

Are Constitutions Still Relevant in the Context of Globalisation?

LIZZETTE ROBLETO DE HOWARTH*

Globalisation has become an intrinsic part of contemporary social life because it has affected and influenced changes in the social landscape such as economics, politics, culture, technology and the environment to name a few. Since national economies have gradually turned into marketplaces for transnational and global flows, as opposed to primary recipients of national socio-economic activity, the authority, and legitimacy of nation-states is challenged: national governments have increasingly become unable either to control what happens within their own borders or to fulfil by themselves the demands of their own citizens. The nature of these global transformations has had a direct impact on international and national political and legal structures, so this article enquires: are constitutions still relevant in this context of globalisation? It also argues that, for a global constitution to be credible, representative and legitimate, the collective interests of humanity should take precedent over the interests of individual nation-states.

* Lizzette Robleto de Howarth has completed her LLB Law (Hons); LLM Human Rights (Merit); LLM in International Economic Law, Justice & Development (Distinction) and is currently undertaking an MPhil/PhD Law at Birkbeck. She is also an Associate Tutor on Constitutional and Administrative Law at Birkbeck and a member of The Honourable Society of Inner Temple. She currently works for the Law Society of England and Wales where she is responsible for managing the Society's international public interest work in the areas of legal development and assistance, corporate social responsibility and international rule of law. Prior to joining the Law Society, Lizzette worked over 16 years in the international development sector on international policy, advocacy and programme management on issues such as human rights, women and gender, statelessness and migration, economic development and trade, and the environment.

Introduction

Globalisation¹ has become an intrinsic part of contemporary social life because it has affected and influenced changes in the social landscape such as economics, politics, culture, technology and the environment to name a few.² The internet, in particular, has played a pivotal function in facilitating globalisation through the creation of the world-wide web, connecting billions of individuals, civil society organisations and governments.³ Economic interdependence and the speed of financial transactions between countries have also performed a major role in accelerating global changes, which has translated into a merger of corporate and state power with many state functions being extensively outsourced.⁴

Due to the scale, impact and nature of globalisation, the monopoly of the state over lawmaking has been transformed through policy, and has also been designed and developed at a supranational level. Consequently, we can no longer talk about politics only in terms of nation-state or statehood.⁵ Since national economies have gradually turned into marketplaces for transnational and global flows, as opposed to primary recipients of national socio-economic activity, the authority and legitimacy of nation-states is challenged: national governments have increasingly become unable either to control what happens within their own borders or to fulfil by themselves the demands of their own citizens.⁶

In this setting, some powerful nation-states have aggressively pushed free trade policies globally under the guise of globalisation to promote their own *raison d'état*⁷ and not necessarily for the welfare

¹ Steger argues that the answer to the question of whether globalisation constitutes a new phenomenon depends on how far we are willing to extend the chain of causation that resulted in those technological and social changes (MB Steger, *Globalisation: A Very Short Introduction* (Preface) (OUP 2009), 18).

² *ibid*, 2.

³ *ibid*, 16.

⁴ W Brown, 'We Are All Democrats Now ...' in G Agamben (ed), *Democracy in What State?* (Columbia UP 2012), 47.

⁵ D Held et al., *Global Transformations: Politics, Economics and Culture* (Contents and Introduction) (Stanford UP 1999), 1-31.

⁶ *ibid*, 4.

⁷ The doctrine of *raison d'état* is an important concept in international relations where pursuit of the national interest is the foundation of the realist school of

of the global community. Furthermore, neoliberalism as a political rationality has launched a frontal attack on liberal democracy, displacing its basic principles of constitutionalism, legal equality, political and civil liberty, political autonomy and universal inclusion; and attempting to replace these values with market criteria of cost-benefit ratios, market efficiency, profitability and efficacy.⁸

This new intermestic policy-making, where domestic and international issues are emmeshed, undoubtedly facilitates opportunities for making domestic policy compatible with international affairs and should be central to foreign policy-making, which is particularly relevant in this age of globalisation. Nonetheless, foreign policies continue to be designed with national interests at heart, which creates tensions between the national and global agendas, with dominant superpowers strongly influencing supranationally global decisions in a way that benefits them. This does not only affect the manner in how global policies are created, but also the perception on how global policy is made, which in turn prevents changes in mindset. If nations are not able to influence the supranational framework, so that their collective visions and aspirations are reflected, it is unlikely that there will be the level of ownership, credibility and legitimacy necessary for any global system to be successful.

Several influential strands of thought suggest that pressures for international constitutionalisation are a product of globalisation and the accompanying increase in the reach and density of international legal norms.⁹ However, what exists now is global economies operating alongside a disjointed global political order, which remains lashed to local and territorial government structures.¹⁰ This clear entanglement between the domestic and international should have propitiated the creation of new discourses, leading citizens away from taking a narrow nationalistic vision on political decisions, to a more globalised outlook. Instead, the current rise of right-wing nationalism and other populist

international relations. The doctrine states that standards of personal morality were irrelevant in statecraft, where the only test was what furthered the interest of the state. (GR Berridge, *Diplomacy: Theory and Practice* (3rd edn, Palgrave Macmillan 2005), 109.)

