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More Law, Less Democracy?

Democracy and Transnational Constitutionalism

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I. INTRODUCTION

Constitutionalism has an impressive past as a means of framing and taming the political, guiding legislation and uniting societies in tacit consensus. This success has powered the worldwide conviction that the political has either to be organised constitutionally or will fail the demands of democracy if not modernity. But while the process of national constitutionalisation is still going on, we are simultaneously, confronted with the decline of state-centred constitutionalism as an effective way of fully subordinating political power to constitutional law. The main reason for this increasing inability of the state's constitution to fulfil its tasks is the changing quality of statehood itself. The transformation of statehood shatters the former unity of territory, power, and people, and challenges the constitution's ability comprehensively to encompass the political entity of the state.

One answer to this problem has been to extend the concept of constitutionalism to the global arena and to promote the idea of a global constitutionalisation. The constitution's journey from a state-centred concept to a transnational project has opened new perspectives, not only in theory but also by the practical achievement of subjecting the exercise of public authority to higher law. Recent trends towards the transnationalisation, privatisation, and sectoralisation of public policy have, during the last decade, captured the attention of constitutional scholars and are leading to the promotion of new ideas about how to theorise the emerging world of globalised law, which extend from positions that defend the state's indispensability to visions of a truly new global constitutionalism beyond the state.

But this transfer of constitutional thinking from the state to the postnational constellation does not come about without losses. One blind spot is remarkable: throughout the debate, there exists general perplexity about how to meet the normative demand of a democratic legitimation for legal arrangements in the globalised world. Since the idea of global democracy remains an unfinished project both theoretically as well as practically, this does not come as a surprise. But the lack

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of democratically legitimised legal arrangements still renders the project of global constitutionalisation not only incomplete but also dangerous.

The future democratic quality of law is also called into question by a third development. In recent years, the promotion of democracy has tended to be substituted by the promotion of the rule of law. As the American Bar Association puts it, there is a growing belief 'that rule of law promotion is the most effective long-term antidote to the pressing problems facing the world community today, including poverty, economic stagnation, and conflict'.[1] While there can be no doubt that the rule of law forms a necessary part of democratic governance, it is doubtful that its external promotion can of itself foster democratic governance. The rule of law as such is not necessarily democratic, and was not in the beginning of its installation in Western societies.[2] In order to fulfil democratic needs, the rule of law has itself to be democratised. The question therefore remains whether and how the promotion of the rule of law can be turned into a precondition for democratic self-government.

There is, then, a growing drift between law and democracy. Surprisingly, this has so far stirred little commotion among legal scholars. Pragmatic answers prevail, and the urgent question of democratic legitimacy is put aside or postponed. There is, to be sure, no ready-made solution to the question of how the normative call for democratic legitimacy is to be reconciled with the political and legal evolution of global rule. Yet concealing the vacancy is no remedy either: it merely shrouds the fact that it has remained indispensable for any legitimate exercise of power to be based upon the consent of the governed and that this major achievement of modernity is seriously threatened by the process of globalisation in general as well as by the globalisation of law in particular.

The practical effects of the dissolution of law and democracy and the normative desirability of promoting democratised law will in this chapter be examined in four steps. The first section recalls the mutual constituency of state, democracy, and constitution, identifies the major drivers for processes of deconstitutionalisation, and interprets them as indicators of a loosening relationship between democratic legitimacy and constitutional law within the state. The second shows how and why the move towards global law does not compensate for the losses in democratic legitimacy, and instead adds to it. The third section presents and evaluates the most salient normative approaches in the neo-Kantian tradition, which claim to present an answer to the open question of the democratic legitimacy of global law. Finally, the last section takes a deflated outlook on the prospects of a fully legitimised rule of law in the globalised world.

[1] American Bar Association, 'Promoting the Rule of Law', <http://www.abanet.org/rol/> (accessed 25 June 2009).

[2] E.-W. Böckenförde, 'Entstehung und Wandel des Rechtsstaatsbegriffs', in his *Recht, Staat, Freiheit: Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte* (Frankfurt am Main: Suhrkamp, 1991), 143–69, at 148.

II. STATE, DEMOCRACY, AND CONSTITUTION

For classical constitutional thought, the state and its constitution are mutually constituent and dependent. It is the state's material and geographical existence which necessitates constitutions. Without the state's will to act constitutionally, and without the state's ability to preserve and defend the viability and validity of the constitution, it would be merely a piece of paper. For the democratic state at least, the reverse is also true, namely that the state depends on the constitution, for there has thus far been no other means of regulating in a binding manner both the democratic practices and the legitimation of rule in secular societies.

In order to serve as an institution which guarantees democratic governance, the constitution must be conceptualised as a specific form of legal regulation. In this perspective, the particularities of constitutional regulation can be determined by three key characteristics. Compared to their predecessors in the form of contracts with rulers, constitutions not only limit the ruler's exercise of power but also *legitimise* such exercise; their coverage of matters is not individualised but *universal*; and they bind not only some people in a given territory but *all people*.[3] A democratic constitution then, in contrast to other kinds of regulation, is a set of norms which a community has agreed upon, which at least in principle is applicable to all important matters of this community, and which is equally valid and mandatory for all members of this community.

Thus understood, constitutions can be considered to be the ingenious answer to the demands of secular societies to be free and bound to rules at the same time, by forming a mutual contract—one individual with every other—in which the security and freedom of the individual are preserved by putting the 'natural rights' of everyone in the hands of the elected few. Constitutions are hence a functional solution to a problem which could only evolve historically and culturally. In response to the problem of how to preserve freedom and security in societies which had discovered what Lefort calls the 'empty place of power', constitutions have filled this place with their own production of legitimate rule.

With the constitution being a set of norms given by a state, for a state, and which is valid within a state, it is coextensive with the state. The constitutional order ends at the borders of a state, with both of them, states and constitutions, having to give way to other states, people, and constitutions at these borders. As the normative counterpart of the state, a constitution must address all of the state's components, ie the territory, power, and people. The unity of these elements in the state also has to be represented in the institutional design of the constitution, which, to be the order of the totality of the state, is a territorial order, a power order, and social order in one.

