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THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW AFTER LIBERALISM

ABSTRACT Many political changes that have taken place across the world in the last decade have been connected with the spill-over of a new narrative in the public dimension. Among other things, this narrative has emphasized returning control over the public space to the people once again, revitalization of the democratic community, restraint on an expansion of judicial power over representational politics, and in many instances, a specific national approach to the questions of governance. These trends have gained the name "illiberal democracy", a description which Viktor Orban introduced into the language of political practice a few years later. Indeed, in many countries worldwide, from the United States of America (USA) during the presidency of Donald Trump, Central and Eastern Europe, to Turkey and Venezuela, it has been possible to observe changes which had the principal *leitmotif* to negate liberal democracy as the only possibility of organizing public space within the state. These trends are continuing, and there are no signs of them disappearing in the near future. The new dispensation in the USA under President Biden also does not guarantee an immediate return to the liberal internationalism of the 1990s.[1] Political changes directed toward the constitutional space of the State have inspired researchers to consider the issues of new constitutionalism, new forms of democracy, and the rule of law beyond liberalism.

This article is an attempt to transfer these considerations to the international level. The text aims to consider whether withdrawal from the liberal doctrine could also be observed on an international level and what these facts could mean for the intellectual project of constitutionalization of international law.

[1] In the American context, after J. Biden's presidential election, there is talk of *tempered restoration* rather than restoring the state of affairs from the Obama administration: J.E. Alvarez, "International Law in a Biden Administration", *New York University Journal of International Law and Politics (JILP)*, forthcoming.

Building upon reflections on constitutionalism and constitutionalization of international law, this text presents what has up until now been the mainstream understanding of international law as a liberal construct. This showcases the illiberal turn observed among certain countries as exemplified by the anti-liberal and realist language of their constitutional representatives. In this respect, this analysis is a modest contribution to the so far nascent field of sociology of international law. However, the main endeavor of this article is to unchain the notions of international liberalism and constitutionalization of international law as being popularly understood as two sides of the same coin. Consequently, the idea of political constitutionalism of international law is introduced. Seeing things from this perspective, this text focuses on the material rather than formal aspects of international law's constitutionalization. Within the stream of so called thick constitutionalism, there are a few elements listed with which the discussion about international law may continue to engage, if this law is to be considered as legitimate not only formally, but also substantially.

Keywords: constitutionalization, authoritarian, international, populism, illiberal, Europe, state, liberal

1. CONSTITUTIONALIZATION AND CONSTITUTIONALISM IN INTERNATIONAL LAW

Looking at the "new constitutionalism" from the perspective of public international law, it is worthwhile to note that the question of constitutionalism and constitutionalization of international law has been one of the most discussed themes in the doctrine of international law since the end of the 20th century. In fact, together with fragmentation and verticalization, constitutionalization forms the *holy trinity of the international legal debate in the early 21st century*.[2] Even if the concept of the "constitution of the international legal community" had been spelled out in the inter-war period by Alfred Verdross,[3] the origins of the contemporary debate is coupled with a diagnosis put forth in German literature[4] of an erosion of the consent principle and state sovereignty and

[2] J. Klabbers, "Setting the Scene", in J. Klabbers, A. Peters and G. Ulfstein (eds.), *The Constitutionalization of International Law*, Oxford 2009, p. 1.

[3] A. Verdross, *Die Verfassung der Völkerrechtgemeinschaft*, Wien 1926.

[4] B. Simma, "From Bilateralism to Community Interests in International Law", *Recueil des Cours de l'Academie de Droit International*, vol. 250, no. 23 (1994), pp. 217-384; C. Tomuschat, "Obligations Arising for States Without or Against Their Will", *Recueil des Cours*, vol. 241 (1993), pp. 195-374; as noted in the literature "constitutionalism and other public law approaches to international law, if not the whole discipline, have a markedly German flavour", A. Bianchi, *International Law Theories*, Oxford 2016, p. 45.

the rise of an international community.[5] The English summary of T. Kleinlein's extensive monograph on this subject starts with an informative statement: *Constitutionalization in public international law suggests that international law and its sub-orders have reached a degree of objectivity in order to limit state sovereignty like a constitutional order. For proponents of the constitutionalization thesis, public international law recognizes a common interest of humanity transcending state interests, hierarchically supreme constitutional principles set boundaries to the hitherto unlimited will of states, international organizations became relatively independent of their member states, and states are no longer left with a genuine domaine reservé. On the basis of these observations, constitutional doctrine in public international law scholarship tries to put public international law on a constitutional foundation*.[6]

The problems connected with such attempts are plausible, noting the fact that public international law differs considerably from domestic legal systems. Without a centralized legislature coupled with a unique executive and coherent enforcement power, it also comprises a growing number of judicial and quasi-judicial authorities which have overlapping competencies. Additionally, the notion of what belongs to the constitutional sphere varies, as it takes place within domestic settings where the notion of what constitutional law stands for seems to be determined by local factors. Boundaries between legal sub-disciplines sometimes seem to be rapidly disintegrating, and the disciplinary divide between law and the social sciences is in the process of being bridged, or at least renegotiated.[7] Thus, global constitutionalism can also be analyzed from an interdisciplinary perspective.[8] It is, therefore, observed that the constitutionalization of international law is much more problematic than the fragmentation of this law – the latter opening the way for varied constitutional processes taking place within international law.[9]

2. MANY FACETS OF GLOBAL CONSTITUTIONALISM

It is a difficult task to present a typology of various understandings of international constitutionalism as global constitutionalism is an interdisciplinary body of knowledge and research and is neither a coherent nor a comprehensive concept.[10] A very useful, al-

[5] A. Peters, "Fragmentation and Constitutionalization", in A. Orford, F. Hoffmann and M. Clark (eds.), *The Oxford Handbook of the Theory of International Law*, Oxford 2016, p. 1016-1017.

[6] T. Kleinlein, *Konstitutionalisierung im Völkerrecht*, Berlin 2012, p. 703.

[7] J. Klabbers, *Setting the Scene...*, p. 7.