⁸ (n 4), 47.

⁹ JL Dunoff and JP Trachtman, *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP 2009), 5.

¹⁰ D Kennedy, 'Law and the Political Economy of the World' (2013) 26(1) *Leiden J Intl L* 7, 12.

movements illustrates that the transition from the national to the global has yet to take place. This is highlighted by the political disengagement and disenfranchisement that exists among many citizens today or the lack of involvement in the traditional political structures. Moreover, the lack of direct links between citizens and supranational organisations gives rise to questions relating to representation, inclusion, legitimacy and accountability. There is also ambiguity about the role of supranational bodies acting as both legislators and decision makers and thereby directly impacting on the separation of powers, which is crucial to the rule of law, as well as affecting the lives of billions of people.

With the expansion of global governance, many administrative and regulatory functions are now performed at global instead of national level; ranging from binding decisions of international organisations to non-binding agreements in intergovernmental networks and to domestic administrative action in the context of global regimes.¹¹ It therefore begs the question: are constitutions still relevant in the context of globalisation?

Setting the scene

The role of constitutions as a political and normative framework

Constitutions are a relatively recent innovation in the history of political institutions, emerging from political struggles and revolutions. They emerged in the last quarter of the 18th century from two successful revolutions against the hereditary rulers in France and in the British colonies of North America.¹² Hobbes conceived modern constitutions to be a contract entered into by the people to form a comprehensive framework through which institutions of government are established and the exercise of their powers regulated.¹³ In Rousseau's view, a healthy, durable and strong constitution is the first

¹¹ N Krisch and B Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17(1) EJIL 1, 3.

¹² D Grimm, 'The Achievements of Constitutionalism and its Prospects in a Changed World' in P Dobner and M Loughlin, *The Twilight of Constitutionalism* (OUP 2010), 3.

¹³ M Loughlin, *Foundations of Public Law* (OUP 2010), 282.

thing to be sought,¹⁴ where natural relations and the laws coincide: the latter serving to secure, support and rectify the former.¹⁵

Schmitt stated that modern constitutional states are the assemblage of two different and ultimately antagonistic components: namely a system of political activity and a series of legal restrictions imposed on that activity to protect individuals.¹⁶ He also differentiated between the ideal concept and the existential¹⁷ concept of the constitution; the latter is analogous to the basic political pact (the social contract), which founds a political unity (the state).¹⁸ This distinction is useful when considering Schmitt's suggestion that 'new [constitutional] forms can be introduced without the state ceasing to exist, more specifically, without the political unity of the people ending'.¹⁹ Moreover, the establishment of a new constitution does not always lead to the founding of a new state.²⁰ Today, the modern constitutional concept broadly refers to a formal contract drafted in the name of 'the people' for the purpose of establishing and controlling the powers of the governing institutions of the state.²¹ Hence, constitutions function as the legitimacy test of a political system: a political system is deemed legitimate if it was established by a consensus of the governed.²²

Loughlin shares Schmitt's analysis that constitutions are not purely normative constructions, on the basis that constitutions are: bound by the historical process of state-building, drafted at particular moments in time and establish their authority only through a political process in which allegiance is forged. Citizens often use constitutional discourse as a means to 'clarify the way they want to understand themselves as citizens of a specific republic, as inhabitants of a specific

¹⁴ J-J Rousseau, *The Social Contract* (1762, Wordsworth 1998), 47.

¹⁵ *ibid*, 53.

¹⁶ As quoted by H Lindahl in 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Self-hood' in M Loughlin and N Walker, *The Paradox of Constitutionalism* (OUP 2007), 9.

¹⁷ (n 13), 211.

¹⁸ *ibid*, 214.

¹⁹ *ibid*, 214-15.

²⁰ *ibid*.

²¹ M Loughlin, 'What is Constitutionalisation?' in Dobner and Loughlin (n 12), 46.

²² (n 12), 8.

region, as heirs to a specific culture, which traditions they want to perpetuate and which they want to discontinue, and how they want to deal with their history'.²³ The universal recognition of constitutionalism, as a model for the organisation and legitimacy of political power, is shown by the fact that even rulers who are disinclined to submit themselves to legal norms feel compelled at least to pretend to be exercising their power within the constitutional framework.²⁴

Power is vested ultimately in 'the people', the constituent power coming together as a collective singular, which is a constant theme of modern constitutional thought from the late 18th century American and French revolutions to the upheavals of the 'Arab spring' in 2011.²⁵ Locke asserted this by stating 'whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government'.²⁶ The political power of 'the people' is maintained and augmented only through the institutionalisation of their will and a constitutional framework is needed because political conflict can arise in all aspects of a group's life.²⁷ Schmitt viewed the constituent power, as 'the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence'. And, Sieyes observed, 'it is impossible to create a body for an end without giving it the organisation, forms and laws it needs to fulfil the functions for which it has been established: this is called the body's constitution'.²⁸ Sieyes also argues that a constitution must build its protection ensuring that the powers delegated are not used to harm the nation that has delegated these powers.²⁹

Loughlin and Walker described fully this paradox of constituent power and constitutional form:

²³ S Choudhry, 'Globalisation in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' Berkeley Law Scholarship Repository (1999), 822 <<http://scholarship.law.berkeley.edu/facpubs/2256>>.