Crucial to this picture of statehood and the modern constitution is the idea of *congruence*: in a given territory, but not beyond, the state and only the state is legitimised to rule over the people, who, by their consent, agree to be ruled under the

[3] D. Grimm, *Deutsche Verfassungsgeschichte 1776–1866* (Frankfurt am Main: Suhrkamp, 1988), 12.

laws of the constitution. On considering the major transformations of the political, however, one finds that all of the classical elements of statehood are changing. In sum, it is this congruence of territory, power, and people—which is reflected in the constitution as a territorial, power, and social order—that is dissolving, thus changing the conditions of constitutional rule.[4]

The principle of territoriality is most decisive for the modern state. It relies on the acceptance of territorial borders as the material limit to the exercise of power. Prepared for in the 1555 peace treaty of Augsburg and resolved in the 1648 peace treaty of Osnabrück and Münster, the overlapping power claims based on personal loyalties were replaced by a system of defined territorial borders. Modern states 'explicitly claim, and are based on, particular geographic territories, as distinct from merely occupying geographic space which is true of all social organizations. … Territory is typically continuous and totally enclosed by a clearly demarcated and defended boundary'.[5] Altogether, the system of modern territorial states organises geographical space by a system of 'territorially disjoint, mutually exclusive, functionally similar, sovereign states'.[6]

The territorial foundation of the state is an issue which was taken for granted as soon as it was established. The political philosophers of the period in which the shift from personal to territorial systems took place easily incorporated the geographic border into their theories.[7] Despite its revolutionary effects on the structures of legitimation, the extension of power, the general self-understanding of states, the organisation of the international system, the concept of security, and the formation of a people, territoriality has only become a major issue of political and scientific concern in the last few years.

This concern follows from the fact that the territorial basis is fading due to changes both *in* and *of* space. Changes *in space* take place where territory formerly controlled by the state's authorities now is ruled by various competing actors, among which the state is but one. Changes in space reorganise the relation between geographic space, its users and/or usage, and its organising forces. A similar degree of attention devoted to changes *in* space has been paid to changes *of space* and/or our perception of space. The sense of territoriality in general is being questioned by the growing importance of non-geographic spaces such as the virtual space of digitality. Without taking the position that geography no longer matters, the geographically organised state is still losing control of the growing virtual space, a fact which also undermines its authority in

[4] P. Dobner, *Konstitutionalismus als Politikform: Zu den Effekten staatlicher Transformation auf die Verfassung als Institution* (Baden-Baden: Nomos, 2002).

[5] J. Anderson, 'Nationalism and Geography', in J. Anderson (ed), *The Rise of the Modern State* (Atlantic Highlands, NJ: Humanities Press, 1986), 115–42, at 117.

[6] J. G. Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations' (1993) 47 *International Organziation* 139–74, at 151.

[7] Thomas Hobbes, *Leviathan oder Stoff, Form und Gewalt eines Kirchlichen und Bürgerlichen Staates*, ed I. Fetscher (Frankfurt am Main: Suhrkamp, 1984), 173; Jean Bodin, *Über den Staat* (Stuttgart: Reclam, 1976), 11; John Locke, *Two Treatises of Government* [1689], ed P. Laslett (Cambridge: Cambridge University Press, 1963), 343, 92.

geographic territories. Virtual space challenges the notion of *locus*; it raises the question of whether it can make sense to speak of space and place anymore, and if so how, if territorial fixation is abandoned. With a restructuring of the geopolitical landscape on the one hand, and a redefinition of space in general on the other, the state enters into a new competition over the control of space and territory. Being territorially fixed, and having a concept of agency and power adjusted to geographic space understood in terms of unquestionable property, the state is 'territorially left behind' vis-à-vis other actors engaging in territorial fluidity.[8] Once an unquestioned and reliable structure of the political, territory is today marked by an increasing number of contingencies.

Among the terms used to describe political modernity, 'sovereignty' occupies an outstanding position: ever since it was transplanted from its original theological background to political reasoning, it has served as a focal point of political action and self-understanding.[9] The continuity in the use of the term, though, can easily betray the fact that 'sovereignty' has undergone a severe change of meaning (from *Fürstensouveränität* to *Volkssouveränität*), so modern usage of the term is not only different from but in some respects even contradicts the original intentions of its inventor. When in the sixteenth century Jean Bodin first applied the idea of sovereignty to the political context, his main concern was to pacify a multitude of competing powers by the means of centralisation and hierarchy, and to put an end to religious and civil war. Following the philosophical reasoning about sovereignty up to the *Federalist Papers* and the constitution of the USA, the concept of sovereignty has been successively enriched and partly redirected. Whereas Bodin basically argued for the *centralisation* of power, Hobbes claimed the *rationality* of absolute power, and although his intentions were different, he opened rather than closed the door to a *democratic share* of this power. This door was swung open wide by Locke, who argued that there is no remedy to the uncertainties of the state of nature so long as power is held by an absolute monarch, who 'commanding a multitude, has the Liberty to be Judge in his own Case, and may do to all his Subjects whatever he pleases, without the least liberty to any one to question or controle those who Execute his Pleasure'.[10] Locke therefore claims that government has to be resigned to the public, for 'there and only there is a Political, or Civil Society'.[11] Following this line on to the *Federalists* as the ones to finally constitutionalise sovereignty, one should not neglect the contribution made by Paine in *Common Sense*, who promoted a mass democratic acceptance of the right to self-government.[12]

[8] W.-D. Narr and A. Schubert, *Weltökonomie: Die Misere der Politik* (Frankfurt am Main: Suhrkamp, 1994), 28.

[9] For the early history of sovereignty cf H. Quaritsch, *Souveränität: Entstehung und Entwicklung des Begriffs in Frankreich und Deutschland Vom 13. Jahrhundert bis 1806* (Berlin: Duncker & Humblot, 1986).

[10] Locke, above n 7, 316.

[11] Ibid 368.

[12] Thomas Paine, *Rights of Man and Common Sense* (New York: Everyman, 1994).