[8] See for example: A. Peters, K. Armingeon, "Introduction – Global Constitutionalism from an Interdisciplinary Perspective", *Indiana Journal of Global Legal Studies*, vol. 16, no. 2 (2008), pp. 385-395; As noted by P. Allot, "the problem of international constitutionalism is the central challenge faced by international philosophers in the twenty-first century", P. Allot, "The Emerging Universal Legal System", *International Law Forum*, vol. 3, no. 1 (2001), pp. 12-17.

[9] E. Cała-Wacinkiewicz, *Fragmentacja prawa międzynarodowego*, Warszawa 2018, p. 272-273.

[10] C.E.J. Schwöbel, *Global Constitutionalism in International Legal Perspective*, Leiden 2011, p. 11; it seems even the distinction between constitutionalism and constitutionalization itself is a terrain of

though sometimes overlapping categorization (which the author admitted herself) of the dimensions of global constitutionalism in public international law, is presented by C. Schwöbel.[11] She lists four categories:

1. Social constitutionalism (emphasizing co-existence): The proponents belong to the "international community school" and emphasize the need for developing a global civil society approach. For this first group of authors, the existence or establishment of a community is at the centre of their attention. It can mean an international community of states, a community of all the subjects of international law, or an international community of global citizens.[12] Authors writing in this spirit advocate for a constitutional reading of the UN Charter[13] or see the subjects of international law as members of the community governed by a constitution, regulating three spheres (legislative, executive and judicial). Such a constitution is not consensual in the sense that states can be bound by obligations, even contrary to their will.[14] On the other hand, the global civil society approach, often represented by sociologists and philosophers,[15] negates the centrality of the State in the international order and promotes the notion of a global constitutionalism of civil society instead.[16]

2. Institutional constitutionalism (emphasizing governance through institutions): Here a constitutional character of international law is to be found in the law of certain international organizations, the law of which is considered to be "constitutionalizing" in a way that reaches beyond the organization itself to the international sphere.[17] In many cases, treaty-based regimes are considered as having a constitutional character since *the founding treaties of specialized institutions are often also entitled constitutions, testifying to the feasibility of them being considered as reference documents for a specialized legal order*.[18] The constitutional role of the United Nations (UN), sectoral constitutionalism (i.e. constitutional characteristics of certain international organizations and their organs), the issue of global governance and so-called compensatory constitutionalism[19] can be found within this school of thought.

debate, see conflicting views in A. Peters, K. Armingeon, *Introduction – Global Constitutionalism...*, and E. Cała-Wacinkiewicz, *Fragmentacja...*, (constitutionalism is a broader term than constitutionalization).

11 C.E.J. Schwöbel, *Global Constitutionalism...*, p. 13-49.

12 Ibid., p. 15.

13 B. Fassbender, *The United Nations Charter as the Constitution of the International Community*, Leiden 2009. For detailed presentation of various understandings of the UN Charter, see: B. Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective*, Hague 1998, p. 37-61.

14 Ch. Tomuschat, "Obligations Arising for...", p. 211.

15 It may be interesting to note that "scholarly debates in international law in Germany often count philosophers among their participants. Philosophical ideas and intellectual stances are taken seriously and integrated into the debate", A. Bianchi, *International Law...*, p. 45.

16 C.E.J. Schwöbel, *Global Constitutionalism...*, p. 17.

17 Ibid., p. 22.

18 C.E.J. Schwöbel, "Situating the Debate on Global Constitutionalism", *International Journal of Constitutional Law*, vol. 8, no. 3 (2010), p. 624.

19 On compensatory constitutionalism see for example: A. Peters, "Compensatory Constitutionalism:

3. **Normative constitutionalism** (emphasizing specific fundamental norms): Distinct from institutional constitutionalism, this vision does not necessarily have an institutional element, rather their legitimacy is derived from their inherent (moral) value. Notions of world law (*Weltrecht*), world inner law (*Weltinnerrecht*) and public order (*ordre public)*, hierarchical order, and fundamental norms (*ius coges*) can be identified within the broader framework of this analysis.

4. **Analogical constitutionalism** (emphasizing analogies to domestic and regional constitutionalism): Scholars contributing to this sphere of global constitutionalism identify constitutional principles of certain legal orders (national or regional), and describe parallel principles in the international sphere. To understand the key themes of constitutionalism that these scholars apply, it is important to look at the domestic or regional constitutions that they themselves are familiar with.[20]

It is imperative to note that apart from the aforementioned schools of thought, there can be other typologies and distinct traditions of thinking.[21] The many meanings of the concept of constitutions also imply that there are many definitions of constitutionalism. Constitutionalism can mean anything form a theoretical and philosophical political model to a normative theory or an ideology pertaining to constitutions in various meanings.[22]

3. THICK AND THIN CONSTITUTIONALISM

It is important to understand the division between 'thin' and 'thick' constitutions and the distinction between the procedural and the material elements of the thick constitution. For purpose of this analysis, it is imperative to define and understand the nature of both these categories. A thin constitution is an ensemble of secondary rules that organize the law-making institutions and processes in a given legal order. Any autonomous legal order entails a thin constitution. A thick constitution is a thin constitution, which also has more elaborate procedural elements and substantive content, such as fundamental rights and democratic principles. Through such material content, the thick constitution guarantees fundamental rights and principles, which constrain the democratic and political order it constitutes.[23] Such differentiation between substantive and formal features of constitutional norms is present in the German constitutional tradition,[24] from which spring the aforementioned schools of thought pertaining to

The Function and Potential of Fundamental International Norms and Structures", *Leiden Journal of International Law*, vol. 19, no. 3 (2006), pp. 579-610.

20 C. E. J. Schwöbel, *Global Constitutionalism...*, p. 48.

21 See for example: J. Klabbers, *Setting the Scene*..., p. 25-31; A. Bianchi, *International Law*..., pp. 46-51.

22 S. Besson, "Whose Constitution(s)? International Law, Constitutionalism, and Democracy", in J.L. Dunoff, J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge 2009, p. 387.

