-87. 2006.

Kobrin, Stephen J. "Bricks and Mortar in a Borderless World: Globalization, the Backlash, and the Multinational Enterprise." *Global Strategy Journal* 7.2, 2017: 159-171.

Laborde, Cécile. "From Constitutional to Civic Patriotism." *British Journal of Political Science* 32.4, 2002: 591-612.

Läidi, Zaki. "Towards a post-hegemonic world: The multipolar threat to the multilateral order." *International Politics* 51.3, 2014: 350-365.

Larson, Deborah Welch, and Alexei Shevchenko. "Status Seekers: Chinese and Russian Responses to US Primacy." *International Security* 34.4, 2010: 63-95.

Laxman, Lekha, and Abdul Haseeb Ansari. "The Interface between TRIPS and CBD: Efforts towards Harmonisation." *Journal of International Trade Law and Policy* 11.2, 2012: 108-132.

Lebow, Richard Ned. "The Long Peace, the End of the Cold War, and the Failure of Realism." *International Organization* 48.2, 1994: 249-277.

Lee, Bandy X., et al. "Transforming our World: Implementing the 2030 Agenda through Sustainable Development Goal Indicators." *Journal of Public Health Policy* 37.1, 2016: 13-31.

Lettington, Robert. "The International Undertaking on Plant Genetic Resources in the Context of TRIPs and the CBD." *Bridges, Year 5*, 2001: 11.

Lindahl, H. K., Martin Loughlin, and Neil Walker. "Constituent power and reflexive identity: Towards an ontology of collective selfhood." *The Paradox of Constitutionalism*, 2007: 9-24.

Loughlin, Martin. "The concept of constituent power." *European Journal of Political Theory* 13.2, 2014: 218-237.

Kadelbach and Kleinlein, 'International Law, A Constitution for Mankind: An Attempt at a Reappraisal with an analysis of constitutional principles, *Yearbook for International Law*, 50, 2007: 303

Kalyvas, Andreas. "Popular sovereignty, democracy, and the constituent power." *Constellations* 12.2, 2005: 223-244

Katyal, Neal Kumar. "Internal separation of powers: checking today's most dangerous branch from within." *Yale IJ* 115, 2005: 2314.

Kayaoglu, Turan. "The Extension of Westphalian Sovereignty: State Building and the Abolition of Extraterritoriality." *International Studies Quarterly* 51.3, 2007: 649-675.

Kern, Alexander. "Global Financial Standard Setting, the G10 committees, and International Economic Law." *Brook. J. Int'l L.* 34, 2008: 861.

Keyes, Clinton Walker. "Original elements in Cicero's ideal constitution." *The American Journal of Philology* 42.4, 1921: 309-323.

Klabbers, Jan. "Constitutionalism lite." *Int'l Org. L. Rev.* 1, 2004: 31

Kleinlein, Thomas. "Alfred Verdross as a Founding Father of International Constitutionalism." *Goettingen J. Int'l L.* 4, 2012: 385.

Kobrin, Stephen J. "Bricks and Mortar in a Borderless World: Globalization, the Backlash, and the Multinational Enterprise." *Global Strategy Journal* 7.2, 2017: 159-171.

Koskenniemi, Martti. "Global legal pluralism: Multiple regimes and multiple modes of thought." *Presentation at Harvard Law School* 5, 2005.

Koskenniemi, Martti. "The Police in the Temple Order, Justice and the UN: A Dialectical View." *Eur. J. Int'l L.* 6, 1995: 325.

Koskenniemi, Martti. "International law and hegemony: A reconfiguration." *Cambridge Review of International Affairs* 17.2, 2004: 197-218.

Koskenniemi, Martti. "The Fate of Public International Law: Between Technique and Politics." *The Modern Law Review* 70.1, 2007: 1-30.

Kostova, Tatiana, Kendall Roth, and M. Tina Dacin. "Institutional theory in the study of multinational corporations: A critique and new directions." *Academy of Management Review* 33.4, 2008: 994-1006.

Kreps, Sarah E. "The 1994 Haiti intervention: A Unilateral Operation in Multilateral Clothes." *Journal of Strategic Studies* 30.3, 2007: 449-474.

Krisch, Nico. "International law in times of hegemony: Unequal power and the shaping of the international legal order." *European Journal of International Law* 16.3, 2005: 369-408.