²⁴ (n 12), 3.

²⁵ M Loughlin, 'The Concept of Constituent Power' Critical Analysis of Law Workshop, University of Toronto (2013), 1 and 17.

²⁶ *ibid*, 3, as reproduced.

²⁷ *ibid*, 17.

²⁸ EJ Sieyes, 'What is the Third Estate?' in Loughlin (n 13), 224.

²⁹ *ibid*, 225.

The paradox [of constituent power and constitutional form] is the expression of the fact that constitutionalism is underpinned by two fundamental though antagonistic imperatives: that governmental power ultimately is generated from the ‘consent of the people’, and that, to be sustained and effective, governmental power must be divided, constrained and exercised through distinctive institutional forms ... It is only with the emergence of the modern sense of a constitution that this tension between constituent power (the power of ‘the people’ to make—and break—the constituted authority) and constitutional form (the framework of rule erected as a bargain or contract, or evolved in their absence) becomes more acute.³⁰

I surmise that the direct interrelation between the political and the normative components of constitutions are fundamental for asserting and enforcing the political vision created by the sovereign power—‘the people’. Consequently, the values of a national constitution, which is currently delivered through the nation-state model, should be taken as the necessary starting point of discussion relating to policy-making at supranational level. This is so that the outcome, a prioritisation of national over transnational law-making, becomes a logical necessity.³¹

Globalisation, sovereignty and the nation-state

Traditionally, the state is constituted by four elements: a territory, a population, a capacity to enter into relations with another state and an administrative structure (or government).³² All these elements have been transformed by globalisation.³³ Brown argues that the monopoly of these combined attributes of nation-states have been severely compromised by ever-growing transnational flows of capital, people,

³⁰ J Tully, ‘The Imperialism of Modern Constitutional Democracy’, Chapter 16 in Loughlin and Walker (n 16), 317.

³¹ R Michaels, ‘Globalization and Law: Law Beyond the State’ in R Banakar and M Travers (eds), *Law and Society Theory* (Hart 2013), 13
<http://scholarship.law.duke.edu/faculty_scholarship/2862>.

³² MN Shaw, *International Law* (5th edn, CUP 2003), 178.

³³ (n 31), 8.

ideas, resources, commodities, violence, and political and religious fealty.³⁴

Territorial integrity and sovereignty were once considered the most important characteristics of a state, given that control over a territory determines territorial sovereignty. Globalisation directly challenges this concept of nation-state, because geographical distance becomes less relevant as territory becomes less important; improved means of communication between people reasserts identity without boundaries; and, closer trade interdependence makes global production chains possible.³⁵ As Strange stated, 'the impersonal forces of world markets ... are now more powerful than the states to whom ultimate political authority over society and economy is supposed to belong ... the declining authority of states is reflected in a growing diffusion of authority to other institutions and associations, and to local and regional bodies'.³⁶ The emergence of international public power does not necessarily render constitutions obsolete or ineffective; but, if statehood is eroding, constitutions cannot longer fulfil its claim to legitimise and regulate all public authority operating within its realm.³⁷

Constitutions were intrinsically connected with the idea of popular sovereignty, which means that the idea of the constitution is not strictly bound to the concept of the territorially bound state.³⁸ This developmental step of loosening the connection of sovereignty from territory and attaching it to the people has been the great achievement of the democratic state at the end of the 18th century.³⁹ A new 'sovereign regime' has displaced the traditional concepts of statehood as an absolute, indivisible, territorially exclusive and zero-sum form of public power (Held 1991). Governments have been reconstituted and restructured in response to the growing complexity of governance processes in a more interconnected world (Rosenau 1997). Devices,

³⁴ (n 4), 44-57.

³⁵ (n 31), 9.

³⁶ (n 5), 3.

³⁷ (n 12), 16.

³⁸ UK Preuss, *Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?* (OUP 2010), 37.

