

Towards World Constitutionalism: Issues in the Legal Ordering of the World Community. Compiled and edited by Ronald St. John Macdonald and Douglas M. Johnston. Leiden, Boston: Martinus Nijhoff Publishers, 2005. Pp. 968. \$329.00.
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This important and huge volume of essays (968 pages!), with contributions from 33 leading scholars from different parts of the world, deals with the lofty idea to create an international constitutionalist order. And that, at a time when the credibility of the UN is all-time low and the international community has seen the emergence of the United States as the world's only superpower. Before even beginning my review, I would underline that this is a praiseworthy initiative.

Interestingly, the foreword by Tommy Koh, more than the introduction by the editors Ronald St. John Macdonald and Douglas M. Johnston, explains the background and reasons for dealing with the topic of world constitutionalism. As the author puts it: 'the editors wanted to dispute the view advocated by some influential American officials that international law is not binding; that the global system, especially in the economic domain should be allowed to grow like topsy; that the strengthening of international institutions was to be resisted; and that the pursuit of distributive justice was illusory'.¹ The United States has a major credibility problem and a lot to explain. When it comes to the most important actor on the world stage, several questions arise: why did it turn its back to the International Criminal Court and the Kyoto Protocol? Why has the United States refused to become a party to a variety of treaties – treaties on matters that are of great importance to the world community, such as the prohibition of land mines, environmental protection and the UN Convention of the Law of the Sea? This volume seeks to find an answer to these questions and 'to promote the rule of law and human dignity in world affairs.'

The editors start from the perspective that sixty years ago, the UN Charter was supposed to serve as an international constitution. However, the international law community as it is now, is facing a great many problems the drafters of the Charter had never envisaged. To name only a few: the 1990's have seen the emergence of the US as the world's only superpower; the structure of the international community has changed fundamentally as corporate entities with global capacities have come to dominate the world economy; and, last but not least, there is the threat of global terrorism. Increasingly, the international community acknowledges the need to set new priorities in the development of international law. Even though it is widely recognized that core of the problem falls within the competences of the United Nations –so far all suggestions to reorganize the UN or reform the Charter have ended in failure. Nevertheless, constitutionalism (I will of course elaborate on this concept, hereafter) is an important aspiration and with this book the editors hope to contribute to its gradual realization.

The book consists of six parts. Part 1 deals with the foundations of the international legal community; part 2 with uniformity and diversity in international law. Part 3 tackles the issue of geopolitics, values and the clash of civilizations; part 4 addresses the historical development of international legal institutions, part. 5 deals with confrontations with established principles of

¹ Tommy Koh, 'Foreword', *Towards World Constitutionalism*, Issues in the Legal Ordering of the World Community, Compiled and edited by Ronald St. John Macdonald and Douglas M. Johnston, Martinus Nijhoff Publishers, Leiden, Boston 2005, p. x.

international law and part 6 reflects on the problem of international law under stress. Since it is impossible to do justice to all of the contributors, I had better say in advance that I will pick out a few essays that are most relevant with a view to the question whether constitutionalism at world level is possible at all.

Despite the fact that it has been the very reason to publish this book, none of the contributors defend the American point of view, referred to in the foreword - the reason why the US refuses to become a member to many important international treaties. That is even more remarkable because the one contribution dealing with ‘American Unilateralism and the Rule of Law’, by Robert F. Turner is, if not persuasive - at least, gives the reader a lot to think about. In his article Turner wants to help the readers understand ‘*why* some American international lawyers who share fundamental values with their colleagues around the world believe many of these policies to be defensible.’² In a historical survey, going back to the days when Jefferson was still a Minister in Paris, through the unilateralism of the US during the Cold War up until the present time, Turner demonstrates why the majority of Americans believe that the best way to prevent war is by embracing the maxim of ‘peace through strength’. In the end two positions can be distinguished, positions which cannot be united unless perhaps the organization of the United Nations is fundamentally changed. On the one hand, there is the fear of American dominance – its vast, unchecked power may well be used to undermine the interests of others. On the other hand, there is the fact that many Americans are wary of the idea of an international law which is interpreted ‘in such a way as to leave US national security subject to the leaders of France, Russia, China or any other foreign country.’³

