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Global Constitutionalism: History, Theory and Contemporary Challenges

Constitucionalismo Global: História, Teoria e Desafios Contemporâneos

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Abstract

Notwithstanding the political origins of constitutionalism in the west and the leading role played by the United States in the creation of the new global order after WWII, this origin of the global constitutional project does not undermine the claims to universality underlying it. After laying out a basic account of some core theoretical premises guiding global constitutionalism, the article presents a series of genealogical reflections, in which the basic project of global constitutionalism is affirmed, even as some of its concrete features and their connection to great power domination – and US domination more specifically – is critically highlighted. It concludes that the core challenge that global constitutionalism faces is not the shift of power away from the west to other geographical areas, such as Asia and South America. Its core challenge are structural inadequacies that are glossed over complacently and self-interestedly by powerful actors claiming to speak in its name and discrediting its basic ideas among those who suffer as a result.

Keywords: Global Constitutionalism; Affirmative genealogy; Critical genealogy; American Empire.

Resumo

Apesar das origens políticas do constitucionalismo no Ocidente e o papel de liderança desempenhado pelos Estados Unidos na criação da nova ordem global após a Segunda Guerra Mundial, essa origem do projeto constitucional global não compromete as reivindicações de universalidade subjacentes. Depois de expor algumas premissas teóricas fundamentais que norteiam o constitucionalismo global, o artigo apresenta uma série de reflexões genealógicas nas quais o projeto básico do constitucionalismo global se afirma, mesmo que algumas de suas características concretas e sua conexão com a dominação das grandes potências – e a dominação dos EUA, mais especificamente – seja destacada criticamente. Conclui que o principal desafio que o constitucionalismo global enfrenta não é a mudança de poder do ocidente para outras áreas geográficas, como Ásia e América do Sul. Seu principal desafio são as inadequações estruturais que são encobertas com complacência e interesse próprio por atores poderosos que alegam falar em seu nome e desacreditam suas ideias básicas entre aqueles que, como resultado, prejudicam.

Palavras-chave: Constitucionalismo global; Genealogia afirmativa; Genealogia crítica; Império americano.

I. Global Constitutionalism and Contemporary Challenges

Modern constitutionalism has its political origins in the 18th century American, French and Haitian Revolutions. Even though the connection between the national and the international was a much discussed topic in 18th century political thought, the defeat of Napoleon and the political settlement of the Congress of Vienna in 1815 ensured that even as gains were achieved by political forces fighting for constitutionalist ideas in various states throughout the 19th century, international jurists have not discussed international law in constitutionalist terms until the 20th century. A first wave of constitutionalist writing took place in the Inter-War Period until after WWII, when the emergence of the Cold War put an end to it. A second wave was initiated in the 1990s and 2000s after the end of the Cold War, was more deeply anchored in institutional and doctrinal developments and, as I will try to argue here, is likely to be more durable, notwithstanding considerable contemporary challenges.[1]

Global constitutionalists bring a particular mindset – a particular jurisprudential approach – to public law. In the next section I will describe the features of this approach in more concrete terms, here it must suffice to paint with a very broad brush, just to get a first thin idea.

Global Constitutionalism takes the basic principles underlying constitutionalism as it has evolved since the American, French and Haitian Revolutions as basic for thinking about law and legitimate authority. These basic principles, derived from the more fundamental idea of free and equals governing themselves, are today ubiquitously invoked in the formula "human rights, democracy and the rule of law". This is the trinitarian mantra of constitutional thought, that along with the idea of free and equals governing themselves, is constitutive of constitutionalism.

The meaning of these commitments and their exact relationship to one another is of course not clear. The formula and its three components have been interpreted, contested, struggled over reinterpreted for more than two centuries, both abstractly and with regard to more concrete institutional or doctrinal implications.

Global constitutionalists interpret this commitment in a way that gives rise to three distinct claims, that *combine the global, the cosmopolitan and the universal*. First,

[1] For an overview see PETERS, 2015. See also WIENER; LANG, 2017.

global constitutionalists insist that constitutionalist ideas are central not only for the domestic state context, but also for making sense of international law. The basic commitments to human rights, democracy and the rule of law guides and constrains not only domestic constitutionalism, but also international law. Constitutionalism is *global* in this way. Second, global constitutionalists insist that domestic law and international law should be understood as an integrated body of law. Such a picture of the legal world has features that might plausibly be called monist. But if it is monist, it is not a monism grounded in the idea of a source-based hierarchy of norms. The norms of international law do not trump the norms of domestic law in all cases. Instead the relationship between the two bodies of law are mediated by shared constitutional principles – the principles that constitute both domestic and international law – and gives rise to a rich and institutionally complex practice that global constitutionalists have described as "constitutional pluralism".[2] But even if these principles do not require the general subjugation of national law to international law, they require that national constitutions be "open": an "open" constitution is a constitution that allows states to engage the international community and international law constructively, both by allowing for membership and participation in international institutions, and by allowing national courts to play a meaningful role in enforcing international law. Call the requirement that the constitutional foreign relations law of a state be "open" to international law in the appropriate way the *cosmopolitan* element of global constitutionalism (KUMM, 2006). Finally global constitutionalists, as comparative and international law scholars, take a *universalist* approach to constitutionalism. Domestic constitutions are required – both from a moral point of view and also as a matter of international law, both in their structural features and primary norms – to respect, protect and fulfil universal human rights. This effectively requires domestic constitutions to establish the core structural features, institutions, and procedures of liberal constitutional democracy. There are many varieties of liberal constitutional democracy, of course, and each state has to design its institutions and codify basic norms in a way most suitable and resonant for the relevant political community. But only constitutions that plausibly qualify as liberal constitutional democracies qualify as constitutions properly so called. Not every power structure, not every formal written document that contains the highest ranked norms of a legal system

[2] For a good introduction to the various approaches and positions associated with that idea see KOMAREK; AVBELJ, 2012.

is a constitution in the relevant sense. Just to get a sense of what that means[3]: Brazil, Columbia and Mexico all have a constitution properly so called, however imperfect they may be. China, Iran or Saudi Arabia do not have a constitution properly so called, nor did the German Empire from 1871 to 1918, let alone the Third Reich from 1933 to 1945. This does not mean that these other regimes and the basic laws they produced do not deserve to be studied by comparatively focused scholars, there may be all kinds of reasons for doing so.[4] And it certainly does not mean that anyone has the right to intervene coercively in countries that do not have a constitution properly so called, even if these are constitutionally deficient and incompatible with international law. But it does mean that these constitutions do not partake in the project of establishing legitimate authority over persons who are deemed to have the status as free and equals. As such they do not partake in the global constitutionalist project inaugurated however bloodily and imperfectly by the American, French and Haitian Revolutions in the last quarter of the 18th century, which over time developed and spread gradually to become a legally institutionalized global commitment in the 20th century after WWII.

The idea of Global Constitutionalism faces two existential challenges. The first is connected to its historical and present failures. A great deal of injustice has been covered up or rationalized in the name of constitutional values, historically and in the present. If the present order can plausibly be described as a global constitutional one, it is a global constitutional order apparently ill-equipped even to assure the prevention of nuclear omnicide, let alone provide reliable assurance of peace and security more generally. And it appears to be equally ineffective in providing the kind of environmental protection that ensures the flourishing of human civilization in the long term. As United Nations Secretary-General António Guterres put it before the General Assembly on Sept. 20, 2022: "We are gridlocked in colossal global dysfunction".

Of course, global constitutionalists will say that it is exactly the conceptual frameworks and principles of constitutionalism that provide the most effective tools to articulate a plausible internal critique of the existing order and to construct the most promising remedies to ensure that constitutional principles, imperfectly realized in the

[3] "Liberal" here does not stand in opposition to "social" or even "conservative". It refers to the idea that ultimately public authority has to be justified to persons – endowed with human rights and human dignity, that have the status of free and equals – in terms they can reasonably accept. This idea is susceptible to more a variety of interpretations, that can lean in libertarian, social or conservative directions.
[4] See for an excellent example FRANKENBERG, GARCÍA, 2019.

present, will be realized to a greater extent in the future. I believe something along these lines to be true. But the coexistence of deeply entrenched hypocrisy, injustice and complacency with highfaluting legal pieties relating to constitutional values does not enhance the credibility of constitutionalism.[5] There is no plausible description of the global constitutional status quo without rendering an account of its serious structural constitutional deficiencies.

There is also a second challenge. Global Constitutionalist narratives are very much part and parcel of the history of western legal and political thought and have been connected to periods of western hegemony. Can it remain relevant when western hegemony is receding and the balance of power is shifting in favour of other regions, most notably Asia, but also South America and, perhaps in the not-so-distant future, Africa? Can global constitutionalism be sufficiently civilizationally and culturally inclusive? What reasons do we have to believe that the global constitutionalist universalist project is different from its other western ideological predecessors with universalist pretensions, such as Christianity or "Western civilization", masking particular interests and cultural practices as universal to justify hegemony?

To engage these questions, the following will try to provide some basic ideas towards an *affirmative genealogy* of global constitutionalism.[6] The idea of an affirmative genealogy[7] is best explained with reference to two related but different ideas: Critical genealogies and progress narratives. Critical genealogies use historical analysis to trace the emergence and use of concepts as a strategy of power, as exemplified in the work of Nietzsche and Foucault. They have a delegitimizing thrust. Affirmative genealogies, on the other hand, illuminate the plausibility of the normative claims that are made in the context of the emergence and use of certain concepts. Affirmative genealogies are distinct from progress narratives in that they neither imply that progress over time is historically linear or inevitable nor suggest that the relevant concepts and ideas are themselves not potentially abused or hypocritically applied. Notwithstanding their affirmative character,

[5] The American constitutional project, for example, is severely darkened by the legacy of slavery and the legacy of injustice towards indigenous people, which reverberates into the present. Some would insist that the Rooseveltian American project to build a new world order from 1941–1945, culminating in the creation of the UN imagined originally as the heart of the new constitutional order, has been similarly darkened in the second half of the 20th century by US practices of imperial domination, perpetual illegal wars, coups and war crimes.

[6] The following draws heavily on KUMM, 2018.

[7] Here I follow JOAS, 2013, chapter 4, whose general idea of a positioning of affirmative genealogies between Kant and Nietzsche and, in modern forms, Habermas and Foucault, I share, without wishing to rely on the convoluted ideas of Ernst Tröltsch.

affirmative genealogies are more attuned to the complexities, frailties and ambivalences of progress, without giving up on the progressive clarification and realization of normative ideals across time and space.