23 S. Besson, *Whose Constitution(s)?...*, p. 385-386.

24 See for example: G. Jellinek, *Allgemeine Staatslehre*, Bodenheim 1982.

constitutionalization of international law. In a formal sense, constitutionalism of international law lays in its supremacy *vis-à-vis* "normal" rules. Constitutionalization of international law means *the emergence of certain norms ordering the system, defining the mutual relationship between its individual elements and the structure of power (including the power to legislate). The unity of this system would be based on a hierarchy of norms within the leading meaning of the United Nations Charter*.[25] Therefore, thin constitutionalization means no more than the introduction of rules which order the system of law within which various constitutional processes co-exist. Such a positivist, formalist,[26] and deeply European[27] understanding of international law is certainly welcomed by any logically constructed structure, yet because it stops at itself just as pure normativism does, it is of limited use in the light of this text. In order to ascertain the relationship between the tendencies that govern the constitutionalism of international law and the illiberal turn among certain subjects of international law, it is important to focus on the themes of global constitutionalism in a substantive sense.

4. GLOBAL CONSTITUTIONALISM IN A SUBSTANTIVE SENSE

All the aforementioned approaches to the constitutionalization of international law have stressed on certain central concepts of thick constitutionalism. For **social constitutionalism**, the key constitutional themes that make up the building blocks are limitation of power, governance, limitation of rights, social idealism, and individual rights.[28] The key themes for those advocating **institutional constitutionalism** are the limitation of power (the first key theme) on one hand and the institutionalization of power (the second key theme) on the other.[29] Similarly, **normative constitutionalism** incorporates all the key themes, to which it adds a standard setting and protection of individual rights.[30] Finally, **analogical constitutionalism** places much emphasis on the idea of law as a system, stressing the standard-setting capacity of constitutions. Therefore, five key themes can be extracted from the aforementioned approaches:[31]

1. *Limitation of power* (largely through legal rules and institutions based on the assumption of law as being corrective),

[25] W. Czapliński, "Zasady ogólne prawa międzynarodowego", in J. Symonides, D. Pyć (eds.), *Wielka encyklopedia prawa*, t. 4: *Prawo międzynarodowe publiczne*, Warszawa 2014, p. 597.

[26] *A serious formalism is not commitment to a particular institution or a particular understanding of a rule. It is committed to the idea of law as a system of universal right and of assessing any institution, rule or judgment in view of that idea*, M. Koskenniemi, "Formalism, Fragmentation, Freedom: Kantian Themes in Today's International Law", *No Foundations – Journal of Extreme Legal Positivism*, vol. 4 (2007), p. 19.

[27] "For others (mainly Europeans), international law has value for its own sake", E.A. Posner, *The Perils of Global Legalism*, Chicago 2009, p. xii.

[28] C.E.J. Schwöbel, *Global Constitutionalism...*, p. 21.

[29] Ibid., p. 34.

[30] Ibid., p. 42.

[31] Ibid., p. 85.

2. Governance through the *institutionalization of power* (and, therewith, the constitution of a legal or political order),
3. *Social idealism*, in the sense of an ideal for the future based on societal values,
4. *Standard setting* in terms of a systematization of law by which society is thought to progress according to a fixed plan or system enshrined in constitutionalism,
5. *Protection of individual rights* (not just as a means of restraining State power but also as a State duty).

Since the above taxonomy is one of many, and at the expense of minor generalization, one can conclude that the ideas for the constitutionalization of international law presented thus far consist of several concepts, which are predominantly present in the language of dogmatic lawyers of constitutional law. This entails limitation of political power, separation of powers, accountability and control over institutions, protection of individual rights against the State, judicial review in the light of a core of universal values (principles) embracing the closed and harmonious system of law. All these notions spring from the liberal concept of law.

5. LIBERALISM, LIBERAL INTERNATIONALISM, AND INTERNATIONAL LAW

It is worth remembering that the linkages between liberalism and international law have been constant and have remained strong, at least since the conceptualization of the meaning of the Peace of Westphalia. The understanding of State sovereignty and its freedom of choices and absence of any higher authority anchored in ultimate morality was, in fact, a transposition of classic liberal ideology which, as has been observed in literature, is no grand political theory.[32] The theory provides no material legitimation for social practices, no government programmes, and no ends or values to be pursued beyond the general and formal aim of maximizing liberty.[33] Yet, the early writers on international law understood that the State could not be engaged in the Hobbesian *bellum omnium* forever, which directed states to coordinate their actions.[34] The emergence of this rational yet formal finding opened a path for "a happy mixture" of consensualist, non-consensualist, positivist, and naturalist arguments presented side by side by the professional mainstream of international lawyers in early 19th century.[35] The concept of sovereignty, often compared to individual freedom, led to the establishment of the modern international system of States, cooperating with each other on the basis of **consent**. Yet, with the passage of time, liberalism has also transformed itself from a passionately anti-democratic and ruthlessly exploitative political programme to one

[32] A. Levine, *Liberal Democracy. A Critique of its Theory*, New York 1981, p. 14.

[33] M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument*, Cambridge 2005, p. 85.

[34] Ibid., pp. 90-91.

[35] Ibid., p. 132.

committed to democracy and at least some measure of economic regulation.[36] Understood in this way, the concept of liberalism became *liberal internationalism* – central to the modern development of international law – at least in its European and North American incarnations. Its central features became a conception of international society, built on notions of state sovereignty and cooperation, but also along lines of idealism, internationalism, and institutionalism.[37] Liberal internationalists have insisted that, practically speaking, internationalism would have to involve liberal principles, liberal allies, and liberal means.[38]

The disintegration of the Soviet Union opened the way for an ideological monopoly of liberal thinking in international relations and international law and the achievement of its normative principles. With the end of the Cold war, liberalism in international law (or *international liberalism*)[39] has increasingly been presented as a positivist (explanatory) theory of international relations and international law.[40] Works of influential American writers based on the premise of the centrality of liberal values, law and the trans-national operation of a 'community of courts', among other aspects, helped in renewing interest in scholarship pertaining to international relations.[41] Democratic values were intended to be central to arguments for legitimacy within international law and for the recasting of the international system as a "world of liberal states".[42] Much like the concept of global constitutionalism,[43] the domestic analogies of liberal democracies exporting national templates to the international level[44] have been present in contemporary liberal internationalist discourse.

