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In Defence of 'Constitution'

Rainer Wahl*

I. INTRODUCTION

For over 200 years, 'constitution' has been a key concept of political–juridical thinking. Its widespread transposition to the European and international level today might therefore be assumed to trigger fundamental thinking about the justification of this terminological and conceptual analogy. A successful transplantation could provide both levels—European and international—with a reinvigorated experience of how the concept of the constitution became so successful in nation states. But an inflationary and substantively inaccurate transfer from the level of the state to levels beyond the state might only offer an illusory solution, one that acts as a barrier against devising more adequate conceptual solutions. The title of this chapter anticipates its hypothesis: that the concept of the constitution is not strengthened but weakened when the terms 'constitution', 'constitutionalism', and 'constitutionalisation' are transferred without thought to the international level.

The term 'constitution' is placed in quotation marks in the title for a reason. What needs to be defended is not existing constitutions, but the linguistic and conceptual use of the term. The core of the controversy does not concern conceptual issues. Terms such as 'constitution' are linguistic usages which can be altered. But when a term is well established, it may prove inexpedient or even misleading to adopt a substantially different use of it. In the context of usage of the term 'constitution', the claim being made by those extending it beyond the state level is that the essence of the existing term applies with equal effect to the new usage, and this extension of scope is conceptually justified. The objective of this chapter is to examine this claim.

II. CONSTITUTION IN AND BEYOND THE STATE

My subject is the extending usage of the term 'constitution', initially with respect to the European Union (EU) and then in the international arena, both as a guiding formulation for the sphere beyond the nation state and, more generally, as providing

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the foundation for a new form of international law. The basic claim being made by advocates of constitution beyond the state is that above the traditional norms of international law, in particular beyond treaties under international law, there lies another layer of norms and principles, and that—this being the decisive point—these norms should bind states. States should be subject to duties that arise independent of, or against, their will.[1] The claim to be examined here goes further and suggests that these higher duties and norms add up to a whole, to a constitution (or at least add up to larger orders). This notion of the constitution beyond the state is propounded in two main variants. In the strong hypothesis, one speaks of international constitutionalism; in the weaker variant, of a (mere) constitutionalisation. The latter, weaker hypothesis avoids the apparent problem of the first: that there is no presentable and perceptible formal constitution on the international level, either as a whole or in relevant partial arrangements.

The traditional understanding of the constitution on the state level is unavoidably the starting point for further considerations. Those who want to apply the term to political units beyond the states must have a clear idea of this concept. Consider two representative analyses. In his systematic elucidation of the German Basic Law, Peter Badura begins with an abstract legal definition of 'constitution' that constitutionalists might use as their starting point: by constitution, Badura writes, 'one understands basic legal prescriptions summarized in a constitutional law ('a constitutional document') on the organization and exercise of state power, state tasks, and basic rights.' He then elaborates:

> The constitution is an order-creating and programmatic *act of foundation and shaping* that seeks to give the community a legal foundation in a concrete historical situation. The constitution traces back to a political decision by the political forces that determine *the instituting of the constitution*. … The constitution has legal, but also political effects, because it is a symbol of state unity and commonality that influences legal consciousness and political life.[2]

Similarly complex is the definition by Dieter Grimm:

> The constitution in the modern sense is characterized by five components:
>
> (1) It is the epitome of legal norms, not a summary of philosophical foundations and not a description of actual power relations in a community.
> (2) The object of these legal norms is the institution and exercise of political rule or public power.
> (3) The constitution tolerates neither extra-constitutional powers nor extra-constitutional ways and means of rule.
> (4) Because rule is legitimate only when constituted and limited by constitutional law, constitutional law takes primacy over all other acts of

[1] See C. Tomuschat, 'Obligation arising for States without or against their Will' (1993-IV) 241 *RdC* (*Recueil des cours de l'Académie de Droit Internationale de la Haye*) 195–374.

[2] P. Badura, *Staatsrecht: Systematische Erläuterung des Grundgesetzes* (Munich: Beck, 3rd edn, 2003), 7 (emphasis in original).

rule. The latter are valid only when they remain within the framework of constitutional law.

(5) The norms of constitutional law are based in the people, because every other principle of legitimization of rule unhinges the remaining components and, in case of conflict, would prevail over the constitution.[3]

Such descriptions of the concept make it clear that 'constitution' is a complex phenomenon belonging to the spheres of both law and politics. The constitution certainly has normative content and makes normative claims. But also important is whether, and the degree to which, it is accepted among the people. And ultimately this recognition by the individual and the people gives the constitution its normative force.

The concept of the constitution is very attractive for the European and, to a degree also, for the international level mainly because this constitutional approach draws on the success story of constitutions. The success of national constitutions, especially after 1945, has been so great that hardly any state wants to eschew the honour of having a constitution, even if it is not a genuine constitution. Here we are speaking mainly of the smaller number of genuine, so-called Western constitutional states. For these states, it is true that there was and still is a success story of constitutions and in particular of constitutional jurisdiction. Constitutional jurisdiction is what first gave these constitutional texts the normative effectiveness they were striving for. Law enforced by this jurisdiction is law with a quality different from law without such jurisdiction; it is, so to speak, law in a different aggregate state. All constitutional states that have instituted a constitutional jurisdiction have made a leap to a higher level of normativity and legitimacy.

This high esteem for such constitutions is the starting point for the many proposals that are seeking to transport the idea of the constitution to the supranational and international levels. The hope is that of achieving similar successes to that obtained in the case in states. Here, a role is played by the expectation that the use of the proven 'honorary title' of constitution will ensure that a significant part of the achievements of national constitutions can be transferred to the newer political units. It is also hoped that, as a result of this transfer, a unified and binding concept of constitution can be adopted as the foundation of all three levels: national, European, international.

There is another quality of constitutions, emphasised mostly by jurists. With the establishment of constitutions, an internal hierarchy within the legal order is created. There now exist an easily identified group of fundamental legal norms; they are norms about norms, norms of a second and higher order. As fundamental norms, they stand above all others, above the vast number of norms contained in 'ordinary' law.[4] They take precedence over all other acts and legal norms. All of this is more

[3] D. Grimm, 'Gesellschaftlicher Konstitutionalismus: Eine Kompensation für den Bedeutungsschwund der Staatsverfassung?', in M. Herdegen (ed), *Festschrift für Roman Herzog* (Munich: Beck, 2009), 69–82. See also D. Grimm, 'Die Verfassung im Prozess der Entstaatlichung', in M. Brenner (ed), *Festschrift für Peter Badura* (Tübingen: Mohr Siebeck, 2004), 145–68, and Grimm in this volume.

[4] The term 'ordinary' law in this extreme form exists only in German law. The term may and must initially surprise, because it designates rather relativisingly precisely the laws

precisely described as the concept of the primacy of the constitution.[5] Once again, the establishment of constitutional jurisdiction is the immanent, logical conclusion of this concept or of this institutional formation of higher rank.

This concept of the hierarchical order of precedence is so attractive that, not surprisingly, it is employed also outside public law, and outside law in general. The theory of societal constitutionalism exhibits the attraction of this construction of primacy: of rules about rules.[6] This is also true of the economic theory of constitutional economics, which focuses on rules about rules: of meta-rules that govern the other rules.[7]

But it might be noted that although the traditional understanding is the starting point, it is not necessarily the authoritative standard for evaluating a broader understanding of the concept. This raises the basic methodological problem. It is assumed that the European and international level are units with special characteristics: units *sui generis* in relation to the state, so to speak. But actually there is little that can constructively be said about what is special about units *sui generis* and initially one can only measure these units with respect to their degree of distance from the characteristics of states. That is, the comparison must be with what the new units precisely are not: states. And as long as one does not have any convincing positive understanding of these special qualities, this is unavoidable.