Krisch, Nico. 'Weak as Constraint, Strong as Tool: The Place of International Law in U.S. Foreign Policy', in D. M. Malone and Y. F. Khong (eds.), *Unilateralism and U.S. Foreign Policy*, 2003

Kumm, Mattias "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice." *Int'l J. Const. L.* 2 2004: 574.

Kuo, Ming-Sung. "Between Fragmentation and Unity: The Uneasy Relationship between Global administrative law and global constitutionalism." *San Diego Int'l LJ* 10. 2008: 439.

Macdonald, Ronald St J., and Douglas M. Johnston, eds. *Towards world constitutionalism: Issues in the legal ordering of the world community*. Martinus Nijhoff Publishers, 2005.

Maduro, Miguel Poiares. "Three Claims of Constitutional Pluralism." *Constitutional Pluralism in the European Union and Beyond*, 2012: 67-84.

Makarenko, Tamara. "The Crime-Terror Continuum: Tracing the Interplay between Transnational Organised Crime and Terrorism." *Global Crime* 6.1, 2004: 129-145.

Malone, David. *Decision-making in the UN Security Council: the Case of Haiti, 1990-1997*. Oxford University Press, 1998.

Mann, Michael. "The autonomous power of the state: Its origins, mechanisms and results." *European Journal of Sociology/Archives Européennes de Sociologie* 25.2 1984: 185-213.

Martenczuk, Bernd. "The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?" *European Journal of International Law* 10.3, 1999: 517-547.

Matheson, Michael J. "ICJ Review of Security Council decisions." *Geo. Wash. Int'l L. Rev.* 36, 2004: 615.

Meron, Theodor. "The Geneva Conventions as Customary Law." *American Journal of International Law* 81.2, 1987: 348-370.

Merry, Sally Engle. "Legal pluralism." *Law & Society Review* 22.5 (1988): 869-896.

Michaels, Ralf. "The True Lex Mercatoria: Law beyond the State." *Indiana Journal of Global Legal Studies* 14.2, 2007: 447-468, 449-452.

Miller, David. "In Defence of Nationality." *Journal of Applied Philosophy* 10.1, 1993: 3-16.

Miller, David. "On Nationality." *Nations and Nationalism* 2.3, 1996: 409-421.

Moore, Sally Falk. "Law and social change: the semi-autonomous social field as an appropriate subject of study." *Law & Society Review* 7.4 (1973): 719-746

Mueller, Julie L. "The IMF, neoliberalism and hegemony." *Global Society* 25.3 (2011): 377-402.

Ni, Kuei-jung. "The Incorporation on the CBD Mandate on Access and Benefit-Sharing into TRIPS Regime: An Appraisal of the Appeal of Developing Countries with Rich Genetic Resources." *Asian J. WTO & Int'l Health L & Pol'y*, 2006: 433.

Noonan, Douglas S. "Charting a New Cultural Commons Research Agenda." *Journal of Cultural Economics* 38.3, 2014: 287-290.

Nowak, Manfred. *Introduction to the International Human Rights Regime*. Vol. 14. Brill Academic Pub, 2003.

Park, Stephen Kim. "Bridging the Global Governance Gap: Reforming the Law of Trade Adjustment." *Geo. J. Int'l L.* 43, 2011: 797.

Pastor Jr, Manuel. "The effects of IMF programs in the third world: Debate and evidence from Latin America." *World Development* 15.2, 1987: 249-262.

Paulson, Lex. "A Painted Republic: The Constitutional Innovations of Ciceros De Legibus". *Ethics & Politics* XVI, 2014, 2, pp. 307-340.

Pauwelyn, Joost. "Bridging Fragmentation and Unity: International Law as a Universe of Inter-connected Islands." *Mich. J. Int'l L.* 25, 2003: 903.

Pavcnik, Nina. "Globalization and within-country income inequality." *Making globalization socially sustainable*, 2011: 233-259.

Perez, Oren. "Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law." *Indiana Journal of Global Legal Studies* 10.2, 2003: 25-64.

Peters, Anne. "Compensatory constitutionalism: The function and potential of fundamental international norms and structures." *Leiden Journal of International Law* 19.3, 2006: 579-610.

Peters, Anne. "The merits of global constitutionalism." *Indiana Journal of Global Legal Studies* 16.2, 2009: 397-411.

Petersmann, Ernst-Ulrich. "From Negative to Positive Integration in the WTO: Time for Mainstreaming Human Rights into WTO Law." *Common Market L. Rev.* 37, 2000: 1363.

