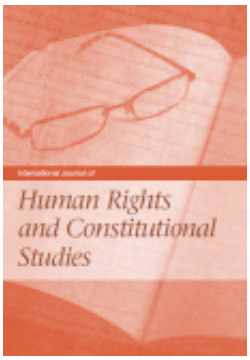

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The precursors of contemporary global constitutionalism

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Abstract: Contemporary and mainstream narratives of global constitutionalism invariably treat it a post-Cold War phenomenon. Though theories abound as to the meaning and nature of global constitutionalism ranging from descriptive to normative, it predominantly remains a scholarly endeavour with some illustrative claims of empirical validity. Given the tremendous diversity associated with the invocation of the label by a variety of academics, a precise genealogy of the concept is hard to obtain. However, an inquiry into the intellectual origins of the notion is all the more important if it has to be revised to be more inclusive, anti-imperialist and truly transformative in nature rather than be in service of reification of Western imperialism reinforced by capitalist globalisation. Besides being readily linked to the idea of globalisation, global constitutionalism is also sometimes seen to be exclusively the brainchild of German philosophers, lawyers and academics. These assumptions need to be interrogated not just as a pretext for stocktaking but for gleaning lessons from the past for conceptualising and envisioning a truly just world order that may or may not be unipolar but which centralises the idea of global peace as well as welfare.

Keywords: constitutional law; international law; global constitutionalism; World War II; Cold War; constitutionalism.

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1 Introduction

Global constitutionalism has an interesting academic pedigree. Though its origins are often traced back to the period following the end of the Cold War, its historical antecedents predate the coining and subsequent popularisation of the term 'global governance' in the late twentieth century. Incidentally, it was during this period that the globalisation discourse was dominant in academic circles. Hence, it would only seem

natural to assume that the idea of global constitutionalism was a by-product of globalisation studies having evolved as a theoretical response to the idea of governance without a government.

While the appeal of the concept in addressing crises of governance in a globalising world must be duly acknowledged, it is also necessary to revisit the dominant historiography because it is only after we get a clearer idea of how, when and where this academic pursuit began that we can actually assess its analytical and normative significance and having identified its foundational shortcomings or remarkableness, one can re-envision or refine the project for the 21st century. Global Constitutionalism 2.0 designed by a second generation of global constitutionalists must not only seek to improve upon the scholarship of their predecessors by elaborating it but also by making radical departures from it where necessary.

2 International constitutionalism in the pre-war and interwar period

The philosophical foundations of modern theories of global constitutionalism can be traced back to the writings of Immanuel Kant and his notion of cosmopolitan federation. Writing as early as 1795, Kant provided the outline of a 'pacific federation' of free states based on a form of organisation that resembled a constitutional setup at the state level (Kant, 1991). The foundation of this lawful federation, according to Kant, lay in domestic law and republicanism since a republican constitution could only guarantee domestic justice as well as cosmopolitan justice eventually. Kant contrasted a republican government (based on separation of executive and legislative powers) from a despotic one (based on unity of executive and legislative powers) and his idea of republicanism entailed a transition from the idea of state sovereignty deriving from Hobbesian tradition to one of popular sovereignty (Cavallar, 1991). Consequently, many scholars have equated Kant's conception of republicanism with modern representative democracies.

Though the federal model espoused by Kant as described above did not envisage the vesting of any coercive powers with the federation as in the case of a federal state, it was nevertheless more agreeable than his alternate model of a world republic that truly corresponded to the idea of a typical international federation which was equipped with coercive powers to enforce its decisions. In order to avoid any confusion between the two, the former model is usually referred to as a league instead of a federation and in Kant's view must be adopted as a 'negative substitute' to the world republic model. He further argued that given the lack of coercive powers with the league and the freedom to exit at will, states unwilling to surrender their sovereignty to an external power would be more inclined to join a league of states as opposed to a world republic denoting an international federation of states.

In this regard, the league could be seen as analogous to a constitution that enshrines certain normative principles that are willingly consented to by all members. Since the league had no centralised authority and was dependent upon states voluntarily signing up for its membership, it relied on voluntary commitment by member states to abide by the law of the league and their respective obligations vis-à-vis the principles of commonly accepted international right (right of nations).

Kantian notion of a lawful federation of free states arose out of his perceived shortcomings of the Westphalian model as well as the notion of *jus gentium* in ensuring perpetual peace. According to Kant, the Treaty of Westphalia did nothing to eliminate

war for good but only affirmed the rights of sovereign states to go to war. By sanctioning the use of war for political ends, Kant argued that the Westphalian model had propagated a lawless international system dominated by self-interested states eager to maintain a balance of power without committing themselves to universal principles. Similarly, Kant critiqued the principle of *jus gentium* deriving from the natural law tradition as being unable to create a lawful community of states or to provide enduring peace (Brown, 2005). Being critical of a coercive world state system as well, Kant sought to devise an alternative to both the Westphalian and global state paradigms. Thus, Kant suggested a lawful federation founded upon mutual respect for principles of universal law that were not imposed by an external authority such as a global state but crystallised through the republican civil constitutions of participating members and a contractual agreement among them for the acknowledgment of a public right to external freedom and universal coexistence that is open to ratification by new members.

Amongst the inter-war scholars of global constitutionalism, the work of Viennese jurist Alfred Verdross is arguably the most significant after Kant. He was a distinguished member of the Vienna School of Jurisprudence founded by Hans Kelsen and is also referred to as the founding father of International Constitutionalism. Influenced by Kelsen's theory of *grundnorm*, Verdross argued that the international constitution served as the *grundnorm* of the international legal system and provided the criterion of validity for all other norms (Klenlein, 2012). This view of Verdross was based on a comparison with State constitutions whereby the notion of international constitution was seen as comparable to municipal constitutions. Further, relying upon the monistic assumption regarding the primacy of international law and the unity of national and international law, Verdross maintained that besides being the basis of validity of the norms of public international law, the international constitution was also indirectly the source of the constitution of municipal legal systems.