III. CONSTITUTIONAL LAW BEYOND THE STATE

Nothing in the broad inventory undertaken in 2007 under the title *Zur Zukunft der Völkerrechtswissenschaft in Deutschland* (The Future of International Law Jurisprudence in Germany) in the Max Planck Society's *Zeitschrift für ausländisches und öffentliches Recht*

passed by parliament. This relativisation of laws has internal consistency, however, namely because of the primacy and the comprehensive meaning of constitutional law in the German legal order. This formation of terminology once again reflects the earlier observation: the primacy of the constitution at the same time means the lower ranking of the laws. See R. Wahl, 'Der Vorrang der Verfassung' (1981) 20 *Der Staat* 485–516. See also id, *Verfassungsstaat, Europäisierung, Internationalisierung* (Frankfurt: Suhrkamp, 2003), 121–60.

[5] Wahl, 'Vorrang', above n 4; id, *Verfassungsstaat*, above n 4, 161–87; id, 'Der Vorrang der Verfassung und die Selbständigkeit des Gesetzesrechts' (1984) *NVwZ* 401–9.

[6] D. Sciulli, *Theory of Societal Constitutionalism* (Cambridge: Cambridge University Press, 1992); G. Teubner, 'Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie' (2003) 63 *ZaöRV* 1–28; A. Fischer-Lescano and G. Teubner, *Regimekollisionen* (Frankfurt am Main: Suhrkamp, 2006), 43, 57.

[7] J. M. Buchanan, *Constitutional Economics* (Oxford: Blackwell, 1991); id, *The Economics and the Ethics of Constitutional Order* (Ann Arbor: University of Michigan Press, 4th edn, 1994); I. Pies (ed), *James Buchanans konstitutionelle Ökonomik* (Tübingen: Mohr, 1996); G. Grözinger and S. Panther (eds), *Konstitutionelle politische Ökonomie: sind unsere gesellschaftlichen Regelsysteme in Form und guter Verfassung?* (Marburg: Metropolis-Verlag, 1998); V. Vanberg and J. M. Buchanan, 'Constitutional Choice, Rational Ignorance and the Limits of Reason' (1991) 10 *Jahrbuch für Neue Politische Ökonomie* 61–78; V. Vanberg, 'Market and State: The Perspective of Constitutional Political Economy' (2005) 1 *Journal of Institutional Economics* 23–49. See also (since 1990) the journal *Constitutional Political Economy*.

und Völkerrecht is so often cited as the constitutionalisation of international law, albeit with numerous variants in wording.[8] In hardly any relevant pan-European or international context has the (primarily, if not exclusively German) literature felt drawn towards adopting the time-honoured concept of the constitution. The aforementioned intention to live from the high degree of esteem for this term in the context of the state is conspicuous—even if states are otherwise conceived as being in a process of erosion. At least with the 'demise' of the state, in the currently predicted phase of de-statification (*Entstaatlichung*), one wants to profit from one of its greatest achievements: the idea of the constitution.[9] Thus, in various contexts, terms like world constitutionalism,[10] international constitutionalism,[11] global constitutionalism,[12] international democratic constitutionalism,[13] multi-level constitutionalism,[14] European constitutionalism beyond the state,[15] and postnational constitutionalism[16] appear in the literature. An interesting variant is that of 'compensatory constitutionalism', expressing the hope that the promotion of constitutionalism on the European or international level will compensate for deficits and losses of constitutionalism on the state level.[17]

[8] *ZaöRV* 67 (2007) with articles by Benvenisti, Kadelbach, Keller, Marauhn, Nolte, Oeter, Paulus, Peters, de Wet, and Zimmermann, all with titles varying the given main theme. Recently, there have been three inaugural lectures regarding this topic: O. Dörr, '"Privatisierung" des Völkerrechts' (2005) *Juristenzeitung* (*JZ*), 905–16; M. Nettesheim, 'Das kommunitäre Völkerrecht' (2002) *JZ* 569–78; R. Uerpmann, 'Internationales Verfassungsrecht' (2001) *JZ* 565–73.

[9] Cf trademark law, where the behaviour of someone who seeks to exploit the fame of a trademark for himself is called 'acting parasitically on the major trademark'.

[10] R. St John Macdonald and D. M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden: Martinus Nijhoff, 2005).

[11] J. Klabbers, A. Peters, and G. Ulfstein, *Constitutionalization of International Law* (Oxford: Oxford University Press, 2009).

[12] A. Peters, 'Global Constitutionalism in a Nutshell', in K. Dicke (ed), *Weltinnenrecht: Liber amicorum Jost Delbrück* (Berlin: Duncker & Humblot, 2005), 535–50.

[13] B.-O. Bryde, 'International Democratic Constitutionalism', in Macdonald and Johnston (eds), above n 10, 103–25.

[14] I. Pernice, 'The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalisation', in P.-M. Dupuy (ed), *Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat* (Kehl: Engel, 2006), 973–1006.

[15] J. Weiler and M. Wind (eds), *European Constitutionalism beyond the State* (Cambridge: Cambridge University Press, 2003).

[16] N. Walker, 'Post-national Constitutionalism and the Problem of Translation', in Weiler and Wind, above n 15, 53.

[17] A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579–610; E. de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (2006) 19 *Leiden Journal of International Law* 611–32. See also R. Wahl, 'Verfassungsdenken jenseits des Staates', in I. Appel and G. Hermes (eds), *Mensch—Staat—Umwelt* (Berlin: Duncker & Humblot, 2008), 135–54.

Constitutional thinking addressed here is often directed specifically at the UN Charter as the constitution of the international community; in this variant, the focus is on the constitutionalisation of the entire order of international law.[18] But the WTO also receives constitutional recognition as a partial order.[19] In addition, there is the evolutionary concept of constitutionalisation, in which a great deal of what is constitutional is expected from further development in the future, but which already places a label on the development.

The constitutionalist interpretation finds similar diversity and an even more frequent use in the German literature, which is generally considered the original source and primary habitat of this approach.[20] The German formulations speak of *überstaatliches Verfassungsrecht* (constitutional law beyond the state),[21] *internationales Verfassungsrecht* (international constitutional law),[22] *kommunitäres Völkerrecht* (communitarian international law),[23] constitutionalisation,[24] and *Der Staat der Staatengemeinschaft* (the state of the community of states).[25] The influence of the private-law-based, or system-theoretical, concept of the civil constitution has already been referred to.

[18] Recently M. Knauff, 'Konstitutionalisierung im inner- und überstaatlichen Recht: Konvergenz oder Divergenz?' (2008) 68 *ZaöRV* 453–90, with a systematisation of the forms of appearence.

[19] J. Trachtman, 'The Constitutions of the WTO' (2006) 17 *European Journal of International Law* 623–46. Otherwise J. L. Dunoff, 'Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law' (2006) 17 *European Journal of International Law* 647–75. Cf M. Hilf, 'Die Konstitutionalisierung der Welthandelsordnung: Struktur, Institutionen und Verfahren', in W. H. von Heinegg (ed), *Entschädigung nach bewaffneten Konflikten: Die Konstitutionalisierung der Welthandelsordnung* (Heidelberg: Müller, 2003), 257–82.

[20] The constitutionalist interpretation is considered to be a German concept, eg A. Paulus, 'Zur Zukunft der Völkerrechtswissenschaft in Deutschland: Zwischen Konstitutionalisierung und Fragmentierung des Völkerrechts' (2007) 67 *ZaöRV* 695–720, at 697, 699, 703, 718. Too few problems take British authors into consideration using the terms constitution and constitutionalism, probably because those terms and concepts are not part of the British law and its tradition.