Petersmann, Ernst-Ulrich. "How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society." *Mich. J. Int'l L.* 20, 1998: 1.

Petersmann, Ernst-Ulrich. "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration." *European Journal of International Law* 13.3, 2002: 621-650.

Philpott, Daniel. "Sovereignty: An introduction and brief history." *Journal of International Affairs*, 1995: 353-368.

Plehwe, Dieter, Bernhard JA Walpen, and Gisela Neunhöffer, eds. *Neoliberal hegemony: A global critique*. Routledge, 2007.

Picciotto, Sol. "Constitutionalizing multilevel governance?" *International Journal of Constitutional Law* 6.3-4, 2008: 457-479.

Pospisil, Leopold. "Legal levels and multiplicity of legal systems in human societies." *Journal of Conflict Resolution* 11.1, 1967: 2-26.

Postelnicescu, Claudia. "Europe's new identity: The Refugee Crisis and the Rise of Nationalism." *Europe's Journal of Psychology* 12.2, 2016: 203.

Prandini. *The Morphogenesis of Constitutionalism in Twilight of Constitutionalism*, Oxford University Press 2010.

Preuss, Ulrich K. "The Implications of Eternity Clauses: The German Experience." *Isr. L. Rev.* 44, 2011: 429.

Pritchard, Bill. "The long hangover from the second food regime: A world-historical interpretation of the collapse of the WTO Doha Round." *Agriculture and Human Values* 26.4, 2009: 297.

Pushaw Jr, Robert J. "Justiciability and Separation of Powers: A Neo-Federalist Approach." *Cornell L. Rev.* 81, 1995: 393,

O'Donnell, Guillermo A. "Why the rule of law matters." *Journal of Democracy* 15.4, 2004: 32-46.

Orford, Anne. 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism', 1999, 10 EJIL 678–689.

Ramasastry, Anita. Corporate Complicity: From Nuremberg to Rangoon – An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations, 20 Berkeley J. Int'l L. 91, 131-36.

Ramirez, Michael D., Stabilization and Adjustment in Latin America, Journal of Economic Issues, (Vol.27 No.4) 1993.

Rasand, Eric. "The Security Council as Global Legislator: Ultra Vires or Ultra Innovative." *Fordham Int'l LJ* 28, 2004: 542.

Raustiala, Kal. "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law." *Va. J. Int'l L.* 43, 2002.

Roberts, Adam, and Benedict Kingsbury. "The UN's Roles in International Relations." 2008, Philpapers.Org – <https://philpapers.org/rec/ROBTUR> Accessed 13th August 2017.

Robinson, William I., and Jerry Harris. "Towards a global ruling class? Globalization and the transnational capitalist class." *Science & Society*, 2000: 11-54

Robinson, William I. "Global Capitalism Theory and the Emergence of Transnational Elites." *Critical Sociology* 38.3, 2012: 349-363.

Romney, Paul. "From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture." *Law and History Review* 7.1, 1989: 121-174.

Rowen, Herbert H. "L'Etat c'est a moi": Louis XIV and the State." *French Historical Studies* 2.1, 1961: 83-98.

- Roxburgh, Angus. *The Strongman: Vladimir Putin and the Struggle for Russia*. IB Tauris, 2013.
- Rückert, Arne. "Producing neoliberal hegemony? A neo-Gramscian analysis of the poverty reduction strategy paper (PRSP) in Nicaragua." *Studies in Political Economy* 79.1, 2007: 91-118
- Sartori, Giovanni. "Constitutionalism: a preliminary discussion." *American Political Science Review* 56.4, 1962: 853-864.
- Scharf, Michael P. *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments*. Cambridge University Press, 2013.
- Scholte, Jan Aart. *Globalization: A Critical Introduction*. Palgrave Macmillan, 2005.
- Scott, Shirley. 'Is There Room for International Law in Realpolitik? Accounting for the US "Attitude" towards International Law', 30 *Review of Int'l Studies*, 2004, 71
- Schwöbel, Christine EJ. "Situating the Debate on Global Constitutionalism." *International Journal of Constitutional Law* 8.3, 2010: 611-635.
- Selkirk, Michael. "Judge, Jury and Executioner – Analysing the Nature of the Security Council's Authority under Article 39 of the UN Charter." *Auckland UL Rev.* 9, 2000: 1101.
- Shackleton, Robert. "Montesquieu, Bolingbroke, and the separation of powers." *French Studies* 3.1, 1949: 25-38.
- Sharp, Malcolm P. "The Classical American Doctrine of the Separation of Powers." *The University of Chicago Law Review* 2.3, 1935: 385-436.
- Slaughter, Anne-Marie, and William Burke-White. "An international constitutional moment." *Harv. Int'l LJ* 43, 2002: 1.
- Smith, Jackie. "The World Social Forum and the Challenges of Global Democracy." *Global Networks* 4.4, 2004: 413-421.
- Spiro, Peter J. "New Global Communities: Nongovernmental Organizations in International Decision Making Institutions." *Washington Quarterly* 18.1, 1995: 45-56.
- Stephens, Beth. "The Amorality of Profit: Transnational Corporations and Human Rights." *Berkeley J. Int'l L.* 20, 2002: 45.
- Stone Sweet, Alec. "The New Lex Mercatoria and Transnational Governance." *Journal of European Public Policy* 13.5, 2006: 627-646.
- Sweet, Alec Stone, and Jud Mathews. "Proportionality balancing and global constitutionalism." *Colum. J. Transnat'l L.* 47, 2008: 72.