The next part (II) part will provide some further jurisprudential, conceptual, and historical contextualization of the idea of global constitutionalism as it relates to the international legal order. The following part (III) will provide thumbnail sketches of some central historical events and issues for the history of constitutionalism, laying the grounds for an affirmative genealogy.

II. Clarifying the issue: What is a global constitutional reading of international law?

1. Global Constitutionalism as a jurisprudential approach

Global Constitutionalism is not a political project to establish a world state under a global constitution. Nor is it an attempt to describe existing international legal structures as equivalents or analogues to domestic constitutional regimes, suggesting that the international legal domain is somehow fundamentally like the state domain. In fact, global constitutionalism is not preoccupied with the concept of the state at all, even though it recognizes the central role that states play both in people´s lives and in international law.

Global constitutionalism is best described as a jurisprudential approach. As such it provides a cognitive frame (KUMM, 2009, p. 258-325), or mindset (KOSKENNIEMI, 2006), for understanding and engaging the world of law. A jurisprudential approach is less than a fully worked out theory. There is place for different competing theories of distinct legal issues or areas of the law within a jurisprudential approach.[8] Furthermore whereas not every lawyer will have a full-fledged theory of the law or particular subparts of it, all lawyers have a cognitive frame or mindset with which he or she engages legal materials, not only global constitutionalists. Legal materials do not in and of themselves solve legal problems. Questions arise how to identify materials that are properly legal, whether they are applicable, how they are to be interpreted, how conflicts between them ought to be resolved, etc. Here, a cognitive frame or mindset provides, first, the resources to construct

[8] This accounts at least in part for the differences between global constitutionalists such as Anne Peters, Geir Ulfstein, Miguel Maduro, Jan Klabbers, Yoon Jin Shin, Miguel Maduro, Daniel Halberstam, others, and myself.

a distinctively legal order out of inchoate materials, provides, second, relatively concrete ideas about what type of arguments count as plausible and convincing arguments in various contexts and, provides, third, a considerable degree of internal coherence and determinacy. Most lawyers are socialized into adopting a particular cognitive frame or mindset. That is why they often believe that they have no theory and that what they do is simply what you do when you are a lawyer. But once cognitive frames or mindsets operating in law are elevated to consciousness and become the subject matter for explicit reflection and argument, they take the form of jurisprudential accounts. In that sense a jurisprudential account is the reflexive form of professional consciousness. Competing jurisprudential accounts typically have considerable overlaps in what they identify as a legally relevant fact and a legally relevant argument, so that in legal practice there will be many occasions where underlying jurisprudential disagreement will be of no practical relevance. But when there is disagreement among well-informed, high-level lawyers on a particular issue – think about disagreement among ICJ or PCIJ judges, or judges on the IACHR or the ECHR – then that disagreement will often be a function of the underlying jurisprudential approach embraced by the judge.

In international law the contemporary[9] mainstream[10] competitors of global constitutionalism as a jurisprudential approach are either *will-based (voluntarist)* or *conventionalist positivist* jurisprudential accounts. A will-based account is one that insist that ultimately all law binding on a state is one that the state must have consented to. If you are a voluntarist, then you believe that treaty law is the paradigmatic form of international law, customary international law reflects the idea of implicit consent and general principles of law are a relatively insignificant catch-all category dealing with trivial or otherwise uncontroversial propositions of law. If you are a conventionalist, you are prone to believe that customary international law is the paradigmatic form of law, with treaties playing an important role in the formation of customary international law, while retaining an independent transactional role due to the customary principle *pacta sunt*

[9] Historically, the precursor to international law – the *ius publicum Europaeum* – was either conceived within the Christian scholastic natural law tradition (from Vittoria and Suarez to Grotius) or, in the 19th century, in civilizational, historicist or naturalist terms; see KOSKIENNEMI, 2001.

[10] What makes these accounts mainstream is that they all take seriously the idea of an internal point of view relating to the law. Various "critical" approaches, such as Marxism, post-colonialism, feminism etc., engage international law from an external point of view, reflecting, for example, on how law reifies pre-existing power structures along lines of geography, class, or gender. An interesting third kind of an approach, that is neither fully external nor internal are poststructural theories such as those developed by KENNEDY, 1987 and KOSKENNIEMI, 1989.

servanda, whereas general principles play a residual role largely subsumed by custom. Finally, global constitutionalism insists that certain basic principles are constitutive of international law, and that the content of these principles is in part more concretely shaped by custom to settle reasonable disagreement about its meaning. Multilateral treaties are both a way to establish custom and of normative significance because of the moral significance of the self-determination enhancing possibility of transactional relations between states within a general public law framework. Note how all three approaches recognize treaties, customary law, and general principles as a source of law. More generally, in practice most legal issues are not sensitive to differences of underlying jurisprudential approaches. There is much qualified lawyers are able to agree on, simply in virtue of being qualified lawyers. But competing jurisprudential approaches are to a large extent the reason for different positions in debates about doctrinal details relating to the sources of law and a wide range of other basic doctrinal issues. Different jurisprudential approaches and the mindsets they produce have a different understanding of the moral grounds of international law and of what makes it a legitimate practice given the world we live in. This is a point that I cannot deepen here.[11] Here it must suffice to have defined global constitutionalism as a distinctive jurisprudential approach competing with other jurisprudential approaches in international law and to have made plausible the idea that jurisprudential approaches are not only of theoretical interest, but at the heart of much of what is interesting and controversial in legal practice.

The focus in the next part will attempt to provide a better understanding of global constitutionalism by describing the contours of the jurisprudential approach, starting with the basic ideas and constitutive principles of international law as they were established in the 20th century. As will become clear, at the heart of a global constitutionalist account of international law are certain principles drawn from the 18th century tradition of the American and French Revolutions as constitutive for the constructive understanding, interpretation and progressive development of international law.

[11] On these issues I follow DWORKIN, 1985.

2. Global Constitutionalism: Basic principles

Between the end of the First World War and the end of the Second World War international law went through a fundamental transformation.[12] Between the establishment of the League of Nations and the United Nations, resulting from the shocks of WWI and WWII, the legal and political world had been radically reconstituted as a matter of principle. Under the leadership of the United States, allies and other state representatives effectively acted as revolutionary agents of the international community to establish the foundations for a new legal and political world ultimately grounded in principles that had previously been alien to international law: these were constitutionalist principles, genealogically connected to basic normative commitments of the 18th century American and French Revolutions, highly contested throughout the 19th and early 20th century in most European states, but set to gain hegemonic status with the victory of the Allies after WWII and fully achieving that status after the end of the Cold War. The commitments of the rule of law, democracy and human rights would become central also to international law. To be sure, there were also structural continuities in international law: both before 1918 and after 1945 states remain the central actors of the international system. And the mechanisms through which the shift was brought about were treaties formally consented to by states. Like in the aftermath of any other revolution many areas of the law were not directly and immediately effected. But that basic structural Westphalian continuity covers up more than it reveals. There are three basic structural features of the new world order that justify speaking of a revolutionary shift and connecting that shift to constitutionalism.

First, the introduction into international law of the idea of *self-determination as a general principle*[13] in 1945 ultimately brought about the end of Empires and led to the *genuine universalization of statehood* for the first time. The subjects of international law were no longer European sovereigns, who competed to divide up the world between

[12] Of course, describing the whole period between 1918 and 1945 as one of transformation does not imply that the transformation was a twenty-seven-year gradual process. World War II and its end in particular can be characterised either as a rupture or as an acceleration and dynamisation of the transformative process.

[13] To cabin in its transformative potential and reflect British and French sensibilities, the principle was originally described by Western international scholars as a 'political principle', until, partly as an impatient reaction to this downgrading, it was revitalised as a 'right to self-determination' in Art. 1 of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966. In the Treaty of Versailles it was introduced as a more limited principle effectively only governing the dismantling of empires and the resolution of territorial conflict of those on the losing side of World War I. After World War II, such cabining in would prove to be untenable.

them using rules of international law to structure the "great game" of competitive Empire building. Nor was the issue merely to gradually expand the circle of subjects to include other powers depending on the degree to which they were recognized as *civilized* by established Western powers. Instead, self-determination established as a general principle in the UN Charta gradually led to the full universalization of statehood as the process of *decolonization* took its course and helped abolish the primary forms of international law enabled domination. At the end of WWII there were less than 60 recognized states. Today there are 193 Members of the United Nations as formally equal sovereigns. Much of that shift is connected to the end of empires and the realization of the principle of self-determination.

Second, the idea of statehood itself was radically reconceived. Internally it was tied to its function to respect, protect and fulfil human rights, echoing the normative commitments of the great 18th century revolutions in the United States and France. States after 1945 were legally bound to comply with human rights as general principles of law referred to in the UN Charta as a general idea and worked out and concretized in the UN Declaration of Human Rights in 1948 and multilateral treaties such as the ICCPR and ICESCR over time. Whereas empire-ending decolonization concerned the external dimension of self-determination and legally delegitimized certain forms of domination by foreign powers, the internal dimension concerned the structure of government institutions and the status of the individual.

The state itself now was understood not merely as an effective power-configuration over territory and people, but as an institutional framework within which those governed by it would practice self-determination, both individually and collectively. The task of public authorities was now to respect, protect and fulfil the human rights of those it was governing. Furthermore, government structures themselves had to meet requirements that reflected this commitment. To be sure, it was up to citizens to determine the concrete structure of the institutions that would govern them. But respecting human rights also implies the establishment of a government legitimated by free and fair periodic elections[14] and an independent judiciary, in short, the basic features of a liberal constitutional democracy.[15] Ultimately the point of the state was to serve as

[14] See Art. 21, Universal Declaration of Human Rights, and Art. 25, ICCPR.
[15] This has been the focus of scholarly interest only after the end of the Cold War; see FRANCK, 1992, p. 46-91. This position is not uncontested, although the critique is rarely based on careful legal analysis but more

an instrument for persons as a basic unit of normative concern and not the other way around. Persons were now reconceived as self-determining agents endowed with human dignity. The issues central to the interpretation and progressive development of the law concern the understanding of human rights and the adequate institutionalization of their protection. What kind of individual remedies should be available under international law? Should there be regional or even universal human rights or constitutional courts? If so, what level of deference should be granted to national political processes? Should the international community, acting through the United Nations under Chapter VII have the authority to prevent serious and persistent violations of human rights? And if a Permanent Member of the Security Council cast a veto, under what circumstances if any could states nonetheless intervene as part of their responsibility to protect? These were and to some extent remain some of the questions that are central to international law after its constitutionalist turn.