In a volume on ‘world constitutionalism’ it is of course important to keep in mind what exactly is meant by the word ‘constitutionalism’. This does not seem superfluous, since even in one of the most illuminating studies on constitutionalism I have read, the author complains that:

Constitutionalism is one of those concepts, evocative and persuasive in its connotations yet cloudy in its analytic and descriptive content, which at once enrich and confuse political discourse.⁴

In his opening essay, Johnston characterizes the concept of constitutionalism. As he puts it: ‘It can be treated semi-ironically as “the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order.”’⁵ In a further demarcation of the concept, Johnston refers to numerous, heterogeneous propositions, such as; the existence of a constitution as fundamental law; the rigidity of the constitution; the presupposed sovereignty of the people; an ethical core such as a bill of rights; separation of powers and judicial review.

However, even though there is a great deal of truth in this characterization, in my view it is illuminating to distinguish between two meanings of constitutionalism that are closely connected. (1) First of all, the term ‘constitutionalism’ is used to indicate *the pursuit of codifying the state’s organization*. One might label this the legal sense of the term. Since the eighteenth century, a great enthusiasm for written constitutions emerged, largely influenced by

² Turner, Robert F., ‘American Unilateralism and the Rule of Law’, in: *Towards World Constitutionalism*, p. 78.

³ Turner, Robert F., ‘American Unilateralism and the Rule of Law’, in: *Towards World Constitutionalism*, p. 101.

⁴ Grey, Th.C., ‘Constitutionalism: An Analytic Framework’, in: Chapman, J.W., Pennock, J.R., *Constitutionalism*, New York 1979, p. 189.

⁵ Johnston, Douglas, ‘World Constitutionalism in the Theory of International Law’, in: *Towards World Constitutionalism*, p. 16.

Enlightenment ideals and the revolutionary spirit of the era. These constitutions were intended to regulate the organization and functions of the main government bodies, and control the relationship between government and citizen. Characteristic of these constitutions is furthermore, that they are regarded as higher law; the constitution is considered as the embodiment of fundamental principles of state-building.

Obviously, it is not only in terms of the state, that the concept of ‘constitutionalism’ is being used. The literature on the European Union describes how the case-law of the European Court of Justice developed a constitutional infrastructure with individual and fundamental rights, enforcement mechanisms, separation of powers and an autonomous and hierarchical order.⁶

With a view to the international order this meaning of the concept is undoubtedly existent, that is to say, different authors underline that it is well possible to regard the UN Charter with its paramount legal status as a world constitution. Besides that, it appears to be practically impossible to change the Charter (in that respect the world order does have a rigid constitution) and there is an ethical core in the shape of the Universal Declaration, including the human rights covenants and supporting instruments.

But then, constitutionalism has a second meaning – it is being used to indicate (2) *a political ideal aiming at limiting government*. In this sense, ‘constitutionalism’ is the idea that government power should be limited by law. Constitutionalism expresses the conviction that no government should ever have unlimited power to do whatever it desires to do - not even democratically elected governments - because every government can relapse into arbitrary rule, unless precautions are taken. The kind of government constitutionalism insists on is government limited by legal means, that is to say by the rule of law, a separation of powers, by judicial review and by guaranteeing fundamental rights and liberties.

Now the question is of course: what are the prospects for world constitutionalism in this sense? ‘The political reality’, Johnston says, ‘is that such a project, to be useful, must be shared across all regions, so that allegations of cultural bias in the field of international law can be confronted. The goals of legal uniformity and universality may have to be reconciled with the value of cultural diversity.’⁷ The editor seems perfectly aware of the fact that in a way it is a ‘mode of international utopianism’ (as he puts it) and that there are many problems on the way to world constitutionalism. Hereafter, I will consider four major difficulties that are considered by different authors: the jurisprudential problem, the question of the legitimacy of an international constitutionalist order, global terrorism and the cultural problem.