[21] See S. Kadelbach and T. Kleinlein, 'Überstaatliches Verfassungsrecht: Zur Konstitutionalisierung im Völkerrecht' (2006) 44 *Archiv des Völkerrechts* (*AVR*) 235–66.

[22] Uerpmann, above n 8; critically, U. Haltern, 'Internationales Verfassungsrecht: Anmerkungen zu einer kopernikanischen Wende' (2003) 128 *Archiv des Öffentlichen Rechts* (*AöR*) 511–57.

[23] Nettesheim, above n 8.

[24] C. Walter, 'Die EMRK als Konstitutionalisierungsprozess' (1999) 59 *ZaöRV* 961–83; id, 'Constitutionalizing (Inter)national Governance' (2001) 44 *German Yearbook of International Law* 170–201; critically R. Wahl, 'Konstitutionalisierung: Leitbegriff oder Allerweltsbegriff?' in C.-E. Eberle (ed), *Der Wandel des Staates vor den Herausforderungen der Gegenwart: Festschrift für Winfried Brohm zum 70. Geburtstag* (Munich: Beck, 2002), 191–207.

[25] W. G. Vitzthum, *Der Staat der Staatengemeinschaft: Zur internationalen Verflechtung als Wirkungsbedingung moderner Staatlichkeit* (Paderborn: Schöningh, 2006).

Evidence of the use of constitutional concepts in the international arena can be found in the positive law of various international courts, in the architecture of the WTO, and in several, much-noted, spectacular problem constellations and cases.[26] Eight illustrations of these usages can be listed as follows.

1. At the top of the frequently mentioned examples stands *the limitation of states' immunity in cases of severe violations of human rights*. The leading case is that of the former Chilean President, *Pinochet*.[27] In this case, the English House of Lords eventually removed Pinochet's immunity, in proceedings that were not, overall, convincing. But policy considerations—the health issues that were pleaded—prevented the implementation of the penalty, and ultimately the process contained a mixture of rigorous decisions and political considerations. In contrast, the *Cour de Cassation* did not permit a suit against the Libyan head of state, Gaddafi, over the attack on a passenger plane.[28]

2. *Limitation of states' immunity in the case of states' foreign ministers*. The most conspicuous case is that of the Foreign Minister of the self-styled Democratic Republic of Congo, who is alleged to have been involved in severe violations of human rights. In accordance with the principle of international law operating in Belgium at the time, a Belgian investigating judge issued an arrest warrant against the Foreign Minister. In proceedings filed by the Democratic Republic of Congo, the International Court of Justice (ICJ) maintained the traditional immunity of Foreign Ministers. But this was a majority decision and a notable minority dissented.[29] In the literature, this immunity problem has rightly been interpreted as

[26] The major cases each time initiated a very extensive discussion whose references cannot be given here in total—D. Thürer, 'Modernes Völkerrecht: Ein System in Wandel und Wachstum: Gerechtigkeitsgedanke als Kraft der Veränderung?' (2000) 60 *ZaöRV* 557–604, at 560, considers 'eight scenarios' that he regards as a 'thematic thread' and as approaches to a paradigm for a newly emerging system of international legal order. For a more detailed survey of the cases and their problems, see Knauff, above n 18, and Dörr, above n 8.

[27] For an account of the complicated circumstances of the different decisions see Thürer, ibid, at 568 et seq. See also C. Maierhöfer, 'Weltrechtsprinzip und Immunität: Das Völkerstrafrecht vor Den Haager Richtern—Urteil des IGH Demokratische Republik Kongo Belgien' (2003) *EuGRZ* 545–54, at 545, nn 1–3; M. Ruffert, 'Pinochet Follow Up: The End of Sovereign Immunity?' (2001) 48 *Netherlands International Law Review* (*NILR*) 171–95; K. Ambos, 'Der Fall Pinochet und das anwendbare Recht' (1999) *JZ* 16–24; C. Tangermann, *Die völkerrechtliche Immunität von Staatsoberhäuptern* (Berlin: Duncker & Humblot, 2002).

[28] *Cour de Cassation*, decision of 13 March 2001, (2001) *Revue géneralé de droit international public* (*GDIP*) 473.

[29] Judgment of the ICJ of 14 January 2002 (*Democratic Republic of the Congo v Belgium)*, excerpts in (2003) *EuGRZ* 563; Maierhöfer, above n 27; C. D. Classen, 'Rechtschutz gegen fremde Hoheitsgewalt: Zu Immunität und transnationalem Verwaltungshandeln' (2005) 96 *VerwArchiv* 464–84; M. Goldmann, 'Arrest Warrant Case', in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2nd edn, 2009 et seq); S. Zeichen and J. Hebestreit, 'Kongo v. Belgien: Sind Außenminister vor Strafverfolgung wegen völkerstrafrechtlicher Verbrechen immun?' (2003) 41 *Archiv des Völkerrechts* (*AVR*) 182–200; O. Dörr, 'Staatliche Immunität auf dem Rückzug' (2003) 41 *AVR* 201–19.

a stage for the conflict between diverging conceptions of international law.[30] At issue is the understanding of international law either as the coordinating law of sovereign states or as the constitution of the 'international community of mankind'. The disagreement between majority and minority in the court was over differing views of the process of production of international law and differing views of international law as such. It is no surprise that the methodology of majority and minority were fundamentally different.[31]

3. A topic widely discussed recently is the immunity of states against civil suits for damages due to torture or other human rights violations.[32] Suits for damages from Greek citizens against the Federal Republic of Germany over Nazi crimes in the Greek community of Distomo have drawn much attention; the verdict against Germany handed down by the highest Greek courts was initially declared inadmissible in the implementation phase, whereupon the plaintiffs strove for the implementation of their demands in Italy.[33] Currently, the entire dispute is before the ICJ, which—with Italy's and Germany's agreement—will aim to clarify the underlying primary issue of immunity.[34]

4. A standard case on the reinterpretation of a Convention that previously applied solely to states in favour of third parties is the case of the German citizen, LaGrand.[35]

[30] Maierhöfer, above n 27, at 548, 549. The immunity of foreign ministers is not comprehensively regulated in treaties, and is therefore a question of customary law. The ICJ holds with state practice and explains that, even for the case of war crimes or crimes against humanity, in state practice there is no exception to the generally recognised immunity of foreign ministers. The dissenting judges' opinions took various forms.

[31] The fundamental international law decision to protect elementary human rights suffices—according to this opinion—to deduce new rules from it. For the dissenters, the concept of *jus cogens* and its asserted higher priority over immunity took central importance, while it played no role in the argumentation of the court. In the opinion of the—constitutionally thinking—minority, a direct connection should be established between the will and interest of single individuals—who thereby become something like 'world citizens'—and international law, bypassing the states, from whose consensus a norm of international law no longer need be derived. But no practicable process of legal recognition can be seen that could directly register the wills of all 6 billion people and the basic values they share despite all cultural differences and from which concrete norms could then be derived.

[32] W. Cremer, 'Entschädigungsklagen wegen schwerer Menschenrechtsverletzungen vor nationalen Zivilgerichtsbarkeit' (2003) 41 *AVR* 137–68; ECtHR in the decision *Al-Adsani v UK* ((2000) *EuGRZ* 403, with comment by Maierhöfer, 391).

[33] Case *Distomo*, *Corte suprema di Cassazione* (Judgment of 29 May 2008, No 14199), German translation: (2008) *NVwZ* 1100–1. See also IMI-decision (military interned/forced labourer) of the same Court (Order of 29 May 2008, No 14201) (2008) *NVwZ* 1101–2; also E. M. Frenzel and R. Wiedemann, 'Das Vertrauen in die Staatenimmunität und seine Herausforderung' (2008) *NVwZ* 1088–91.