This piercing of the veil of sovereignty and radically changing the understanding of what is essentially within the jurisdiction of a state to determine for itself was brought about for two reasons. In part for the obvious reason that because the German Fascist regime and some of its allies had committed atrocities against its own population to such an extent that it seemed important for international law to delegitimize human rights-violating behaviour by states, instead of turning a blind eye and describing such behaviour as a sovereign act of state about the substance of which international law has nothing to say. Such agnosticism would ultimately implicate international law and undermine its legitimacy. But perhaps more important was the idea that the internal structure of the state and how it related to its citizens had implications for how it would conduct its foreign policy. Whereas Kant (1795) was the first to argue that what he called republics – essentially liberal constitutional democracies – would not go to war against one another[16], Roosevelt shared the belief that "making the world safe for democracy" and ensuring "freedom from fear" meant that international law had to establish basic standards for legitimate government.[17] It was of central importance to ensure that individual persons were no longer conceived as subject citizens serving as a resource for competitive power-

general policy concerns about a lacking international consensus, fostering military intervention and risking a new imperialism. For an extensive discussion see MARKS, 2000.

[16] A claim substantiated by considerable empirical evidence; see DOYLE, 1983, p. 205-235. For a useful review of the various permutations of the 'Democratic Peace' debate, see PINKER, 2011, p. 278-294.

[17] See Roosevelt's State of the Union Address of 6 January 1941 discussing the foundational significance of the "four freedoms" for the global order that the United States would work towards.

mongering states, which mobilize their subjects with reference to the dignity, pride and glory of the nation and its superior culture and power to build empires and raise their status. This was important to prevent nationalist ideologies, whether of a fascist or merely authoritarian bent, from continuing to serve as a basis for domination either internally or externally.

But the idea of state of statehood was also changed more generally in its relationship to the "outside". States were conceived as an integral part of a larger international community, whose authority was not derived from the authority of each individual state. Fundamentally, the international community was in authority and could restrict the freedom of states whether an individual state consented to these restrictions or not, both on the grounds of general principles of law – some of them protected as *ius cogens* – and on the grounds of customary international law. Sovereignty was no longer a right not to be subject to restrictions without first having consented to them. Sovereignty was better understood as focused on membership and participation in a larger global community of principle.[18] The legal structure of this shift will be described below. The question is how such a shift is connected to constitutionalism. Fundamentally there are two reasons why such a shift is required by constitutionalist commitments. The first is a commitment to non-domination. If self-determination within a framework of equal sovereign states is the principled starting point for imagining international order, then powerful states should not be able to dominate others, irrespective of whether they have consented to such a restriction or not. Here the prohibition of the use of force is paradigmatic. More generally the idea of the rule of law as applicable also to the relationship between states is grounded in this idea, with the concrete rules of law themselves of such a nature that they reflect a commitment to non-domination and sovereign equality. Second, the limited capacity of states to secure global public goods and welfare needs to be overcome. The international community needed to develop a legal and institutional infrastructure that would enable humanity to act collectively to address these issues. Self-determination is not a practice that takes place within the territorial confines of the state. Opportunities are provided and restrictions imposed also by the wider global environment. Those too are not simply to be taken as a natural fact about the world, but to be made the subject matter for collective shaping through

[18] See, for example, CHAYES; CHAYES, 1995.

collective action. This is the background understanding with which constitutionalists make sense of the following legal shifts of general structural significance.

First, states were no longer authorized to go to war to secure their rights under international law. Restating the commitment first entered into by most states in the Kellog-Briand Pact in 1928,[19] the UN Charter in Art. 2 Sect 4 prohibited the use of force in all cases except when a state was being subjected to an armed attack[20] or when the state was acting within authorization of the UN Security Council acting under Chapter VII. States that believed their rights to be infringed by another state are under an obligation to settle disputes peacefully. Until the issue was brought to a court or tribunal a party thinking of itself as aggrieved could take certain countermeasures, subject to procedural and substantive constraints, to force the violating side to resume compliant behaviour. But the state would not be permitted to seek legal redress by way of force. Even though the basic idea here was that *the rule of law was to replace the law of force*, and courts and tribunals had a significant role to play both after 1945 and significantly proliferated after 1990, the jurisdiction of any court over any dispute is still generally believed to require the consent of states. But notwithstanding these continuous violations of the basic principle of *nemo iudex in sua causa* central to the rule of law,[21] violations of the prohibition of the use of force could lead to charges of "crimes of aggression", which in principle could be subjected to criminal sanctions.[22] Similarly serious and systemic violations of humanitarian law or human rights law could be subjected to criminal persecution as war crimes or crimes against humanity, even if the person responsible for these actions was a state official acting under orders or even if he was the head of state himself. *Respondeat superior* was no longer recognized as a valid defense and the immunity of heads of state or ministers in office no longer provided protection. In that sense, since 1945,[23] it is simply wrong to say that states have the monopoly of power, if we mean by that the ultimate authority to determine how and when individuals may use force against other individuals.[24] The core of the norms over which the ICC now has

[19] For an account that highlights the significance of that pact, see HATHAWAY; SHAPIRO, 2017.
[20] See Art. 51, UN Charter.
[21] Deficiencies lamented by luminaries such as Hans Kelsen and Hersch Lauterpacht after WWII.
[22] I will forego the complicated issues relating either universal jurisdiction or the jurisdictional complexities of the ICC provisions in this regard.
[23] If not already since the Nuremberg and Tokyo trials, at least since the ICC became operational in July 2002.
[24] Of course, that does not mean that state officials do not often get away with illegal use of force amounting to wars of aggression or war crimes or crimes against humanity, but this is no different from criminals within the national context often getting away with serious crimes. If that fact was never in and of itself sufficient to

jurisdiction is furthermore protected as *ius cogens*. They cannot be changed by the opposing will of a state, no matter how powerful.

Second, a preoccupation of the constitutionalist tradition of the 18th century was not just to constrain power but to create the preconditions for collective empowerment. Collective self-determination on the level of the state has its limits and is unable to secure a wide range of global public goods central to global welfare. In international law some degree of collective empowerment would occur through innovative reengineering of the jurisgenerative process as well as through the creation of administrative capacities over time. The core idea here is to overcome the restrictions connected to consensus requirements characteristic of treaty making. On the more conventional side the International Law Commission, a body of highly regarded state-appointed legal experts established under the auspices of the UN, produces reports that either by themselves or by serving as a basis for multilateral treaty making play a central role to not only codify but progressively develop new international law across a wide range of fields.[25] More innovatively, a new understanding of customary international law evolved, which limited the amount of time needed for binding custom to form[26] and reinterpreted what counts as state practice, or how much state practice and *opinio iuris* was needed (LEPARD, 2010). This facilitated the emergence of new binding norms through strengthening the effective role of the UN General Assembly which enacts Resolutions that, although not binding in themselves, became a central part of a decentralized quasi-legislative process of generating customary international law. Finally, over time, a new plethora of international institutions grounded in multilateral treaties from the GATT (later the WTO), the World Bank and the IMF created an infrastructure for administratively managing certain aspects of the global commons with a focus on the global economy. Today, international institutions have wide-ranging roles in administrative rule-making (ALVAREZ, 2005). Moreover international organizations interacts with domestic actors to produce practices described and critically analysed by the field of global administrative law (KINGSBURY; KRISCH; STEWART, 2005, p. 15-62). From a global constitutionalist view these shifts are

undermine the claim that the state has the monopoly of the use of force, then the same must appropriately apply to the claims of international law.

[25] Examples include the preparatory works of the Law of Treaties as well as the Draft Responsibility of States for Wrongful Acts, Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

[26] Think of "pressure-cooked" or "instant" international law; see the discussion in INTERNATIONAL COURT OF JUSTICE, 1969.

interpreted as having the general point to build the institutional and legal infrastructure to empower humanity to collectively shape the world through legal regulation, ensuring non-domination and enhancing welfare.

3. The real and the ideal within the law: On the critical and transformative potential of global constitutionalism

If law is constituted by basic principles that together establish an ideal of constitutionalist legality, then the teleology of a legal system imagined in this way is geared towards the full realization of these principles. But the actual positive rules and institutions might be in tension with these basic principles or realize them only in a limited, incomplete way. There may be significant tensions between the legally prescribed principled ideal and the actual institutional and rule bound practices in positive existence. Such a situation is one in which the concrete legal rules and institutions, although legally valid, are legally deficient. Note how this puts lawyers in a position to criticize existing positive law from the perspective of legal principle, that is a perspective that is internal to the law. Constitutionalism, then, allows for a critical normative assessment of existing legal rules and institutions from a perspective that is internal to the law.

The international legal order that emerged after 1945 was reconstituted by the core principles described above. They were enshrined in legal documents like the UN Charter. But the institutionalization and concretization of these principles was left to be completed over time and in part remains structurally inadequate to prevent domination of great powers or hegemonic coalitions.

To take the example of human rights, even if it would be correct to claim that after 1945 states were legally required to respect human rights, the requirement was left radically underspecified both in substantive terms and in terms of the availability of remedies in case of violation.[27] The legal project of a commitment to human rights began as a legally articulated promise, rather than an effectively institutionalized reality. And even though there has been a considerable evolution in the field of human rights both concerning the definition of the primary norms and of establishing institutions and

[27] Samuel Moyn's thesis that human rights law came into existence only in 1977 is as ridiculous after careful probing as it sounds at first, but it is his major achievement to have described a major shift in the wider political and cultural reception of human rights that occurred in the late 1970s; see MOYN, 2010.

doctrines enforcing them – primarily but not only regionally rather than universally – a great deal of deficiencies remain.