³⁹ *ibid.*

such as the guarantee of rights and separation of powers,⁴⁰ together with parliamentarianism and constitutionalism, have restrained sovereignty, reducing the risk of governments becoming oppressive and despotic.⁴¹

With the inclusion of non-state actors (e.g. non-governmental organisations (NGOs), multinational corporations (MNCs)) and greater focus on individual human rights, international law has affected internal matters of sovereign states and began to break up the idea of absolute state sovereignty.⁴² These stakeholders co-exist, partly overlap and often compete and conflict at a trans-border level in which no single ruler can be identified and held responsible for the quality of the social order.⁴³ Grimm argues that the state shares its power with a number of non-state actors, most of them international organisations, to whom sovereign rights have been transferred and whose activities escape the arrangements of national constitutions.⁴⁴ This internal erosion puts at risk the constitutional capacity to establish and regulate all public power that has an impact on the territory where the constitution is in force.⁴⁵ An example of this can be illustrated by the trade agreements under the World Trade Organization (WTO) that are considered global economic constitutions and charters of rights of transnational corporations (TNCs),⁴⁶ which are considered by some scholars to undermine national constitutions.

Non-state actors and their activities are directly influencing and reshaping the preferences of states and inter-state relations, which deny governments the ability to possess or exercise their authority.⁴⁷ For example, contract law is increasingly determined by party choice

⁴⁰ Declaration of the Rights of Man and of the Citizen (1789)
<<http://www.hrcr.org/docs/frenchdec.html>>.

⁴¹ (n 38), 24.

⁴² (n 31), 15.

⁴³ AB Murphy as stated in Preuss (n 38), 38.

⁴⁴ (n 12), 4.

⁴⁵ *ibid*, 4.

⁴⁶ S Shrybman, 'The World Trade Organisation: A Citizen's Guide' (Canadian Centre for Policy Alternatives 1999), 6
<https://www.policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/the_wto.pdf>.

⁴⁷ R Woodward, 'An 'Ation' not a 'Nation': The Globalisation of World Politics', Chapter 17 in J Michie, *The Handbook of Globalisation* (Edward Elgar 2003), 311.

and commercial parties frequently delegate their disputes to arbitrators instead of state courts.⁴⁸ Some state functions, such as security and policing, the management of prisons, etc., are in effect being privatised and outsourced to private enterprises. Most significantly, once all domestic avenues have been exhausted, both individuals and states can access international and regional mechanisms, offered by supranational institutions, to settle cases and/or access remedies where the state is just another actor in the proceedings.

The UN Charter⁴⁹ sets out the fundamental principles of governing relations between states, which could be construed as the natural starting point for the elaboration of global constitutional norms, principles and rules.⁵⁰ The UN Charter⁵¹ has institutional 'supranationality' that permits authoritative decisions without continuous consent;⁵² supranationality, in this case, is the key element of a constitutional order that separates a constitution from an ordinary treaty.⁵³

Therefore, world politics can no longer be viewed as a world of states, but is instead a vibrant mosaic of ceaselessly changing authoritative actors that includes, but is not reducible to, states.⁵⁴ There is also greater cooperation between nation-states, through formal or informal agreements, which some scholars argue may mean that sovereignty is shared, putting an end to traditional legal relationships. This makes the role of national constitutions challenging,

⁴⁸ (n 31), 17.

⁴⁹ Article 2 of Chapter 1: Purposes and Principles provides for the three key principles: the sovereign equality of UN members; the peaceful settlement of disputes; and the prohibition of the threat or the use of force: <<http://www.un.org/en/sections/un-charter/chapter-i/>>.

⁵⁰ S Zifcak, 'Globalising the Rule of Law: Rethinking Values and Reforming Institutions', Chapter 2 in S Zifcak (ed), *Globalisation and the Rule of Law* (Routledge 2005), 40.

⁵¹ A charter has the character of a law, presupposing a hierarchical relationship of rulers and ruled; it is a 'grant or guarantee of rights, franchises, or privileges from the sovereign power of a state or country'. *Webster's New Collegiate Dictionary* (Merriam-Webster 1980), 186.

⁵² MW Doyle, 'The UN Charter—A Global Constitution?', Chapter 4 in JL Dunoff and JP Trachtman (n 9), 115.

⁵³ *ibid*, 131.

⁵⁴ (n 47), 312.

but not necessarily irrelevant, given that the nation-state is still accountable to the constituent power—the sovereign/‘the people’.

Globalisation and the challenges of the nation-state paradigm

Globalisation is characterised by four elements: *extensity*, which relates to the stretching of activities beyond borders and distances; *intensity*, which concerns the growing magnitude of interconnectedness in these transactions; *velocity*, which describes the speed of global diffusion of ideas, goods, information, capital and people and *impact*, which reflects the influence of the enmeshment between the global and the local.⁵⁵ Nation-state boundaries, between domestic matters and global affairs, have become blurred as a consequence of the extensity, intensity and velocity of trans-border interactions, which has resulted from greater movements of capital, people, information, goods and services.⁵⁶ Globalisation has forced states to increase the intensity and frequency of their interactions as they grapple with urgent new problems arising from environmental degradation, financial crises and instability and the proliferation of weapons of mass destruction.⁵⁷ Bilateral and multilateral interactions, treaties, institutions and organisations arising from these processes are all providing the ‘scaffolding’ (Brenner 1999) that support states in the global arena.