Ever since the first constitution of modern times, sovereignty has shown a two-sided face: it claims the centralisation of power in the state *and* binds it to democratic consent. The concept of democratically exercised sovereignty (*Volkssouveränität*) now links two questions about power: the question as to the objects and extent of power, and locating them within the state; and the question of the formal responsibility for the exercise of this power by situating it ultimately with the people.

The concept of sovereignty for a long time has had its critics. During the early decades of the twentieth century, Harold Laski questioned whether sovereignty was but a hiding place for the issue of power and if there was any more legitimation to locating it in the state than in the individual wills of the people.[13] At the same time, Hans Kelsen argued that sovereignty is incompatible with international law (*Völkerrecht*), with his preferences being clearly in favour of the latter.[14] This early theoretical reasoning for a critical view on the concept of state sovereignty has recently gained renewed support as a result of the state acquiring the status of *primus inter pares*—as a national actor within the 'corporate state', and as an international actor within the structures of global politics.

Taking up the differentiation of the objects and extent of power as one side of sovereignty and the democratic responsibility as the other, the changes in sovereignty can now be evaluated in two steps. First, we see an exodus of objects of power out of the state, in the sense that an increasing number of basic issues such as environmental matters, trade relations, legal affairs, and also legal sanctions and tax matters are no longer either adequately or completely covered by one state. And second, this also leads to a decrease in the number of democratic options for controlling the ways in which this power is exercised, for these options have been till now located only in the state. Although these two processes are linked, they can be differentiated analytically and should be valued differently. Assessing the loss of the state's supremacy is purely a matter of measuring the output efficiency of decision-making processes, and this assessment should be based on empirical studies rather than political convictions. But political convictions quite rightly have their place in evaluating the loss of democratic control accompanying this process.

Political theory insists that the legitimation of the constitutional order must be based directly or indirectly on the consent of the people. Ever since Rousseau's formulation of the social contract, the problem has been how consent can be formed if the people have free and different wills. One answer has prevailed, namely the assumption of homogeneity on the basis of traditional, cultural, or ethnic bonds, which either legitimates excluding the dissenters as irrelevant 'others', or which ideally includes the dissenting minority into the community by

[13] H. Laski, 'Die Souveränität des Staates', in H. Kurz (ed), *Volkssouveränität und Staatssouveränität* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1970), 90–108.

[14] H. Kelsen, 'Der Wandel des Souveränitätsbegriffs', in H. Kurz (ed), *Volkssouveränität und Staatssouveränität* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1970), 164–78; H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer Reinen Rechtslehre* (Aalen: Scientia, 1981).

assuming that sooner or later it will be part of a majority again. The construction of homogeneity can come about aggressively as in the version of Carl Schmitt,[15] or be seen as a constitutional goal as expressed by Otto Kirchheimer,[16] or simply be presented as a normatively necessary precondition for success in the general deliberation as maintained by Jürgen Habermas.[17] Without denying important differences between these theories, one significant concurrence of these arguments must be stated: there is no other way of constructing legitimate rule under secular and democratic conditions than by assuming the ability to achieve consent on the basis of shared views and values.[18] Ever since they were introduced into constitutional theory, homogeneity and consent have been theoretical constructions as opposed to realistic descriptions. Nevertheless, we seem to have reached a period in which these fictions have become less convincing, especially if we take seriously the sociological observations of a growing self-reflexivity, individualisation, differentiation, and transnational migration. These social changes challenge the political fiction of a 'closed society',[19] a fiction which lies at the foundation of democratic theory and the democratic practices in most countries.

Territorial contingency, the diffusion of power, and social plurality together alter the conditions under which the supremacy of democratic constitutionalism within the state was established. The exercise of public authority within the state can no longer be considered to be under the full control of constitutional law. Insofar as the constitution is understood as the legal realisation of the social compact of a people, these changes also imply that democratic control by means of constitutional law gives way to an exercise of political power beyond constitutional norms, or to put it differently: that the linkage between law and democracy is loosened. Globalising law is one remedy to put the exercise of public authority, which has escaped the nation state, anew under legal regulations. But while the establishment of transnational law undoubtedly can produce norms for matters beyond the state, it fails to meet the criteria for democratic legitimacy of legal arrangements.

[15] C. Schmitt, 'Legalität und Legitimität', in his *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954* (Berlin: Duncker & Humblot, 3rd edn, 1985), 263–350, at 235.

[16] O. Kirchheimer, 'Weimar—was dann?', in his *Politik und Verfassung* (Frankfurt am Main: Suhrkamp, 1981), 9–56, at 17–18.

[17] J. Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates* (Frankfurt am Main: Suhrkamp, 1994).

[18] A noteworthy exception to this rule is the idea of *nichtüberzeugter Verständigung* ('unconvinced understanding') in N. Luhmann, *Beobachtungen der Moderne* (Opladen: Westdeutscher Verlag, 1992), 202 (unfortunately Luhmann used the term once only, and failed to provide further explication).

[19] S. Benhabib, 'Democracy and Identity: Dilemmas of Citizenship in Contemporary Europe', in M. T. Greven (ed), *Demokratie—Eine Kultur des Westens? 20. Wissenschaftlicher Kongreß der Deutschen Vereinigung für Politische Wissenschaft* (Opladen: Leske und Budrich, 1998), 225–48, at 237.

III. THE DEMOCRATIC BLIND SPOT IN TRANSNATIONAL CONSTITUTIONALISM

'Transnational constitutionalism' is here understood in an encompassing sense as a common denominator for various attempts to extend the project of global law beyond the traditional frame of public international law. It therefore extends beyond the type of law which only concerns relations between sovereign states and intergovernmental organisations.[20] This younger debate observes and conceptualises a global law which addresses or affects citizens directly and which is not restricted to law between states but between different social, economic, or political entities within and outside of states. Independent of whether or not the term 'constitutionalism' is used to coin those projects by the authors themselves and irrespective of the general difficulties in applying the term of constitution to global law,[21] these approaches share the idea that the global arena itself is a legislative sphere in which binding regulations are produced which overrun the constitutional autarky of every single state and which therefore can claim constitutional quality themselves.