Similarly the idea of criminalizing violations of the use of force that violated prohibitions of wars of aggression, war crimes, crimes against humanity or genocide was established in the Nuremberg and Tokyo trials. But these trials themselves were highly imperfect instantiations of the new principles. Only the vanquished were on trial, not the victors. Neither issues relating to the fire-bombing of axis cities, from Dresden to Tokyo, nor the ethnic cleansing of Germans in Poland and Czechoslovakia or the use of nuclear weapons in Hiroshima and Nagasaki were subjected to legal scrutiny by criminal courts. The courts were not constituted by way of impartial and independent procedures, but by the victors. But notwithstanding these serious structural deficits, that are perfectly correctly criticized, it would be wrong to simply decry these faults as an indication that this was just a hypocritical form of dispensing victor's justice. A better way to understand these events is to think of them as part of a path to gradually institutionalize new principles under real-world conditions. It would take further steps after the end of the Cold War, first as ad hoc projects to establish UN Tribunals with jurisdictions over specific conflicts in Yugoslavia and Sierra Leone by way of UN Security Council Resolution, before a general court with the jurisdiction would be established by the Statute of Rome in the form of the ICC. And even that Statute, in particular but not only with regard to its limited jurisdiction for crimes of aggression, is subject to plausible and continuing legal critique.

If constitutionalism thus allows for taking a critical perspective on existing legal institutions and doctrines that is internal to the law, the flip side of constitutionalism's critical potential is its potentially transformative character.[28] Both are a function of the possible tension between the ideal and the real within the law. A constitutional transformation occurs when either through interpretation or progressive development the significance of these basic legal principles becomes an argument to reinterpret existing rules or reform existing institutions in structurally transformative ways to make them more compliant with the underlying legal principles that legitimate them.

If an existing legal practice can be criticized in light of its grounding principles and, conversely that practice may at times be transformed to make it more compliant with underlying principles, then the way to get from criticism to transformation is either

[28] For the debate on transformative constitutionalism see HAILBRONNER, 2017, p. 527-565.

by way of legal interpretation, by progressive development of the law or by law reform. Once basic principles have been brought to bear to criticize an actual legal proposition as incompatible with the principles underlying it, these are the three ways to ensure that positive rules and practices are more closely aligned with its legitimating principles. In all three cases the underlying principles assume a regulative function, the point of which is to bring actual legal practice more in line with its principled foundations. When it comes to legal interpretation, principles provide objective teleological arguments in favour of interpreting the law in one way rather than another, when an issue is disputed. We speak of progressive development of the law, when principled challenges to settled understandings of the law lead to new settlements that are more aligned with underlying principles. The limits of progressive development of the law are reached whenever there are reasonable alternative ways of interpreting a principle with regard to an issue that is appropriately addressed by political actors.[29] When that is the case, reform – requiring some kind of political endorsement – becomes necessary to legitimate a choice between reasonable alternatives and validate the particular solution the law is to embrace. Even though more would need to be said, the teleological character of the law does not imply that law, conceived in constitutionalist terms, does not have the resources to uphold the institutionally central distinction between legal interpretation and progressive development of the law on the one hand and political reform on the other.

III. Some ideas on an affirmative genealogy of global constitutionalism

The history of constitutionalism is not studied appropriately simply as part of the history of ideas or of the history of certain formal legal institutions and doctrines. It should be studied as part of an actual legal and political practice in the variety of contexts it touches. A history of global constitutionalism would focus not just on how constitutional ideas were invented, interpreted, developed, and justified over time, but also on how, why, and by whom they were resisted. It should focus not just on the successes it helped bring about, either in terms of individual and collective emancipation from domination, economic prosperity and general welfare, or cultural and civilizational flourishing, but also

[29] Of course, this formulation covers up a can of worms. For a classical critical treatment of the related distinction between judicial and non-judicial (political) disputes, see LAUTERPACHT, 1933.

its ambivalences, failures, and hypocrisies. A history of global constitutionalism could not plausibly be a simple progress narrative. For that there has been and continues to be too much ambivalence, failure, and hypocrisy. But the question is whether a greater familiarity with the history of constitutionalism and its contestations might lead to an understanding of it that would make more plausible its normative claims and its potential, notwithstanding all of this. The question is whether a genealogy of constitutionalism, as it has spread both horizontally across political communities and states worldwide and vertically to capture the imagination of statesmen, entrepreneurs and jurists shaping the international legal order, may affirm it, rather than discredit it. In other words, the question is whether the history of global constitutionalism might lend itself to an affirmative genealogy. To the extent that it could, it would have to address a variety of concerns, perhaps the most important of which is the that global constitutionalism and its commitment to human rights, democracy and the rule of law is just the latest reincarnation of the West's attempt to cover up its imperial ambitions and particular interests by dressing them up as a universalist ideology. What Christianity was from the 16th to the 18th century and what "civilization" became in the 19th and early 20th is resurrected after WWII, this time as constitutionalist ideology.

1. The new constitutionalist world order and "the West"

Perhaps the best way to make plausible the idea of an affirmative genealogy is to face head on the most obvious series concerns that appear to give credence to this scepticism. It is true that constitutionalism originated in the heartland of "the West": in the American and French Revolutions in the 18th century. It is also true that the modern global constitutionalist project is deeply connected to the Roosevelt administration seeking to shape a new world order after WWII. The United States was the Revolutionary agent in this regard, putting its considerable war proven power and diplomatic clout to work to achieve its aim. Here it much suffices to briefly recount three examples.

The first two concern the role of the US in establishing new constitutions for the main Axis powers. These were effectively ordered to establish some version of a liberal constitutional democracy after having surrendered unconditionally. Neither the genealogy of the German Constitution nor of the Japanese Constitution reflected the commitment to "We the People" freely deciding on how to govern themselves.

In the case of Germany, the leadership was reluctant because, they claimed, there was no people that could give themselves a constitution: The Eastern parts of Germany were occupied, after all, by Soviet forces and the new constitution could only be applicable in the Western occupied territories. They were told to get on with it nonetheless and all the representatives from the various states could do to express their discontent was to refuse the new document the name of a constitution. They called it a Basic Law instead and the Allied powers signed off on it after assuring themselves that the document met their requirements. Only after that was the document ratified by state Parliaments.

The story of the Japanese Constitution is even more unsubtle.[30] After having been told to amend and modernize the Meji constitution by General MacArthur as the Supreme Commander of Allied Powers (SCAP), the reluctant government established a research committee to study whether an amendment of the constitution was necessary. The Committee concluded that amendments to the Meji Constitution were indeed necessary, but that they were relatively minor. When the draft amendments were published, the SCAP was frustrated by their conservative content and had his staff members draft a new constitution within eight days. While that constitution left intact the emperor as head of state, it abolished the feudal system, established the principle of popular sovereignty, required the renunciation of war and prohibited the maintenance of armed forces. The government was then pressured to adopt the draft and moved it through the ratification process.

The genealogy of the UN Charter is not entirely dissimilar. Even though the Charter was adopted by 50 Nations at the San Francisco Conference in 1945, the decisions on the basic structure and principles had already been decided sometime between the Atlantic Charter, in which Roosevelt arm-wrestled Churchill to sign off on common principles, over the Tehran and Yalta conferences to the Dumbarton Oaks conference. Much of the preparatory work was done by various parts of the US Roosevelt administration. The UN would not exist in anything like its present form were it not for the leading role of the United States. Axis powers were excluded as enemy states from the negotiations and would not become Members until 1956 in the case of Japan and 1973 in the case of the divided Germany. Finally, there were 51 states who were the

[30] The following draws on MATSUI, 2011, p. 4-20.

original signatories of the UN Charter in 1945. Today there are 193 states. The difference is to the greatest extent one connected to peoples successfully claiming self-determination against their colonizers and Empires disintegrating.

What is clear is that in all of these cases the spread of constitutionalism was part of a distinctly American dominated project. What is less clear is what it teaches us about constitutionalism's universalist posture in its relationship to the West and the rest of the world. This is not only the case because there are generally good reasons not to make conclusions relating to the moral validity of a claim too quickly after having analysed its genealogy. It is also because this genealogy itself is not without its interesting ambivalences and complexities.

The idea of "the West" is a complicated notion in the history of constitutionalism. A closer examination quickly makes clear that the connection between constitutionalism and "the West" is attenuated, at best. Germany as a major European power in the first half of the 20th century appears to share more traits with Japan, a major Asian power, than with the United States and is treated in much the same way as Japan by the Allies: as a country in need to be re-educated and weaned off its nationalist militaristic culture. More generally, Germany, much like Japan, both in the early 20th century in WWI under the Kaiser and under National Socialism adopted ideologies which had nothing to do with constitutionalism. On the contrary, the German nationalist culturally supremacist "ideas of 1914" propagated when the War began were self-consciously embraced as a distinct alternative to what were described as the materialist, individualist, and ultimately existentially shallow ideas of "1789", that were claimed to be incompatible with German culture even by such luminaries as Thomas Mann. Going further west in Europe to France, the German Nazis found willing collaborators in the conservative authoritarian Vichy regime. In France the ideas of the French Revolution had produced deep divisions and a series of counterrevolutions throughout the 19th century, as conservative authoritarians sought to connect the idea of France as a nation not to the principles of the revolution, but its catholic faith and the aesthetic superiority both of the simple life in the French countryside (*la France profonde*) as well as the aesthetic splendour created by its nobility. Cross off the idea of the aesthetic splendour of the nobility and you get something close to the populist vision of France that Marine Le Pen is peddling today. Even Britain's role in this context is not simple. WWII was Britain's "finest hour", as it provided a bulwark against the Nazis. But of course Britain itself was a

global Empire structured internally by a class system in which hereditary privilege remained of central importance, with the working class invited to feel nationally elevated by imagining their miserable plight to be connected to the "white man's burden" to help bring civilization to the rest of the world by way of managing an Empire in which the sun did not set. The recognition of the principle of self-determination by Churchill was a price he had to pay to secure the desperately needed support of the United States against Hitler. Roosevelt had made it quite clear that he was not willing to invest American blood and treasure to defend and uphold the British Empire.

In 1945 constitutionalization of the world was an American led project, not a Western one, because constitutionalism had not taken a deep hold among major powers in Europe before the end of WWII, notwithstanding a century-old history of political and ideological struggles. And its most intrusive actions and attempts at re-education were not aimed at hapless backward people, but Germany and Japan, the highly civilized barbarians that had unleashed World War II in Europe and Asia.

The constitutional moment of 1945 brings a decisive break between the old European colonial order established before WWI and the post-WWII order. The end of WWII saw the most aggressive imperial powers of their time put into place. At the same time with the idea of self-determination, the prohibition of the use of force and human rights a set of normative principles were established that also delegitimized the older European Empires such as those of Britain and France, even though the process of decolonization would still require time and national struggle. In that sense the constitutional moment of 1945 was also a high point of anti-imperialism.