Globalisation has produced ‘global disorder’ because, *inter alia*, the global system has not developed new forms of political and social organisation going beyond the nation-state (Amin 1998, 2). This is connected with one of the persistent constitutional problems of the modern era, which is that the power of capital and specifically of multinational corporate entities, has transcended the nation-state while the exercise of political and legal power has remained trapped within its confines.⁵⁸ What is observed today, from the preparations of side agreements to the General Agreement on Tariffs and Trade (GATT) all the way down to the regulation of foodstuff in the European Union

⁵⁵ (n 5), 15.

⁵⁶ *ibid*, 15.

⁵⁷ (n 47), 313.

⁵⁸ F Macmillan, ‘The WTO and the Turbulent Legacy of International Economic Law-Making in the Long 20th Century’, Chapter 8 in J Faundez and C Tan, *International Economic Law, Globalisation and Developing Countries* (Edward Elgar 2010), 170.

(EU), is an increase of transnational regulatory cooperation and of joint efforts at implementation.⁵⁹ The focus lies not so much on individual administrative acts but on the establishment of new regulatory authority⁶⁰ that takes power away from the state and moves it towards the appointed supranational institutions.

The tendencies of extended private governance activities and the hybridisation of international actors illustrates that 'the new legal order is working significant transformation in governance arrangements, both locally and globally, which suggests that the distinction between the public and the private realm is becoming increasingly difficult to sustain'.⁶¹ World summits and other (official and unofficial) meetings lock governments into global, regional and multi-layered systems of governance that they barely monitor, let alone control.⁶² For example, the 17 Sustainable Development Goals (SDGs),⁶³ which succeeded the Millennium Development Goals (MDGs),⁶⁴ have effectively moved the goalposts of accountability of national development activities, from the nation-state to the UN.

The state, through its government, has the power to lay down binding rules, as laws, and does not require the specific consent of the governed to enforce these laws.⁶⁵ However, greater delegation of law-

⁵⁹ A Somek, 'Administration without Sovereignty' University of Iowa Legal Studies Research Paper, College of Law, No. 09-04 (2009) <<http://ssrn.com/abstract=1333282>>.

⁶⁰ *ibid*, 6.

⁶¹ R Nickel, 'Private and Public Autonomy Revisited: Habermas' Concept of Co-originality in Times of Globalisation and the Militant Security State', Chapter 8 in Loughlin and Walker (n 16), 165.

⁶² D Held et al., 'Globalisation' (1999) 5(4) *Global Governance* 483, 488.

⁶³ On 25 September 2015, countries adopted a set of goals to end poverty, protect the planet and ensure prosperity for all as part of a new sustainable development agenda. Each goal has specific targets to be achieved over the next 15 years. The website clearly states: 'For the goals to be reached, everyone needs to do their part: governments, the private sector, civil society and people like you.' The UN Sustainable Development Goals (SDGs) <<http://www.un.org/sustainabledevelopment/sustainable-development-goals/>>.

⁶⁴ At the Millennium Summit in September 2000, the largest gathering of world leaders in history adopted the UN Millennium Declaration, committing their nations to a new global partnership to reduce extreme poverty and setting out a series of time-bound targets, with a deadline of 2015. The UN Millennium Development Goals (MDGs) <<http://www.unmillenniumproject.org/goals/>>.

⁶⁵ (n 31), 12.

making powers to supranational institutions (e.g. global: International Monetary Fund (IMF), WTO; UN/regional: EU, European Court of Justice (ECJ)) is taking place, which limits the state's absolute discretion on law-making.⁶⁶ Power in governing the international economy is likely to remain in the hands of the wealthy nations and the supranational bodies that they control and fund, like the IMF or the World Bank.⁶⁷ In addition, states must comply with certain international standards (e.g. international human rights laws; international humanitarian laws; Roman statute, etc.), which means states can no longer treat their citizens as they see fit.⁶⁸ Further collective responsibilities lay in the realm of cyberwar, international and ecological terrorism, and transnational organised crime, which cannot be satisfactorily dealt with by traditional military means within a national framework.⁶⁹

Non-state organisations have thrived partly because of the emergence of global issues that states and their various collaborative institutions have proved ill-suited or unwilling to deal with.⁷⁰ Various international and regional tribunals have been created, many in the last few decades, including the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the ECJ⁷¹ and more.⁷² The WTO is one of the most significant actors in the global economy and has become emblematic in its efforts to establish a global system of international trade.⁷³ Through the Dispute Settlement Body and Appellate Body (WTO-DSB), the WTO exercises compulsory jurisdiction that is not contingent upon the consent of the parties.⁷⁴

⁶⁶ *ibid*, 12.

⁶⁷ P Hirst and G Thompson, 'The Future of Globalization' 37(3) *Cooperation and Conflict* 247, 251-2.

⁶⁸ (n 62).

⁶⁹ *ibid*, 489.

⁷⁰ (n 47), 315.

⁷¹ BZ Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004), 127-8.