- Sweet, Alec Stone. "Constitutionalism, Legal Pluralism, and International Regimes." *Indiana Journal of Global Legal Studies* 16.2, 2009: 621-645.
- Steinberg, Richard H. "Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints". 98 AM. J. INT'L L. 247.
- Stepan, Alfred. "Federalism and democracy: Beyond the US model." *Theories of federalism: A reader*. Palgrave Macmillan US, 2005. 255-268.
- Stone, Diane. "Transfer Agents and Global Networks. The Transnationalization of Policy", *Journal of European Public Policy*, 11.3, 2004, 545-566.
- Stone, Diane. "Global Public Policy, Transnational Policy Communities, and their Networks." *Policy Studies Journal* 36.1, 2008: 19-38.
- Swanson, Robert, et al. Strengthening Health Systems in Low-Income Countries by Enhancing Organizational Capacities and Improving Institutions. *Globalization and Health*, 5. 2015
- Sweet, Alec Stone. "The Constitutional Council and the Transformation of the Republic." 2008. Yale Law School Legal Scholarship Repository – http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1077&context=fss_papers
- Sweet, Alec Stone. "Constitutionalism, legal pluralism, and international regimes." *Indiana Journal of Global Legal Studies* 16.2, 2009: 621-645.
- Sweet, Alec Stone. "The Structure of Constitutional Pluralism: Review of Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Postnational Law." *International Journal of Constitutional Law* 11.2, 2013: 491-500
- Talmon, Stefan. "The Security Council as World Legislature." *The American Journal of International Law* 99.1, 2005: 175-193.
- Tamanaha, Brian Z. "The folly of the 'social scientific' concept of legal pluralism." *Journal of Law and Society* 20.2, 1993: 192-217.
- Tamanaha, Brian Z. "Understanding legal pluralism: Past to present, local to global." *Sydney L. Rev.* 30, 2008: 375.
- Taylor, Peter J. 12 "Relocating the Demos?" *Transnational Democracy: Political Spaces and Border Crossings*, 2002: 236.
- Teubner, Gunther. "Global Bukowina: Legal Pluralism in the World-Society." 1996 – <https://core.ac.uk/download/pdf/14504125.pdf> Accessed 12th November 2017.
- Teubner, Gunther, et al. "Debate and Dialogue: Constitutionalizing Polycontextuality." *Social & Legal Studies* 20.2, 2011. 209-252.