[34] Frenzel and Wiedemann, above n 33; Cremer, above n 32; Dörr, above n 29.

[35] Judgment of the ICJ of 27 June 2001 (*LaGrand—Germany v United States of America*) (2001) *EuGRZ* 287, (2002) 91 *JZ* with comment by C. Hillgruber, 94; K. Oellers-Frahms, 'Die Entscheidung des IGH im Fall LaGrand: Eine Stärkung der internationalen Gerichtsbarkeit und der Rolle des Individuums im Völkerrecht' (2001) *EuGRZ* 265–72. For a comprehensive

This and several parallel cases concerned violations of Article 36 of the Consular Convention of 1963. The USA failed in several cases to report to a consulate of the state of an arrested (and then convicted and executed) foreigner, as stipulated in the Convention. In the LaGrand case, the Federal Republic of Germany obtained an interim decision from the ICJ, although this did not postpone the execution. At the core of the case is the—controversial[36]—reinterpretation of the Convention (which, as a consular convention, was originally intended to protect the states' interests in orderly diplomatic intercourse) into a treaty applicable to third parties and containing subjective rights for affected parties.[37]

5. The *Tadic* judgment, the first ruling of the International Criminal Tribunal for the Former Yugoslavia, sets minimum standards of humanity and justice in civil war.[38] Since what were addressed were crimes in a civil war, this judgment is one of the first instances in which at least some aspects of international law was applied in relation to internal events, and which therefore interfered with the internal affairs of states.[39]

6. An extreme example is so-called humanitarian intervention.[40] At the forefront of this many-layered topic stands the noble and recognised goal of helping people whose human rights are in danger of violation. But ultimately the means of pursuit is military action, which itself necessarily endangers and usually also destroys life. This specialised topic will not be further examined here. But the dilemma is clear: the noble values being pursued do not safeguard against very problematic, namely deadly, interventions and actions resulting from that pursuit.

7. We will mention only in general the innovations and improvements through the *international criminal jurisdiction* before and after the Rome Statute. Here we can note a development with some gradual steps of progress and with great political reservations.

account of the facts and the controversial arguments, see B. Grzeszick, 'Rechte des Einzelnen im Völkerrecht: Chancen und Gefahren völkerrechtlicher Entwicklungstrends am Beispiel der Individualrechte im allgemeinen Völkerrecht' (2005) 43 *AVR* 312–44, especially 316 et seq.

[36] See K. Oellers-Frahms, above n 35; B. Simma, 'Eine endlose Geschichte? Art. 36 der Wiener Konsularkonvention in Todesstrafenfällen vor dem IGH und amerikanischen Gerichten', in P.-M. Dupuy (ed), above n 14, 423–48; Hillgruber, above n 35; Grzeszick above n 35.

[37] *Case concerning Avena and Other Mexican Nationals* (*Mexico v United States of America*), ICJ Reports 2004, 12 et seq (with comments).

[38] See <http://www.icty/org>, links: *The Cases, Completed Cases, Tadić*. Also J. Menzel, T. Pierling, and J. Hoffmann (eds), *Völkerrechtssprechung: Ausgewählte Entscheidungen zum Völkerrecht in Retrospective* (Tübingen: Mohr Siebeck, 2005), 787, with references at 791.

[39] Thürer, above n 26.

[40] Intervention for humanitarian reasons: Thürer, above n 26; Nettesheim, above n 8; Paulus, above n 20. On the NATO intervention in Yugoslavia, see Thürer, above n 26, at 574 (facts and grounds) and 579 et seq, there clearly stating that an intervention for humanitarian reasons—if at all—can only be justified by means of a new methodological interpretation of the UN-Charter. For the consideration that great innovations are often preceded by such a change of methodology, see below section IV. 8.

8. The *Listing Procedure* carried out by the UN or, more precisely, by a committee of the UN, has brought international law one of its current major cases, namely the proceedings of the cases *Yusuf* and *Kadi*. To combat terrorism, the UN ordered the freezing of all bank accounts of persons registered on a list. The proceedings concern the legality of the listing procedure, with the plaintiffs claiming that they have been wrongly placed on the list. With this instrument of counter-terrorism, the Security Council has adopted a type of legislation. The key question is whether there are legal limits to the Security Council's power to legislate and whether these limits lie solely in *ius cogens* or also in other legal prescriptions. At any rate, this question about the limits placed on the Security Council addresses the constitutional dimension in, and tests the strength of, international law.[41]

IV. CONSTITUTIONAL THOUGHT: AN OVERVIEW

In the following section, the basic ideas of constitutionalist theories will be synthesised, in ideal-typical form, from the rich and highly differentiated literature.[42] At the core of these theories lies the constitutionalisation hypothesis: namely, that international law should not be solely state-centred or consensus-determined.[43] The wills of individual states should not be the standard; rather, an independent layer of fundamental norms should exist above the states.

[41] Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat IF v Council of the EU and Commission of the EC* [2008] ECR I-6351, (2009) *Europarecht* (*EuR*) 80; (2008) *EuGRZ* 480. For commentary, see S. L.-T. Heun-Rehn, 'Die europäische Gemeinschaft und das Völkerrecht nach Kadi und Al Barakaat' (2008) *ELR* 327–38; H. Sauer, 'Rechtsschutz gegen völkerrechtsdeterminiertes Gemeinschaftsrecht?' (2008) *NJW* 3685–8; K. Schmalenbach, 'Bedingt kooperationsbereit: Der Kontrollanspruch des EuGH bei gezielten Sanktionen der Vereinten Nationen' (2009) *JZ* 35–43; J. A. Kämmerer, 'Das Urteil des Europäischen Gerichtshofs im Fall Kadi: Ein Triumph der Rechtsstaatlichkeit?' (2009) *EuR* 114–30; S. Remberg, 'Recht auf Verteidigung und effektiven Rechtsschutz gegen Vermögensbeschlagnahme wegen Terrorismusverdacht durch Ratsbeschluss' (2008) *ERL* 60–7; C. Ohler, 'Gemeinschaftsrechtlicher Rechtsschutz gegen personengerichtete Sanktionen des UN-Sicherheitsrats' (2008) *EuZW* 630–3; C. Tomuschat, 'Die Europäische Union und ihre völkerrechtliche Bindung' (2007) *EuGRZ* 1–12; S. Steinbarth, 'Individualrechtsschutz gegen Maßnahmen der EG zur Bekämpfung des internationalen Terrorismus' (2006) *ZEuS* 269–85; S. Hörmann, 'Völkerrecht bricht Rechtsgemeinschaft? Zu den rechtlichen Folgen einer Umsetzung von Resolutionen des UN-Sicherheitsrates durch die EG' (2006) 44 *Archiv des Völkerrechts* (*AVR*) 267–327.

[42] For references to the rich German literature, see: Dörr, above n 8; Nettesheim, above n 8; Kadelbach and Kleinlein, above n 21; Thürer, above n 26; Uerpmann, above n 8; Peters, above n 17; de Wet, above n 17. Critically taking different perspectives: A. von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 *Harvard International Law Journal* 223–42; Haltern, above n 22; C. Hillgruber, 'Dispositives Verfassungsrecht, zwingendes Völkerrecht: Verkehrte juristische Welt?' (2006) 54 *Jahrbuch des Öffentlichen Rechts* (*JöR*) 57–94.

[43] For a summary of the constitutionalisation hypothesis, see Paulus, above n 20, at 700.

From this basic conviction, constitutionalist developments assume the following internally consistent derivations.

1. If international law is not state-centred, then it requires a new reference point and a new subject. This new subject is the community of states or, more properly termed in the frame of the constitutionalists, the international community. The *international community* is not simply a new concept;[44] it is also the standard-setting concept, the lynchpin. The concept offers an answer not only to new problem situations of global reach, but also to the common interests of (most) states to combat the human rights violations of some states.