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36 B. Jahn, *Liberal Internationalism. Theory, History, Practice*, Basingstoke 2013, p. 67.

37 D. Joyce, "Liberal Internationalism", in A. Orford, F. Hoffmann and M. Clark (eds.), *The Oxford Handbook of the Theory of International Law*, Oxford 2016, p. 473.

38 S. Moyn, "Beyond Liberal Internationalism", *Dissent*, vol. 64, no. 1 (2017), p. 117.

39 "Liberal internationalism is a composite and dynamic phenomenon (...). The form and meaning of liberal internationalism is thus constantly in flux", B. Jahn, *Liberal Internationalism*..., p. 39.

40 R. Buchan, *International Law and the Construction of the Liberal Peace*, Oxford–Portland, OR 2013, p. 4.

41 A. Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics", *International Organization*, vol. 51, no. 4 (1997), pp. 513-553; A.-M. Slaughter, "Toward an Age of Liberal Nations", *Harvard International Law Journal*, vol. 33 (1992), pp. 393-405; A.-M. Slaughter, "International Law And International Relations Theory: A Dual Agenda", *American Journal of International Law*, vol. 87, no. 2 (1993), pp. 205-239.

42 A.-M. Burley, "Law Among Liberal States, Liberal Internationalism and the Act of State Doctrine", *Columbia Law Review*, vol. 92, no. 8 (1992), pp. 1907-1996.

43 *It appears that the current debate on global constitutionalism is tainted with biases and limitations, which, I believe, derive from investment in liberal-democratic political practice as the seemingly only available political practice with universal appeal*, C.E.J. Schwöbel, "The Appeal of the Project of Global Constitutionalism to Public International Lawyers", *German Law Journal*, vol. 13, no. 1 (2012), p. 2.

44 *What is happening is a struggle to somehow reinvent at an international level the sovereign authority it was determined to transcend in the first place*, D. Kennedy, "The International Style in Postwar Law and Policy", *Utah Law Review*, vol. 7, no. 1 (1994), p. 14.

6. GLOBAL CONSTITUTIONALISM – CARVING THE LIBERAL PROJECT IN STONE

There may be two more things that link liberal internationalism and global constitutionalism together: abstract elaboration of guiding norms and principles – the arbitrariness of their inclusion (or rejection) and the focus on predominantly limiting, conservative and overwhelmingly formalistic features of the desired liberal constitutionalism of international law. Indeed, both liberal internationalism and global constitutionalism operate on a number of abstractly enumerated values or, as some scholars prefer to call it, principles.[45] For example, A. Paulus derives principles from Western constitutional tradition, such as democracy, separation of powers, rule of law and *Rechtsstaat* (constitutional state), states' rights, human rights, equality, and solidarity.[46]

A similar approach is presented by S. Kadelbach and T. Kleinlein who have added a new dimension to the existing list of principles – respect for the environment as an international constitutional norm, which is also derived from national constitutional principles.[47] It is also said that the commitment to human rights, democracy, and the rule of law – the 'trinitarian mantra of the constitutionalist faith' – is part of the deep grammar of the modern constitutionalist tradition.[48] This is the promise of constitutionalism – the promise of the end of politics in a polity where things are done according to the rule of law, not the rule of man.[49] Yet, such a truly liberal approach to the notion of constitutionalization of international law exposes this idea to criticism. Some label it as the "imperialism" of modern constitutionalism. Following this line of thought, modern constitutionalism is characterized not so much by openness towards all, but rather by "attempts to carve in stone a liberal political project" which, like most political projects, tends to be of greater benefits to some than to others.[50] Some even

[45] *Although not static, an approach based on principles can provide a more predictable legal technique, which is particularly necessary in the absence of legitimate institutions which could deal authoritatively with the collision of values*, S. Kadelbach, T. Kleinlein, "International Law – A Constitution for Mankind: An Attempt at a Re-appraisal with an Analysis of Constitutional Principles", *German Yearbook of International Law*, vol. 50 (2007), p. 338.

[46] A.L. Paulus, "The International Legal System as a Constitution", in J.L. Dunoff, J.P. Trachtman (eds.), *Ruling the World?...*, Cambridge 2009, pp. 92-106.

[47] S. Kadelbach, T. Kleinlein, "Überstaatliches Verfassungsrecht: Zur Konstitutionalisierung im Völkerrecht", *Archiv des Völkerrechts*, vol. 44 (2006), pp. 235, 254.

[48] M. Kumm, A.F. Lang Jr., J. Tully, A. Wiener, "How Large Is the World of Global Constitutionalism", *Global Constitutionalism*, vol. 3, no. 1 (2014), p. 3.

[49] J. Klabbers, "Constitutionalism Lite", *International Organisation Law Review*, vol. 1, no. 1 (2004), p. 47.

[50] J. Tully, *Strange Multiplicity. Constitutionalism in an Age of Diversity*, Cambridge 1995; J. Tully, "The Imperialism of Modern Constitutional Democracy", in M. Loughlin, N. Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford 2007, pp. 315-338.

doubt the qualitative difference between legalization[51] and constitutionalization and continue to warn that *to grasp at values is to throw gas on the flames*.[52]

As in liberalism where "freedom from" is considered to be the central point of this ideology, formalism and the limitation of power is the *leitmotif* for the constitutionalization of international law. Coupled with its striving for de-politicization of policy-making[53] it can, therefore, be said that global constitutionalism approaches international law by asking negative questions, restraining competences, and protecting individual freedom. In addition to the attempt to build the legal system in a formal way, this trend does not specifically comment on its material content in particular – the goals that international law are supposed to serve. Respecting proportions, in this context, one can ask the question of the content and role of a constitution in general, referring to the widely discussed dispute between Kelsen and Schmitt and the latter's "essence of political experience" and his critique of the foundations of liberal constitutionalism.[54] From this point of view, there is a need to include in global constitutionalism factors such as political elements in law, changing landscape of subjects of international community, the issue of global "demos", its potential *pouvoir constituant*, participation, legitimacy, and the future of global governance, among others. Some of these elements have recently manifested themselves in the realm of world affairs.