2. Imperialism in a new guise? Why the post War International Legal Order and the American Empire are two different things and in tension with one another

Of course anti-imperialism can itself turn into imperialism very quickly. When the Japanese navy defeated the Russian Navy in the battle of Tsushima in 1905, this was widely celebrated by subjugated people of the world as proof that the Imperial Western powers could be defeated. For many non-white peoples this seemed to mock western racial hierarchies and the presumption to "civilize" the supposedly "backward" countries in Asia (MISHRA, 2012, p. 3). It made a deep impression on future leaders of liberation struggles and projects of national modernization, from Mohandas Gandhi, then an

unknown lawyer in South Africa, to Mustafa Kemal later known as Atatürk, then a young Ottoman soldier in Damascus, to Jehawahral Nehru, later the first Indian Prime Minister, and Sun Yat-sen, later the first President and founder of the Chinese Republic (Ibid., p. 1-6). But even though it is correct to understand this as a moment in which established western imperial powers and their racial presumptions were undermined in a way that gave hope and wakened from its lethargy a wide range of subjugated peoples across Asia, it was not an anti-imperialist moment. Ultimately the battle of Tsushima was a battle in a war between two competing imperial powers over who would control Manchuria and Korea: Russia, as an established European power or Japan, a regional upstart seeking its own place in the sun after having gone through a process of radical modernization following the Meji Restoration. What that battle and Japan's subsequent further rise illustrated was merely that Empire and racially and culturally presumptuous domination was not something that Europeans or the West could effectively maintain a monopoly over. If the battle of Tsushima was the beginning of an Asian awakening and the "opening chords of the recessional of the West" (Ibid., p. 6), then it left open the possibility that an awoken Asia would simply replicate the worst of what the West had to offer. Imperialism based on presumption of racial or cultural superiority, too, is a western ideology with widespread appeal also outside of the West.

To be sure, it was widely believed that Japans success had something to do with its constitution (Ibid., p. 1-6), whereas Russia's weakness was associated with its ossified autocratic structure. In that sense the battle of Tsushima was also a constitutional moment. The possibility to gain self-respect and constitutional government appeared to go together. It helped fuel a series of popular constitutional revolutions against autocracies not only in Asia but also in Russia. Students from all over Asia flocked to Japan to study its constitution. But the 1889 Meji constitution, like its Prussian 19th century counterpart which it was developed from shared mainly the constitutional form with constitutionalist ideas and remained deeply wedded to autocratic government and legitimacy. The Japanese Emperor was the sovereign, his power derived from religious authority, and he had the status of a living god; the Diet was weak and individual rights were benevolent grants of the Emperor. Unlike the post-war constitutional transformations, the Meji constitution had little to do with the establishment of liberal constitutional democracy.

The failure of the battle of Tsushima as an anti-imperialist constitutional moment teaches something important: Defeating imperial powers alone is insufficient to guarantee the victors anti-imperial bona fides. So the question arises: does the United States qualify as an imperial power in the morally relevant sense after WWII, given its role giving birth to the new world order after WWII and dominating it thereafter?

The answer is ambivalent and requires making a basic distinction: On the one hand the United States effectively became a global Empire after WWII, if by Empire we mean a hegemonic state that effectively dominates other states at least in part by way of active or threatened coercion. On the other hand, to the extent the US has become an Empire, it largely alienated itself from the basic international legal infrastructure and ideals that it has helped to establish, which the rest of the world, over time, would increasingly embrace. This suggests that it is important to distinguish between the global constitutionalist character of the new international legal order which the Roosevelt administration played a central role to help bring about between 1941 and 1945 on the one hand and the project of American Empire that emerged soon after the end of the war on the other. Both are in fundamental tension to one another, even if there are also aspects which make them mutually supportive. This requires further elaboration.

If we mean by Empire the structural imposition of power on other people directed by the metropolitan centre of a state[31], then U.S. foreign policy after WWII can be understood as a project of global Empire, even if the means by which it structures and upholds its dominant role are different from those pursued by the British and other European Empires in previous centuries. The mechanisms through which that global US Empire is organized is grounded in coercive power in the form of a worldwide system of military bases, a deep see navy tasked and equipped for global power projection, a global system of regionally differentiated unified military command structures, one for each part of the globe, as well as a worldwide active network of intelligence services equipped with unsurpassed surveillance technology ranging from backdoor access to digital platforms to a global system of satellite reconnaissance. In coordination with less violent but equally constraining diplomatic, corporate and financial influence the coercive infrastructure for the practice of global empire is thus in place. The violent side of the practice of Empire includes covert operations, coups and interventions such as those in Indonesia, Iran,

[31] This is an understanding of Empire that is close to that of FERGUSON, 2005.

Guatemala, El Salvador, Nicaragua, Chile, not to mention the Middle East, to the major wars such as Vietnam, Afghanistan or Iraq. In the context of the post Sept. 11 "Global War on Terror", they included the more individualized practices of extraordinary rendition and torture, officially abolished only after significant expanding of the US drone program, geared towards the killing of suspected terrorists wherever the US finds them, if the country in which they are found is deemed by the US to be insufficiently reliable to follow through with the persecution of such terrorists.

It is furthermore *not* plausible to claim that the foreign policy thrust of the United States can generally be interpreted as actions of a superpower serving as an anchor and guardian of that new legal order. Its actions can only occasionally be claimed to have served such a function, whereas many of its actions were and are directly in conflict with it and were instead directly geared towards increasing influence of power of the United States while removing or weakening actors who pursue policies the United States deemed to be directed against its interests. US foreign policy reaches a sweet spot where the defence of the global constitutional order which it had helped create and which is ideologically closely connected to its own revolutionary ideology and its self-image, is aligned with its imperial ambitions.[32] But such an alignment has been and continues to be contingent. The UN Charter, the prohibition of the use of force, the sovereign equality of states, self-determination and non-interference, human rights treaties, the laws of armed conflict and international criminal law – central legal features of the existing constitutional order – are not easily rendered compatible with American practices of Empire.

When the UN Charter was opened for signature in June 1945, there were no nuclear weapons, no CIA and no worldwide network of US military bases. Genealogically, the emergence of basic legal infrastructure of the post-war legal world was independent of and predated the pursuit of American Global Empire. The latter was a project the US gradually stumbled into as the inexperienced new Truman administration found itself as the sole nuclear power facing off a Stalinist Soviet Union after defeat of their common enemies. With the infrastructure for global empire fully in place by the end of the Cold War, there appeared to be little incentive, geostrategically, to reinvigorate and render more functional the global constitutional order after the Soviet threat subsided. Whether such a course would have been politically feasible in the US, given the domestic structure

[32] A dramatic contemporary example of such an alignment are US policies in support of the defense of the Ukraine against Russian aggression.

of deep personal and financial entanglement between corporate defence interests, think tanks and universities, the political system of representation and government bureaucracies, is not obvious. In the end there were no major US attempts at UN reform geared towards increasing its functional capacities after the end of the Cold War. Major initiatives towards global constitutional innovation, from the establishment of the International Criminal Court to the Treaty on the Prohibition of Nuclear Weapons, took place without a US leadership role and in part directly against the position of the US, undermining their effectiveness and limiting their success.

But even though it is important to highlight the genealogical independence of and tensions between the global constitutional order and American imperial ambition and practice, it would be wrong to simply describe the international legal order merely as an innocent bystander and victim of lawless American imperial ambition. There are two ways in which the existing international legal order effectively enables and supports the American project of empire.

First, the existing legal order appears to champion values and principles connected to US values. For the Biden administration, for example, the protection of what is referred to as "the rules-based international order" goes together well with his signature framing idea of a struggle between "democracies and autocracies". What is right about this is that it is a plausible interpretation of existing human rights law that states are required to establish some kind of liberal constitutional democracies. If they do not, they are deficient from an international legal perspective. What has never been emphasized by the United States, even though it is uncontroversial as a matter of international law, is that the rules relating to the prohibition of the use of force and self-defence apply to democracies and autocracies equally. Democracies are granted no privileges to use force against autocracies and autocracies have the same right of self-defence as democracies when attacked. The Russian attack against the Ukraine is legally speaking not primarily an example of an autocracy illegally fighting a democracy,[33] but

[33] However one may judge the situation leading to a regime change in Ukraine in 2014 in the context of the Maidan protests, the Ukraine has evolved in the past 10 years to somewhat strengthen its democratic credentials, while Russia has gradually become more autocratic. Yet Ukraine and Russia have a similar structure of problems with regard to corruption, oligarchic power and regional ethnic minorities. In relevant rankings, Ukraine has in the past years always been ranked much closer to Russia then, say, the lowest ranked EU countries. See, for example, the Freedom Index 2021 (FREEDOM HOUSE, 2021): Russia: 19, Ukraine: 61, Hungary: 69, Poland 81, US: 83, Germany 94; and the EIU Democracy Index 2021 (ECONOMIST INTELLIGENCE, 2021): Germany: Rank 15/Score 8.67, US 26/7.85, Poland: 51/6.8, Hungary: 56/6.5, Romania: 61/6.43, Ukraine: 86/5.57, Russia: 124/3.24 (10-8: full democracy, 8-6: Flawed Democracy, 6-4: Hybrid Regime, <4: authoritarian).

simply the case of an illegal aggressor state fighting against a state practicing self-defence. Similarly the United States attacking Iraq in 2003 was, legally speaking, not a legal attempt by a coalition of democracies to end a terrible dictatorship and to bring democracy to Iraq , but simply an act of aggression of one state against another.[34] It is deeply troubling that debates in the United States after the debacle of the endless mostly unsuccessful as well as illegal military interventions in the Middle East in the two decades following September 11 are framed as either "continuing to engage the world" or opting for a more isolationist posture under the auspices of an "America first" approach. The idea of engaging the world in ways that does not prioritize the illegal use of force is not an option that is the focus of discussion. Nor is the question how and who should be held criminally responsible for the worst type of more obvious atrocities committed. It is this self-righteous callous nonchalance that creates considerable resentments on the side of significant parts of the international community.[35] These resentments in turn give resonance to calls of reactionary powers, such as Russia and China, to move beyond what is called a "unipolar order" in which the only great power generally free to violate international rules relating to the use of force is the United States, to a "multipolar" one, in which other states, in particular Russia and China, should have the same privileges.