This structural notion of an international constitution as a body of norms sitting at the top of the normative pyramid was the dominant view till 1926 when Verdross published his seminal treatise titled *The Constitution of the International Community* wherein he defined an international constitution as "those norms which deal with the structure and subdivision of, and the distribution of spheres of jurisdiction in, a community" (Verdross, 1926). Though these 'norms' were above the States, they were nevertheless deemed to be part of public international law. Accordingly, it has been suggested that the publication did not intend to elaborate the concept of a constitution of the international legal community but only defend the coherence of international law by establishing it as a unitary and fundamental legal order (Fassbender, 2009). Verdross perhaps admitted as much when he agreed that the international constitution as an empirical reality was to be understood only in a material sense and not a formal one deriving from customary international law. However, the innovative aspect of Verdross' contribution was his transfer of the concept of constitution to the international level.

In his subsequent works, however, Verdross both revisited and refined the notion of an international constitution. In his introduction to the book tiled *The Sources of Universal International Law* published in the year 1973, he elaborated the substantive contents of an international constitution as including the obligation to respect territorial sovereignty and political independence; the prohibition of the use of force; substantive provisions of the Charter of the United Nations and so on. The substantive constitution was thus composed of 'original' constitutional principles (as refined and amplified from

time to time by international customary law) and multilateral treaties (Klenlein, 2012). In another significant treatise published three years later, Verdross identified three distinct phases in the development of international constitutional law with each highlighting the importance of a distinct source of constitutional normativity (Fassbender, 2016).

The first phase was characterised by the development of constitutional principles for a non-organised community of states. These constitutional principles were not the result of treaties or international custom but arose out of informal consensus among states when modern international law was in a rudimentary stage. Verdross called these principles as 'original' or 'necessary' constitutional law since they were both antecedent to and provided the basis for customary international law as well international conventions. Accordingly, these unwritten norms specified the creators and addressees of the rules of public international law; the procedure in which these rules are created and; finally, the rules or norms imposing substantive limits on creation of rules of public international law. By specifying the sources subjects and mode of creation of international law, they may be said to have served as a kind of metaconstitution or the constitution of international law rather than the constitution of the international community. This original law is said to be the result of a hypothetical social contract or similar understanding among certain powerful and independent geographical units that their relationships would prospectively be governed by law.

The second phase was the period of constitutional development leading to the establishment of the constitution of the League of Nations. The Covenant of the League of Nations was described by Verdross as the first 'constitutional instrument' of international law although initially he saw the league as only a part of the international legal community albeit more comprehensive than others (Klenlein, 2012). The third phase could be defined as the period of transformation of the Charter of the United Nations into the formal constitution of the international community. In the initial stages, Verdross was reluctant to characterise the Charter of the United Nations as a constitution of the universal community of States due to the fact that the United Nations originally included only 51 member states. Correspondingly, it could only be described as the constitution of a 'partial structure' in the 1950s through 1960s. However, in 1973, he went on to describe the UN Charter as the 'anticipated constitution' of the community of States. Verdross pointed out that the Charter was the result of a multilateral treaty that was negotiated under the general regime of international law in force at the time thus establishing that principles of international constitutional law may have their foundations in multilateral treaties as well. Since the Charter owed its origin to an international treaty whose binding import was determined by general international law, it was said to have presupposed the existence and validity of an international law that existed prior to it. In that sense, Verdross argued that the Charter's true normative underpinnings lay in the unwritten constitution of the universal international legal community.

In Verdross' earlier writings, the normative prominence of international constitutional law, as originally defined, was attributable to the overall ordering scheme of norms not on some thick substantive justification. However, gradually he realised that the superior legal claim of norms allocating jurisdiction; defining procedures of norm-creation and determining the sources of international law did not rest solely on some 'legal logic' that placed them at the top (as some sort of delegator of legal authority) in the normative hierarchy of the international community but on also on the strength of their moral foundations. Thus, he justified the supremacy of the UN Charter not only with reference to the text contained in Article 103 but also by invoking principles of morality. The

Charter's claim as the basic law of the international community derived from the good faith of all the members who ratified it thereby not only adopting it but also affirming their resects for a body of universal law. Since the Charter's superior rank was not determined with reference to its relative structural significance vis-à-vis other norms of international law, Verdross concluded that the higher status of constitutional norms of international community was based both on 'legal logic' as well as fundamental principles of morality to which the members of the international community had pledged their allegiances (Klenlein, 2012).

The institutional achievements in the wake of World War I, namely, the establishment of League of Nations and Permanent Court of International Justice were also been regarded as 'constitutional moments' by some authors of the interwar and post-war period because of the structural changes introduced by the inauguration of these organisations of global peace and justice in the international society (Hudson, 1932). As early as the year 1918, the term 'constitution' was added to the international law lexicon when German secretary of state, Mattias Erzberger, influenced by the ideas of Woodrow Wilson proposed a draft constitution of the League of Nations in his book titled *The League of Nations: The Road to World Peace*. It was averred that the constitution of the League of Nations would not supplant the national constitutions of sovereign states but supplement them. Accordingly, the league was conceived as "a higher community of peoples joining together for the preservation of peace and their common well-being" (Erzberger, 1918). As is evident from the statement, the league pre-supposed a high degree of cohesion among the members of a community and can be seen the precursor of the idea of the idea of an international legal community that was not synonymous with a 'family of nations'. By opening up the personal scope of international law to recognise subjects other than sovereign states and acknowledging the possibility of integration of the international society under an overarching system of law, the proposal marked a departure from the erstwhile notions of sovereignty which consisted in the claim that nation states were self-contained political units operating in distinct, isolated spheres and thus could be seen as the precursor of the theories of international law that emphasise its systemic nature. Though the final document emerging as a result of the peace conference was not titled as a constitution, it was nevertheless described as the 'fundamental charter of the international society' by British lawyer and former ICJ Judge, Sir Hersch Lauterpacht (Lauterpacht, 1932). He later expanded on his idea by endorsing the formal primacy of the Covenant over any other treaty obligations despite the Covenant itself being the result of a multilateral treaty. The self-standing status of the Covenant was affirmed based on a purposive construction of Article 20 of the Covenant and well also by taking into account the overall representative character of the institution (Lauterpacht, 1936). In arriving at this conclusion, Lauterpacht borrowed insights from the scholarship of his former teacher and friend, Arnold McNair who had published seminal treatises on the law of treaties. As early as the year 1930, McNair in an article titled *The Functions and Differing Legal Character of Treaties* sought to classify treaties on the basis of their fundamental juridical character. He distinguished four types of treaties: treaties having the character of conveyances; treaties having the character of contract; law-making treaties and treaties akin to charters of incorporation. Law-making treaties were further subdivided into treaties creating constitutional international law and treaties creating or declaring ordinary international law. The former comprised treaties that brought into existence an international organisation and were intended to enhance the