The jurisprudential problem

In his article, Johnston also outlines the ‘moral divide’ among international jurists between ‘legal formalists’ on the one hand and ‘legal realists’ on the other. The legal formalists are trained in Europe and tend to regard law as the paramount normative presence in human affairs. The legal realists are most strongly influenced by the intellectual and social values of North America and tend to look at law as a social process. Rather than seeking an international order through law

⁶ Lenarts, K., ‘Constitutionalism and the Many Faces of Federalism’, *American Journal of Comparative Law*, Vol. 38 (1990), p. 205; Weiler, J.H.H., ‘The Reformation of European Constitutionalism’, Vol. 35 (1997), *Journal of Common Market Studies*, 97.

⁷ Johnston, Douglas M., ‘World Constitutionalism in the Theory of International Law, in: *Towards World Constitutionalism*, p. 27.

and new legal institutions and procedures, American international jurists may tend to look at extra-legal means and values. The fear of legal realists is that an increase of world constitutionalism may raise the level of textualism within the professional community. From a certain point of view, this divergent way of thinking, even between international jurists seems to reflect exactly why a world constitutionalism is still far ahead of us.

The question of legitimacy

If there would be such a thing as world constitutionalism, there should at least be a *democratic* constitutionalist order. That is the viewpoint which is convincingly defended by Brun-Otto Bryde, in his article entitled ‘International Democratic Constitutionalism’. It is inevitable that we need more international law, according to Bryde, since many problems we face today can only be addressed at an international level. One only has to think of environmental protection to understand that these problems can only be solved with a view to the interest of mankind as a whole, not of individual states alone. At the same time, however, international law becomes increasingly demanding. ‘International law can no longer contend itself with the coexistence of a small number of state actors in restricted fields of action. Instead it has to provide for a complex system of rules for all areas of life.’⁸ In addition to that the question of the legitimacy arises. We cannot contend ourselves with striving for a system of international law which complies with the rule of law. International law also has to be representative for those who are affected by it. Therefore, Bryde says, not only do we need a constitutionalist order, but we need a democratic constitutionalist world order.

Gerhard Hafner points at the same problem, from a different angle. He focuses on the question of the accountability of international organizations, when their power and significance is ever increasing, and competences are more and more shifting from states to international organizations. The organisation of the European Union is an obvious – albeit regional – example, where an increase in power at the European level has taken place from the very start of the European Communities (even though in the 21st century the tide of the public opinion about constitutionalizing Europe seems to be turning). On the whole, Hafner concludes, the standard of accountability of international organizations is a political response to their growing impact and power. ‘But it would be wrong to direct this complaint to the IOs themselves; the Member States as being those responsible for the structures of IOs, must be the first addressees, as IOs can hardly develop activities which reach beyond the will of the States.’⁹

The problem of global terrorism

The problem of global terrorism is addressed by Vaughan Lowe in a very illuminating paper, the central argument of which is that it is unhelpful, and perhaps even dangerous, to frame the legal response to terrorism in terms of a ‘war against terrorism’. According to Lowe it is important to keep self-defence (as a unilateral action) and the maintenance of international peace and security

⁸ Brun-Otto Bryde, ‘International Democratic Constitutionalism’, in: *Towards World Constitutionalism*, p. 103.

⁹ Hafner, Gerhard, ‘Accountability of International Organizations’, *Towards World Constitutionalism*, p. 630.

distinct. Why? Self-defence is to be exercised unilaterally. Action for the maintenance of international peace and security was intended to be a multilateral matter, that is to say, it was to be reserved for the Security Council. In the wake of the September 11 attacks, what seems to be happening is that ‘the mechanisms of unilateral action in self-defence are being extended to circumstances that are properly cases of action to restore or maintain international peace and security, in order to remedy what are seen as the defects in the UN system.’¹⁰ The most prominent example of this is the invasion of Iraq in 2004. Lowe argues (quite convincingly) that it is necessary to restore the original legitimacy of actions of self-defence and those to maintain international peace and security. Moreover, if armed intervention in a foreign state is necessary, it is advisable to involve regional organizations.

But, however convincing from an international law point of view, the question remains whether existing principles and structures do not often lead to a stalemate in these matters – even when it comes to strengthening regional organizations, as Lowe suggests. If existing international law and procedures as they are suffice, should not we come at least to a reorganization of the Security Council?