7. ILLIBERAL TURN IN INTERNATIONAL RELATIONS AND THE RISE OF THE RADICAL 'NEW RIGHT'

The emergence of populist movements and parties on the political scene, as well as the populist rhetoric of some world leaders, has been the subject of a lively discussion over some years. Several scientific assessments of the impact of populism on international politics and consequently on international law and global constitutionalism can be cited here:

With the rise of populism across the global system, gauging populism's impact on foreign policy becomes more and more important. One particular form of contemporary populism especially on the rise in the West is radical right populism, blending nativism and anti-establishment sentiments. (...) *Nativist strains of contemporary populism are prevalent across*

[51] "The undoubted increase of law in the inter-national world ('legalization') does not translate automatically into a substantive constitution in the absence of that sense of shared 'project' or objective", M. Koskenniemi, "The Fate of Public International Law: Between Technique and Politics", *The Modern Law Review*, vol. 70, no. 1 (2007), p. 16.

[52] Ibid.

[53] "The geopolitics of neoliberalism ultimately requires a depoliticization of policy-making within and between countries: that is, a suppression of collective decision-making", D. Singh Grewal, "Three Theses on the Current Crisis of International Liberalism", *Indiana Journal of Global Legal Studies*, vol. 25, no. 2 (2018), p. 610.

[54] See also i.a., W.E. Scheuerman, "Carl Schmitt's Critique of Liberal Constitutionalism", *The Review of Politics*, vol. 58, no. 2 (1996), pp. 299-322.

America and Europe. This component of populism has major repercussions for political attitudes, particularly in the realm of foreign policy. An understanding of politics, and the world, as a battle between natives and non-natives translates to foreign policy attitudes that are skeptical of the intentions and actions of foreign countries and peoples.[55]

In this discourse, the values of global constitutionalism ought to be limited or abandoned altogether by "we, the pure people" and their "authentic" leaders who profess to care about "the ordinary person" and other denizens of the cultural, economic and political "hinterlands," nationally and internationally.[56]

However, it would be a mistake to identify this change only in the context of marginalized groups in society and to highlight only the economic basis of retreat from liberal democracy. As it has been observed, contemporary radical conservatism is a product of a decade-old attempt to craft a philosophical position capable of mounting an intellectual challenge to the contemporary liberal order, fostering political movements dedicated to its destruction, and supporting alternative political projects at the national, regional, and global levels.[57] The New Right (NR) demonstrates a similar aversion to the liberal international order. The catalyst for disagreement over the international dependence system was the financial crisis and the refugee crisis coupled with mismanaged immigration policy under successive governments. In some countries the hotspot was an increasing threat of organized crime and common violence, which successive governments failed to fight (for example, Philippines and Brazil). In addition, some of the right-wing circles are against the use of human rights mechanisms to change "the only correct morality" (for instance, the LGBT issue). The question to be asked is: do these movements want to return to the nationalist and closed nation states of the 19th century? The answer is not simplistic, but these movements do not seem to exhibit such tendencies. For example, the members of these groups themselves often benefit from the effects of globalization: electronic communication, freedom of travel, and exchangeability of currencies. However, among these movements there is almost an obsession with sovereignty and resistance to un-elected elites, as well as bureaucracies of international organizations, including international courts, which pursue their own policies, independent of the Member States. For example, in the European Union (EU) this tendency is not new. For years, the constant subject has been the detachment of the Brussels elite from the reality of the Member States and the democratic deficit of the EU. Therefore, having to choose bad politicians in Brussels, thousands of kilometers away and the same bad politicians at home, most populists would choose the latter. In the end, it will be "our" shady politics.

Populist groups and social movements have so far failed to win parliamentary elections in any of the developed countries. However, the rhetoric presented above was

[55] C. Kane, C. McCulloch, "Populism and Foreign Policy: Deepening Divisions and Decreasing Efficiency", *Global Politics Review*, vol. 3, no. 2 (2017), p. 42.

[56] R. Hirschl, "Opting Out of 'Global Constitutionalism'", *Law and Ethics of Human Rights*, vol. 12, no. 1 (2008), p. 12, 18.

[57] J.-F. Drolet, M.C. Williams, "Radical Conservatism and Global Order. International Theory and the New Right", *International Theory*, vol. 10, no. 3 (2018), p. 286.

already reflected in the programs or practices of leaders of some states (V. Orban, R. T. Erdoğan, D. Trump, J. Bolsonaro, R. Duterte). Arguments raised by the NR may also provide an explanation for the reasons for changes in international law. These, according to the findings of this study, could be:

1. The desire of states to restore sovereignty[58] (in the sense of ultimate law-making power) from international organizations: For instance, the desire of the UK government to create an ambitious relationship after Brexit that nonetheless respected the sovereignty of the UK and the autonomy of EU.
2. The desire to link international law with the raw interests of states: An example of such tendencies could be protracted negotiations at the UN Climate Change conferences or the rejection of the UN Compact on Migration by at least a dozen capitals as Europe and the US shift towards using tougher border controls to stop arrivals.
3. The desire to suppress the managerialism of the bureaucracy of international organizations: For instance, bureaucratic mechanisms augmented by the COVID-19 WHO legitimation crisis. This tendency is not new. In fact, considerable portion of the doctrine of international law engages with the classic concept of the limitation of international institutions, subjecting them to judicial review. Yet, in this case, the question is not about the international rule of law, but of stripping international institutions from effective powers to discipline member states and scrutinize their policies *vis-à-vis* general and abstract values. The prolonged dispute between the European Commission and Poland on the justice system reform is also a good example.
4. The desire to limit judges' activism at the international level: International tribunals can be very creative and capable of extending considerably the scope and reach of their jurisdiction and the rules they are entrusted to interpret. This contradicts with the still-founding principle of international litigation that the jurisdiction of international judges exists 'only because and in so far as the parties have so desired'. For example, the problem of judicial activism and even "over-intrusiveness" has been raised regarding the judicature of the EctHR.[59]
5. The desire to expand the political debate beyond the allowed "playing field" designated by liberal ideology and political correctness guarded by law: To some, there are strong reasons to question the inclusion of hate speech bans in international human rights laws.[60]
6. The desire to move away from a situation where international, mainly 'soft law' regulations, introduce ethically controversial cultural changes through the back

[58] Some authors claim that sovereignly can never be transferred on the foreign subject, therefore it can never be restored. If this is the case than we can correctly speak of "restoration of the execution of sovereignty". Practical results remain the same.