constitutional law of the international society that was already present in a rudimentary form embodied in its customs and conventions. According to McNair, the constitutional treaties were of special significance since they created a "public law transcending in kind and not merely in degree the ordinary agreement between States" (McNair, 1930). As far as the practical consequences of the recognition of a class of treaties as 'constitutional treaties' is concerned, McNair suggested that it would be twofold: *first*, these treaties would not stand terminated in the event of a war between two or more contracting parties and *second*, these treaties would have third party effects. McNair's functional reading of treaties was thus meant to signify crucial transformations in the international legal system whereby its rudimentary constitutional architecture was amplified through mechanisms devised to perform law-making, administrative and adjudicatory functions in the absence of centralised institutions comparable to a modern state.

Lauterpacht's peculiar approach towards reading of multilateral treaties establishing international institutions in constitutional terms may also be found in the writings of another influential English scholar of the interwar period, namely, James Brierly who saw the emergence of institutions of international co-operation since the middle of the 19th century as the beginning of international constitutional law. Brierly's (1936) conception of constitutional law was based on a domestic analogy whereby international institutions performing functions analogous to legislative, executive and judicial functions in the national context were deemed to be the substitutes for a nascent international government.

Besides German and English scholars, a prominent French academic of the interwar period who engaged with the notion of international constitutional law prominently in his writings was Georges Scelle. Influenced by the monist school of legal thought, Scelle emphasised the unity of the global legal system. Further, placing the individual at the centre of his conception of a legal order, he asserted that 'solidarity' among individuals was the source of all law and that individuals were the only true subjects of a legal system (Kasirer, 1987). Consequently, in the hierarchy of the global legal order, the law of the people was at the top followed by interstate, supra-state and extra-state systems of law. Scelle distinguished law of the law of the people (*droit des gens*) from international law not only with reference to its normative prominence but also its scope and stated that universal solidarity trumped partial solidarities thereby implying that the interests of the global community would be superior to the interests of nations (Thierry, 1990).

Under Scellian structural arrangement, each collectivity from the highest to the lowest level was founded on a body of 'constitutive' norms that were not only necessary for its existence but also its endurance and further development. Thus, every level of society had some semblance of a constitutional law and the international society was no exception. From a comparative perspective, he argued that though the international community has no such institutions designated as the legislature, executive or the judiciary to perform essential social functions, it nevertheless has a constitutional structure which was relatively ill-defined and underdeveloped. The constitutional law of the international society was composed of laws necessary for the organisation of public power as well as those relating to collective rights and freedoms (Kasirer, 1987). The international constitutional law thus placed limits on the exercise of power and determined the scope of operation of different branches of international law.

The institutional deficiency of the international society required the enlistment of assistance from coordinate branches of national governments for the performance of its legal functions namely, law-making, enforcement and adjudication. This performance of

dual functions by the institutions of modern governance in the states who were additionally called upon to act as organs of the international society was captured by the expression 'role splitting' or *dedoublement fonctionnel* in Scellian theory. According to Scelle, though normative monism consisting in the existence of a body of ecumenical and universal law for governing the law of states was already in existence in the global society, it was yet to be complemented by a form of institutional monism that would likely result from the progressive and advanced integration of the global collectivity. Once this institutional monism was achieved, the burden of performing international duties in addition to national ones imposed on the governing institutions of national societies would automatically stand relieved.

As to how this integration of the global society would be achieved, Scelle relies on two crucial developments, namely, the demise of the state sovereignty and realisation of the principle of federalism at the global level. Scelle maintains that world federalism was predicated on the realisation of a legal and institutional hierarchy and implied the autonomy of societies above and beyond the states (Thierry, 1990).

Another French lawyer and scholar who elaborated the idea of international constitutional law albeit in a very different sense form his predecessors was Boris Mirkine-Guetzévitch who is widely regarded as one of the founders of the discipline known as comparative constitutional law. According to Mirkine-Guetzévitch, historically there were three different conceptions of the relationship between municipal law and international law, namely, parallelism implying the co-existence of distinct and independent legal orders; internationalism implying the primacy of international law over municipal law and constitutional nationalism consisting in the primacy of national constitutional law over international law. While parallelism corresponded to the idea of dualism, the other two conceptions corresponded to a monist approach. In order to ensure the viability of the international society, there was a need to conceive of practical solutions to reconcile conflicts between different legal orders. However, Mirkine-Guetzévitch did not see the position of constitution over the relationship between the two systems of law, that is, national and international law as a mere technical issue but one of fundamental significance.

In the 20-year interwar period, Mirkine-Guetzévitch noted the direct effect of international law over individuals arising as a result of the popular phenomenon of modern national constitutions embracing public international law norms. Especially evident in the constitutional practices of European nations like Germany, Spain and Austria, there was a trend towards constitutional incorporation of fundamental rules of international law as well as modification of existing constitutional texts to bring them in conformity with international treaties in the first half of the twentieth century. Influenced by these developments, Mirkine-Guetzévitch (1931) conceived of international constitutional law as a distinct discipline belonging to the family of public law. This disciplinary innovation was the result of opening of domestic law of freedom to inputs from the world law of peace and the subsequent discovery of an interface between constitutional law of nations and international relations theories. This was the period when certain founding members of the League of Nations were adopting new constitutions or revising the text of the new ones to ensure harmony between fundamental norms of national law and universal international law. By registering ratified international Conventions with the Secretariat of the League of Nations and in some cases requiring a proposed constitutional text to be placed before the League for its approval, there was a

manifest attempt to link a domestic constitutional provision with the law that defined the sphere of action of the League of Nations.