⁷² For an overview of these tribunals see P Sands et al., *Manual on International Courts and Tribunals* (Butterworths 1999).

⁷³ J Faundez and C Tan, *International Economic Law, Globalisation and Developing Countries* (Edward Elgar 2010), 5.

⁷⁴ (n 71), Chapters 10 and 11.

The politics of globalisation and the challenges to constitutions and nation-states

Despite the efforts to reduce its capability and expanse, so far there has been no appetite to answer what role states will play in world politics and for the formulation of new methodologies capable to successfully supersede them. Nation-states remain significant actors and a successful structure for organising the political space⁷⁵ but, by and large, they have lost their structural superiority over the social and political world.⁷⁶ Hirst and Thompson gave a word of caution: 'if all states, including the most powerful, were to cease to be the primary political actors across borders being displaced by companies, NGOs, regional governments, networks, international agencies, etc.; one could anticipate a severe anti-globalisation 'backlash', as nationally rooted publics experience a loss of the benefits of domestic governance and increased exposure to international pressures'. Most importantly, a global market system, where international competitive pressures and market forces subsume national economies, and in which transnational agencies and networks reduce states to the equivalent of local authorities, would be vulnerable to multiple political and social threats that had no means to counteract international terrorism, commercial piracy and crime.⁷⁷

Unfortunately, blatant self-interest, hypocrisy and power-based actions in the international arena have generated mistrust in the international regime, giving rise to the belief that the global system is a tool that perpetuates the advantages held by the West over the rest of the world.⁷⁸ The US, for example, has conveniently hidden behind its own constitution to protect their national interest in clear violation of the general principles of international law.⁷⁹ Moreover, the USA disregarded the decision of the ICJ⁸⁰ following a complaint lodged in

⁷⁵ (n 47), 313.

⁷⁶ (n 38), 38.

⁷⁷ (n 67), 249.

⁷⁸ (n 71), 136.

⁷⁹ See D Weissbrodt, 'Globalisation of Constitutional Law and Civil Rights' (1993) 43 J Legal Educ 261, 268, the example of *United States v Alvarez-Machain* (1992) 112 SCT 2188.

⁸⁰ *ibid*, 130.

the 1980s by Nicaragua⁸¹ challenging the legality of US military actions.⁸² Although the US considers itself bound by clauses in the International Covenant on Civil and Political Rights (ICCPR),⁸³ which prohibits 'cruel, inhuman or degrading treatment or punishment', it is only to the extent that the clause is congruent with the far narrower prohibition in the 8th Amendment against 'cruel and unusual punishment' as asserted in *Stanford v Kentucky* 492 US 361 (1989). Another example is the various controversial US actions on the war on terror, in cases of extraordinary rendition of suspected terrorists and the commission of human rights abuses against terrorist suspects by US agents at sites outside of the US.⁸⁴ All of these actions undermine the moral and/or political decisions made by the global system on behalf of its member states.

Where self-interest becomes exceedingly dangerous for the world's population is regarding global environmental issues, like climate change and environmental degradation, which have become a serious threat to humanity, biodiversity, habitats, flora and fauna worldwide. Dealing with these increasingly important problems requires the consensus of the global community of states in order to agree effective global responses. As stated in the Paris Agreement: 'climate change represents an urgent and potentially irreversible threat to human societies and the planet and thus requires the widest possible cooperation by all countries, and their participation in an

⁸¹ Case concerning the military and paramilitary activities in and against Nicaragua (*Nicaragua v United States of America*) (Merits) Judgment of 27 June 1986
<<http://www.icj-cij.org/docket/?sum=367&p1=3&p2=3&case=70&p3=5>>.

⁸² By twelve votes to three, the Court *decided* that the United States of America, by certain attacks on Nicaraguan territory in 1983-1984, namely attacks on Puerto Sandino on 13 September and 14 October 1983, an attack on Corinto on 10 October 1983; an attack on Potosi Naval Base on 4/5 January 1984, an attack on San Juan del Sur on 7 March 1984; attacks on patrol boats at Puerto Sandino on 28 and 30 March 1984; and an attack on San Juan del Norte on 9 April 1984; and further by those acts of intervention referred to in subparagraph (3) hereof which involve the use of force, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another state:
<<http://www.icj-cij.org/docket/?sum=367&p1=3&p2=3&case=70&p3=5>>.

⁸³ In September 1992, the US joined 114 other nations as a party to the ICCPR: K Ash, 'US Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence' (2005) 3 Nw J Intl Hum Rts 1.

⁸⁴ (n 9), 17.

effective and appropriate international response, with a view to accelerating the reduction of global greenhouse gas emissions'.⁸⁵

Carefully considered global governance measures would enable market stability and would protect citizens against unacceptable insecurity and risk, which would help to prevent a major backlash against globalisation from a range of disenchanting stakeholders.⁸⁶

Conclusions

Globalisation has brought a great deal of benefits in terms of technology transfer, global interdependences and skill-sharing. And yet, economic inequalities have also exacerbated alongside political disenfranchisement. In 2016, Oxfam reported that the world's 62 richest billionaires were as wealthy as half the world's population.⁸⁷ These economic actors hold immense unaccountable power and control over the basic livelihoods of a vast number of people.⁸⁸ The current rise of right wing nationalism and other populist movements are evident and could help to explain the political disengagement and political marginalisation that has occurred resulting from the lack of foresight created by the political gap between local and the global.