- Teubner, Gunther. "Global Law without a State" 1997
<https://philpapers.org/rec/TEUGLW> – Accessed 25th October 201.
- Teubner, Gunther. "The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors." *The Modern Law Review* 69.3, 2006: 327-346.
- Teubner, Gunther. *Constitutionalising Polycontextuality* Social and Legal Studies, 19, 2010.
- Teubner, Gunther. *Constitutional Fragments: Societal Constitutionalism and Globalization*. Oxford University Press, 2012.
- Teunissen, Jan Joost, and Age Akkerman, eds. "The Crisis That Was Not Prevented: Lessons for Argentina, the IMF, and Globalisation." *Forum on Debt and Development*, 2003.
- Toke, Dave. "Epistemic Communities and Environmental Groups", *Politics*, 19: 97-102. 1999.
- Trachtman, Joel P. "The Constitutions of the WTO." *European Journal of International Law* 17.3, 2006: 623-646.
- Tully, James. "Modern constitutional democracy and imperialism." *Osgoode Hall LJ* 46, 2008: 461.
- von Benda-Beckmann, Franz. "Who's afraid of legal pluralism?" *The Journal of Legal Pluralism and Unofficial Law* 34.47, 2002: 37-82.
- Von Bogdandy, Armin. "The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System." *Common Market L. Rev.* 36, 1999: 887.
- Van Reenen, John. "Brexit and the Future of Globalization"? No. 35. Centre for Economic Performance, LSE, 2017.
- Wade, Robert Hunter. "The invisible hand of the American empire." *Ethics & International Affairs* 17.2, 2003: 77-88
- Walen, Alec. "Judicial review in review: A four-part defense of legal constitutionalism. A review essay on Political Constitutionalism." *International Journal of Constitutional Law*, 7.2, 2009: 329-354.
- Walker, Neil. "Taking Constitutionalism beyond the State." *Political Studies* 56.3, 2008: 519-543.
- Walker, Neil. "The Idea of Constitutional Pluralism." *The Modern Law Review* 65.3, 2002: 317-359.
- Walker, Neil. "Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders." *International Journal of Constitutional Law* 6.3-4, 2008: 373-396.

Wang, Zhi. "The Impact of China's WTO Entry on the World Labour-intensive Export Market: A Recursive Dynamic CGE Analysis." *The World Economy* 22.3 1999: 379-405.

Watson. "Constitutionalism, Judicial Review, and the World Court", 1993, *Harvard International Law Journal* 34.1.

Weatherall, Thomas. "Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence." *Geo. J. Int'l L.* 46, 2014: 1151 *Review of International Studies* 18.1, 1992: 3-17.

Weiss, Thomas G. "The Illusion of UN Security Council Reform." *Washington Quarterly* 26.4, 2003: 147-161.

Wiener, Antje, et al. "Global Constitutionalism: Human Rights, Democracy and the Rule of Law." *Global Constitutionalism* 1.1, 2012: 1.

Zerbe, Noah. "Contested Ownership: TRIPs, CBD, and Implications for Southern African Biodiversity." *Perspectives on Global Development and Technology* 1.3. 2002: 294-321.

Zumbansen, Peer. "Transnational Legal Pluralism." *Transnational Legal Theory* 1.2, 2010: 141-189.

Zürn, Michael. "Global Governance and Legitimacy Problems." *Government and Opposition* 39.2, 2004: 260-287.

Book Chapters

Bloch, Marc. "The Feudal World." Cantor and Wertham (eds) *Medieval Society* 1967.

Bryde, Brun-Otto. "International democratic constitutionalism." *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* 103, 2005.

Dobner. *More Law Less Democracy. The Twilight of Constitutionalism*, Oxford University Press, 2010.

Fassbender, Bardo. "Rediscovering a Forgotten Constitution: Notes on the place of the UN Charter in the International Legal Order". Dunoff, Jeffrey L., and Joel P. Trachtman, eds. *Ruling the world? Constitutionalism, international law, and global governance*. Cambridge University Press, 2009.

Ferrajoli, Luigi. "Beyond Sovereignty and Citizenship: A Global Constitutionalism" in Richard Bellamy ed. *Constitutionalism, Democracy, and Sovereignty: American and European Perspectives* 154, 1997.

Grimm, D. "The Achievement of Constitutionalism". *Twilight of Constitutionalism*, Oxford University Press, 2010.

Kadelbach, Stefan. "Jus Cogens, Obligations Erga Omnes and Other Rules – The Identification of Fundamental Norms." *The Fundamental Rules of the International Legal Order*. Brill, 2005. 21-40.

Klabbers, Jan. "Setting the Scene." Klabbers, Jan, Anne Peters, and Geir Ulfstein. *The Constitutionalization of International Law*. Oxford University Press, 2009.

Lang, Anthony. "A Constitutionalising Global Order", *An Introduction*. Lang and Wiener *Handbook for Global Constitution*, 2017.

Loughlin, Martin. "Constituent power subverted: From English constitutional argument to British constitutional practice." Oxford University Press, 2007.
Loughlin and Walker (eds). *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford University Press, 2007.

Loughlin, Martin. "What is constitutionalisation?" *Twilight of Constitutionalism* Oxford University Press, 2010.

Jansen, Nils "European Private Law in Europe: National Laws, European Legislation and Non-Legislative Codifications". Niglia, Leone, ed. *Pluralism and European private law*. Bloomsbury Publishing, 2013.