[59] See for example: F. Zarbiyev, "Judicial Activism in International Law – A Conceptual Framework for Analysis", *Journal of International Dispute Settlement*, vol. 3, no. 2 (2012), p. 276.

[60] See for example: J. Mchangama, "The Problem with Hate Speech Laws", *The Review of Faith and International Affairs*, vol. 13, no. 1 (2015), pp. 75-82.

door: Globally and regionally there are a number of controversial issues regarding the definition of family, civil unions, homosexual rights, reproductive rights, among others. More often than not, they appear in non-binding resolutions of international organizations, so-called 'soft law' acts, containing 'commitments' and having a political effect, despite opposition by states. They can also evolve into legal obligations over time (hardening of 'soft law'), which is often criticized.

For these and certainly other reasons, there is arguably a current move away from the constitutionalization of international law, in practice if not in form, as evinced by the international community's apparent paralysis, for example, in the face of the enormous number of crimes against humanity and apparent return to Cold War power politics in the context of the civil war in Syria.[61]

In the latest literature, the above trends have been structured into three expressions of constitutional resistance or defiance: secessionism, nullification, and "opting out".[62] Nullification is the idea that promotes refusal on the part of sub-national units to enforce federal laws that they deem unconstitutional.[63] From the international perspective, it takes the form of dispute between national and supra-national organizations (for instance, the EU) where the principle of subsidiarity and *ultra vires* acts are raised against the implied powers. On the other hand, neo-secessionism is understood as a broader concept in which secessionist trends have echoed the principles of international law, for instance, the right to self-determination vs. territorial integrity. It is claimed that it now comprises not only the physical partitions of countries (for example, the Catalan referendum) but also withdrawal from supra-national regimes (for example, Brexit), international organizations (US-UNESCO, WHO), institutions (Philippines- ICC), or treaties (the declared desire of the Prime Minister of UK to withdraw from the ECHR). In some instances, it overlaps with yet another trend – "opting out" of international agreements which do not fit internal policies, motivated by domestic self-interests.

In this respect, the work of Harold H. Koh is important as he criticized the isolationist trends of Donald Trump's US realism towards international law and isolationism towards international community first in his article[64] and later, in his widely discussed monograph.[65] Harold Koh stressed that the departure from liberal international order can be seen in many countries,[66] and this, according to the author, was a sign of

[61] M. Rosenfeld, "Is Global Constitutionalism Meaningful or Desirable?", *The European Journal of International Law*, vol. 25, no. 1 (2014), p. 179.

[62] R. Hirschl, *Opting Out of...*, pp. 1-36.

[63] Ibid., p. 18.

[64] H.H. Koh, "The Trump Administration and International Law", *Washburn Law Journal*, vol. 56 (2017), pp. 413-469.

[65] H.H. Koh, *The Trump Administration and International Law*, Oxford 2019; see also: http://opiniojuris.org/2018/10/16/the-trump-administration-and-international-law-a-reply/, 29 October 2018.

[66] "China, Russia, and illiberal democracies like Hungary, Poland, and Venezuela are emerging not just as spoilers of, but as active predators within, the liberal international order", H.H. Koh, "The Trump Administration and International Law", *Washburn Law Journal*, vol. 56 (2017), p. 468.

a fundamental battle: *What is ultimately at stake is a struggle between competing visions of a future world order: our current system of Kantian global governance versus a cynical system of authoritarian spheres of influence. That is why we are potentially at such a dramatic moment of change. What is being rejected now is not just a prior administration's foreign policy strategy, but a broader political philosophy of international cooperation, of the kind that philosopher Immanuel Kant talked about in his great pamphlet Perpetual Peace*.[67]

What resembles the aforementioned changes in international politics? They are certainly a manifestation of a return to realism in international relations and a retreat from liberal institutionalism. For international law, this is all the more important as it reminds of the (still) key role of the original entities of international law – states and the (still) strong method of horizontal creation of this law. The method, which, although coexisting with a vertical approach, has never been removed from international law. Does this mean the end of positivism? It is difficult to answer this question in a straightforward manner. It certainly indicates its weaknesses. However, even such concise examples open the need for interdisciplinary research by scientists involved in international law, as well as in the context of geographical and cultural differentiation. Attempts of this sort have already been made. More than half a century ago, Hans Morgenthau's plea for sociologically sensitive anti-formalism led to no serious sociology of international law and instead gave birth to a new discipline of international relations.[68] Until recently, the scant literature on the sociology of international law[69] has been brought to life more in recent years.[70] The sociological approach to international law differs from the analysis of proper international relations. It must take into account the apparatus developed under sociology of law, observe changes among actors of the international community, develop an approach to understanding the sources of law in a non-dogmatic manner, as well as refer to validating issues such as, *inter alia*, the values and legitimacy of international law.

8. THE "ILLIBERAL TURN" AND ITS IMPLICATIONS FOR CONSTITUTIONALIZATION OF INTERNATIONAL LAW

The question remains as to whether the framework of the illiberal turn in international relations implies changes to the concept of constitutionalism and constitutionalization of international law? The answer may, to begin with, depend on the standpoint represented, *vis-à-vis* the constitutionalization of international law and the manner in

[67] Ibid., p. 466.

[68] I disagree with M. Koskenniemi who claims controversially that "if law is a 'reflective' mirror of social or phenomena, ambitious minds will turn away from it", M. Koskenniemi, *The Fate of Public...*, p. 20.

[69] In the second half of the last century one English language monograph should be mentioned: B. Landheer, *On the Sociology of International Law and International Society*, Hague 1966.

[70] M. Hirsch, *Invitation to the Sociology of International Law*, Oxford 2015; M. Hirsch (ed.), *Research Handbook on the Sociology of International Law*, Cheltenham 2018.

which it reflects the reality of this law or rather imagines an ideal world. If the concept is purely normative then empirically observable counter tendencies will not change its scientific appeal, for what matters here is a pure theory of law isolated from its practical possibilities. However, this should not be the case, at least in its entirety. Evidence of "foundational problem"[71] or the "hybrid character[72] of global constitutionalism mixing strictly normative and strictly descriptive notions can also be found in literature.