2. If the content of international law is no longer to depend on consensus (or be the result of contractual agreement), then it requires substantive anchoring. That is why the new international law is building on and evolves from general values and principles. Recourse to values is of such importance to the writing of constitutionalists that influential essays invariably adopt the corresponding thesis in their titles. Illustrative are: *Der Schutz der Menschenrechte als zentraler Inhalt des völkerrechtlichen Gemeinwohls* (The Protection of Human Rights as Central Content of General Welfare under International Law) and 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order'.[45] It is the highest values that lend some norms the character of *ius cogens*, or compelling law,[46] ie norms that remain binding even if individual states reject their validity.[47] A similarly important role is played by the recourse to common goods, ie global goods, as is found in internation law.

3. The concept of *ius cogens* is a cornerstone of the new thinking and the embodiment of constitutionalisation. *Ius cogens* has its own attraction as a category, although

[44] Nettesheim, above n 8, at 569–70, 571 et seq, with comprehensive references to other literature; A. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (Munich: Beck, 2001); Bryde, above n 13, at 107: 'The core of a constitutionalised international law is the general acceptance of a common interest of mankind that transcends the sum of individual interests.'

[45] B. Fassbender, 'Der Schutz der Menschenrechte als zentraler Inhalt des völkerrechtlichen Gemeinwohls' (2003) *EuGRZ* 1–16; id, 'The Meaning of International Constitutional Law', in R. St John Macdonald and D. M. Johnston (eds), above n 10, 837–51, at 838; de Wet, above n 17, at 614; T. Rensmann, 'The Constitution as a Normative Order of Value: The Influence of International Human Rights Law on the Evolution of Modern Constitutionalism', in P.-M. Dupuy (ed), above n 14, 259–78; id, *Wertordnung und Verfassung: Das Grundgesetz im Kontext grenzüberschreitender Konstitutionalisierung* (Tübingen: Mohr Siebeck, 2007); Thürer above n 26.

[46] Regarding *ius cogens* see Stefan Kadelbach, *Zwingendes Völkerrecht* (Berlin: Duncker und Humblot, 1993); Kadelbach and Kleinlein, above n 21, at 235, 251 et seq; J. A. Frowein, 'Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung', in R. Bernhardt (ed), *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler* (Berlin: Springer, 1983), 241–62; id, 'Jus cogens' (1997) 3 *Encylopedia of Public Law* 65–9; C. Tomuschat and J.-M. Thouvenin (eds), *The Fundamental Rules of the International Legal Order: 'Jus Cogens' and Obligations 'Erga Omnes'* (Leiden: Nijhoff, 2006).

[47] The central problem of whether the imagined values are really universal or not is hardly mentioned and even less solved by argumentative means.

its area of application is small. It is impossible to overlook the great discrepancy between the theoretical esteem for *ius cogens* and its very low relevance in the practice of international law.[48] Nevertheless, conceptualisations of hierarchies of norms and the deduction from abstract values are very popular among constitutionalists.[49]

4. If international law is not to remain formal law, then it must become substantive law. Logically, a *materialisation* of international law is required.[50]

5. If international law is not to exhaust itself in legal positivism, then the new international law relies on *ethical foundations*. The idea of justice is characterised as the power of change.[51] Accordingly, it is said that international law must orientate itself more towards human values and the value and meaning of justice. In this sense, international law adopts principles of morals and integrates legal philosophy.[52]

6. In advanced versions, the state is grasped as a member and the *states as members of the international community*. The states are responsible for the realisation of worldwide general interests. They are declared organs of the international community and thereby take on a serving role in the realisation of superordinated purposes. The state is viewed as part of the community of states, and the community has primacy.

7. If the states are not the final purpose of the law and also not of international law, then it is consistent that, as in every other law, also in international law the *individual person* is understood as the final purpose. The world population is the legitimate reference point of international law and at the same time the rights of the individual do not form an exception, but become a normal component of international law. The 'individual in international law' becomes a privileged theme and an essential pillar of a constitutionally orientated international law. It is therefore stated with much pathos: all law serves the human being. International law, too, must serve the human being and must not be merely law among states. International

[48] For the related concept of obligations *erga omnes*, see B.-O. Bryde, 'Verpflichtungen Erga Omnes aus Menschenrechten', in W. Kälin (ed), *Aktuelle Probleme des Menschenrechtsschutzes* (Heidelberg: Müller, 1994), 165–90; Tomuschat and Thouvenin, above n 46; D. Schindler, 'Die erga-omnes-Wirkung des humanitären Völkerrechts', in U. Beyerlin (ed), *Recht zwischen Umbruch und Bewahrung: Festschrift für Rudolf Bernhardt* (Berlin: Springer, 1995), 199–212.

[49] Erika de Wet reports about the VICI-project of the Netherlands Organisation for Science Research (*NWO*): 'The Emerging International Constitutional Order: The Implications of Hierarchy in International Law for the Coherence and Legitimacy of International Decision-making' (2007) 67 *ZaöRV* 777–98.

[50] Explicitly Nettesheim, above n 8, at 571, with several relativisations of this demand.

[51] Thürer, above n 26.

[52] Ibid 581, regarding the acceptance of intervention for humanitarian reasons: 'Therefore one has to consider whether the accent lies on the text of the Charter or the spirit and meaning of the modern constitutional order. As with national constitutional law, the question is if and to what extent the constitutional law can be interpreted in an evolutionary and goal orientated manner, in the sense of an optimal realization of basic human values and whether the providers of the constitutional order can acquire implied powers.' It is questionable whether the Kosovo-case could be the starting point and catalyst of an advancement of international customary law (581–2).

law does not serve the states; the states serve international law. This proclaims an anthropocentric turn in international law.[53] At the same time, a harmony between national, European, and international law results on the basis of this unified individualistic orientation.

8. From the standpoint of scholarship, each great change in law begins with a change in method of interpretation, with the creation and prevalence of a new preconception. If state-centredness is abandoned, then the will of states can no longer be the sole standard for interpreting contracts. The objective method of interpretation necessarily moves into the foreground as something new, whereas international law was traditionally the domain of the subjective method.[54] This is easily explained. If the subjective method had the specific function of not obligating states, as masters of contracts, to more than what they agreed to consciously and explicitly in the contracts, then it suggests itself that a conception that builds a layer of principles and guidelines superseding the states must make itself independent of the will of the states by means of objective interpretation. The methodology is pivotal, and those who are able to make a new method prevail can claim to have gained decisive legal-political ground.

V. CRITIQUE

If we move from the ideal-typical description of constitutionalist theories to critique, then at the outset there is considerable agreement on the nature of the changes taking place in the international field and its law, changes that are paralleled in the equally great 'transformative change' affecting states.[55] There can be no doubt about the persistent nature of the changes taking place in the international realm and affecting international law. The crucial question is whether this change is so great and so uniform that it can be characterised as amounting to a constitutional turn. In order to answer this, it is necessary to examine normative assumptions and political content of the constitutional claim.

[53] For the relation between international law and the individual, see P. Häberle, 'Nationales Verfassungsrecht, regionale "Staatenverbünde" und das Völkerrecht als universales Menschenrecht: Konvergenzen und Divergenzen', in C. Gaitanides (ed), *Europa und seine Verfassung: Festschrift für Manfred Zuleeg* (Baden-Baden: Nomos, 2005), 80–91; P. Kunig, 'Das Völkerrecht und die Interessen der Bevölkerung', in P.-M. Dupuy (ed), above n 14, 377–88.

[54] Thürer, above n 26; Nettesheim, above n 8; M. Herdegen, 'Das "konstruktive Völkerrecht" und seine Grenzen: Die Dynamik des Völkerrechts als Methodenfrage', in P.-M. Dupuy (ed), above n 14, 898–911.