Thus, Mirkine-Guetzévitch's idea of international constitutional law was meant to reinforce the idea of the unity of public law and in a sense champion the monistic theory of the relationship between municipal and international law. In this regard, international constitutional law was not a branch or subdiscipline of public international law, nor did it simply suggest the primacy of domestic law over international law. It just emphasised the proximity of the two disciplines and the formative influence of international law in domestic politics of sovereign states operating in relative isolation from one another.

3 International constitutionalism in the post-war period

3.1 Scholarly engagement with post-World War II developments in international law

The post-war scholarship of continental Europe especially Germany has also significantly informed the debates surrounding global constitutionalism and the corresponding development of its various theories. According to von Bogdandy (2006), since the end of World War II, three distinct visions of a world order corresponding to the insights derived from major international events or military crises could be identified in the European scholarship on international law. The first vision was based on a realist appreciation of the world order and the corresponding plea for following a superpower whose interests were substantially in alignment with the interests of the European nations. This approach corresponded to the UK's vision of a global order. The French vision, on the other hand, entailed the conception of a multi-polar world with a unified and powerful Europe that was at par with other global powers. The third and the last vision was that of constitutionalism and consisted in a recasting of international law. This view was characterised by the quest for a global legal community that would direct political power towards realisation of common values and fulfilment of a common good. Attributing this vision to German scholars, von Bogdandy (2006) asserted that though it was not the exclusive approach, in German international law scholarship, it was nevertheless a recurring theme across the works of many German scholars. The continental origin of the idea of 'international constitutionalism' is also confirmed in the comparative studies of American lawyer and novelist Jed Rubenfeld who argues that the idea emerged in Europe as a consequence of the failure of the nationalist ideology in World War II (Rubenfeld, 2003).

This peculiar approach of German internationalists to imagine international law in constitutional terms, however, is attributable to a variety of historical factors instead of being solely the result of a sobering realisation in the wake of military failures and the corresponding loss of power at the global level. According to Kadelbach and Kleinlein (2007), there are four reasons for the distinctly constitutional complexion of German international law scholarship. The first pertains to the emphasis placed on the methodological significance of the idea of coherence of a legal system in conventional German legal theory. The second reason for the marked presence of constitutional themes in German publications on international law is the historical inextricability of the two disciplines based on the presumption of unity of law. The frequent invocation of the federalist framework for explaining the relationship among different units within the

national context as also among distinct sovereign entities at the international level is the third reason why constitutional ideas permeate the public law scholarship of German theorists. The fourth and final reason for the ubiquity of the constitutional themes in German international legal theory is the unique nature of the classical literature available on the subject. This preponderance of classical doctrinal resources (consisting mainly in the writings of scholars who subscribed to the idealist school of thought of international relations) has informed both modern and contemporary interventions in international political and legal theories thereby imbuing international legal scholarship with a distinct constitutional hue.

Bianchi also invokes similar arguments while distinguishing the nature of German legal scholarship by reference to its intellectual history. The systemic conception of international law; the longstanding tradition in the academy of treating international law as a branch of public law and the corresponding recognition of disciplinary contiguities between international law, constitutional law and administrative law by teachers of international law and the decisive embrace of scholarly contributions from German philosophers are the key features on which the distinctiveness of the German academic approach *vis-à-vis* international law is posited (Bianchi, 2016).

The constitutional narrative of international law in the post-war period focused on two distinct but related developments in the discipline. Encapsulated by the compendious expression 'autonomisation of international law', the first development pertained to the systematic consolidation of international law and the second related to the institutionalisation of international law. Besides implying systemic consolidation and progressive institutionalisation, autonomisation also meant the emergence of international law as a value order that sought to promote and protect the fundamental values of the international community as opposed to the interests of states.

The systemic consolidation of international law refers to the fundamental structural and substantive transformations in the field of international law since the end of World War II and its corresponding reception as a body of coherent and logically ordered rules and principles existing above and beyond the will of states. In this respect, the literature refers to an increase in the subjects of international law and as well as its normative thickening in the period following the end of World War II. It was widely agreed that these developments were suggestive of a transformation from a Westphalian model of international law identifiable with a body of diffuse multilateral and bilateral treaties without any conceivable let alone meaningful relationship among them to a constitutional system of international law comprising a body of norms that were not only related to each other in a meaningful manner but also derived their legitimacy from a source higher than individual state interests.

Among the post-war German scholars in the English-speaking world, it was Friedmann who first took note of the transformation of international law from a law of co-ordination to one of co-operation evident in the structure of international organisations setup for the purpose of realising common ends. Correspondingly, he proposed that the teaching of international law be split up into different branches one of which would be termed 'international constitutional law' (Friedmann, 1964). Friedmann's conception of international constitutional law consisted in a comparative analysis of the constitutional designs of various international bodies including those of regional organisations. The next important scholarly intervention of the post-war period came from the former judge of International Court of Justice and German Jurist, Herman Mosler who developed the

idea of an international legal community in his Hague Academy General Course Lectures in 1974. According to Mosler, the legal foundation of a society was a constitution that detailed its organisational structure and informed its functioning. While he agreed that there was no general constitution of international law, he maintained that there were nevertheless many constitutional elements to aid in the functioning of the international community (Mosler, 1980). Further, Mosler drew a distinction between a 'constitution' and an 'international public order' and in his formulation, substantive principles were not deemed essential to the idea of a constitution but were decisive components of the *order public international*. The elements of this common public order were basic, indispensable values and principles in the absence of which, the international community would cease to exist. Thus, both Friedmann and Mosler's ideas of an international constitution were confined to the development of certain formal features and institutions heralding a structural transformation of the international realm thus marking a transition from a Kantian 'state of nature' to a 'state of law' in the international society. While the most significant aspect of Friedmann's theory was the idea of institutionalisation of international law, Mosler's unique contribution was his idea of an international legal community. Both these concepts have been extensively explored and refined by the scholars of the global constitutionalist tradition after the end of the Cold War.