From the perspective of political science, the main task for global public law in this newer sense is to regain regulatory control over the exercise of legal or political power. From a democratic standpoint this necessarily involves a full democratic legitimacy for the production process of this law, its application, and its control. The problem is that this demand can no longer be fulfilled by means of a legitimacy chain (in which the people as members of sovereign states are viewed as authors and addressees of the law), when either the coverage of global law leaves the paths of interstate conventions or when the production of global law is a task for expert conventions or private committees which are not representatives of the affected civil societies. In either case the legitimacy chain is disrupted, thus leaving open the question of consent. None of these conditions is denied to be empirically correct: there is a widespread agreement that the emerging global law is a conglomerate of rules and regulations which exceed the sphere of human rights, which can overrun national constitutions (and not only within the EU), that compliance is enforced by means of either juridical or economic sanctions, and that the production of these rules has become a matter for hybrid actors, including not only states or intergovernmental organisations, but also private, economic, and civil actors of all kinds. The new global law therefore is confronted with a structural lack of democratic legitimacy which can be stated in two respects: by general substantiation and by empirical observations of new concepts of transnational law.

The democratic foundation of constitutional law and vice versa its ability to found democratic governance within the state is closely linked to the different aspects which have been outlined in the first section: first, that the rule of constitutional law must be limited to a distinct territorial-personal unit and cannot claim

[20] The term therefore covers concepts such as international constitutional law, global constitutionalism, societal constitutionalism, and global administrative law.

[21] Cf Grimm, Preuss, Loughlin, and Wahl in this volume.

validity beyond this unit; and, secondly, that it must address a specific political entity within this unit which is responsible for the exercise of public authority, ie government. Transnationalisation and privatisation of public authority challenge these basic preconditions of the state's constitution: a clear distinction between inside and outside as well as a distinct separation of public and private.[22] Following Grimm in this basic argument about the inapplicability of constitutional thinking beyond the state, the argument can be extended to liberal democracy in general: not only constitutional thinking, but liberal democracy itself is dependent on a constricted political entity. In political theory this condition is conceptualised as a social compact between a given people. The limitation of this people is crucial for the idea of a social compact, for only the seclusion of a political entity allows for those who are ruled to consent to the ones who rule them. Practically the compliance with this compact depends on the development of a specific organisation which exercises governmental power, because the separation between a social and a political sphere is a precondition for the constitutional subjection of the exercise of political authority. All in all, the diffusion between governmental and private actors, the dissolution of clearly demarcated political entities into the transnational sphere, and the blending of private and public actors in the exercise of political authority, which altogether characterise the transnational constellation, diminish the options for democratic control over the exercise of political authority, and neither can these open questions be answered, nor are they answered in the conceptions of transnational constitutionalism. Those which so far are available fall short of explaining how exactly global regulations can be legitimised by the consent of the people who are affected.

How then is this problem addressed in conceptions of global law? The range of answers is wide. Many scholars simply leave the question of legitimacy aside, while those who do address the problem either (1) consider it to be a transitional phenomenon, (2) continue to rely on the legitimacy chain, or (3) deny that there is any problem at all. These stances are sketched in turn.

Representative of the first response is Christian Tomuschat, who maintains that

> no group of countries is opposed in principle to the recognition of human rights as an important element of the international legal order, almost no group rejects democracy as a guiding principle for the internal systems of governance of States. Given this rapprochement towards the emergence of a true international community, objections to general principles of law are progressively losing the weight which they carried 25 years ago.[23]

[22] D. Grimm, 'Die Verfassung im Prozess der Entstaatlichung', in M. Brenner, P. M. Huber, and M. Möstl (eds), *Der Staat des Grundgesetzes—Kontinuität und Wandel: Festschrift für Peter Badura* (Tübingen: Mohr Siebeck, 2004), 145–67. See also Grimm in this volume.

[23] C. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law, 281 Recueil des Cours* (The Hague et al: Nijhoff, 1999), at 339.

While it may be true that the international community shares a set of normative values, including human rights and democracy, it remains questionable whether a basic agreement can count as a substitute for direct involvement, co-determination, and control of general principles of law. Critically viewed, Tomuschat's argument is paradoxical: if we all agree to be democrats, we do not have to be democratic anymore. The basis of his argument is a substitution of practices with beliefs. Instead of *acting* democratically we agree upon the principle. While a shared belief in democracy (if it were true) should not be underestimated, it still cannot serve as a substitute for a practical democratic legitimation of global principles.

Armin von Bogdandy and colleagues clearly see the problem. They state that we are in the 'difficult situation whereby international institutions exercise public authority which might be perceived as illegitimate, but nevertheless as legal—for lack of appropriate legal standards. Consequently, the discourse on legality is out of sync with the discourse on legitimacy'.[24] For them, and I agree, the newer attempts to make up for the legitimacy deficit by looking at 'accountability' and 'participation' do not suffice, since 'there is hardly any shared understanding about their material content. Presently, these concepts do not provide accepted standards to determine legality, but are not much more than *partes pro toto* for the concept of legitimacy.'[25]

Representing the second approach, Bogdandy et al address the question of legitimacy of global law through their own 'public law approach'. They start by approving some findings of the global governance concept. They note that

> the global governance concept recognizes the importance of international institutions, but highlights the relevance of actors and instruments which are of a private or hybrid nature, as well as of individuals—governance is not only an affair of public actors. Second, global governance marks the emergence of an increased recourse to informality: many institutions, procedures and instruments escape the grasp of established legal concepts. Third, thinking in terms of global governance means shifting weight from actors to structures and procedures. Last but not least, as is obvious from the use of the term 'global' rather than 'international,' global governance emphasizes the multi-level character of governance activities: it tends to overcome the division between international, supranational and national phenomena.[26]

They criticise, however, the fact that the concept of global governance 'is mainly understood as an essentially technocratic process following a little questioned dogma

[24] A. von Bogdandy, P. Dann, and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 *German Law Journal* 1375–400, at 1389.

[25] Ibid.

