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## **POST-NATIONAL (INTERNATIONAL) LAW AT THE END OF HISTORY**

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### **Abstract**

The post Cold War world has seen the rise of Global Governance, a governance by international institutions that increasingly manage to bypass the traditional mechanisms of international law-making and, more importantly domestic procedures of incorporation. This has put into question the legitimacy of the international legal order for which legal scholars have put forward proposals for reform – a post-national legal order. What they see is the democratic deficit of global governance and propose models of legal order that try to fix it. However, what they do not justify is their basic assumption: why democracy (and equality and rights) in a world that is increasingly rejecting it? By not justifying this assumption legal scholars have withdrawn themselves from the next ideological debate: why are democracy and rights the best alternatives for a future legal order.

### **Introduction**

More than two decades ago, in his book *The End of History* Fukuyama (1992) came up with a bold prediction regarding the shape of the international political map in the post-Cold War world. In his book he argued that the collapse of Communism as a competing ideology has solved humanity's enduring struggle for recognition (the motor of History) with capitalist liberal democracies as the end state of History. His claim was that "if a society wanted to be modern, there was no alternative to a market economy and a democratic political system" (Fukuyama 2007). In the foreseeable future, he argued, the world would be populated with capitalist liberal democracies, with a few holdouts, that would engage in trade and commerce, and sometimes, in conflict, but that a future grand ideological conflict was off the table. Fukuyama did not give a timeline of when this world would come into existence, but it is safe to say that for the foreseeable future the globe's political map will not be Fukuyama's. After all, 'not everyone wanted to be modern' (Fukuyama 2007).

In a parallel development in the realm of international law there is a growing consensus – the classical paradigm of international law (its sources and the foundations of its legitimacy) no longer adequately describes how the international system operates, nor how and why we should consider any legal result of the system as being legitimate and worthy of deference (Krisch 2012). The process of Globalization, the rise of international organizations, of multinational corporations, of rebel groups, of international NGOs and other non-State actors, has shifted the international system from one of centrality of states to one of global governance (Dunoff and Trachtman 2009). Post-national law is on the rise, and so are scholarly proposals for its future shape.

Most of the proposals follow a specific pattern. They see the phenomenon of global governance and its legal outcomes as deficient in terms of their democratic legitimacy. The reform proposals are then geared towards fixing this democratic deficit by proposing some form of institutional reform. What they skip in their argumentation is the step of why

democracy and why should it be the bedrock of a future post-national legal order? While I believe that democracy is crucial, I also believe that by not justifying these assumptions we miss an important debate and withdraw ourselves from the ideological discussion. In order to win the argument, we first have to make it. In this review, I will look at four models of post-national law: Global Administrative Law, Pluralism, International Law as Public Law, and Constitutionalism beyond the state and see whether these proposals imagine Post-national law as the International Law at the end of History.

## **The Problem**

In 2005 the European Court of Justice (ECJ) decided the *Kadi* case, a case revolving around the conflict between UN Security Council mandated sanctions which were implemented through the legal system of the European Union, and the Union's fundamental rights obligations.<sup>1</sup> The case is a prime example of the changes that, at the time it was decided, had gathered full speed. It asked the questions: what is the relationship between the UN and the EU; are the organs of the UN bound by fundamental rights; can another international organization legally review and even frustrate the peace and security efforts of the UN Security Council given the primacy of the UN Charter through Article 103; what is the relationship of the Union with its member States in relation to possible conflicts between fundamental rights and their UN obligations?