The systemic evolution of international law from its historical conception as a random mix of rules and principles contracted between states and thus grounded in international politics as opposed to shared interests of the international community is attributable to its expansion beyond the inter-state sphere. This phenomenon of rapid institutionalisation or organisation of the international society by legal means in twentieth century has been captured in detail by American law professor David Kennedy who set out to examine the historical background in which internationalists of the post-war period came to be obsessed with the idea of setting up more and more institutions as new subjects of international law (Kennedy, 1987). Historically, an international organisation was conceived as a sector-specific, functional institution that was created by a group of states through a multilateral treaty. The entity was composed of distinct organs that were capable of possessing independent wills which could very well be at variance with the wills of its members. Accordingly, the earliest invocation of the terminology of constitution in respect of international institutions was to distinguish the founding treaties of international institutions (which could even be labelled as such) from common international agreements. The most telling examples of this approach in the post-war can be found in the early rulings of the International Court of Justice that used the term as a shorthand for the constituent instrument of an intergovernmental organisation.[1] With respect to the United Nations, the term 'constitution' and its cognates were also used to endorse a particular hermeneutic orientation.

This development would shortly capture the attention of international law scholars and soon enough in the year 1961, McNair published a revised edition of his book titled *Law of Treaties* wherein he described a treaty establishing an international organisation as a 'constitutive treaty' and ascribed a 'public law character' to it (McNair, 1961). This was the development of an idea that he had already expressed during the interwar period. He also described treaties of these kind as semi-legislative due to the fact the parties to these treaties were a powerful group of states acting or assuming to act in a semi-legislative capacity for the entire international community. These treaties constituted an exception to the principle of *pacta tertiis nec nocent nec prosunt* and had *erga omnes* legal effect. According to McNair, constitutive treaties were initially binding

only on the states that brought a new international person into being. However, with the passage of time and the acquiescence of other states, the treaty would invariably acquire a *de jure* status *vis-à-vis* other states as well. Examples of constitutive treaties in McNair's classification included the Covenant of the League of Nations as well as the Charter of the United Nations.

However, a year later, the International Law Commission used the term constitution in a much wider sense than a multilateral agreement forming the legal basis of an international organisation. It was suggested that the legal capacity of an international organisation to enter into treaties with other subjects of international law depended on its constitution which was a comprehensive notion comprising internal rules of the organisation along with its constituent treaty (International Law Commission, 1962). By giving specific legal recognition to the legal activities of the internal organs of an international organisation, the International Law Commission underscored the autonomy of an intergovernmental institution thereby expanding the scope of an international community which is a prominent and recurring component of German scholarship on international constitutionalism.

The idea that that the foundation of an international organisation despite being the result of a multilateral convention was a fundamentally different and arguably more significant international event than regular contractual arrangements among states found resonance in the writings of Herman Mosler as well who distinguished a treaty from an organisation with reference to the attributes of the novel international being as well as its distinct legal attributes. Writing in 1980, Mosler asserted that a treaty was simply a legal instrument through which contracting parties established mutual rights and obligations or signified an intention to be bound by certain rules of conduct in mutual relations. Accordingly, it was required to be interpreted in the light of the intention of the parties having due regard to its object and purposes (Mosler, 1980). An organisation, on the other hand, was an international entity with an independent existence notwithstanding the fact that it was originally founded upon the consent of states. Further, it was characterised by a structural and institutional framework consisting in distinct organs (each circumscribed by a sphere of competence) performing various functions on its behalf. The will of the organisation was expressed in the activities of its organs and was independent of the will of its founding members.

Another qualitative difference between regular multilateral treaties and founding treaties of intergovernmental organisations that historically justified that special reading or description of the latter in constitutional terms was its dynamic nature. According to Franck, the constitutional understanding of the law of international organisations derived from the fact that it was treated differently from other branches of law by legal professionals. The ascription of constitutional character to such a body of law was premised on ability to undergo an 'organic growth' (Franck, 1964). Thus, Franck emphasised that a treaty establishing an international organisation could be characterised as a living instrument. Since the metaphor of living instrument originated in the context of domestic constitutional law to justify certain methods of interpretation by constitutional courts and implied a dynamic and evolutive approach to constitutional adjudication, the comparison of the constituent instruments of international organisations to a living organism suggested that they were capable of evolutive interpretation in the light of changing conditions and to meet contemporary exigencies.

Rosenne maintained that judicial and scholarly explication of the documents establishing international institutions in constitutional terms was based on the understanding that there was a clear conceptual difference between constituent instruments of international organisations and multilateral treaties. He argued that according to the constitutionalist position, insofar as fundamentally different rules and principles governed the mutual relationship between the parties to a multilateral treaty and the members of an international organisation, they could hardly be seen as belonging to the same *genus* (Rosenne, 1989). Consequently, he warned against seeing the developments in the law of international organisations (following a particular trajectory informed by its unique institutional features that are evidently absent in case of bilateral multilateral treaties) as 'precedents for the general law of treaties and *vice-versa*' (Rosenne, 1966).

While tracing the historical evolution of the concept of a treaty in international law, Rosenne reiterated that it was heavily influenced by private law theories of 'contract'. Over the years, this contractual orientation of international treaties was used to characterise not only bilateral agreements among sovereign states but also participation in multilateral peace conferences or international organisations. However, with the invention of complex multilateral treaties performing a range of functions including legislative ones, Rosenne argued for the liberation of international legal theory from the private law concepts having origins in domestic laws of states. It was in this context that he identified two contrasting approaches towards characterisation of constituent instruments of international organisations: one that regarded them as international treaties comparable to other multilateral agreements with certain special features and the other that sought to describe constituent instruments of intergovernmental organisations in constitutional terms as *sui generis* documents that could not be identified with an international treaty. In a later work, he seems to have embraced a dualist understanding of the constituent instruments of international organisations. Resultantly, in an attempt to reconcile autonomous legal status of an international organisation with its contractual origins, Rosenne submits that while the element of treaty is limited to the specific event of foundation of the organisation, its constitution features are, the constitutional element relates to the development of a constitution post the founding act and the corresponding development of constitutional practices and embrace of dynamism as an inherent feature of the constitutional enterprise in the functioning of the organisation (Rosenne, 1989).