This brings up the second way in which the international legal order has implicitly been complicit in the US project of global empire. While the international order enabled the United States to use that order to mobilize coalitions to constrain others, the structure of the order ensured the impunity of the United States when it violated its basic rules. To understand what features of the international order account for this fact, it is

[34] This is not the place to analyze in depth the various justifications that the US has put forward to justify the invasion and the academic literature this has spawned. Justifications range from claims about a hidden program relating to the production of weapons of mass destruction (not only famously untrue but also legally irrelevant for the purpose of legally justifying the unilateral use of force), to the idea of getting rid of a terrible dictator ("the world is better off without Saddam Hussein", another claim which in light of the mid six figure mortalities the conflict produced is questionable, as well as being legally irrelevant), to legally audacious claims that the intervention could be justified on the grounds of a 1991 UN Security Council Resolution authorizing the use of force against Saddam Hussein after he invaded Kuwait, given that Saddam Hussein had engaged in a material breach of the agreed-upon ceasefire conditions ending that conflict, the result of which was claimed to be the renewed activation of the original authorization. It is unlikely that any of these claims would have been recognized by an impartial and independent international tribunal. Not surprisingly, there was no international court with the jurisdiction to assess these claims.

[35] Note how notwithstanding the widespread support of the GA Resolution condemning Russian aggression after its invasion of Ukraine is not complemented by comparably widespread support of sanctions against Russia, let alone providing arms for Ukraine. Only states who are in the EU or are in alliance with the United States and are under its nuclear umbrella are providing such support. Others are reluctant to follow the lead of states that are either themselves participating in practices deemed by them to be not so different or are complacent in trying to hold them to account. The perception of hypocrisy and double standards by its leading power undermines the systems credibility to effectively mobilize also against other threats.

useful to reflect why today the challenge to the United States unipolar position in the global order is being challenged by Russia and China. It is no coincidence, that Russia and China are at the heart of current geostrategic revisionary challenges. Together with the United States these three states and only these three states out of the 193 UN Member States have the following three features in common, together constituting their special status in the international legal system: First, they are all nuclear powers, their privileged status validated in the Non-Proliferation Treaty. Second, they are Permanent Members of the UN Security Council and as such they have a veto right. Third, they have not subjected themselves to any court that would allow other states to seek to hold them legally accountable, nor have they ratified the Rome Statute establishing the International Criminal Court, thus ruling out the prosecution for acts of aggression. None of these states can effectively be held legally accountable either through the UN Security Council or international courts and tribunals. And all of them have the means to ensure that, militarily, their actions can never have existential consequences, given that any serious threat to existential interests can be addressed by threatening nuclear war. I have argued elsewhere that this means that great powers defined by these features are effectively recognized by international law to possess prerogative powers.[36] These prerogative powers concern the discretionary use of force, subject only to balance of power considerations relating to other great powers, which the international system effectively accepts, whether the use of force is illegal or not. The existence of prerogative power, exercised primarily by the United States after the end of the Cold War, effectively gave the United States a free pass to engage in its pattern of illegal coercive behaviour. The same structural deficiency – the recognition of great power prerogative power – is now at the heart of the helplessness of international law in its confrontation with the blatant aggressive acts of Russia against the Ukraine. The competition over who gets to use prerogative power, and to what extent, is a competition between great powers in which the only decisive factor are balance of power considerations, calculated taking into account the background threat of nuclear war and mutually assured destruction. This calculus looked differently for China and Russia twenty or even ten years ago than it does in the present: thus the challenges. The existence and scope of prerogative power in the current international system, its enabling of American Empire in the period after the end

[36] Great Power Competition, Prerogative Power, and International Law (on file with author).

of the Cold War and its condemnation to powerlessness in the face of the new great power competition is arguably the greatest challenge to the global constitutional order.

3. The Postwar Order as another "false universalism" imposed by the global hegemon?

The argument above has clarified that there is a significant break between the European variations of Empire and the new global constitutionalist order the US was instrumental in bringing about. It also clarified that to assess the international legal order, it is not enough to condemn the United States as engaged in a project of Empire and assume that this also taints the international legal order created under US leadership. The international legal order and the American project of Empire have a different genealogy and are often in tension. Even if the charges against the United States are true, the project of Empire was largely undertaken by means directly inimical to the order and not authorized by it. So the question remains: If we focus on the international order itself, are the basic standards it establishes and the requirement it imposes sufficiently sensitive to difference and pluralism, or are they better understood as an imposition by the hegemonic power of the era? It is not enough of course to simply claim that the establishment of constitutionalism can never be imperial, because it simply is the correct legal and political ideology. Given that this was the kind of argument with which all imperial projects were justified, and that these claims remain controversial and contested, more is required. That is all the more obvious when, as in the case of the UN Charter, there are good grounds to be sceptical of some of its provisions, even from a global constitutionalist point of view. But what exactly is required to be able to reject the argument that global constitutionalism is just the latest false universalism foisted upon the world, this time by the United States as the dominant imperial power emerging from WWII?

If constitutionalism is effectively imposed on a particular nation or the world, as it was on Germany and Japan after WWII and as it arguably was on the whole of the world by way of the UN Charter, then it becomes decisive whether those subjected to the order generally embrace its basic principles over time, make it their own, engage with it, participate within it and, if they deem necessary, modify aspects of it as they deem fit. One of the decisive features of constitutionalism is that it legally authorizes and highlights

such participatory engagement and rejects the lethargic attitude of mere subjects as unworthy of the office of citizenship.

a) Dealing with former enemy states: Imposing Constitutions on Germany and Japan

The German Basic law has over the decades not only become a central point of reference in the everyday political and legal debates, with the Constitutional Court recognized as a highly influential and respected institution. Over time the constitution has also become a central factor for German national identity and pride, even though that does not mean that Germans feel constrained to amend it as they deem appropriate.[37] In Germany the idea of constitutional patriotism has real resonance and widespread, even if not universal, support. The claim that the constitution should be understood as an imperial imposition has no contemporary resonance whatsoever.

In Japan the constitution appears to also be widely regarded as successful and enjoys widespread support. Yet there are two striking features that a scholar of comparative constitutional law cannot help but notice and that are of interest here. On the one hand courts have refused to play the active role that they play in most established liberal constitutional democracies, even though they have the formal powers to do so (MATSUI, p. 140-151). Furthermore, the constitution has not been amended once, even though there are obvious reasons for doing so. In its famous Art. 9 the constitution does not only renounce the right to wage war, but also the right to maintain armed forces. Assuming that Japan maintains the right to defend itself as guaranteed under Art. 51 of the UN Charter, as appears to be the dominant view among Japanese scholars – that provision would imply that Japan be denied to maintain the military means to do so. Of course, in practice Japan maintains one of the most sophisticated militaries in the world in the form of their Self Defense Forces. This status quo is problematic not only because it undermines the authority of the constitution opening it up to charges of hypocrisy. It also undermines the potentially strong role that Japan appears to in principle be willing to play as a militarily active contributor to missions authorized under Chapter VII of the UN Charter. The reasons for both the resistance to more engaged judicial review and to amend the constitution are surely complex and this is not the place, or the author,

[37] The German constitution has been amended by 54 amendment laws amending 109 articles in its first 60 years until 2009.

qualified to discuss them in depth. But could it be at least in part because there is a degree of cultural recalcitrance against the legalist spirit that comes with constitutionalism, once the constitution is taken seriously as containing operative norms which guide and constrain political actors? Is it simply because the discrepancy between what the constitution requires and what is done in practice does not matter, because fundamentally, the constitution should not be taken too seriously as a legally operative constraining text, but more of a symbol for the new post-war Japan? Could it, perhaps more audaciously, be because if previously the person of the Emperor was sacred, it must now be the constitutional text whose role is primarily imagined to be symbolic? Is it because Japanese citizens and politicians do not trust themselves to change anything in the constitution, because they imagine this to be a slippery slope leading inevitably into a new authoritarian perhaps even militaristic regime? The new constitution may stand for the new post-WWII Japan, pacifist and prosperous, that as such is a success and enjoys widespread support. It is less obvious that, given these features, constitutionalism as a legal and political practice has developed deep roots in Japan, even though of course more would have to be said. What that suggests is that acceptance of constitutions and of liberal constitutional democracy can, in practice, mean a variety of things and does not imply that all core normative commitments will in fact be effectively institutionalized. Acceptance of something originally foreign will always involve cultural adaptation, but it may also mean partial subversion and the subtle rejection of some facets of what is claimed to be accepted. But even if an account along these lines were to do justice to the Japanese experience with constitutionalism, it suggests that claims that the constitution is not legitimate and that it symbolizes the ongoing domination of Japan by the United States, are not plausible.

b) Global constitutionalism and its many authors

The global order, as it emerged after WWII was not simply a product of Western minds, shaped by Western traditions and imposed by powerful Western statesmen. It was the result of a process which included the successful struggle of subjugated colonized nations against imperial oppression. And once the basic post-WWII order was established, political struggles and contestation over the meaning of its core principles involved a wide

variety of Asian actors. The following can only provide some very cursory glimpses to illustrate that point.