[55] The expression 'transformations of the state' is the central expression of the project in Bremen: see S. Leibried and M. Zürn (ed), *Transformation des Staates* (Frankfurt: Suhrkamp, 2006). It is fitting because it avoids the 'from—to'. If something undergoes a transformation the perpetuation of former decisions continues to resonate, and the process cannot be easily and pithily be put into a 'from—to' formula.

Normativism

What is immediately—and negatively—conspicuous is the purely normative approach of the advocates. It is, of course, not inaccurate to understand law as a demand for what ought to be. But what is disconcerting is that there should be no non-normative prerequisites or effectiveness prerequisites for this normativity, at any rate, none is discussed. The theory of international constitutionalism and of the values and value systems postulated by constitutionalism does not and cannot name the institutions and processes that could serve as paths to their realisation. The constitutionalist theories postulate a pure normativity and pure values; they thereby claim validity in, of all places, the international world, a field characterised by power relations and conflicts of interest.[56] But an overarching fundamental order of primacy, which is a particular interest of these theories, does not come for free, but only through the fulfilment of important prerequisites.

It might be noted, by way of comparison, that the primacy of state constitutional law could not and cannot be taken for granted or be implemented in reality simply by edict. The material primacy of the constitution develops with and through the institution of constitutional jurisdiction. The German constitutions since the beginning of the nineteenth century differ from today's fundamentally in that the former, without constitutional jurisdiction, were only semi-effective constitutions that were raised to the level achieved today only after 1949 with the victory of the Federal Constitutional Court. The values found today in the basic rights of Germany's constitutional document, the *Grundgesetz* or Basic Law, and in other constitutions were already formulated and present in the philosophical and political–theoretical literature of the eighteenth century. But that was far from giving them legal effectiveness, even after the promulgation of the first constitutions.

Only when the values postulated in the literature were first adopted in the texts of the constitutions (and concretised there), and much later gained institutional anchoring and a venue for realisation with the institution of constitutional jurisdiction, could the development of what today is the standard for a constitutional norm begin: namely, fundamental content, substantive primacy, and procedures for implementation. An order of primacy that actually stands the test of reality does not arise solely within a normative cocoon. More is needed, namely the overall constellation of a constitutional state and in the history of constitutionalism, the path to this was (with the exception of the United States) very long.

The politically emptied concept of the constitution

The transposition, within the literature, of the concept of the constitution from the states to the European and international levels usually suffers from a narrow, politically emptied, under-complex, and diluted version of the concept of the state

[56] Paulus, above n 20, at 703: 'Eine Völkerrechtswissenschaft, die sich auf die bloße Normativität zurückzieht, vergisst, dass jedes Sein-Sollen eben doch ein Mindestmaß an Verwirklichungsmöglichkeit impliziert, um Autorität zu beanspruchen' ('A science of public international law which restricts itself to mere normativity overlooks the fact that, in order to claim authority, every ought implies at least a minimal chance of its realisation').

constitution.[57] This concept says the constitution is the highest norm, it has primacy, it politically organises fundamentals, and it expresses the relationship between political rule and the citizens. But the concept does not address the question of why this highest norm possesses the power to shape political–social life, why the nation and the individual should recognise it, and why this recognition confers on it the possibility of being effective.

The question of the transferability of the concept of the constitution 'beyond the state' takes on its necessary depth and its full seriousness only when one begins with what took shape as a constitution in the history of the state. The challenge is not that of offering a (new) definition of constitution as the supreme component of the legal order. In the course of the last two centuries, constitutions were striven for not only by jurists for legal use; they were also the object of intense and passionate political strivings. Numerous political movements worked for the enactment of a constitution: it was struggled for, politically and frequently with revolutions. Every overcoming of a dictatorship is sealed with the enactment of a constitution: in Germany in 1949, in Spain, Portugal, and Greece and in all transition states after 1989. Those who fought for a constitution knew why they did so. These movements were borne by important segments of the nation—in short, constitutions were and are parts of political–social movements and real political forces stood and stand behind them.

These forces were effective and important not only during the process of establishing a constitution. Citizens continue to support the constitution with their recognition and acceptance; the citizens' expectations of freedom are orientated towards the constitution. It is this esteem that gives the constitution its real power, a power that the norms of the constitution need if they are to have the effect that was previously improbable, namely to fetter the strongest institutions of political power and to eliminate unconstitutional action.

The complex constitutional-state constellation

This outline makes it clear that 'constitution' in the state is not only the highest norm but that 'constitution' is also an overall constellation of legal effects and qualities, of political hopes, of acceptance from 'below', and of real forces in political life. In Germany, constitutional court rulings are to a great degree 'carried' (*getragen*) by the citizens; this is precisely what gives the court its weight. All in all, one can speak of a complex, multifaceted *constitutional-state constellation*. It consists of a combination of

- principles;
- the formulation of general values in constitutional-law norms, ie the transposition of state philosophy into law in general;

[57] Ultimately, the same is true for the influential opinion of Christian Walter about the *constitutional functions* which are bundled at the state and are unbundled beyond the state (C. Walter, 'Die Folgen der Globalisierung für die europäische Verfassungsdiskussion' (2000) *Deutsches Verwaltungsblatt* (*DVBl*) 1–13; id, above n 24).

- the formation of institutions, whose importance cannot be overestimated. This begins with the establishment of representative parliaments that maintain an internal connection between democracy and the principle of the rule of law and it finds its high point during the twentieth century with the worldwide spread of constitutional jurisdiction;
- a shift in mentality among the rulers from a power orientation to a legal orientation;
- an equally necessary shift in mentality among subjects to the mentality of citizens and possessors of basic rights; and
- the anchoring of the idea of the constitution among the players in the political sphere and also among individuals.

What is termed the constitutional-state constellation here is called 'law in context' in parts of the scholarly literature.[58] It expresses the conviction that the constitutional question does not only concern the legal quality of the norms of constitutional law; the field is much broader.

In light of these considerations, the general discussion whether the concept of the constitution can be detached from the state takes on a new accent.[59] As is well known, the constitutionalists vehemently advocate such a detachment. For such advocates, the basic problem seems solved if this tie is broken and a concept of constitution—in some ways changed—is applied to the two other levels. But behind this connection between constitution and state stands not only an understanding of a concept; the complex concept of 'constitution' refers to and is in reality carried by the aforementioned constitutional-state constellation. More—and something more important—is required if the concept of constitution is to work on the European and international level. The objective here is not to register a copyright or trademark for the term 'constitution'. But the transposition is plausible and adequate for the actual problem only if something substantively comparable to the aforementioned constitutional-state constellation is present on the two other levels. This remains a matter of dispute.

The essential point is to avoid a technocratic or diminished concept of the constitution, a rump concept. That is why the complexity of the traditional legal–political idea of the constitution in the state is underscored. The constitutionalist interpretation in international law bears the burden of proof that a similar constellation of legal and political components stands behind its concepts. This new constellation need not be exactly the constitutional-state constellation, but it does have to be a constellation that combines the normative and the political, values and institutions,

[58] Haltern, above n 22.

[59] From the comprehensive discussion shall here be cited only: E. de Wet, 'The International Constitutional Order' (2006) 55 *International and Comparative Law Quarterly* 51–76.
Traditionally the term 'constitution' was reserved for domestic constitutions. Most municipal constitutions today provide a legal framework for the political life of a community for an indefinite time. They present a complex of fundamental norms governing the organisation and performance of governmental function in a given state and the relationship between state authorities and citizens. This is a rather abstract definition.

and that is politically supported by some kind of 'community'. In regard to the latter, the normative construct of an international community probably does not suffice; rather, in some way or other, a real, perceptible, and acting connection must exist between persons.[60]

With respect to the overall constellation, it is evident that on the international level there has been

- great progress made in terms of principles, values, and concepts;
- much less progress in terms of political buttressing: the international order and international law do not reach people nearly as much as state law does; and
- minimal progress in institutionalisation.