Jaume, Lucien. "Constituent power in France: The revolution and its consequences." Loughlin and Walker (eds). *The paradox of constitutionalism: Constituent power and constitutional form*, Oxford University Press, 2007.

Lindahl, H. K., Martin Loughlin, and Neil Walker. "Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood." *The Paradox of Constitutionalism*, 2007: 9-24.

Prandini. "The Morphogenesis of Constitutionalism". Dobner and Loughlin (eds) *The Twilight of Constitutionalism*, 2010. 201.

MacDonald, Ronald St John. "The International Community as a Legal Community." *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*. Leiden: Brill, 2005

Montesquieu. *The Spirit of Laws*, Chapter 11. Constitution Society. 1750.
http://www.constitution.org/cm/sol_11.htm – Accessed 10th Jan 2018.

Müller, Jan-Werner. "A General Theory of Constitutional Patriotism." *International Journal of Constitutional Law* 6.1, 2007: 72-95.
2010.

Pernice, Ingolf. "The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalisation." *Völkerrecht als Wertordnung/Common Values in International Law: Festschrift für Christian Tomuschat/Essays in Honour of Christian Tomuschat*, 2006: 973-1006.

Preuss, Ulrich. "Disconnecting Constitutions from Statehood", Dobner and Loughlin: *The Twilight of Constitutionalism*, Oxford University Press, 2010.

Stiglitz, Joseph E. "Is there a post-Washington Consensus consensus?" *The Washington Consensus reconsidered: Towards a new global governance*, Oxford University Press, 2008. 41-56.

Stromquist, Nelly P. "The impact of structural adjustment programmes in Africa and Latin America." *Gender, education and development: Beyond access to empowerment*, Zed Books. 1999: 25-30.

Taylor, Ian. "Hegemony, Neoliberalism, and the IMF" in Boas, Morten, and Desmond McNeill, eds. *Global institutions and development: framing the world?* Routledge, 2004.

Teubner, Gunther. "Fragmented Foundations." *Dobner, P. & Loughlin, M. The Twilight of Constitutional Law*, 2010: 327-341.

Vidmar, Jure. "Norm Conflicts and Hierarchy in International Law." De Wet, Erika, and Jure Vidmar, eds. *Hierarchy in International Law: The Place of Human Rights*. OUP Oxford, 2012

Wahl, Rainer. "In Defence of Constitution." Dobner, Petra, and Martin Loughlin, eds. *The Twilight of Constitutionalism?* Oxford University Press, 2010.

Walker, Neil. "*Beyond the Holistic Constitution.*" *The Twilight of Constitutionalism*, Oxford University Press, 2010.

Walker, Neil. 'Making a World of Difference? Habermas, Cosmopolitanism and the Constitutionalization of International Law' in O Shabani (ed), *Multiculturalism and Law: A Critical Debate* (University of Wales Press, Cardiff , 2007.

Winham, Gilbert R. "International Regime Conflict in Trade and Environment: The Biosafety Protocol and the WTO." *World Trade Review* 2.2, 2003: 131-155.

Legislation

Appellate Jurisdiction Act (1876). Gov.uk – http://www.legislation.gov.uk/ukpga/1876/59/pdfs/ukpga_18760059_en.pdf- Accessed 13th November 2017.

Bill of Rights, (1688). Gov.uk – <https://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction> – Accessed 18th December 2017.

Cartagena Protocol, Convention for Biological Diversity (2000) Article 11 – <https://www.cbd.int/doc/legal/cartagena-protocol-en.pdf> – Accessed 15th July 2017.

Charter of the United Nations (1945). United Nations – <http://www.un.org/en/charter-united-nations/> – Accessed 6th Jan 2018.

Constitution of Belgium, (1831), Partylaw – www.partylaw.leidenuniv.nl/party-law/4c8b5e51-c490-454c-8582-16387287acdc.pdf- Accessed 23rd October 2017.

Constitution of the United States, (1788) Accessed at <http://constitutionus.com/> – 12th December 2017.

Constitution of France (1791). Wikisource – https://en.wikisource.org/wiki/French_Constitution_of_1791- Accessed 12th December 2017.

Constitution of Germany, (1949) – <https://www.btg-bestellservice.de/pdf/80201000.pdf> – Accessed 14th August 2017.

Constitution of India (1950) – India Code – <http://indiacode.nic.in/coiweb/welcome.html> – Accessed 12th December 2017.