The ECJ, following an appeal, decided to annul the EU legal act that put Kadi under sanctions using the rationale that once the UN sanctions mechanism gets internalized through EU legislation it must be in compliance with the EU's human rights norms, regardless of the EU's other obligations under the UN Charter. (De Sena and Vitucci 2009). While it couldn't invalidate the UN sanctions regime it could review 'domestic' implementing legislation and put 'domestic' rights standards first. The fundamental questions that it highlighted, however, were never fully laid to rest: how are we to manage a world that is increasingly becoming multi-layered, where the rights and obligations of governments and individuals are decided by organs and institutions that are far removed? How do we manage the inevitable conflicts of obligations that arise from states and non-state actors being part of so many regimes? How do we manage this phenomenon called Global Governance? How will and how should the *legal* system of Global Governance look like? Well there are at least four proposals on the table and this is how they look like.

## **Global Administrative Law**

Global Administrative Law (GAL) as a project and as an umbrella term focuses on studying the administrative law features of global governance (Kingsbury, Krisch et al. 2005). By global administrative law features they consider the 'vast increase in the reach and forms of transgovernmental regulation and administration' (Kingsbury, Krisch et al. 2005, at 16), in areas such as 'security, the conditions on development and financial assistance to developing countries, environmental protection, banking and financial regulation, law enforcement, telecommunications, trade in products and services, intellectual property, labor standards, and cross-border movements of populations, including refugees' (Kingsbury, Krisch et al. 2005, *ibid*). What they see is an interdependent world that attempts to answer common problems by establishing transgovernmental regulatory frameworks, 'shifting many regulatory decisions from the national to the global level' (Kingsbury, Krisch et al. 2005, *ibid*) often through non-standard mechanisms and international regimes. Global regulation is done not only through

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<sup>1</sup> T-315/01 - *Kadi v Council and Commission*, Court of First Instance of the European Union, 21 September 2005.

state centric mechanisms, like international organizations, but through transnational networks that are a mesh of public agencies, private organizations and international bodies.

The result of this rise in global governance is that the rules that can govern the conduct and the rights of individuals is, increasingly, made by entities that the classical conceptions of sovereignty, authority and legitimacy do not cover. It is at this point that the familiar story of international law brakes down. GAL is a way to both explain a changing world and offer solutions to what is seen as common phenomena. A map of the world painted in the GAL brush would look like a Jackson Pollock painting (Casini 2015): a lot of different colours and clusters of paint connected by streaks denoting possible connections between clusters and the effects that they might have on different paint drops.

When it comes to reform proposals, most GAL scholarship focuses on importing administrative law solutions to the problem of global governance. This would typically involve procedures such as notice and comment, sunshine provisions and provisions on transparency as well as creating mechanisms for participation and consultation of affected population. A good example of this would be the World Bank's requirements that come attached to projects financed by it, where the respective governments need to go through a prior and informed consultation process with affected/indigenous communities before implementing the project.

As an umbrella term it fits a copious amount of research of which I will focus on the proposal for a Pluralist legal order as represented in Krisch's *Beyond Constitutionalism* (Krisch 2012) as a comprehensive and a normative, as opposed to descriptive, account of the post-national legal order.

### **Pluralist Post-national World Order**

To understand the concept of pluralism we have to imagine the world populated with a large number of entities: states, international regimes (Koskenniemi and Leino 2002, Simma and Pulkowski 2006, Young 2012), transnational organizations and networks, private-public partnerships etc. Some of these entities interact with other entities in the system some of the time, and they increasingly interact with each other in ways that connect multiple levels of organization: sub-state, national and international. In this interaction the entities ultimately follow different sources of authority: some may follow their national constitution, some may follow the international treaty that established them, while others follow founding documents that are more akin to private contracts. The absence of an overreaching framework of rules is the defining feature of Pluralism, or at least the starting point of the Pluralist analysis. As such it offers quite a flexible approach to world governance problems, leaving the actors in the system with a lot of discretion in choosing the means and the mechanisms to achieving specific aims. In such a framework, the actors, which could range from governments to government agencies, from Multi-National Companies to individuals, can flexibly choose which regime/entity is best suited for achieving their specific aim. For Krisch this flexibility is one of the more attractive features of Pluralism.