A similar critique is levelled against the neglect of the political processes that finally buttress the acceptance of the constitution. In a state, the constitution is a layer of norms within a political unit in which the fundamental adherence to the norms results from the individual's relationship of belonging to this state as a citizen. This resource, too, is not available in this way on the international level. If it is characteristic of state and constitutional law that the political realm must be addressed, then this is even more true for international law. It is surprising that the constitutionalist interpretation of the understanding of 'international law' is narrowly limited to texts and values, constructions and theories, and this in a time when the study of history, for example, is undergoing a thorough cultural turn, in which it grasps rule and the exercise of rule comprehensively and in which it explicitly regards documents and texts as insufficient for the purpose of understanding the complex phenomena of political rule and allegiance. Substantially contributing to this narrowing are system-theoretical theories with their painful abstractions and avoidance of analysis of actual processes.

The constitutionalist viewpoint is holistic. Drawing on the concept of the constitution as the entire basic order of a political unit, it seeks to capture the rapidly developing international field and its international law in one great formula. This grand endeavour has failed and cannot currently succeed. An important reason for this is the high degree of differentiation among the individual sectors, regimes, or contractual orders of international law. To postulate grand formulas or mere value orders first and only then to begin a detailed analysis of all these areas, sectors, and partial orders is to take the third or fourth step before the first. There is good reason why the theme of fragmentation

[60] A. von Bogdandy, 'Konstitutionalisierung des europäischen öffentlichen Rechts in der europäischen Republik' (2005) *JZ* 529–40, n 9: 'Dass eine Konstitutionalisierung ohne einen entsprechenden politischen Willen zum Zusammenschluss nicht gelingt, zeigt die vorerst gescheiterte Konstitution eines globalen Völkerrechts.' ('Constitutionalisation cannot succeed without a corresponding political will for unification; this is demonstrated by the fact that for the present the constitution of a global public law has failed.')

has become a major theme.[61] It has also become a counter-concept to constitutionalism and to constitutionalisation, if only because the high degree of differentiation and the internal complexity of the international level that it reveals and takes as fundamental, is incompatible with the unified world and the holistic approach of constitutionalism.

VI. THE STATE OF THE ART

The concept of the constitution on the European level

On the European level, which from the beginning seemed predestined to take up the idea of the constitution, a major learning process has taken place. Even if the Lisbon Treaty should take effect, neither its wording, nor its substance, nor its symbols fulfil the hopes that were originally placed in the European constitutional treaty. The question arises: What did the political movement in favour of a European constitution originally intend?

The movement initially advanced suggestions from the jurisprudence, including the characterisations of the European Court of Justice.[62] But the aim of the constitutional treaty was also to accelerate the course of integration, by reforming the machinery of government on the European level after the accession of so many new states and generally advancing the political integration that was always also to be pursued along with the initial path of economic integration. The constitution discussion was an offer to enhance *political* integration by using the highly esteemed term of 'constitution', by revising the understated language of the earlier treaties,[63] and by equipping the Union with the symbols of a flag and an anthem. Thus far, the constitution project began properly. It did not relate solely to the legal sphere; rather, the intent was to strengthen the political basis, the political infrastructure of the EU, so to speak, and above all to increase the citizens' acceptance of, and attachment to, the EU.

The initiators of the European constitution project wanted a constitution for the individuals and the nations in Europe in the full sense of a combination of the legal and the political. The individuals were to identify more with the EU, feeling an attachment to it similar to the attachment they felt and still feel for their (nation) state. The problem, however, was that one can make offers for more attachment and identification, but the success of this depends on whether the citizens also want to take this qualitative step onto a new level of integration. At any rate, two nations, the French and the Dutch, apparently did not want to accept this offer. And thus the

[61] For further references, see A. L. Paulus, 'Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?', in T. Broude and Y. Shany (eds), *The Shifting Allocation of Authority in International Law* (Oxford: Oxford University Press, 2008), 193–213.

[62] Beginning with the Opinion delivered by Advocate-General Lagrange of 25 June 1964 concerning the ECJ, Case 6/64 *Costa v ENEL* [1964] ECR 1279, at 1289; Case 294/83 *Les Verts v European Parliament* [1986] ECR 1357, at 1365, para 23: 'charte constitutionelle de base qu'est le traité'.

[63] In the first decades, the Treaty establishing the European Community consciously avoided the terms 'constitution' and 'laws'.

fate of the constitutional treaty illustrates the point that the theoretical concepts of academicians and the slogans of politicians and EU elites do not suffice. The individuals themselves have to decide whether to accept the offer of increased integration.

Thus, political processes and political movements in favour of European integration are necessary,[64] but texts that academicians claim resemble the character of constitutions are not enough. In formulating the constitutional package, the politicians rightly assumed that the legal order of primacy and the legal design as a whole are insufficient and that symbols and words play important roles. But this insight is also useless so long as the nations of Europe, or some of them that are permitted to express themselves, have not boarded the train of increased integration.

Consequently, in a long process on a winding path that lasted almost ten years, the great—even decisive—political question of a European constitution was answered—in a negative fashion. A European constitution worthy of the name must also connect the legal and the political. The mere order of primacy, the creation of fundamental and overriding norms is not enough. A constitution cannot successfully be instituted while ignoring the people and the nations. An explicit constitution-formulating convention, which has occasionally been held in the history of the constitutional state, is not always necessary. But the emergence of a constitution involves more than the drafting of a mere legal document: there must be a secured site for the nations and the individuals, where these are recognised to be the bearers (*Träger*) of the constitutional process. If this does not exist, then the intrastate referendums on the treaty become referendums on Europe's path as a whole. Whether the concept of the constitution can be detached from the state is ultimately a secondary and superficial conflict. Of course it can—provided something is offered that is comparable to the concept of the constitution.

The constitutional concept at the international level

The constitutional project is even more problematic at the international level.[65] Whereas in the EU there is a certain acceptance of some form of European integration and a corresponding feeling of community and belonging,[66] in the international

[64] Here, the possibility of developing a stronger feeling of pan-European identity among the nations is in no way denied or assumed to be unlikely. But such a development must not be simply postulated, it must actually occur. This is a strategic point where actual events and normative claim are inseparably tied and mutually dependent, just as empirical and normative sciences depend on each other in this point.

[65] Wahl, above n 17, 135–54.

[66] In the text, the wish for integration and the feeling of belonging has been consciously relativised. Thinking and languages have to do justice to a problem that has been mostly neglected. In regard to integration or the feeling of belonging to the EU, the issue is not yes or no, but degrees. Since 1958, the respective members of the EC or EU have had a *limited* feeling of belonging (expression taken from Gertrude Lübbe-Wolff). The point is always the degree of feeling of belonging; in the prehistory of the constitutional contract, one strives for a higher degree of feeling of belonging.

sphere, all the characteristics associated with community and a political structure are absent. In a number of circumstances, 'international community' is a meaningful term which expresses the fact that, beyond the consensus of all states, in certain—albeit very few—problem situations there exists a value relation distinct from that created by state consent. But there is no international community in the strong sense of the term as an entity capable of acting or of legitimising action. And the notion of having democratically elected delegates representing such an international community, in some world forum, is entirely utopian.

