

## **Critical Review**

**Dunoff, Jeffrey; Trachtman, Joel (eds.) (2009). *Ruling the World? Constitutionalism, International Law, and Global Governance*. Cambridge: Cambridge University Press**

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Global constitutionalism emerges as a legal response to globalization. By recognizing that globalization has given a global expression to certain phenomena that extend beyond the sphere of the state, this doctrine proposes mechanisms that give them global regulation towards the formation of a universal public order. Basically, the proposal of global constitutionalism offers a normative compensation to the state constitutional deficits induced by globalization<sup>1</sup>. This is a structural debate which, although still discussed within the theory international law for the most part, has broad implications in the organization and governance of international society. It is in this sense that Allott notes that «the problem behind international constitutionalism is the core challenge facing internationalist philosophers in the twenty first century»<sup>2</sup>.

The book *Ruling the World? Constitutionalism, International Law, and Global Governance* provides a starting point to put this current important debate into context and to extend it to other fields such as International Relations.

Organized by Jeffrey Dunoff – professor of International Law at Temple University – and by Joel Trachtman – professor of International Law at Tufts University –, this collective work brings together contributions from thirteen prestigious authors, a total of thirteen chapters organized into three distinct parts<sup>3</sup>. The first part<sup>4</sup> sets global

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<sup>1</sup> Peters, Anne (2009). «The Merits of Global Constitutionalism». *Indiana Journal of Global Legal Studies*. 16(2): 397-411.

<sup>2</sup> Allott, Philip (2001). «The Emerging Universal Legal System». *International Law Forum*. 3(1): 12-17, 16.

<sup>3</sup> In addition to the preface by Thomas Franck - «International Institutions: Why Constitutionalize?».

<sup>4</sup> Contributions from: Jeffrey Dunoff, Joel Trachtman - «A Functional Approach to International Constitutionalization» (3-35); David Kennedy - «The Mystery of Global Governance» (37-68); Andreas Paulus - «The International Legal System as a Constitution» (69-109).



constitutionalism into context while proposing an analytical framework for progressing the debate. The second part<sup>5</sup> examines the constitutional aspects of a few specific international systems often mentioned in the literature as examples of global constitutionalism: the United Nations, the European Union and the World Trade Organization. Finally, the third part<sup>6</sup> looks at some cross-cutting issues that inform this debate: relationship with state constitutionalism, constitutional pluralism and the democratic legitimacy of constitutionalism beyond the state.

A fundamental question arises immediately in the analysis of global constitutionalism: "why constitutionalize?" This is actually a question that Thomas Franck asks right in the preface. The answer may lie in the need to complement national constitutionalism and adapt it to the global situation, which states cannot address by themselves. The dilution of the power of the state into other political levels beyond its own, the increasingly stronger demand for the globalization of democracy, development, and of respect for human rights, chained to the practice of "good governance", trigger new constituent impulses that complement and reverse national constitutional systems. The creation of a constitutionalized global public order would thus be an imperative of reason. It is in this sense that Andreas Paulus recognizes the potential of global constitutionalism so that the world is governed by rules of law that go beyond the logic of power.

Although there may be an intrinsic goodness transmitted by the followers of this doctrine, which aims to organize international society according to international standards and principles characteristic of state constitutional orders that limit power and guarantee fundamental rights, the answer to the question "why constitutionalize?" does not end here. First, this is because this doctrinal construction is also a reflection of the anxiety that informs current international law regarding its nature and its value. As Jeffrey Dunoff warns, the "constitutional discourse" may be a defence reaction of internationalist jurists. On the other hand, the structuring power of liberalism is currently present in International Law<sup>7</sup>. Accordingly, as underlined by Joel Trachtman using the World Trade Organization as an example, constitutionalization also stems from an increasing need to produce International Law that promotes liberalization. It is in this sense that David Kennedy draws attention to the fact that the "metaphor" of constitutionalism runs the risk of offering an institutional platform leading to the spread of universal ethics, when ethical pluralism is what is required.

The existence of a global constitutional order is, nevertheless, a premise of this doctrine. As Bardo Fassbender points out, this is not a creation exercise, rather a revelation or rediscovery (and, it should be added, eventual progressive development). Instead, David Kennedy defends that the global constitutional order has yet to be

<sup>5</sup> Contributions from: Michael Doyle - «The UN Charter - a Global Constitution?» (113-132); Bardo Fassbender - «Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order» (133-147); Neil Walker - «Reframing EU Constitutionalism» (149-176); Jeffrey Dunoff - «The Politics of Internationalism Constitutions: The Curious Case of the World Trade Organization»; Joel Trachtman - «Constitutional Economics of the World Trade Organization» (206-229).

<sup>6</sup> Contributions from: Stephen Gardbaum - «Human Rights and International Constitutionalism» (233-257); Mathias Kumm - «The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State» (258-324); Daniel Halberstam - «Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States» (326-355); Miguel Poiares Maduro - «Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism» (356-379); Samantha Besson - «Whose Constitution(s)? International Law, Constitutionalism, and Democracy» (381-407).