[26] Ibid 1378.

of efficiency'[27] and seek in their own approach for a 'response … to such claims of illegitimacy from a public law perspective'.[28]

The public law perspective is defined by the dual function of public law: in the liberal and democratic tradition public authority may only be exercised if it is based on public law (constitutive function) and is controlled and limited by it (limiting function).[29] On this basis the answer to the legitimacy of public authority is provided in three steps. First, the authors want to look at those activities only which 'amount to an exercise of unilateral, i.e. public authority'.[30] They argue, that the global governance perspective is insufficient in singling out these unilateral acts, since 'global governance flattens the difference between public and private, as well as between formal and informal ones' and, moreover, rather concentrates on processes than on single acts.[31] Second, a workable concept of public authority is therefore needed. The authors define '*authority* as the legal capacity to *determine* others and to reduce their freedom, i.e. to unilaterally shape their legal or factual situation' and differentiate between binding and conditioning acts of this authority.[32] The third and final step defines the 'publicness' and internationality of public authority. This is understood as follows:

> We consider as international public authority any authority exercised on the basis of a competence instituted by a common international act of public authorities, mostly states, to further a goal which they define, and are authorised to define, as a public interest. The 'publicness' of an exercise of authority, as well as its international character, therefore depends on its *legal basis*. The institutions under consideration in this project hence exercise authority attributed to them by political collectives on the basis of binding or non-binding international acts.[33]

Although the authors concede that these institutions only have limited resources of democratic legitimacy, since those are 'largely state-mediated',[34] nevertheless the gap between the exercise of public authority and its democratic founding may be closed via their connection to the legitimacy chains rooted in their 'constituent polities'.[35] But is the problem really solved? I have my doubts. The global governance perspective clearly informs us about the fact that public authority defined as the 'legal capacity to determine others and to reduce their freedom' is indeed exercised by a

[27] Ibid 1379.

[28] Ibid 1380.

[29] Ibid.

[30] Ibid.

[31] Ibid 1381.

[32] Ibid 1381–2

[33] Ibid 1382.

[34] Ibid 1400.

[35] Ibid.

multitude of actors, private and public, formally and informally. Starting from the empirically informed observation that the exercise of public authority is no longer limited to those who are public by means of their *formation*, but by the *effects* they have on the global public, the authors return to an idea of publicness in the first sense only. The broad global governance perspective is narrowed by the normative decision to count only those acts as an exercise of public authority which are exercised by states or intergovernmental organisations and which have a 'legal basis' for their operations. For those actors the legitimacy is quite unquestionable, since they are representatives of given polities. The severe problem of legitimising the exercise of public authorities by *other* actors, which are active in the production of global law—a fact which is by no means denied by the authors themselves—remains unaddressed.

Illustrative of the third response is the work of Erika de Wet. De Wet states that 'many critics regard the value system developing under the influence of international institutions and tribunals as an illegitimate, super-imposed normative system that takes place beyond any form of democratic control or accountability'.[36] In addition to the arguments which have been accentuated here, the general criticism addresses the lack of democratic accountability for the elite groups of national officials, the questionable legitimacy of non-governmental organisations of the emerging Global Public Policy Networks. De Wet reports that 'the impact of this illegitimacy becomes even more palpable when the law of the international organization is enforced directly in the domestic legal order without the national parliament's imprimatur, especially where a Member State is outvoted in the international organization that produced the directly applicable decision'.[37] Correct though her account of the criticism is, her conclusion is questionable: 'It is submitted that the flaw in these arguments lies in their *mythologizing* of national democratic governance as a model for international governance.'[38] It would be more correct to state that the flaw of the arguments lies not in the mythology of national democratic governance but in the fact that the democratic legitimacy of governance is an inalienable right and therefore must be transferred to the global arena—and that otherwise, if this is not possible, the globalisation of law must be criticised. But at this point de Wet turns the argument round by questioning whether democracy really equates with legitimacy.

Her first argument is based on the diversity of democracies. Surely, democracy can 'mean many different things, including popular democracy, representative democracy, or pluralist democracy, to name but a few'.[39] But the fact that there are different organisational forms of democracies does not challenge the basic fact that all of them must base their governmental system on the consent of the people.

[36] E. de Wet, 'The International Constitutional Order' (2006) 55 *International and Comparative Law Quarterly* 51–76, at 71.

[37] Ibid 72.

[38] Ibid.

[39] Ibid.

In her second argument de Wet challenges the nature of democratic theory. She states:

> [I]t has not yet been convincingly explained why the concept of democracy would in and of itself be determinative for the legitimacy of any form of governance. Even in well established democracies, the legitimacy of the decision-making process has been undermined by the fact that national democracies tend to exclude many who are affected by their policies, simply because they are not part of the *demos* as understood in a particular ethno-cultural sense. However, it is questionable whether such ethno-cultural definitions of *demos* are compatible with the founding principles of constitutional democracies which aim at full representation and participation of all affected by the decision-making process. It thus becomes questionable whether the substance of the national democratic legislative decision-making process would necessarily reflect the actual wishes of the majority of those affected by it.[40]

What is this referring to? Modern concepts of citizenship have gone far beyond the inclusion of an 'ethno-cultural demos', and overcome the *ius sanguinis* principle of citizenship (which itself was never the dominant modern principle of citizenship). The argument that the 'substance' of the decision-making process does not reflect the wishes of the majority of the affected refers back to a long tradition of anti-democratic rhetoric, but a tradition that also has been widely rejected. Direct democracies do tend to represent the empirical will better than representative democracies but they tend to do so on the basis of the subjection of the minority; representative democracies, by contrast, possess a greater propensity to forge compromises.[41] By definition a compromise is something that nobody would have voted for if there had not been others with diverging ideas. Moreover, governments and parliaments also have the function of articulating and translating the popular will into viable policies. The argument that democracies produce decisions that do not reflect the 'actual will' is a merely populist one.

De Wet continues, thirdly, that

> even in instances where groups are officially represented in the governmental decision-making process, the legitimacy of the process suffers from the lack of the de facto access of many of these groups to the public debate leading up to the governmental decision-making process; as well as the lack of transparency of the decision-making process itself; and the (perceived) lack of independence and expertise of the decision-makers in question.[42]

[40] Ibid 73.

[41] E. Fraenkel, 'Die repräsentative und plebiszitäre Komponente im demokratischen Verfassungsstaat', in his *Deutschland und die westlichen Demokratien* (Frankfurt am Main: Suhrkamp, 1991), 153–203.