Constitution of the Netherlands, (2008). De Rechtspraak – <https://www.rechtspraak.nl/SiteCollectionDocuments/Constitution-NL.pdf>- Accessed 14th August 2017.

Convention for Biological Diversity, 1992. UN Treaties – https://treaties.un.org/doc/Treaties/1992/06/19920605%2008-44%20PM/Ch_XXVII_08p.pdf – Accessed 2nd November 2017.

Declaration of the Rights of Man, Preamble (1789) Avalon Law Project, Yale Law School - http://avalon.law.yale.edu/18th_century/rightsof.asp – Accessed 3rd December 2017.

International Convention on Civil and Political Rights, (1966) – See in Particular Articles 2, 14, 15. UN Treaties- <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>- Accessed 13th Nov 2017.

Petition of Rights, Constitution Society (1628) – <http://www.constitution.org/eng/petright.htm>- Accessed 3rd Jan 2007.

Presidential Directive NSC 25, (1994) – <https://fas.org/irp/offdocs/pdd/pdd-25.pdf>- Accessed 14th Jan 2017.

Security Council resolution 1267, (1999), [Afghanistan], 15 October 1999, S/RES/1267, 1999, available at: <http://www.refworld.org/docid/3b00f2298.html> – Accessed 12 January 2018.

Statute of the International Court of Justice, June 26, 1945.
http://avalon.law.yale.edu/20th_century/decad026.

UN Security Council, *Security Council resolution 948, 1994 [Haiti]*, 15 October 1994, S/RES/948 1994, available at:
<http://www.refworld.org/docid/3b00f15840.html> – Accessed 12 January 2018.

Security Council resolution 1267, 1999, [Afghanistan], 15 October 1999, S/RES/1267 1999, available at:
<http://www.refworld.org/docid/3b00f2298.html> – Accessed 12 January 2018.

Universal Declaration of Human Rights, (1948) – Website of the United Nations –
<http://www.un.org/en/universal-declaration-human-rights> – Accessed 10th December 2017.

Vienna Convention on the Law of Treaties, (1969) –
<https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> – Accessed 13th Nov 2017.

WTO Agreement on Trade and Related Aspects of Intellectual Property Right (TRIPS), 1994 – Website of the World Trade Organisation
https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm – Accessed 12th Sept 2017.

World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures, – https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm (1994) – Accessed 2nd November 2011.

Cases

Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004, available at: <http://www.refworld.org/cases,ICJ,414ad9a719.html> – Accessed 12 January 2018.

Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, International Court of Justice (ICJ), 21 June 1971, available at: <http://www.refworld.org/cases,ICJ,4023a2531.html> – Accessed 8 January 2018.

Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), International Court of Justice (ICJ), 18 September 2002, available at:
<http://www.refworld.org/cases,ICJ,4040b4f97.html> [accessed 10 January 2018].

Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986, available at:
<http://www.refworld.org/cases,ICJ,4023a44d2.html> [accessed 7 January 2018],

Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, International Court of Justice, 1998, para.37 – <http://www.icj-cij.org/files/case-related/89/089-19980227-JUD-01-00-EN.pdf>

Kadi v. Council of the European Union and Commission of the European Communities, C-402/05 P and C-415/05 P, European Union: Court of Justice of the European Union, 3 September 2008, available at: <http://www.refworld.org/cases,ECJ,51e6bbe4.html> – Accessed 12 January 2018.

Prosecutor v. Anto Furundzija (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, available at: <http://www.refworld.org/cases,ICTY,40276a8a4.html> – Accessed 10 January 2018.

Prosecutor vs Dusko Tadic, Decision on the Defence Motion of Interlocutory Appeal on Jurisdiction case, Appeals Chamber, 2 Oct 1995 – <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>

Questions Relating to the Obligation to Extradite or Prosecute, International Court of Justice (ICJ) 20 July 2012. <http://www.icj-cij.org/files/case-related/144/144-20120720-JUD-01-00-EN.pdf> – Accessed 11th December 2007.

‘*The Case of the SS Lotus*’, Permanent Court of Justice, 1927, World Courts – http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm

Websites

Amnesty International – <https://www.amnesty.org/en/what-we-do/corporate-accountability/> – Accessed 3rd November 2017.

Aristotles Political Theory in the Stanford Encyclopaedia of Philosophy (1998) – <https://plato.stanford.edu/entries/aristotle-politics/> – Accessed 12th October 2017.

Global Alliance for Vaccinations and Immunisation – <http://www.gavi.org/about/> – Accessed 15th October 2017.