Besides the emergence of functionally underpinned international institutions with independent legal authority and competences, the post-war period also witnessed another prominent constitutional development in the field of international law. This development consisted in the vertical differentiation of the field and the evolution of a normative hierarchy. Though the recognition of a body of fundamental and non-derogable norms and principles rooted in natural law as opposed to state consent dated back to the 18th century, the vertical conception of an international legal order which was neither value-free nor simply an expression of the interests of states was the result of Verdross's seminal publications of the twentieth century. In his monograph titled *Forbidden Treaties in International Law* published during the Nazi regime, Verdross questioned if rules of *jus cogens* character could be located within general international law and went on to answer it in the affirmative (Rosenne, 1989). According to Verdross, norms having the character of *jus cogens* were essentially prescriptive, unconditional and non-derogable meaning thereby that they could not be set aside by the will of the parties to a treaty. Verdross (1937) distinguished between two types of *jus cogens* norms: *first* comprising

those rules of general international law that had graduated or mutated over time to acquire a compulsory character and *second* rules prohibiting states from conduct *contra bonos mores*. The states were required to not conclude treaties contrary to these rules. The absolute, imperative and universal character of these norms was also affirmed in the later works of Verdross (1966) where he attributed their absolute character to the fact that they were meant to serve the interests of the entire international community as opposed to a group of states but it was was not until 1973 that he linked the concept to international constitutional law. In *The Sources of Universal International Law*, Verdross asserted that *jus cogens* was a part of 'necessary' constitutional law (Klenlein, 2012). In the second half of the twentieth century, the Vienna Convention on the Law of Treaties also consecrated *jus cogens* norms of international law by not only defining a peremptory norm but also by providing for consequences for its breach including but not limited to invalidation of treaties.[2] Besides *jus cogens*, the constitutionalist reading of international law in the post-war period consisting in the development of a hierarchy based on substantive values invariably sought to foreground the development of the concept of *erga omnes* by the International Court of Justice[3] and Article 103 of the Charter of the United Nations. However, their peremptory character was either deemed derivative or was contested on various grounds (Whiteman, 1977). Thus, during this period, a trend towards emergence of a concrete hierarchy of norms based grounded in public order and universal moral principles was witnessed accompanied by the hardening of international law and the corresponding transformation of the international legal order into a value order not entirely dependent on the will of states.

3.2 Documentary and institutional proposals of world order and global justice

Besides notable scholarly interventions in the form of conventional scholarship, concerted efforts by a group of intellectuals has also been responsible for the conception and systematic elaboration of documentary and institutional proposals for lasting world peace in constitutional terms. Besides conventional legal scholarship, the visions of these groups of scholars, academics and practitioners, manifested in the wake of some great international tragedy or crises of governance, can also be said to be the precursor of modern and contemporary theories of global constitutionalism. One of the earliest attempts at world constitutionalism was The Chicago Draft of a World Constitution or the 'Hutchins Constitution' that was framed by a group of scholars and intellectuals brought together by Robert Hutchins, the then president of the University as well as two of his colleagues, namely, Giuseppe Antonio Borgese and Richard McKeon in the year 1948. These scholars were of the opinion that nuclear weaponry was beyond the control of sovereign states that the international system was in crisis due to the political void created by the use of the atomic bomb. However, they also realised that this moment was opportune for laying the foundations of a new world order. The profundity of global change envisaged by these academics required vast intellectual resources that they themselves were unable to provide. Therefore, at the instance of Borgese and McKeon, Hutchins agreed to put together a committee of academics and intellectuals who would be entrusted with the task of drafting a world constitution as the first significant step towards realising meaningful global change (Rosenboim, 2017).

The Committee to Frame a World Constitution was convened for the first time in the year 1945 and at the time of publication of the Draft in the year 1947, it was composed of

six professors from the University of Chicago, four from other American universities and one from the University of Toronto in Canada. The organisation is considered to be a part of the World Federalist Movement inaugurated in the aftermath of the Second World War. The Committee's embrace of the federalist framework was quite clear in its proposal of a constitution for what its architects referred to as the Federal Republic of the World (Culbertson, 1949).

The Draft was premised on four fundamental assumptions regarding peace and global governance. The first of these assumptions pertained to the redundancy of war and the need to declare it illegitimate through law. Further, the members of the Committee presumed that universal peace was both realisable and capable of being addressed and enforced by legal means. The second assumption was regarding the indispensability of World Government. The third assumption derived from the second and it consisted in the belief that since the World Government was crucial to arresting the annihilation of the world, it was more than a fantastical notion and that the idea of a World Government could very well be translated into reality. The fourth and final assumption was that that the World Government would bear significant dividends and that its most outstanding accomplishments would be peace and justice. The final document thus contained a proposal for setting up a Federation with wide-ranging powers over subjects as diverse as taxation, communication, migration and armed forces. Additionally, an entity known as the World Bank was also sought to be established even though an organisation by that name had already been in its existence when the committee was convened. The legislative powers were supposed to be exercised by a Council whose members would be elected by a Federal Convention that in turn was envisaged as the largest representative assembly whose members would be directly elected by the people (Cassese et al., 2020). The executive organ of the World Government was composed of a President elected by the legislature. The President would have the powers of initiating federal legislation that would eventually have to be approved by the Council. Further, the President was required to appoint the Chancellor who in turn would form the Cabinet keeping in mind that the members of the Council could not be a part of the Cabinet. Finally, the judicial powers were vested in a Grand Tribunal consisting of 60 justices appointed by the President. The military was sought to be put under the control of a Chamber of Guardians and another innovative institution known as the Tribune of the People was contemplated as the spokesperson for minorities.