<sup>7</sup> Koskeniemi, Martti (2005). *From Apology to Utopia: The Structure of International Legal Argument*. Cambridge: Cambridge University Press.



created. In any case, the work assumes that premise and presents three examples traditionally identified in the literature as manifestations of global constitutionalism. The first example goes back to the United Nations Charter. Both Michael Doyle and Bardo Fassbender, departing from a somehow formal exercise of comparing the Charter with the "constitution-type" (the state one), see the United Nations Charter as the "constitution of the international community". This is a structural issue to which this doctrine, understandably, pays special attention. The possibility of the United Nations Charter taking this status permits not only seeing the Charter as the matrix of international public order, but also considering the United Nations as the centre of global governance. Secondly, the European Union is often invoked as a model of constitutionalism beyond the state, which Neil Walker and also Daniel Halberstam refer to. However, it has also been argued, with some assertiveness, that it cannot serve as a model for global constitutionalism due to its specificities and unique characteristics – it is a regional process based on political and cultural consensus<sup>8</sup>. Moreover, the present integration political crisis that the European Union is experiencing attests how difficult it is to "constitutionalize" beyond the state. Finally, the third example refers to the World Trade Organization. Whereas Joel Trachtman acknowledges that it is part of the international constitutional matrix, Jeffrey Dunoff, in turn, adopts a slightly more cautious stance, refusing that the Organization may be considered a constitutionalized entity, whilst accepting that it might be seen as such when there is greater openness and participation. In addition to these three examples, it would be relevant if the book also paid particular attention to the International Criminal Court and to the Security Council as a reflection of the trend towards the creation of "organs of sovereignty" in the context of global public order.

One of the major challenges facing global constitutionalism is the constant (but impossible) comparison, even competition, with state constitutionalism. To overcome the difficulties stemming from this, Mathias Kumm introduces a new paradigm in the discourse on constitutionalism – cosmopolitanism. Thus, constitutionalism would be conceived within a cosmopolitan dimension, not merely state-based. This would pave the way for a pluralist perspective of global public order regarding the relationship between the domestic law of states and international law, overcoming the insufficient and conflicting explanations offered by monistic and dualistic theories. It is along these lines that Stephen Gardbaum concludes that the international system of human rights does not merely replicate the catalogue of fundamental rights of state constitutions: There is a difference between the rights of individuals and the rights of citizens of a state. Similarly, Miguel Poiares Maduro argues that courts should adapt their ways of reasoning and their institutional role to the new constitutional context in which they operate. The ever-present and much debated question of the legitimacy of International Law can also find new ways here. In this regard, Samantha Besson mentions the advantage of a pluralistic form of legitimacy inherent to international constitutionalism, as it requires the implementation of democratic and constitutional requirements at national, regional and international levels.

The book *Ruling the World?* is an interesting contribution to our understanding of global governance in the language of constitutionalism. This is a doctrine that, in itself, is a demanding theoretical exercise. However, the intellectual appeal of the global

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<sup>8</sup> Peters, Anne (2006). «Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures». *Leiden Journal of International Law*. 19: 579-610.



constitutionalism project must be restrained by an vigilant critical exercise. First, because in the current framework of international social relations, the project risks enhancing the dynamic of the logics of power, which already influence more or less institutionalized, more or less informal mechanisms of international social relations. In this case, the intention of limiting power and creating an international dynamic underpinned by law could instead be co-opted – perhaps naively – by other type of prevailing power interactions. It might even become a Leviathan hidden under a cloak of legitimacy conferred by international law. It is worth recalling Zolo's scathing criticism to the thesis he dubbed "cosmopolitan law"<sup>9</sup>. The author draws attention to the fact that the disparity between the elite of the few rich and powerful countries and the mass of weak and poor countries cannot be solved simply by resorting to "instruments of institutional engineering and even less through the tools of 'global constitutionalism'"<sup>10</sup>. Zolo stresses that even the most liberal and democratic form of global constitutionalism will remain a fiction, since the bodies with coercive power in the context of international order coincide with the military structure formed by a small group of powers that are exempt from any judicial control.

In this book there is an apparent intention to undertake an open discussion on global constitutionalism – the very question in the title *Ruling the World?* seems to indicate it. However, the work is in fact representative of the debate taking place within this doctrine, and does not really leave way for fracturing opinions that challenge its own fundamentals or purposes. Most of the authors who contributed to the work are followers of the global constitutionalism doctrine. Although their perspectives do not always coincide, despite some critical stances almost all see global constitutionalism as a valid route to explore (with the exception of the ultra-sceptical view of David Kennedy, which contrasts sharply with that of others).

On the other hand, while addressing a topic that is based on the idea of supporting a paradigm that tends to be universal, the book reflects a distinctly "western" vision, in that the authors are all from the U.S. and Europe. *Ruling the World?* is an important contribution to the debate on global constitutionalism. However, it is also true that this work does not provide a definitive answer to the question that is its title.

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<sup>9</sup> Zolo, Danilo (1997). *Cosmopolis: Prospects for World Government*. Cambridge: Polity Press.

<sup>10</sup> *Ibidem*, 121.