If practice matters, then three answers come to mind: the first can be a paraphrase of the often (mis)quoted[73] Chinese Prime Minister's statement, who said, *it was too early to assess the implications of the French Revolution*. From this view, global constitutionalism is mainly a normative ideology, based on solid German constitutional tradition, descriptively thick, persuasive, and universalist in its ambition. From this perspective, counter trends are mainly seen as short-lived accidents, happening occasionally both in time and in space, with no power to change the course of thought once programmed.

The second answer mirrors Thomas Frank's thesis, which focusses on the working class in Kansas and how they have been supporting the Republican Party in opposition to their material interests.[74] The difference between political rhetoric and policies implemented, as observed in this book, serve as a reminder to cautiously distinguish between the declaratory vocabulary of state representatives and their ultimate behavior. An example of this can be voting patterns or signed agreements. An illustrative example can be Poland's recent conduct, a country in which the populist right-wing government uses illiberal rhetoric and undertakes anti-constitutional changes, while at the same time supporting the stability and liberal agenda of international law as a non-permanent member of the UN Security Council (2018-2019) or voting against countries of the "Global South" in the UN General Assembly.[75]

But there is also the third answer: that the illiberal turn indeed challenges the theory of global constitutionalism. The question that arises thus is: can there be constitutionalization of international law which is not liberal?

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71 W. Werner, "The Never Ending Closure: Constitutionalism and International Law", in N. Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives*, Cambridge 2009, pp. 329-368, esp. at 330-331.

72 J.G. van Mulligen, "Global Constitutionalism and the Objective Purport of the International Legal Order", *Leiden Journal of International Law*, vol. 24, no. 2 (2011), p. 279.

73 In fact, Zhou Enlai was supposed to comment on 1968 turmoil in France and not about the 1789 events.

74 Thomas Frank, *What's the Matter with Kansas? How Conservatives Won the Heart of America*, New York 2005.

75 An example of this is the UNGA resolution of 19 December 2006 on the promotion of a democratic and equitable international order for which 124 states voted in favor, against 56 and four abstentions. Australia, Canada, Japan, New Zealand, the USA, the United Kingdom and other European Union countries, including Poland, voted against the resolution. United Nations General Assembly, *Promotion of a Democratic and Equitable International Order. Resolution*, A/RES/61/160, 19 December 2006, at https://digitallibrary.un.org/record/589450, 25 November 2021.

9. TOWARDS POLITICAL CONSTITUTIONALISM IN INTERNATIONAL LAW

From an academic point of view, the juxtaposition of international liberalism and global constitutionalism shows four possible ideal types. The first, which is currently exclusively historical, is a denial of the constitutionalization of international law and, at the same time, the rejection of liberal ideology. In other words, "Hobbes's war of all against all". The denial of the thesis on the constitutionalization of international law and emphasizing the consensual character of this law, while at the same time defending the liberal character of international law is, in turn, the view that puts classically understood sovereignty as the basis of international order. In my opinion, the realism expressed in this view is difficult to defend as it denies the common values and even existence of the international community and sterilizes international law from goals that go beyond the satisfaction of individual interests of states, treating international law as a necessary evil. This is also the view, although still encountered in the statements of some politicians, which does not match the description of international reality today.

Another ideal type is the thesis on the constitutionalization of international law combined with the contestation of liberal ideology. If one were to imagine such a project of international constitutionalism, it would resemble the supreme will of the sovereign, a dictatorship of the majority, and breaking the limitations typical of liberalism: the protection of individual freedom, the separation of powers and the rule of law. This would be constitutionalism, referring to Carl Schmitt's infamous views about the need for homogeneous democracy, the distinction between friend and enemy[76] and the exclusion of heterogenous elements.[77] It would end up with a dictatorship of the oligarchy,[78] lack of respect for individual rights, and the fall of the division of powers within international institutions. It is, thus, seen that the combination of elements characteristic of liberal ideology and the thesis of the constitutionalization of international law is inevitable. Global constitutionalism cannot develop by rejecting international liberalism, which does not mean that it cannot exist beyond liberalism. Without denying the achievements of this doctrine, in particular the protection of rights, it can fill its gaps by returning to the "challenge of the political".

Contemporary criticism of international constitutionalism emphasizes this aspect of focusing on a mechanism to secure rights, and to guarantee a political process that brings about sustainable and fair compromises between diverging interests. As stated in the literature: *Although the global constitutionalist approach abandons itself from the*

[76] C. Schmitt, *The Concept of the Political*, London 2007, p. 26.

[77] On Schmitt homogeneity discourse see for example: A. Peters, "Dual Democracy", in J. Klabbers, A. Peters and G. Ulfstein (eds.), *The Constitutionalization...*, p. 308.

[78] "The debate on an international constitution will not resemble domestic constitution-making. This is so not only because the international realm lacks a pouvoir constituant but because if such presented itself, it would be empire, and the constitution it would enact would not be one of an international but an imperial realm", M. Koskenniemi, *The Fate of Public...*, p. 19.

statism of traditional international law, it does so for the price of rushing into an apolitical, morally based individualism which is characteristic for a liberal approach.[79] In his writings, Martti Koskenniemi stated: *Thinking of international law in apolitical and technical terms opened the door for expert rule and managerialism, not in competition with politics as in the domestic realm, but as a substitute for it. What we now see is an international realm where law is everywhere – the law of this or that regime – but no politics at all; no parties with projects to rule, no division of powers, and no aspiration of self-government beyond the aspiration of statehood – aspirations identified precisely as what we should escape from*.[80] And finally: *Constitutionalism is struggling because international law and global governance have become increasingly effective, thus, removing key issues from the reach of national constitutions and domestic political processes. International law, on the other hand, experiences problems because its thin, consent-oriented legitimacy base no longer appears adequate to the task. Now that international law has grown in importance, it is seen as overly formalistic and undemocratic, and a thicker, more substantive foundation seems called for*.[81] Therefore, constitutionalization of international law beyond liberalism would mean adding to the classical canon of liberal constitutional thought (the limitation of power, the institutionalization of power, social idealism, standard-setting, and the protection of individual rights)[82] the promise of a revival of politics, democratization, and a substantively rooted legitimization of international law, based on a non-orthodox understanding of this law.