[42] De Wet, above n 36, at 73.

This argument also must be rejected: modern democracies contain an abundance of experts and expert-commissions,[43] interest groups, and non-governmental participators of all kinds which offer a wide array of formal and informal modes of participation, including membership of political parties, the right to elect and to be elected, and thus be part of the political decision-making process. Also the idea that parliamentarians and members of governments lack 'independence and expertise' repeats long-standing prejudices against parliamentarian democracies which have been rebutted in practically every serious scientific piece which has been produced on this subject.[44]

The main aim of de Wet's argument is to call into question the legitimacy of domestic democracy in order to evade the issue of democratic legitimacy of global politics and law: if domestic democracy cannot provide for legitimacy, why then should international policy- and law-making ever strive for it? In her own words:

> However, if one accepts that democracy does not necessarily result in legitimate decision-making either, it becomes plausible to ask whether the international legitimacy deficit can be overcome through other measures than democratic decision-making. These would include but not be limited to measures aimed at a more accessible and transparent decision-making process. Viewed in this light, it is inappropriate to dismiss the possibility of legitimate post-national decision-making out of hand.[45]

But what if one does not agree that democracy does not result in legitimacy? Or rather: what if one is convinced that democracy is the only means to reach full legitimacy?

IV. KANT AND HIS SUCCESSORS: DEMOCRATISING TRANSNATIONAL CONSTITUTIONALISM?

The normative argument for a democratic legitimation of law is most clearly expressed in the Kantian project of outlining the necessary preconditions for eternal peace. According to these, constitutional law is crucial for putting into reality the principles of moral philosophy. Following Hobbes's idea that men are by nature in a state of war, Kant sees the only remedy in establishing a rule of law to which everybody consents. Since a state of peace will not simply evolve, it must be established by means of law.

[43] S. Siefken, *Expertenkommissionen im Politischen Prozess: Eine Bilanz zur Rot-Grünen Bundesregierung 1998–2005* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2007).

[44] S. S. Schuettemeyer, *Fraktionen im Deutschen Bundestag 1949–1997: Empirische Befunde und Theoretische Folgerungen* (Opladen: Westdeutscher Verlag, 1998). W. Patzelt, 'Politikverdrossenheit, populäres Parlamentsverständnis und die Aufgaben der politischen Bildung', in *Aus Politik und Zeitgeschichte* (*APuZ*), B7/8-1999, 31–8.

[45] De Wet, above n 36, at 73–4.

Starting from a conflict theory, Kant sees the need to establish three elements of a global legal order aimed at solving possible clashes. Conflict can occur between people of one state, between states, and in the relation between individuals and states. In symmetry with the possible sources of conflict three different elements of a global legal order have to be established in order to make peace possible:

> All men, who have a mutual influence over one another, ought to have a civil constitution. Now every legitimate constitution, considered in respect of the persons who are the object of it, is I. either conformable to the civil right, and is limited to the people (*jus civitatis*). II. Or to the rights of nations, and regulates the relations of nations among each other (*jus gentium*). III. Or to the cosmopolitical right, as far as men, or states, are considered as influencing one another, in quality of constituent parts of the great state of the human race (*jus cosmopoliticum*). This division is not arbitrary; but necessary in respect of the idea of a perpetual peace.[46]

According to these considerations 'the civil constitution of every state ought to be republican'.[47] A republican constitution results from the idea of a social compact, 'without which one cannot conceive of a right over a people',[48] and is defined as a constitutional order which respects the liberty of men, enables the equal subjection of all to the law, and is based on equality of all members of a state. Legal and exterior liberty therefore, is not 'the faculty of doing whatever one wishes to do, provided it injures not another. It consists in rendering obedience to those laws alone to which I have been able to give my assent'.[49] Earlier in this essay Kant had already argued that a state is not 'like the soil upon which it is situate, a patrimony. It consists of a society of men, over whom the state alone has a right to command and dispose'.[50] Although Kant goes beyond Rousseau in stating that representatives can exercise the task of finding the right decisions, he does not leave any doubt that the state *is* society, and that therefore the state's right 'to command and dispose' must ultimately be rested on self-government. Normatively, there is no doubt that the right to self-government is closely linked to the right to legislate, which can be traced back to the people's

[46] Immanuel Kant, *Project for a Perpetual Peace: A Philosophical Essay. Translated from the German* (London: Vernor & Hood, 1796), at 13.

[47] Ibid 13.

[48] Ibid 4.

[49] Ibid 14.

[50] Ibid 3. The thought that it is society alone which can make the rules to which it shall obey is expressed even more clearly in the German version, where Kant clearly states the identity of state and society: 'Der Staat ist nämlich nicht (wie etwa der Boden, auf dem er seinen Sitz hat, eine Habe (patrimonium). Er ist eine Gesellschaft von Menschen, über die niemand anders als er selbst, zu gebieten und zu disponieren hat' (Immanuel Kant, 'Zum Ewigen Frieden: Ein Philosophischer Entwurf', in W. Weischedel (ed), *Immanuel Kant: Schriften zur Anthropologie, Geschichtsphilosophie, Politik und Pädagogik I, Werkausgabe Band XI* (Frankfurt am Main: Suhrkamp, 1795/1993), 191–251, at 197).

own consent, and that both rights are indispensable for the establishment of, if not perpetual, at least temporary peace.

Kant's vision for eternal peace based on the consent of the people can be summarised as a multi-level system, in which a domestic republican constitution is complemented by an international public law, which regulates the relation between states, and a global layer of universal human rights. His insistence on the right of legal self-determination and his attempt to connect this thought with the vision of peaceful international order has inspired a discussion about the modernity and applicability of his thoughts for the post-national constellation. Two different readings of Kant prevail: one reading is recommendatory, in the sense that it seeks to adopt Kant's proposal as a guideline for the establishment of the international order. The second reading is more factual, claiming that Kant's ideas are already materialising in the existing order. I will argue, however, that Kant's premisses prohibit thinking about the democratic legitimacy of law in continuity with his scheme.