The cultural question

As Johnston puts it: ‘the goal of world constitutionalism may be perceived to be threatening for a variety of reasons: jurisprudential, ethical, cultural, social and political.’¹¹ As far as the cultural point of view is concerned - under the heading of ‘Geopolitics, Values and The Clash of Civilizations’ Abou-el-Wafa sheds light on the Islamic point of view on world constitutionalism. His ‘Contributions of Islam to the Development of a Global Community Based on Rules of International Law’, seems in a way a perfect example to demonstrate the difficulty in uniting Western and non-Western thought. The author goes to great lengths to demonstrate that Islamic thinking presupposes a world community. As it is presented, however, there appears to be a fundamental problem. Abou-el-Wafa’s point of view seems to be that of a world community of Islam. Let me elucidate this, by citing some passages in his article:

‘Islam is a world religion. More than one quarter of the world population, principally concentrated in Asia and Africa with some minorities in Europe, the Americas and Australia, adhere to the religion of Islam – it is truly an extra-territorial and supra-national movement.’ (...), the religion of Islam is destined to be a universal one. (...)¹² There are many verses in the Quran that confirm the concept of a global community.’

Reading these lines, one has difficulties escaping the feeling that what is meant here is an Islamic community, rather than a world community.¹³

¹⁰ Lowe, Vaughan, ‘Security Concerns and National Sovereignty in the Age of World-Wide Terrorism’, *Towards World Constitutionalism*, p. 673.

¹¹ Johnston, Douglas M., ‘World Constitutionalism in the Theory of International Law, in: *Towards World Constitutionalism*, p. 19.

¹² Abou-el-Wafa, Ahmed, ‘Contributions of Islam to the Development of a Global Community Based on Rules of International Law’, in: *Towards World Constitutionalism*, p. 308-309.

¹³ A few passages further, however, Abou-el-Wafa points to the fact that Mohamed presented himself as the ‘messenger of all mankind’. He is supposed to have said: ‘A profet used to be sent to his people, but I have been sent to mankind as a whole.’ *Idem*, p. 310.

The article contains a lengthy analysis of the compatibility of Islamic thinking with international law. First of all, the author discusses the contributions of Islam with regard to the normative aspects of international law and international relations (what he calls the ‘general principles of law’). Secondly, the contributions of Islam that are related to the operative aspects of international law and relations. Among these, he mentions: international treaties; diplomatic intercourse; combating international terrorism; and international responsibility. As proof for the ‘compatibility of Islamic thinking with international law’ Abou-el-Wafa sums up a series of Islamic principles from the Quran, the Shari’a, sayings from the prophet or even interpretations of Western scholars of Islamic thinking. The *raison d’être*, or rationality of the general principles of (international) law is left beyond consideration. Particularly when it comes to the problem of how to deal with combating international terrorism, this way of arguing seems rather peculiar. I quote:

‘It is well known that acts of terrorism have existed *ab initio*. (...) With respect to this phenomenon, one can safely say that Islam has no link with such terrorist acts. It has been well established that Islam is a tolerant religion, which prohibits illegitimate violence, intimidation, and terror.¹⁴

However, a major problem of Abou-el-Wafa’s point of view seems to be that the reason why the Islamic world should abide by rules of international law is that they’re approved by the Islam. That is to say, not because the Islamic world accepts international law as such. But how can we ever come to a world community or world constitutionalism if all religions would first review international law in the light of their convictions? Does not world constitutionalism presuppose the universal acceptance of a higher order, no matter the moral background of the different parts of the world community?

Coming to my final observations, I would again underline the importance of this book. It contains a great many remarkable, illuminating essays on many different topics, which are not only interesting for international lawyers but for anyone who cares for the ideal of creating a stable international community. As I said before, ‘Towards World Constitutionalism’ addresses a very important topic at a time when the international order is fragile, to say the least. Having read the essays I am inclined to believe constitutionalism in the legal sense of the term (as outlined above) can be said to exist, even at world level. Constitutionalism as a political ideal of limiting the power of government(s) though, may be a too utopian ideal for the world community as a whole. It must, however, be an aspiration for ‘subsections’, such as environmental protection, the law of the sea and the prohibition of land mines. I do hope this book will contribute towards realizing that ideal.

¹⁴ *Idem*, p. 325.