Though the authors contemplated various practical objections to their draft constitution, they were nevertheless convinced of its normative significance as providing a significant point of departure that would inform and inspire further debates and conversations about World Government and the problems associated with the idea (Turlington, 1949).

The world constitution was envisaged as an instrument for liberation of the colonial world because it was asserted that by becoming members of the world federation, the colonial peoples would be able to get rid of imperialism for good without incurring the costs of a potentially devastating war. However, since colonial independence was conditional upon signing up for the membership of the federation, the authors of the world constitution did not accord much significance to the political agency and right to self-determination of the disenfranchised people of the colonial world (Rosenboim, 2017).

Despite their geographical proximities and shared political and constitutional history, there was a sharp division among the members of the drafting committee that arose out of

competing visions of world order. These two conflicting approaches were represented by two different pioneers of the project. The universalist approach was championed by Borgese who insisted on a centralised and unitary World Government and a universal bill of rights that was based on principles of natural law. By contrast, McKeon's pluralism consisted in advocating a federal structure that distributed political power among different agencies and allowed for the coexistence of multiple political traditions, positions and philosophies (Rosenboim, 2017). Even though the former approach was finally accepted as evident in the final outcome of the deliberations, the history of creation of the Chicago draft was hardly an example of a political failure attributable to a utopian vision of a just world order. It was instead a reflection of the challenges inherent in the conceptualisation of a global constitution.

The Clark-Sohn Proposal of 1958 was also one of the earliest scholarly attempts at organising the world under the rule of law. Harvard Law School alum Grenville Clark and law professor, Louis B. Sohn collaborated together to come up with a detailed blueprint of a world order based on a wholesale revision of the UN Charter in their book titled *World Peace Through Law*. Aided by a realisation that world law was needed for world peace which alone could ensure complete disarmament, the authors argued that for the world law to be effective there should be world legislative and judicial institutions backed by the enforcement machinery of a world executive (Bingham, 1959). Further, they maintained that elements of this world law should be enshrined in a constitution as well as statutory instruments that would be applicable universally and constrain the ability of nations to go to war or invoke violence barring exceptional circumstances such as the use of violence in self-defence which would be considered justified (Beck, 2005). Besides complete and progressive disarmament of all nations, the establishment of a permanent world police force and an international judicial and conciliation system were central features of the Clark-Sohn proposal. The method through which an effective world law for ensuring last peace was sought to be achieved consisted in a comprehensive amendment, modification and extension of the Charter of the United Nations. Consequently, the responsibility for maintaining peace and enforcing disarmament was given to the General Assembly while the Security Council was sought to be replaced by a more comprehensive body named the Executive Council with a membership of 17 nations elected by the General Assembly (Bancroft, 1958). The right to veto was to abolished and, in its place, a qualified majority voting system was envisaged. Further, important organs of the United Nations such as the Economic and Social Council and the Trusteeship Council were required to be entrusted with greater responsibilities complemented by quite a few other bodies and institutions (Wagner, 1958).

The detailed proposal with respect to each of the central features noted above was contained in a set of seven Annexes following the original placement of Articles in the UN Charter. Annexure I pertained to disarmament requiring complete elimination of national military in all the nations in a simultaneous, proportionate and progressive fashion. Annexure II detailed the provisions regarding a United Nations Peace Force which would be the only recognised and legitimate military force for the entire world following the process of complete disarmament. Under Annexure III, there was the proposal for a world Judicial and Conciliation system consisting of a hierarchical setup of judicial institutions with the International Court of Justice at the top. The establishment of a World Development Authority to provide developmental assistance in the form of

interest-free loans and grants-in-aid to underdeveloped areas was also contemplated under the plan (Bancroft, 1958). Next, a detailed proposal with respect to the establishment of a United Nations Revenue System was also provided for under the plan. The last important feature of the Clark-Sohn proposal was a Bill of Rights proposed to appended at the end of the revised Charter of the United Nations. The purpose of the Bill of Rights was twofold:

a to reiterate the fact that the United Nations enjoyed limited powers and explicitly reserve non-delegated powers for exercise by respective member states

b guarantee protection of basic individual rights by placing limits on the activities of the United Nations.

Despite its many promising features, the Clark-Sohn proposal was not without its fair share of criticisms. The most problematic aspect of the proposal was deemed to be its endorsement of weighted voting scheme of representation. According to the revised system of representation envisaged under the plan, greater voting strength was supposed to be conferred on nations with higher populations. Nevertheless, this was only meant to account for population disparity across nations given the enhanced prominence of the General Assembly under the Charter. Accordingly, the authors themselves admitted that were not too particular about this formula of representation thereby implying a willingness to revisit the same in the light of persuasive arguments.

Another important group project that not only defined 'global constitutionalism' in a very specific way but also sought to enhance the quality of conversations around a just world order by removing the barriers of geography and discipline was the World Order Models Project (WOMP). The WOMP was an intellectual movement led by American academics Saul Mendlovitz and Richard Falk that started in the year 1961 and lasted till the end of the Cold War. It comprised a network of scholars from various disciplines including sociology, political science, philosophy and law who hailed from different parts of the world including Europe, USA, Asia and the Global South. This interdisciplinary and international research project never assumed the form of a political organisation with a specific agenda but had a decidedly pluralist research profile evident in its embrace of open-ended outputs and lack of commitment to a particular theory or methodology (McKeil, 2022). The avowed aim of this scholarly engagement was to re-imagine global politics and propose alternative world order models that were both inclusive and capable of realising just and enduring peace.

Despite differences in their civilisational backgrounds, the diverse group of WOMP scholars were united in their assumption that the current world order was in crisis. They further agreed that the international order of the decades immediately following the first half of the twentieth century was inadequate to address common global interests such as those pertaining to nuclear arms and ecological management. Accordingly, an alternative world order was required that was capable of overcoming the challenges ensuing from the current power dynamics of the world. The complex power equations among mighty nations were not only dictating all policy-making at the international level but were also the reason for an ongoing conflict that affected all mankind. The WOMPers surmised that the existing international order was not only a structural impediment to overcoming global challenges but was in most cases constitutive of those challenges as well.