Global Water Partnership – <http://www.gwp.org/> – Accessed 27/10/2017.

Infogram.com <https://infogram.com/share-of-world-gdp-throughout-history-1gjk92e6yjqm16> – Accessed 14th August 2017.

Encyclopedia of Sociology – <http://www.sociologyencyclopedia.com/public/search?query=community> at 12th December 2017.

Financial Times Lexicon, Globalization: <http://lexicon.ft.com/Term?term=globalisation> – Accessed 12th September 2015.

International Corporate Governance Network – <https://www.icgn.org/> – Accessed 6th November 2017.

United Nation Website – <http://www.un.org/en/sections/about-un/main-organs/> – Accessed 11 Jan 2018.

Payscale.com- <http://www.payscale.com/data-packages/ceo-pay> – Accessed 19th August 2017.

Statista. <https://www.statista.com/statistics/264119/revenue-of-exxon-mobil-since-2002/> – Accessed 3rd November 2017.

Website of the International Monetary Fund – <http://www.imf.org/external/np/sec/memdir/members.aspx> – Accessed 12th August 2017.

Website of the United Nations, History of the Security Council – <http://www.un.org/en/sections/history-united-nations-charter/1945-san-francisco-conference/index.html> – Accessed 15th October 2017.

Website of the Bank for International Settlements http://www.bis.org/list/jforum/tid_140/index.htm- Accessed 26th October 2017.

Website for the Global Alliance for Vaccination and Immunisation – <http://www.gavi.org/about> – Accessed 3rd December 2017.

Wikisource, Constitution of the Year III – https://en.wikisource.org/wiki/Constitution_of_the_Year_III

News Articles

Economy, Elizabeth C. “China’s Imperial President: Xi Jinping Tightens His Grip.” *Foreign Aff.* 93, 2014: 80. Buckley, Chris. “China Takes Aim at Western Ideas.” *The New York Times* 19, 2013.

Financial Times. 21st December 2015. The Doha Round Finally Dies a Merciful Death – <https://www.ft.com/content/9cb1ab9e-a7e2-11e5-955c-1e1d6de94879>

Vice, Margaret *President Putin, The Russian Perspective*, Pew Research Centre – <http://www.pewglobal.org/2017/06/20/president-putin-russian-perspective> – Accessed 02/12/2017

Falklands Referendum: Voters Choose to Remain UK Territory, Website of the BBC – <http://www.bbc.co.uk/news/uk-21750909> – Accessed 3rd December 2017.

Ipsos Mori Economy and Immigration Key Factors in Brexit Vote – <https://www.ipsos.com/ipsos-mori/en-uk/economy-and-immigration-key-issues-britons-eu-referendum> – Accessed 02/12/2017.

Gallup, One in Six Say Immigration Main Problem Facing United States, Tops Chart – <http://news.gallup.com/poll/173306/one-six-say-immigration-important-problem.aspx> – Accessed 1st December 2017.

Presentations

Colley, Don, and S. Aitken. “The “Right to the Internet” is a Right to the City: Public Spheres, Virtual Commons and Social Movements Online and in the Street.” *Annual Meetings of the Association of American Geographers, Los Angeles*. 2013.

Cooper, Alexis, and Gabriel Davis. “Trumpian’ Attitudes in Central Europe: Causes for Hungary’s, Germany’s and Poland’s Attitudes Towards Transatlantic Trade.” *Claremont-UC Undergraduate Research Conference on the European Union*. Vol. 2016. No. 1.

Haunss, Sebastian, and Shadlen, Kenneth. C. “Politics of Intellectual Property”, paper presented at Workshop for the Joint Sessions of the European Consortium for Political Research (EPCR), 2008. Available at: www.ecprnet.eu/ecpr/rennes/Workshop/14.pdf – Accessed 11 Nov 2017.

International Corporate Governance Network *Statement on Global Corporate Governance Principles*, July 9, 1999.

Tomuschat, Christian. “International Law as the Constitution of Mankind.” *International Law on the Eve of the Twenty-First Century*, New York, NY, 1997

Reports

Commentary on The Geneva Conventions of 12 August 1949: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 26, J. Pictet ed. 1952.

Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Yearbook of the International Law Commission, 2001. Vol. II.

Roseveare, Caroline. “Rule of Law and International Development.” 2013. DFID Research and Evidence Report – https://assets.publishing.service.gov.uk/media/57a08a0be5274a27b20003c7/Literature_Review