In today's world, only when national constitutional law and international law are seen together, will we be able to obtain a complete picture of the legal conditions for political rule in a country.⁸⁹ In this context, national governments must now reconsider their roles

⁸⁵ Framework Convention on Climate Change 2015 (Paris Agreement under the United Nations Framework Convention on Climate Change)
<<https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf>>.

⁸⁶ (n 67), 250.

⁸⁷ L Elliott, 'Richest 62 people as wealthy as half of world's population, says Oxfam' *The Guardian* (18 January 2016)
<<http://www.theguardian.com/business/2016/jan/18/richest-62-billionaires-wealthy-half-world-population-combined>>.

⁸⁸ B de Sousa Santos, 'Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality' in B de Sousa Santos and CA Rodriguez-Garavitorom (eds), *Law and Globalisation from Below* (CUP 2005), 41.

⁸⁹ (n 12), 16.

and functions in order to respond to rapid growing demands and seek to work together for the global good.⁹⁰

The growth of transnational interactions should have brought about international benefits as well as international stewardship, both of which would reinforce the need for global political rules that are equally applicable to all states. For that reason, more political thinking and debate is required to shape our shared global values in order to give birth to new (political and social) identities and suitable institutions that appropriately respond to globalisation. There should also be renewed enthusiasm and more research into the political alternatives available that could seriously contest the prevailing inequalities in international relations.

It can be argued that the extreme discontent against globalisation lies in the fact that most people have not benefited from the current global neoliberal economic model and are mistakenly blaming globalisation itself. Proponents of neoliberal globalisation have failed to consider that economic changes should be carried out on a country's own terms (e.g. China⁹¹), taking into consideration their domestic contexts and the creation of safety nets to protect their population.⁹² Neoliberal economic globalisation forcefully imposes market rules under which current global economics operate, which greatly benefits the top 1%⁹³ but creates huge inequalities for the majority of the global population. The neoliberal economic globalisation model should be abandoned in favour of a more sustainable model that benefits all. Most importantly, people, as the constituent power, should have a greater stake in their own society, whether domestically or globally, which can only happen through a more inclusive global vision. Otherwise, the fragile global political interconnection will fragment even further, which can be illustrated

⁹⁰ (n 62), 495.

⁹¹ J Hickel, 'A Short History of Neoliberalism (and How We Can Fix It)' (9 April 2012) <http://www.newleftproject.org/index.php/site/article_comments/a_short_history_of_neoliberalism_and_how_we_can_fix_it>.

⁹² DM Kotz, 'Globalisation and Neoliberalism' (2002) 12(2) *Rethinking Marxism* 64 <http://people.umass.edu/dmkotz/Glob_and_NL_02.pdf>.

⁹³ J Treanor, 'Half of world's wealth now in hands of 1% of population - report' *The Guardian* (13 October 2015) <<https://www.theguardian.com/money/2015/oct/13/half-world-wealth-in-hands-population-inequality-report>>.

inter alia by the breaking up of institutions (see, e.g. Brexit;⁹⁴ the recent upsurge of nationalism⁹⁵ e.g. France; the rise in populism e.g. Donald Trump;⁹⁶ among others).

Constitutions establish a political vision and a system that provides an institutional space in which the affairs of a multitude become the matter of collective deliberation and action.⁹⁷ And yet, global constitutionalisation has remained somewhat stagnant due to the fact that powerful developed economies are more interested in facilitating the smooth transfer of (natural and financial) resources into their own economies, either directly or through their multinational corporations. Furthermore, traditional powerful economies have for decades strategically positioned themselves at the centre of supranational institutions in order to ensure that their interests are preserved within the new world order. Less powerful economies have had limited influence in the creation and operation of the supranational legal and political system. Moreover, when less powerful economies have developed and the hegemonic control of powerful nation-states has been challenged this has been traditionally met with the imposition of economic sanctions, trade conditions, isolation, direct interference in national affairs, regime change and other compliance mechanisms. There will never be any trust between nation-states and global stakeholders at the foundations of international relations if this remains the status quo.

A global constitution is needed as a more suitable and sustainable political proposition that is able to respond to our political ideals in our role as global citizens, which could then bring greater accountability and responsibility to this imbalanced world. I suggest that wide-ranging discussions on the role of constitutions at a global level will 'test the waters' as to the transnational nature of the law and

⁹⁴ L Elliott, 'Brexit is a rejection of globalisation' *The Guardian* (26 June 2016) <<https://www.theguardian.com/business/2016/jun/26/brexit-is-the-rejection-of-globalisation>>.