From the outset, the use of the term 'constitution' in this context invokes a legal concept of constitution, a mere order of primacy of legal norms. The establishment of fundamental values and the hope that courts (initially national courts, then perhaps international ones) will implement these values directly in positive law are not unjustified. But all prerequisites for the strong variant of constitutionalism are lacking. Overwhelmingly, the opinion is voiced that the UN Charter is not the world's constitution; it is accepted that its work in its own sphere is important, but its responsibilities are far from covering all sectors of international politics. The attempt to extend the UN Charter and to define it as the core of a future substantive world constitution was problematic from the beginning and, at any rate, has failed.[67]

But the weak variant, the assertion of a progressing constitutionalisation, also meets doubts and misgivings. The constitutional idea in general international law, conceived as the one great peg (*Klammer*) on which to hang many individual arrangements and which could function as an order of primacy for treaties and customary law, has—to summarise almost ten years of discussion—not succeeded. The project failed because of its sweeping ambition in seeking to transpose itself as the juristic mark (*Kennzeichen*) of *ius cogens*, and promoting the validity of a series of other concepts (common goods, common interest, and the like[68]), independently of the current consensus of the states. The concept of the constitution was to serve as the means of transport, but this interest hardly extended beyond the constitution's claim to hierarchical superiority.

In general, what has not progressed during the last ten years is the meshing of individual components into a coherent concept that, with the name 'constitution', recalls similar syntheses and integration achievements in state constitutions. Instead, the difficulties of such an idea have clearly emerged. As for German and European voices in particular, they have often transposed the earlier, positively evaluated experience with the project of a European constitutional treaty to the international level. The European discussion was to serve as a door opener for the international discussion.[69] It is therefore not surprising that the constitutionalist interpretation was

[67] Paulus, above n 20, at 699; Fassbender, above n 45, 1–16, nn 5, 15.

[68] In the same way, the figure of the world order treaties must not only be generally described, but also formed in detail. In the German tradition, one says it must be doctrinally or dogmatically elaborated, which means a great deal of work.

[69] F. C. Mayer, 'European Law as a Door Opener for Public International Law', in J.-M. Thouvenin and C. Tomuschat (ed), *Droit international et diversite des cultures juridiques—International Law and Diversity of Legal Cultures* (Paris: Pedone, 2008), 345–59.

even less successful on the international level. As a consequence, we should eschew for the foreseeable future the comprehensive approach of international constitutionalism. And, for reasons of scientific clarity, we should also avoid usage of the term 'constitution'.[70] Further steps of progress in international law will take place on a more concrete level in individual sectors and in patient analyses, as is taking place in the project on Global Administrative Law. Only a problem-saturated and practically-oriented international law can once again take the path of abstraction—but in a much more reflective mode.

The concept of societal constitutionalism

The defence of the term 'constitution' is mounted in particular against the thesis of 'societal constitutionalism'.[71] Insightful observations and analyses, including much that is innovative and worth considering, are presented under this name. But the use of the word 'constitution' is not understandable. As the name suggests, the lynchpin of this approach is society or segments of society (societal constitutions). This revives and gives a new content to the old European concept of civil society, although now the plural, civil constitutions, is used.

The thesis assumes these civil constitutions exist independently of state boundaries and state politics and that, in accordance with their respective inner character, they act in a worldwide association. In the context of a systems theory that becomes ever more abstract, these regimes, being such civil constitutions, are based solely on societal factors. The character of a constitution should be acknowledged for these regimes because they have developed fundamental rules into a higher-ranking order. The order of primacy, the set of rules on rules, is interesting. But the constitution is emptied of everything political, everything that otherwise characterises constitutions. With great pathos, the theory addresses the individual person, but what it has in view is individuals solely as societal beings; every political connection to and every participation in a political unit is removed. The individual is conceived as a subjective individual who is supposed to have rights and duties. But nothing is said about the individual as a political being, as *citoyen*. What the American and French Revolutions launched—the combination of political freedom and the individual's political participation alongside the protections of the rule of law—has no place in these concepts.

[70] Let us recall once more the fate of the European constitutional treaty. Back then, in their double role as scientific observers and legal policy shapers, numerous scholars of Europe used powerful rhetoric to defend the concept and the constitution and saw major progress in transposing concepts and terms from their narrow nation-state application to the European level. In their often very powerful will to help shape politics, which always also endangers scholarship, they used the concept of the constitution to help bring citizens over hurdles to a deepened union. With the concept of the constitution, citizens were to advance to the next step of integration. The intentional and also instrumentalised use of the concept of the constitution was of no avail here, but was rather a component of the failure. It is not difficult to predict the same for the international level.

[71] See above n 6 and, critically, Grimm, 'Gesellschaftlicher Konstitutionalismus', above n 3.

Societal constitutionalism is the furthest away from the originally rich and comprehensive constellation of the constitution; of all conceptions it offers the least in the way of a comparable transposition of this overall constellation into present-day circumstances. The use of the terms 'societal constitutions' and 'regimes', in Sciulli's and Teubner's sense, is based on a great number of premisses that cannot all be discussed here. But it is clear that the theory of societal constitutions has demanding and strong presuppositions. It presupposes the self-development of societal systems that apparently function mostly without addressing any form of public and sovereign tasks.

Beyond that, the theory is characterised by a number of absences: no politics takes place in it, there is no parliament as legislature, no politically accountable legislation, no public law, no constitutional law, no sovereign one-sided relationships. It is difficult to imagine that the pure civil society it imagines can be made a reality. The theory cannot entirely ignore political steering, but it is hard to judge what type, by means of laws or treaties under international law, is silently assumed. But this issue is not explicitly discussed.

The proponents of societal constitutionalism enjoy discovering the new so much that they have no attention left for already existing achievements. Overall, this literature lacks a basic acceptance of a figure of simultaneity, namely, that along with all the newness one sees or hopes to have in the future, much that is old retains great importance and may even be the indispensable prerequisite for the new. This is a fundamental objection. The decisive problems of the present and the future not only concern speculation on which completely new situation the current constellation will develop into; the decisive problems lie in the description of the *simultaneity* of different phases, different components, different principles—of the state, the EU, and international subjects, and of state, European, and international law. The overall constellation of all levels, all layers of law, and all public tasks that must be managed, must be kept in focus.

VII. CONCLUSION

The term 'constitution' is a demanding concept which can be understood only as an overall constellation of numerous components. The narrowing in the literature is based primarily in the narrowing and political emptying of the concept. The objective of this chapter has not been to place 'constitution' under trademark protection, nor to protect the term as an exclusive characteristic of state constitutions. To be defended are the comprehensive and complex components of the concept of the constitution: the diversity of its preconditions, its institutional formations, and the developed mechanisms of its realisation. 'Constitution' is also to be defended against the many who want to exploit the noble aura of the term without first achieving the necessary prerequisites. But so much of what is meant by 'international constitution', 'international constitutionalism', and 'constitutionalisation' is mere anticipation, distant hope, contourless 'emergence', and the invocation of evolution.

This, however, is not the last word. It may be true that the constitutionalist approach to international law has reached its zenith, and it might well have failed. Yet it cannot be ignored that the discussion has offered much insight into the need to use supranationally founded ideas in international law. To gather in the harvest is a worthwhile continuation of this discussion. Obligations arising for states without or against their will exist, be it *ius cogens* or obligations *erga omnes*. And the phenomena which fall under the heading of societal constitutionalism are important enough to be analysed further and in conjunction with the related sovereign or public law figures or elements. But important though these elements are, they do not provide the foundation for a totally new construction of international law. Rather, they are elements added to the existing and changing building of international law. If a constitutionalist approach beyond the state needs a new start, then, this has to be more modest and must engage with other fields of discussion, such as the fragmentation of international law, the emergence of global administrative law, and the emergence of sectoral international law. International law has many manifestations and a considerable dynamic: it cannot be apprehended or newly conceived solely by deduction and abstraction.