Representative of the recommendatory line is Ernst-Ulrich Petersmann. For Petersmann, 'Kant was the first political thinker who developed a comprehensive theory of national and international constitutionalism based on the insight that the problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed external relationship with other states and cannot be solved unless the latter is solved'.[51] Petersmann therefore asks if 'modern international law and the UN Charter offer such a constitutional framework for cosmopolitan cooperation and perpetual peace among legally free and equal citizens'.[52] While his account on the constitutional quality of the UN remains sceptical, since 'lasting peace cannot be effectively secured by power-oriented organizations like the UN',[53] Petersmann is more optimistic about the WTO and European constitutional law. With the latter being an 'interlocking layered system of national and international guarantees of human rights, democracy, and rule of law which can be directly invoked and enforced by European citizens',[54] it shows, according to Petersmann, that 'this constitutional insight—that cosmopolitan international guarantees of freedom, non-discrimination, and rule of law can strengthen and extend corresponding national legal guarantees of citizens also within their own countries vis-à-vis their own government—goes far beyond Kant's draft treaty for perpetual peace'.[55] European constitutional law and its underlying Kantian theory therefore could—or, rather, should—inspire a reform process of the UN. For Petersmann the Kantian project has not yet become reality, but it nevertheless instructs us on how to proceed. In his view, the UN Charter 'needs to be supplemented by a new UN constitution focusing

[51] E.-U. Petersmann, 'How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?' (1998) 20 *Michigan Journal of International Law* 1–30, at 7.

[52] Ibid 12.

[53] Ibid 14.

[54] Ibid 16–17.

[55] Ibid 17.

on effective protection of fundamental rights and constitutional democracies as preconditions for lasting peace'.[56]

Jürgen Habermas is the most prominent author of those who comply with the second line of approach to the Kantian outline of an international constitutional order. In his essay 'Does the Constitutionalization of International Law Still Have a Chance?', he argues that Kant's proposal should be read as a model for a multi-level system, and not be misunderstood as a model for a *Weltrepublik*.[57] Therefore national constitutions and a constitutionalised world order do not have to be of the same kind: while national constitutions must be republican in the sense of adopting democratic self-government, it suffices for the international order to lay down the cosmopolitan principles of universal human rights. But 'liberal constitutions beyond the state, if they are to be anything more than a hegemonic legal façade, must remain tied at least indirectly to the processes of legitimacy within constitutional *states*'.[58] While Habermas sees that the realisation of the Kantian vision is challenged by other projects, especially the neoliberal design of a denationalised *Weltgesellschaft*, the post-Marxist scenario of a decentred empire, and the anti-Kantian project of *Großraumordnungen* in the tradition of Carl Schmitt's thinking,[59] he nevertheless finds some evidence that the Kantian project is emerging. He finds the basis for this optimism mainly in the UN Charter and several newer features of the UN: in contrast to the League of Nations, which basically concentrated on the prevention of war, the UN Charter lays down and enforces human rights. This is underlined by the right of the UN Commission on Human Rights (UNCHR) to influence national governments as well as by the right of everyone for petition to the UNCHR. Although this right has so far not been used extensively, it nevertheless documents the recognition of individual citizens as direct subjects of global public law (*Völkerrecht*).[60] Secondly, the renunciation of force is now supported by Articles 42 and 43 of the UN Charter which enlarge the possibilities for the engagement of the Security Council in general, by for example extending its rights to intervene in intrastate conflicts. Thirdly, the UN is an inclusive organisation and not, as with the League of Nations, an avant-garde of liberal democracies.[61] All in all, Habermas concludes, the International Community sees itself committed to the enforcement of those constitutional principles, which so far have only been realised by nation states only, on a global scale.[62]

Two hundred years ago, the world was different. This is more than a banal statement when it comes to the question of the applicability of philosophical ideas which have been produced against the background of a completely different world. For

[56] Ibid 30.

[57] J. Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?', in his *The Divided West* (Cambridge: Polity, 2006), 115–93.

[58] Ibid 140.

[59] Ibid 185–6.

[60] Ibid 162.

[61] Ibid 163.

[62] Ibid 160.

Habermas it is evident that there are some prejudices in Kant's thinking which derive from his contemporary biases: Kant is neither fully aware of the implications of cultural differences nor of the force of nationalism, and he shares the 'humanist' idea of the superiority of the European civilisation.[63] Habermas is nevertheless convinced that the 'provinciality of our historical consciousness vis-à-vis the future is not an objection to the universalistic program of Kantian moral and legal philosophy'.[64] I dare to doubt that.

Kant's argument for a republican constitution as the legal foundation of every state lies at the heart of his whole project of eternal peace. It is based on two premisses: first, that since men are all equal they have the *right* to obey those laws only which they themselves have agreed to; and secondly that since men are potentially hostile to each other in the state of nature they have the *duty* to subject themselves to common laws. The right of self-determination is thus coupled with the necessity of self-protection, which in cases of doubt can turn against *others'* right of self-determination. Since a man or a nation in the state of nature 'deprives me of that security, and attacks me, without being an aggressor, by the mere circumstance of living contiguous to me, in a state of anarchy and without laws; menaced perpetually by him with hostilities, against which I have no protection, I have a right to compel him, either, to associate with me under the dominion of common laws, or to quit my neighbourhood'.[65] The right of self-determination is obviously unevenly distributed around the globe. What does that mean under the circumstances of a 'global neighbourhood'? It cannot be interpreted other than the right of those who have united under republican constitutions to compel those who have a different idea about which laws they want to obey or to 'disappear'. This, of course, leads off the track from 'eternal peace' and has little to do with a *universalistic* right to self-governance.

To put it differently, Kant's belief in the republican constitution is *not* a universalistic truth beyond all cultural differences; it is the expression of the belief in the superiority of the European civilisation and the fruits of the enlightenment as the *only* remedy for hostility among people. Notwithstanding the fact that there is a certain tension between the 'right to one's own right' and the duty to interpret this right in the canalised way of republicanism, let us assume that this is a correct assumption. What does that imply for the conception of the multi-level system of the international order? One conclusion is that the second and third layer, the *ius gentium* and the *ius cosmopoliticum*, must include provisions for cases in which states which have not—by self-determination—agreed upon a republican constitution must have these imposed upon them by the world community. This is not far from reality, especially not far from the rule of law promotion, be it merely politically suggested or militarily imposed. But is it compatible with Kant's plea for a legal autonomy at home, peaceful cooperation among states, and the cosmopolitan duty of hospitability? It

[63] Ibid 145–6.