This can be expressed in several ways. It seems one should start with global demos, however which in fact does not exist. After all, the globalization of international life, the growth of the importance of non-state actors forces the redefinition of the role and impact on international law of private entities with a global reach, not only as recipients but as co-shaping this legal order.[83] The fundamental change in social life caused by the COVID-19 pandemic, the wide use of on-line communication, discussions among hundreds of people across national borders in the virtual space, should support this trend. The project of constitutionalization of international law beyond liberal doctrine calls for invigoration of democracy within international law, understood as a move significantly more ambitious than "low intensity democracy", "cosmetic democracy" or "facade democracy", which in literature have been characterized as providing some of the institutions and procedures associated with modern democracy, while leaving established centers of power substantially intact.[84] Certainly, each constitution is also

[79] Ch. Volk, "Why Global Constitutionalism Does Not Live up to Its Promises", *Goettingen Journal of International Law*, vol. 4, no. 2 (2012), p. 560.

[80] M. Koskenniemi, *The Fate of Public*..., p. 29.

[81] N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford 2010, p. 3.

[82] See above, footnote 48.

[83] For example the project of expanding the notion of rulership is at the heart of recent writings by David Kennedy. See especially: D. Kennedy, *The Dark Sides of Virtue. Reassessing International Humanitarianism, Princeton*, 2004.

[84] S. Marks, *The Riddle of All Constitutions. International Law, Democracy, and the Critique of Ideology*, Oxford 2000, p. 53 and there cited literature.

a language of power. A constitution can "empower" a people through the creation of new institutions by which interests and powers can be channeled towards productive outcomes.[85]

As proposed by Anne Peters, global constitutionalism requires dual democratic mechanisms: through greater democratization of states (acting on behalf of their citizens on the world arena) but also above or via democratic relationships that cut across nation states. Here, *citizens, as the ultimate source of political authority, must be enabled to bypass their intermediaries, the states, and take direct democratic action on the supra-state level (individual track)... The two-track model does not imply a complete shift of the international institutions' accountability to natural persons, but merely suggest bringing in the global citizens as principals besides states where appropriate*.[86] Andrew Strauss and Richard Falk expressed a similar view – a vision of *democratic transnationalism which calls for the resolution of political conflict through an open transnational citizen/societal centered political process legitimized by fairness, adherence to human rights, the rule of law, and representative community participation*.[87]

One should also look at the sources of law in a non-orthodox manner. Of course, this discussion refers to the increasing role of international agreements, which do not have the rank of treaties and the validity of which is measured by whether and how the subjects of norms, rules and standards, come to accept those norms, rules and standards.[88] In short, it may be reiterated that constitutionalization of international law beyond liberalism calls for the redefinition of sources and subjects of that law beyond the "veil of ignorance". Some even say that perhaps before our very eyes a new area of law has been born – a global law that requires a systematic description of its sources, norm of creation, validity, application, and interpretation.[89]

10. INFLUENCE ON THE CONSTITUTIONALISM OF NATION STATES

And what influence can the aforementioned considerations have on the constitutionalism of nation states?

Chantal Mouffe claims that the growing dissatisfaction with politics has been caused by a common anti-political vision, an attempt to design the institutions which, through supposedly "impartial" procedures, would reconcile all conflicting interests and values. Challenging the "post-political" narratives, and borrowing from C. Schmitt, she reminds that antagonism is constitutive of "the political".[90] Therefore, if a populist shift

[85] M. Kumm, A.F. Lang Jr., J. Tully, and A. Wiener, *How Large Is the World...*, p. 6.

[86] A. Peters, *Dual Democracy...*, p. 264-265.

[87] R. Falk and A. Strauss, "The Deeper Challenges of Global Terrorism, A Democratizing Response", in D. Archibugi (ed.), *Debating Cosmopolitics*, London–New York, NY 2003, p. 203.

[88] Yet, this stand is not unproblematic; see: J. Klabbers, *Setting the Scene...*, p. 94-98.

[89] R. Domingo, *The New Global Law*, Cambridge 2011.

[90] Ch. Mouffe, *On the Political*, London 2005, p. 2, 3 and the following.

in international relations could teach us anything, it would probably be a return of the language of politics to international law, which will allow us to develop a constitutional project for this law as a project filled not only with the structure of the system but also with political content. Such a project may not be better, but certainly more honest.

Until recently, in discussions on constitutionalism, the relationship between national and international levels was seen in an emerging trend of so-called "compensatory constitutionalism".[91] Such narratives denoted a set of compatible supra-national and international institutions that fulfill functions that hitherto have been fulfilled by state constitutions. Thus, the de-constitutionalization at the national level, brought about by forces such as globalization and internationalization, was compensated for by norms enacted, implemented, and enforced at the international level, yet with the least doubtful source of legitimacy. Jürgen Habermas claimed that at the global level, the democratic procedure no longer drew its legitimizing force only, indeed not even predominantly, from political participation and the expression of political will, but rather from the general accessibility of deliberative processes whose structure grounded an expectation of rationally accepted results.[92] It is not possible to state the same with as much confidence in contemporary times.

11. CONCLUSION

This article attempted to show the myriad ways in which global constitutionalism has been defined and understood. Currently, the notion of constitutionalization of international law is still a theoretical issue. It is important to develop this concept further in order to address the future and shortcomings of international law in the classical perspective of the dynamic and static system of law, its rules and principles, and the hierarchy of norms within it. Perhaps the postulates of democratization of the international community presented at the end of this text will be implemented one day, augmented by lifestyle changes triggered by the COVID-19 pandemic. However, as of today, it should be assumed that the political change which new constitutionalism may represent will be made first at the domestic level based on the political principle of national democratic consent.

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[91] See for example: A. Peters, *Compensatory Constitutionalism...*, pp. 579-610.

[92] J. Habermas, *The Postnational Constellation. Political Essays*, Cambridge 2000, p. 110.

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