When President Wilson insisted on establishing the legal principle of self-determination in the Treaty of Versailles that ended WWI, it was applied merely as a principle governing territorial claims relating to defeated powers. It was not applied to territorial claims that the defeated European powers had against the victors, and it was certainly not to apply to territories belonging to the British and French Empires outside of Europe. Yet it was as the Treaty of Versailles was negotiated and as later on state delegates were to be seated at the newly established League of Nations that non-European actors made their claims in the name of self-determination and called out the hypocrisy of the European powers. After the atrocities of WWI claims of a superior European civilization seemed spurious at best. When Gandhi was asked what he thought of Western civilization he quipped that he thought it would be a good idea, a sentiment that had considerable resonance after WWI. More generally representatives of Egypt, India and others claimed they were *a civilization*, thereby implicitly rejecting the presumptions be the existing powers to have the authority to determine which of the relevant actors met relevant "civilizational" requirements. Pressure mounted to give up the requirement of "civilization" in order to be recognized as a state. Thus the universalization of statehood, without a civilizational adage, is an achievement that is a result of a political struggle in which those colonized and subjugated appeared as central actors and ultimately overcame their merely passive status.[38]

Another example of a non-western country playing an active constitutionally progressive role pushing for the development of international law, even if in that specific context not immediately successfully, was India in the context of its intervention in East Pakistan in 1971.[39] It brought humanitarian intervention onto the agenda of the UN Security Council as a subject for discussion and as a potential ground to authorize the use of force, when it wanted to intervene in East Pakistan.[40] The Pakistani government was effectively engaged in a genocide against Bengalis there, which ultimately left at least 500.000 Bengalis dead. Besides the humanitarian concerns India sought to stop the

[38] For a description of this evolution see LORCA, 2014.
[39] For a book length treatment of the issues focusing on the role of Nixon and Kissinger seeking to preclude Indian intervention see BASS, 2013.
[40] For a book-length treatment of the issues focusing on the roles of Nixon and Kissinger seeking to preclude Indian intervention, see BASS, 2013; see also BASS, 2015, p. 227-294.

considerable flow of Bengali refugees across its borders. Since this was in the middle of the Cold War and Pakistan was an ally of the West and India was not, the substantive position that India put forward had no chance of being accepted in the UN Security Council. But its position would find support much later, after the Cold War was over. It is today generally accepted that the mandate to secure international peace and security under Chapter VII of the UN Charter also includes the possibility to authorize all necessary measures to secure the rights of individuals against serious and systematic human rights violations, irrespective of whether those violations have little or no tangible physical effect outside of a state´s borders.

Furthermore, the role of successive Japanese and other Asian governments and civil society actors to help bring out an elimination of nuclear weapons deserves to be mentioned. For the past 24 years Japan has introduced a resolution to bring about the elimination of nuclear weapons before the General Assembly, which generally passes with very widespread support. The issue is a legal constitutional one rather than just a political one, because any use or threat of use of weapons is arguably in violation of basic principles of humanitarian law.[41] In July of 2017 122 countries, excluding the United States and practically all European Union countries, but including Bangladesh, Malaysia, Indonesia, Thailand and Vietnam adopted the Treaty on the Prohibition of Nuclear Weapons. It remains to be seen whether the Treaty will prove to be an effective step towards the elimination of Nuclear Weapons by building pressure on Nuclear powers.[42] But what this issue too makes clear, is that the divide between the different sides have little to do with regional geography or culture and a great deal with global political contestations over the principles and practices that we live under real world conditions in which those who are powerful are reluctant to be constrained.

[41] When the ICJ had an opportunity to adjudicate the issue it effectively avoided it by way of a highly unusual *non licet* decision, thus leaving the issue open (INTERNATIONAL COURT OF JUSTICE, 1996, 226; see also INTERNATIONAL COURT OF JUSTICE, 2016, relating to duty of nuclear powers to make a good-faith effort to work towards the elimination of nuclear weapons under the Non-Proliferation Treaty).

[42] Five of the eight current nuclear powers are Asian: China, North Korea, India, Pakistan and Israel. Two are European: France and the United Kingdom. One is North American: The U.S. If Israel is counted as part of the West, then there are four western nuclear powers. There are none in South America, Africa, or Oceania.

c) Global Constitutionalism and the challenge posed by China

If China today appears to be a country unwilling to embrace constitutionalism domestically that has very little to do with intrinsic features of its culture and traditions and a great deal with highly path contingent options and preferences taken by the existing party elite, and Xi Jinping more specifically (1) These are decisions that have a great deal to do with real failures of liberal constitutional democracy elsewhere, suggesting that China might do better to explore other options. (2) What that means for Chinas relationship to global constitutionalism in international law, however, remains ambivalent (3).

(1) Much like Japan China embraced radical reform and modern constitutional government as a result of its humiliations when confronted with other powers. First in the Opium Wars in the middle of the 19th century, which, beyond the unequal Treaties imposed on them led to the loss of Hong Kong to the British. Then, in the eyes of the Chinese perhaps even more humiliatingly, the defeat in the first Sino-Japanese war of 1894/1895.[43] Note how that humiliation was not simply the result of China being disrespected as an equal by others effectively establishing themselves as superior. It was the result of Imperial China imagining itself as the Center of the world, with other nations and peoples relating to the center through complicated rituals of submission and trading privileges (SVARVERUD, p. 8-15). When the British first established unequal Treaties with China it was not even clear to the Chinese government that they were unequal in any relevant sense. Sure, British citizens would be subject to consular jurisdiction and not Imperial jurisdiction, but in ancient China jurisdiction was generally personal and not territorial anyway. And if the Chinese were not granted consular jurisdiction over their citizens in Britain on a reciprocal basis, then that made perfect sense: Chinese subjects were generally not allowed to and had no reasons to travel elsewhere anyway, whereas of course there were good reasons for others to come to China to show reverence and learn from the superior Chinese culture and hope to gain from trade with it. But the losses against Japan hurt: After all how could a tiny island long dependant on the Chinese language and culture defeat an Empire many times its size? The military defeat against Japan prepared the ground for the end of the Quing Dynasty and the birth of China as a

[43] For a history of China's encounter with and embrace of international law, see SVARVERUD, 2007; see also TANG, 2012, p. 701-723.

Constitutional Republic in 1911, with Sun Yat-sen as its first President. Even though the specifics of the constitution needed of course to be adapted to special Chinese circumstances, unlike the Meji Constitution of 1889 the Chinese constitution reflected a genuine commitment to constitutionalist principles. Because of the remaining powerful role of warlords and the divisions between nationalists and communists the country was in permanent turmoil, until in 1949 Mao Tse tung was able to unify mainland China under Communist rule and establish the People´s Republic of China with his rival Chian Kai-shek holding on to Taiwan. Even though Chian-Kai-shek´s Kuo-Ming Tang governed in Taiwan by way of martial law for the first decades, by the late 1980s Taiwan was not only enjoying considerable economic success but gradually developing into a modern liberal constitutional democracy. In mainland China, too, after the death of Mao Tse Tung who had to be prodded by Stalin that having a formal constitution is a good idea because might help legitimate the regime and stabilize it (ZHANG, 2012, p. 43), with a turn towards markets under Deng Xiaoping there would be a new Chinese Constitution enacted in 1982. That constitution generally shared the core hallmarks of a modern constitution, guaranteeing democracy, human rights and the rule of law. But it did insist on the political monopoly of the Communist party and like in all Communist countries, its role remained negligeable in political life. Instead important shift in power and political orientation would at best be reflected in the Communist parties statutes, not the constitution. Similarly, what mattered were not parliamentary bodies or court decisions, but decisions by the party Congress. If the situation in China today is different from the situation in other countries that had embraced Communisms but then went on to establish liberal constitutional democracies, it was because the way the Chinese leadership handled the potentially transformative moments in 1989, when huge students demonstrations in Beijing threatened the stability of the regime. Unlike the East German Communist party elite facing the same issues that year, the Chinese government decided to clamp down. Nonetheless, even among those who favoured the clampdown there were those who embraced the idea that China would eventually develop into a liberal constitutional democracy. They just did not think that China was quite ready to take that step yet. Not surprisingly throughout the 1990s and 2000s Chinese scholars at universities openly discussed the possibilities and operative details of when and how China would eventually

join the constitutionalist world.[44] Of course, it was still not possible to publish open political calls to establish a liberal constitutional democracy, as 303 intellectuals did in 2008, when they published the Charter 08 on the occasion of the 60th Anniversary of the Un Declaration of Human Rights and the 100th Anniversary of the Chinese Constitution as well as the 10th Anniversary of the China signing the International Covenant on Civil and Political Rights. But short of public political advocacy for liberal constitutional democracy putting the Communist party and its political monopoly on power under immediate threat, much was permitted.[45] That only changed after Xi Jinping took power in 2012. These debates have effectively been put to rest by more severe party guidelines on what should and should not be discussed in political and legal seminars and the threat of sanctions. What is clear looking at the experience in Taiwan, current events in Hong Kong or recent history in China that claims that somehow Chinas culture and tradition make it uniquely unsuitable for embracing liberal constitutional democracy is without grounds.

(2) The reason for the leadership to choose an anti-constitutionalist course after 2012 and to instead emphasize, consolidate and expand on party control is likely to have many reasons. But among those reasons are no doubt the perceived failure of liberal constitutional democracies to deliver what they promise and to reflect a plausible model for best civilizational practice. On the one hand the example of Russia taught China that it did well not to engage in regime change itself, when it was confronted with a serious challenge in 1989. After all Russia not only lost its position as a superpower in the international system, its economy also suffered a severe downturn and the standard of living declined significantly for a large part of the population in the decade after the introduction of western reforms. And was it not also the case that India, the world's largest democracy since its independence, was developing at a much slower pace than China? Finally was it not the case that the European Union and the United States – those supposed models of constitutionalist commitments – were engaging in strangely irrational actions to the challenges posed by terrorism, fighting useless and illegal wars, were struggling with a serious financial crisis, and, after providing on lacklustre economic growth for a decade were now suffering from capture by political movements, parties and individuals which seemed to accelerate self-destructive tendencies? Was it really

[44] See, for example, BUYUN, 2010, p. 197-230.

[45] Perhaps typical for expressing moderately progressive sensibilities of this time was KEPING, 2009, advocating an incremental building-block approach to democratic evolution in China, focused first on civil society, local government, intra-party democracy and strengthening the rule of law.

plausible that the Chinese Communist Party could not do better than that? Could it not reinvent itself as a quasi-meritocratic organization recruiting talent to technocratically govern the country, merging the idea of a Leninist Avantgarde party with Confucian ideas of bureaucratic merit, thus ensuring further growth and stability and perhaps, in the long term, global pre-eminence?[46]

It was no doubt also the combination of 30 years of successful growth that made the Communist Party leadership confident about what it might be able to do, just at a moment when liberal constitutional democracy seemed weak and lacklustre. Note how that this may well turn out to be a judgment to regret. Liberal constitutional democracies also seemed weak and decadent when a wide variety of Fascist and Communist forces appeared to have all the vitality necessary to conquer the future in the 1930s. And the achievement of the Communist party should not be exaggerated. Even after nearly forty years of growth the standard of living of the average Chines on the mainland is still not as high as that of the average Chinese in Taiwan or Hong Kong, let alone the average South Korean or Japanese. Instead of standing in awe we might just as well ask: Why so little so late? Why did it take China so long for it to regain a position, that it had lost in the 18th and 19th century? Not implausibly the historical role of the Chinese Communist party has not just been to cure China from its century of humiliation. The failures of Communist party rule in the first 30 years of its reign were also a contributory cause for its prolongation. And with its current leader breaking the post Maoist convention to limit his leadership to two terms, and pursuing an increasingly authoritarian path, it remains an open question how bright the future of China will be without major political reforms.