According to this group of scholars, the world was comprised of three systems: states system comprising of territorial entities and banks, corporations, and media that provided

support to state structures; international governmental institutions including the United Nations as well as regional organisations in which states were the principal participants; and non-state actors and individuals acting through various social vehicles including voluntary associations, citizen groups and social movements. According to their definition of global constitutionalism, the scholars of this tradition maintained that these three layers must be permeated by a set of transnational norms, rules, procedures, and institutions necessary for the realisation of world order values (Falk, 1993a).

The 'world order values' developed by the scholars associated with the project comprised: "the minimisation of large-scale collective violence; the maximisation of social and economic wellbeing; the realisation of fundamental human rights and conditions of political justice; and the rehabilitation and maintenance of environmental quality" (Falk, 1975). WOMP's mission statement, described these values in a rather concise manner as including "peace, economic well-being, social justice, ecological balance and positive identities" (Dalby, 1999). The specific focus on world order values was also suggestive of the fact that non-coercive and accountable institutions were preferable to centralised arrangements. Thus, WOMP scholars took a great interest in social movements that sought to bring about meaningful reforms in political institutions through pragmatic means and in alignment with the world order values.

According to Falk, the theory of global constitutionalism entailed an extension of 'constitutional thinking' to the world order and that it differed from both from outmoded 19th century blueprints as well as strictly positivistic accounts of law (Falk, 1993b). Consequently, neither did it advocate the adoption of a war/peace system nor did it make an appeal for the extension of the Austinian framework to the global level (Falk, 1993a). Despite being one of the most ambitious scholarly endeavours of its time, the WOMP scholars did not choose to define global constitutionalism in purely legalistic terms or identify it with essentialised, positivistic conceptions of law grounded in notions of sanctions and effective enforcement. However, given WOMPers investment in the project of humane governance, global constitutionalism was also envisioned as a process through which democracy was widened and deepened across a range of political activities and institutions both within and beyond the state. Further, it was averred that the transformative politics envisaged by global constitutionalism would require collaborative efforts between civil society organisations and other tiers of the world in an effort to further democratise states and international organisations.

The idea of global constitutionalism espoused by WOMP also did not support centralisation of world authority as advocated by the theorists of world federalism. Consequently, it regarded the idea of integration of sovereign states or the creation of a world government as counterintuitive and one that had the potential of compounding the problem of democratic deficits (Kimijima, 2010). A world government that was not only more powerful than a scattered group of formally equal sovereign states but also operated at a much greater distance from the global citizenry was hardly a preferable alternative to other models of global governance. In contrast to proposals affirming 'globalisation from above', WOMP's global constitutionalism aimed to affirm the autonomy of global civil society in an effort to support the emergence of a globalisation from below. This was in part due to the realisation that civil society actors could effectively constitutionalise global society and enable global citizenry to control state power from below.

The world government model was however championed by Saul Mendlovitz who was one of the pioneers of the WOMP movement (McKeil, 2022). Inspired by

Grenville Clark and Louis Sohn's work, Mendlovitz remained convinced that some iteration of the world government model was not only desirable but also on its way to being realised. Nonetheless, Mendlovitz's proposal did not find favour with any other WOMP participant who either denounced it categorically for its potential to usher in global tyranny given the asymmetry of power and wealth between and among nations, or remained sceptical about the prospects of democratic world government since the preconditions were not only lacking but also inconceivable for the near future. Speaking in the context of global constitutionalism, Falk argued that it would be a mistake 'to reduce the perspective of global constitutionalism to governmental alternatives to state system' despite the apparent familiarity of a centralised system of world government equipped with coercive means (Falk, 1993a). He maintained that it was possible to apply 'constitutional thinking' to global governance without necessarily advocating the establishment of a world government.

The quest for alternative world order models undertaken by WOMP scholars was informed by 'global' rather than 'international' interests. By foregrounding common interests and values of humankind as opposed to the international society, WOMP demonstrated a commitment to realisation of cosmopolitan values since its very inception. According to Mendlovitz, "to think, feel, and act as a global citizen is the essence of world order inquiry." Falk, on the other hand, likened the endeavour to an exercise in overcoming the 'logic of Westphalia' that had seemingly lost its relevance given its inability to protect the 'most vital needs of humanity' (McKeil, 2022).

Correspondingly, WOMP's notion of global constitutionalism shared many parallels with the current theories of global constitutionalism in that it was foundationally concerned with justice and order. As Falk (1975) pointed out: "our concern with global constitutionalism implies a conception of law and order." Additionally, the conception of a 'just world order' in predominantly legal terms was also a hallmark of the WOMP's research orientation. Finally, given its thrust on critical and diagnostic engagement with the status quo and re-imagining world order in both descriptive and normative terms, the WOMP movement can be truly said to be a forerunner of the contemporary theories of global governance that seek to rely upon the doctrine of constitutionalism and usage of constitutional language to support or contradict the legitimacy of the global order.

4 Conclusions

Global constitutionalism has hitherto been a predominantly Western academic project. Despite may criticisms being levelled against it for entrenching neoliberalism in the guise of constitutionalism and exacerbating inequality among nations unleashing a new form of colonialism by means of persuasion rather than coercion, the academic exercise has not really tried to radically reinvent itself. A brief excursion into the historical beginnings of the global constitutionalist enterprise is only the first step towards getting the priorities of the global academic community right and shift the focus from institutions and macro-issues to micro-issues of concern to the planet as a whole as well as to the whole of humanity not just as citizens of disconnected nations but as inhabitants of a densely connected universe.

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Notes

1 See, e.g., *International Status of South West Africa*, Advisory Opinion, 1950 ICJ Rep. 186, 187; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 ICJ Rep. 49.51; *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, Advisory Opinion, 1955 ICJ Rep. 67, 106.

2 Vienna Convention on the Law of Treaties, Art. 53, 64.

3 *Case Concerning Barcelona Traction, Light, and Power Company, Ltd. (Belgium v. Spain)*, Judgment, 1970 ICJ Rep. 3.