⁹⁵ 'Rise of nationalism one of world's real dangers, says Minister' (14 November 2016) <<http://www.ambafrance-uk.org/Rise-of-nationalism-one-of-real-dangers-for-world-today-Minister>>.

⁹⁶ A Taub, 'Trump's victory and the rise of white populism' *The New York Times* (9 November 2016) <http://www.nytimes.com/2016/11/10/world/americas/trump-white-populism-europe-united-states.html?_r=0>.

⁹⁷ (n 38), 43.

supranational law-making, which would hopefully bring additional arguments that advocate for a global constitution. Public international law has focused too much on the mechanics of law, i.e. sources of law, procedures and institutions of inter-state diplomacy—instead of thinking forward on the broader role of the law in this new world of political, social and economic globalisation. Whether through international constitutionalism,⁹⁸ by way of constitutionalisation,⁹⁹ or by means of global administrative law,¹⁰⁰ there seems to be a consensus among scholars on the need for a comprehensive global framework that regulates the new global order, especially now that power has moved beyond national governments into the realm of international and transnational spheres.

It makes more sense to speak about the transformation of the state power than the end of the state; but, instead of a transformation, as suggested by Held et al., I would propose an evolution of the state, which genuinely reflects this new international political and legal landscape. This would mean repositioning political equality, social justice and liberty at the heart of a coherent global political project, which is strong enough for a world where power is exercised on a transnational scale.¹⁰¹ Global political theories that are capable of reflecting and interpreting the challenges posed by globalisation, and

⁹⁸ What is international constitutionalism remains disputed; the debate has produced a great number of different ‘constitutionalisms’, ranging from emphases on human rights and judicial review in international institutions to broader calls for a legalisation of post-national politics and visions of a global order subject to an identifiable document. N Walker, ‘Taking Constitutionalism beyond the State’, in Dobner and Loughlin (n 12), 251-2.

⁹⁹ Constitutionalisation stands as an expression of a set of processes that are now having a significant impact on decision making at all levels of government – local, regional, national, transnational and international. It involves the attempt to subject all governmental action within a designated field to the structures, processes, principles and values of a ‘constitution’ (n 21), 47.

¹⁰⁰ Global Administrative Law (GAL) starts from the insight that much of global governance can be understood in administrative terms, as global administration that operates in a ‘global administrative space’ in which the boundaries between the domestic and international spheres have largely broken down. N Krishch, ‘Global Administrative Law and the Constitutional Ambition’ in Dobner and Loughlin (n 12), 255.

¹⁰¹ (n 62), 496.

the acceptance that world politics is nowadays more complex than state-centred politics remain in their infancy.¹⁰²

It is obvious that, so far, there have been winners and losers of globalisation and serious tensions are arising from the disconnection between international policies, its institutions and peoples. Powerful countries should no longer be allowed to hide behind 'national interest' to attain their own geopolitical goals; to unsustainably exploit natural resources; to rationalise territorial expansionism; or to justify lack of action. Globalisation presents new opportunities to improve policy effectiveness and to tackle international problems that require global and local interventions, such as: the prevention of conflict and war, poverty, climate change and environmental protection. International peace and security could only be maintained efficiently by the establishment of an international community whose main organ is an international court endowed with compulsory jurisdiction.¹⁰³ Collective action requires institutional devices that compel the subordination of single states under a collective will to be effective.¹⁰⁴

Undoubtedly, globalisation, through its different conduits, has transformed the world and could potentially be a source of good for all. However, the prevailing imbalanced power dynamics in the world order should be redressed by the adoption of a credible legally binding constitution that protects the equality of all the states.¹⁰⁵ Equality before international law of all member states of the family of nations is an invariable quality derived from their international personality.¹⁰⁶ Therefore, nations should be able to influence the supranational framework, so that their collective visions and aspirations are reflected within these global governance structures. Most importantly, those structures should be responsive to the collective needs of all states, so that the level of ownership, credibility and legitimacy makes this new set of international relations successful.

¹⁰² (n 47), 216.

¹⁰³ H Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organisation' (1944) 53 YLJ 207, 214.

¹⁰⁴ UK Preuss, 'Equality of States: Its Meaning in a Constitutionalised Global Order' (2008) 9 Chic J Intl L 17, 30.

¹⁰⁵ Lassar Openheim, 1 International Law: A Treatise (H Lauterpacht, ed) S 115 (6th edn, Longman 1947), 238.

¹⁰⁶ *ibid.*

Constitutions establish a political vision, which provides a legitimate institutional space in which the affairs of a multitude become the matter of collective deliberation and action.¹⁰⁷ In a globalised world, all nations must face the challenge of bringing humanity together to resolve the problems that affect us all; putting aside their differences and national interests. One can only hope that the signature and ratification of a document that could take the form of a global constitution could signal a new chapter in global politics where the collective interests of humankind take precedent over the interests of individual nation-states.

¹⁰⁷ (n 38), 43.