[64] Ibid 146.

[65] Kant, above n 46, 13.

certainly contradicts Kant's fifth preliminary article: 'No state shall by force interfere with either the constitution or government of another state.'[66] A second conclusion is that Kant's reasoning does not provide answers for *all* the moral problems which are posed by a globalised, multi-centric, multi-ethnic, and multi-religious world.

Kant may not have been aware of the idea of nationalism, but he certainly perceived the world as ultimately constituted by states: the autonomous state, an independent polity, is the backbone of his whole account. But common wisdom and empirical evidence show that states have been relativised in their capacity to be the only and autonomous political actors on the global scene; in many cases, they may not even be the most important ones any longer with respect to the formation of the international order. What consequences does this have for the applicability of Kantian thought on today's problems? Habermas repeats the claim that the legitimacy for any transnational constitution must be derived from democratic nation states; but what if nation states are simply not the central actors in this construction? The idea of a legitimacy chain cannot then be applied, and the problem of how the evolution of globalised law can be democratically legitimised remains unsolved.

Kant not only believed in 'democratic peace' but also in the evolution of peace on the basis of free trade:

> It is the spirit of commerce that sooner or later takes hold of every nation and it is incompatible with law: the power of money being that which of all others gives the greatest spring to states, they find themselves obliged to labour at the noble work of peace, though without any moral view; and instantly seek to stifle, by mediations, war, in whatever part it may break out, as if for this purpose they had contracted a perpetual alliance; great associations in a war are naturally rare, and less frequently still successful.[67]

This peaceful picture of the merits of commerce will hardly be subscribed to by those nations which since the 1980s have been forced into the 'free' trade system by the structural adjustment programmes of the World Bank. It may be the 'power of money' which is here at work, but not only since the privatisation of world politics and the involvement of economic actors has it become possible that the 'power of the law' becomes subservient to the 'power of money'.[68] The idea that economic commerce is an independent sphere, which encourages states to 'labour at the noble work of peace', is so far away from the hard competition on and for markets that not only Karl Marx but also free-traders like Adam Smith would shake their heads about such naivety. Moreover, Kant's belief that free trade evolves outside of law prevents us from relating his position to the attempt to understand the promotion of legal arrangements for the benefit of commercial interests. But regulations for the 'free'

[66] Ibid 2.

[67] Ibid 42.

[68] K. Polanyi, *The Great Transformation: Politische und ökonomische Ursprünge von Gesellschaften und Wirtschaftssystemen* (Frankfurt am Main: Suhrkamp, 1976).

market are among the most prominent examples for the evolution of global law, whether they be praised like the '*lex mercatoria*' or disliked by many, such as aspects of patent law.

Finally, Kant and his successors seem to agree that the global arena is sufficiently legally organised if it guarantees human rights. Without denying the importance of human rights, one cannot ignore the fact that global law extends far beyond human rights: the debate on global law is concerned with trade law, social law, global private law, patent law, financial law, and administrative law to name but a few. These all have an impact on domestic and international, as well as global, subjects and polities, determine their policies, and challenge their 'legal autonomy'. Limiting the quest for global law to human rights, and finding that those have already been laid down more or less satisfactorily and that therefore the project of global democracy is within grasp fails to account for the fact that there *is* a darker side of global regulations which affect the political, economic, social, and personal lives on earth—independent of and beyond our consent. This is the hard case for the search for means of legitimation, and every failure to find these means (or stop the production of this law) will ultimately deepen the gap between democracy and law. If philosophy still seeks to keep abreast of contemporary developments, it cannot ignore real world developments, which are far removed from the well-organised ideal world of citizens living peaceably and hospitably in independent (republican) states.

V. OUTLOOK

The account of our achievements in legitimising law—and the exercise of public authority on the global scheme—must remain pessimistic. On the domestic scene, changes of statehood induce a process of deconstitutionalisation which also includes a loss of our 'right to our own right'. On the global level, the production of law is undertaken in many fields, and those who observe and promote this production either do not care about its democratic control or they are unable to provide satisfactory answers to how it could be legitimised. This pessimistic outlook may easily arouse the question whether I am exaggerating in one of two (or both) directions. Do I take the quest for democratic legitimacy too seriously? And am I too critical about the prospects for the democratic legitimacy of global law?

The normative argument that human equality *must* be interpreted as the right to decide upon one's own government is hard to refute. Article 21 of the Universal Declaration of Human Rights recognises that

> [e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives. The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.[69]

[69] Universal Declaration of Human Rights, 10 December 1948, A/RES/217A(III).

Who, but the citizens themselves, should—in a secular world—have the right to tell them where to go, what to approve of, what to spend their money on, and what kind of government they want to have? If this is a universalistic moral imperative, then there is no exception, neither for Western Europe, nor for Papua New Guinea. The right of self-determination cannot be abandoned or bent without giving up on the essential basis of modernity: the equality of mankind as the normative starting point for all our reasoning about social, political, and individual life.

Further, can it really be denied that we are moving away from the realisation of this ideal rather than drawing nearer? Is the 'world system' bringing us closer to self-determination, or does it present itself as an inevitable force which we have to accept and subject ourselves to? The latter seems closer to the truth of the matter. But it is not the 'world system' as such—after all, this is still a man-made world, with interests and biases, and with the general propensity to present those interests as common ones. Whom does the disregarding of democratic legitimacy serve? Who profits when democracy is abandoned? And how can we go on promoting democracy as the basis of 'eternal peace' when we are about to forget about its merits and indispensability in the heart of its invention? This neglect of democracy does not come as a natural force; it is a consequence of a shift in attention and valuation from legitimacy to efficiency, from political to legal constitutionalism,[70] from democracy to legal technocracy. So, at what point have we arrived? Back at the very beginning of thinking about the legitimate production of global law.

[70] See Loughlin in this volume.