IV. Conclusion: The Future of Global Constitutionalism

The historical sketches in the previous part began to draw some basic contours of an affirmative genealogy of global constitutionalism. Historically, the link between "the West" and global constitutionalism is significantly more attenuated then it is often portrayed to be. First, constitutionalist ideas have been and continue to be, at various times, in various jurisdictions, subject to rejection and contestation in "the West", both

[46] For an understanding along those lines see BELL, 2015.

fundamentally and with regard to specific manifestations. Furthermore the United States after World War II has itself had a deeply ambivalent relationship with the global legal order it had helped to create, just as often seeking to subvert and neuter it, as serving as its anchor or guardian. The ideology of "the West" is no more closely associated with constitutionalism then with competing ideas. Various forms of authoritarian nationalist ideologies, celebrating national culture, ethnicity, religion and tradition, fascist or communist ideologies or Empire are no less western as constitutionalism and have been as influential globally, if not more influential, then constitutionalism. Second, constitutionalist ideas have been embraced by actors worldwide against European states (embraced by the colonized and brought to bear against colonizers, unmasking their hypocrisy), to liberate themselves and throw off the yoke of imperial domination. With the appropriation of these ideas by non-Western actors their meaning could sometimes be altered and progressively reformed. Universal categories and their meaning have often been shaped by encounters and conflict and not simply dictated by one side. Third, constitutionalist ideas have been used by those dominated within states against their respective oppressors in states of all continents. They have and continue to be embraced and invoked against local and national elites in non-western contexts who defend their privileges and established practices of domination and exclusion with reference to sovereignty, national culture and tradition. Those elites, in turn, declare those who invoke rights and constitutionalist ideas as inauthentic, corrupt and the fifth column of the – foreign – enemy. Anti-constitutionalist actors have often served, in their respective contexts, as apologists for the ideology of self-serving regional or national elites in the name of national culture and tradition, providing them with intellectual cover against challenges made by those they govern, challenges often made in the name of human rights, democracy and the rule of law. Doing so, they have often detracted from the real hypocrisy and domination that apologists of the status quo are trying to hide and that the critical use of constitutionalist ideas might have more effectively exposed and addressed. These are phenomena that critical postcolonial sensibilities tend to obfuscate rather than illuminate, thus furthering the reification and essentialization of the idea of civilizational and cultural difference. Such reification loses sight of on ongoing relationships of domination within cultures and civilizations and coalitions of domination as well as resistance across cultures and civilizations.

There is no guarantee that constitutionalism will remain relevant in the future, not globally, not in Asia, not in the US, Europe or South America. But constitutionalism may well remain relevant even if Western hegemony is receding and the balance of power is shifting. What matters is that a sufficiently powerful coalition of actors embrace it, across all continents. Whether that will be the case in the midterm is an open question. The international legal order suffers from serious structural deficiencies, that casts a serious shadow on the prospects of its future viability, deficiencies whose structure constitutional thinking is well suited to identify and address. If it is to survive, it will have to transform to more fully realize its core principles. But if constitutionalism won't remain relevant, because various anti-constitutionalist powers become hegemonic and successfully shape the world in their image, then it would be wrong to assume that the reason for its demise is its insufficient civilizational and cultural inclusiveness. The greatest threat to constitutionalism is the hypocrisy of those who selectively invoke its ideals; the complacency of those who celebrate its principles while keeping their eyes firmly averted from the fundamental injustices and forms of domination they are complicit in; the ambition and ruthlessness of those who stand to profit from its demise; and the ignorance of those who believe there is nothing of value for them to lose.

References

ALVAREZ, José. International Organizations as Law-Makers. Oxford, NY: Oxford University Press, 2005.

BASS, Gary. Blood Telegrams: Nixon, Kissinger, and a Forgotten Genocide. Toronto: Alfred A. Knopf, 2013.
_____. The Indian Way of Humanitarian Intervention. The Yale Journal of International Law, v. 40, p. 227-294, 2015.

BELL, Daniel. The China Model: Political Meritocracy and the Limits of Democracy. Oxford, UK: Princeton University Press, 2015.

BUYUN, Li. Constitutionalism and China. *In*: KEPING, Yu (Ed.). Democracy and the Rule of Law in China. Leiden: Brill, 2010, p. 197-230. Originally published in 1993.

CHAYES, Abram; CHAYES, Antonia. The New Sovereignty: Compliance with International Regulatory Agreements. Cambridge, MA: Harvard University Press, 1995.

DOYLE, Michael. Kant, liberal legacies and foreign affairs. Philosophy and Public Affairs, v. 12, n. 3, p. 205-235, 1983.

DWORKIN, Ronald. A Matter of Principle. Cambridge, MA: Clarendon, 1985.

ECONOMIST INTELLIGENCE. EIU Democracy Index 2021, [s.l.], 2021. Available at: <https://www.eiu.com/n/campaigns/democracy-index-2021/>. Access in: 30 sept. 2022.

FERGUSON, Niall. Colossus: The Rise and Fall of American Empire. London: Penguin Books, 2005.

FRANCK, Thomas. The emerging right to democratic governance. American Journal of International Law, v. 86, n. 1, p. 46-91, 1992.

FRANKENBERG, Guenther; GARCÍA, Helena. Authoritarian Constitutionalism: Comparative Analysis and Critique. Cheltenham, UK & Northampton, MA: Edward Elgar, 2019.

FREEDOM HOUSE. Freedom Index 2021, [s.l.], 2021. Available at: <https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege/countries-and-regions>. Access in: 30 sept. 2022.

HAILBRONNER, Michaela. Transformative Constitutionalism: Not Only in the Global South. The American Journal of Comparative Law, v. 65, n. 3, p. 527-565, 2017.

HATHAWAY, Oona; SHAPIRO, Scott. The Internationalists: How a Radical Plan to Outlaw War Remade the World. New York; London; Toronto; Sydney; New Delhi: Simon & Schuster, 2017.

INTERNATIONAL COURT OF JUSTICE. Federal Republic of Germany/Netherlands, North Sea Continental Shelf Judgments [1969], ICJ Rep 3, 20 February 1969.
_____. Legality of the Threat or Use of Nuclear Weapons. Advisory Opinion, ICJ Reports 1996.
_____. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament [Marshall Islands v. India], Judgment of 5 October 2016.

JOAS, Hans. The Sacredness of the Person. Washington, DC: Georgetown University Press, 2013.

KANT, Immanuel. Toward Perpetual Peace. [s.l.]: [s.n.], 1795.

KENNEDY, David. International Legal Structures. [s.l.]: Nomos, 1987.

KEPING, Yu. Democracy Is a Good Thing: Essays on Politics, Society and Culture in Contemporary China. Washington, DC: Brookings Institution Press, 2009.

KINGSBURY, Benedict; KRISCH, Nico; STEWART, Richard. The emergence of global administrative law. Law and Contemporary Problems, v. 68, n. 3-4, p. 15-62, 2005.

KOMAREK, J.; AVBELJ, Matej. Constitutional Pluralism in Europe and Beyond. Oxford, UK: Hart, 2012.

KOSKENNIEMI, Martti. From Apology to Utopia: The Structure of International Legal Argument. Cambridge, NY: Cambridge University Press, 1989.
_____. Constitutionalism as a mindset: reflections on Kantian themes about international law and globalization. Theoretical Inquiries in Law, v. 8, n. 1, p. 9-36, 2006.
_____. The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960. Cambridge, NY: Cambridge University Press, 2001.

KUMM, Mattias. Democratic Constitutionalism Encounters International Law: Terms of Engagement. *In*: CHOUDHRY, Soujit. The Migration of Constitutional Ideas (Cambridge, NY: Cambridge University Press, 2006, p. 256-293.
_____. On the History and Theory of Global Constitutionalism. *In*: SUAMI, Takao;

PETERS, Anne; VANDERVOEKE, Dimitri; KUMM, Mattias (Eds.). Global Constitutionalism in Europe and East Asia. Cambridge, NY: Cambridge University Press, 2018, p. 168-200.
_____. The cosmopolitan turn in constitutionalism. *In*: DUNOFF, Jeffrey;

TRACHTIMAN, Joel (Eds.). Ruling the World? Constitutionalism, International Law, and Global Governance. Cambridge, NY: Cambridge University Press, 2009, p. 258-325.

LAUTERPACHT, Hersch. The Function of Law in the International Community. Cambridge, MA: Clarendon, 1933.

LEPARD, Brian. Customary International Law: A New Theory with Practical Applications. Cambridge, NY: Cambridge University Press, 2010.

LORCA, Arnulf Becker. Mestizzo International Law: A Global intellectual history of 1842–1933. Cambridge, NY: Cambridge University Press, 2014.

MARKS, Susan. The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology. Oxford: Oxford University Press, 2000.

MATSUI, Shigenori. The Constitution of Japan: A Contextual Analysis. Oxford, UK: Hart, 2011, p. 4-20.

MISHRA, Pankraj. From the Ruins of Empire: The Revolt against the West and the Remaking of Asia. London: Penguin, 2012.

MOYN, Samuel. The Last Utopia: Human Rights in History. Cambridge, MA: Harvard University Press, 2010.

PETERS, Anne. Global Constitutionalism. *In*: GIBBONS, Michael T. (Ed.). The Encyclopedia of Political Thought. Malden, MA: Wiley Blackwell, 2015, p. 1484-1487.

PINKER, Steven. The Better Angels of Our Nature: Why Violence Has Declined. London: Penguin, 2011.

SVARVERUD, Rune. International Law as World Order in Late Imperial China: Translation, Reception and Discourse 1847–1911. Leiden: Brill, 2007.

TANG, Chi-Hua. China-Europe. *In*: FASSBENDER, Bardo; PETERS, Anne (Eds.). The Oxford Handbook of the History of International Law. Oxford, NY: Oxford University Press, 2012, p. 701-723.

WIENER, Antje; LANG, Tony (Eds.). Handbook on Global Constitutionalism. Cheltenham, UK & Northampton, MA: Edward Elgar, 2017.

ZHANG, Qianfan. The Constitution of China: A Contextual Analysis. Oxford, UK: Hart, 2012.

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