But before we delve more deeply into Krisch's framework for the post-national world order it would be better to make a couple of distinctions regarding the range that the term Pluralism can have. Krisch himself talks about at least two other types of pluralism: Radical (systemic) and Institutional (Krisch 2012, at 71). He takes the example of radical pluralism from Neil MacCormick's (MacCormick 1999) early writing on the EU. MacCormick theorised plausible impacts of conflicting sovereignty in the EU context of two levels where the systemic units, the Member States and the EU institutions both 'had internally plausible claims to ultimate authority' (Krisch 2012, at 71).

The point of conflict emerged when they did not agree on the definitive point of authority, since for the Member States it was their own national constitutions, while for the EU

organs it was the EC/EU treaties. This could lead to having two conflicting legal outcomes that would be legal and consistent from their own internal point of reference. For MacCormick there was no overreaching legal framework that could resolve the conflict – the reason for conflict was built within the system and was a feature of it. Both levels could exist parallel to each other without ‘external coordination’ (Krisch 2012, at 72), at least not a legal one.

MacCormick later softened his views, finding the overreaching legal framework in the form of international law. What he was afraid of was the logical outcome of systemic pluralism – that legal conflicts might not have a *legal* conclusion and that other avenues might have to be explored if the conflict is to be resolved.

Which leads us to Institutional Pluralism. Institutional Pluralism, while recognizing that there are multiple levels to global governance, from sub-national, to national, to regional, to inter-regional to global (and everything in between) it presupposes that there are also overarching thick legal principles (institutions) that can help with managing and deciding legal conflicts of authority, such as: legality (rule of law), subsidiarity, due process, reasonableness, proportionality and the respect for human rights, among others (Kumm 2009, at 277).

These thick legal principles allow for conflicts to be settled around issues and concepts that are flexible but well understood and comforting, at least for lawyers. The thickness of the overarching framework moves the concept of Pluralism more towards a constitutional, or at least, a consitutionalized framework. The one thing missing for this to be a constitutional and not a pluralist framework, is the lack of predetermined hierarchy between these substantive principles, which leaves a great deal of flexibility in managing conflicts.

Nevertheless, this overarching framework is still too thick for Krisch (Krisch 2012, 76-77) and it is too close to constitutionalism, which he sees as too hierarchical and brings with it the possibility of capture, which turns a constitutional order into a hegemonic one. For him, Pluralism offers three virtues: adaptation, contestation and checks and balances. By adaptation he means that a pluralist system would allow for the ‘adaptation to new circumstances in a more rapid and less formalized way: by leaving the relationships between the legal sub-orders as undetermined’ thereby keeping them ‘open to political redefinition over time’ (Krisch 2012, at 79).

Contestation, on the other hand, is an answer to the more pessimistic views of system domination and hegemony. The creation of an architecture that has disruption and openness as its features should provide more space for contestation by weaker actors. It comes in strong and weak forms of the argument for contestation as a feature and a virtue. In the weak form it is an answer to the current (unequal) distribution of power and the possibilities of this distribution being transferred to a new constitutional arrangement. As such, the weak form of the argument is only appealing as far as the current (or a similar) unequal distribution of power lasts. Contestation is no longer interesting once we overcome the current arrangement (why should we leave wide avenues of contestation to the ‘right’ political order?) (Krisch 2012, 81-82).

In the strong form, contestation itself is seen as a feature of ‘any post-national order, not just the current one’ (Krisch 2012, at 83). The strong argument is an answer to the pessimism that in multicultural societies any institutionalization of a political order without domination or hegemony is impossible. Consequently, the response is to have avenues of contestation available to different actors, mitigating the problems of power politics to a degree. (Krisch 2012, 82-85)

Finally, the virtue of checks and balances emerges out the definition of pluralism itself; if no level can claim ultimate authority, no decision of one level can bind all others. Moreover, it is not only that no level can ultimately emerge superior, but other levels can actively veto the decisions of other levels. The result would be that ‘of a constant potential for mutual challenge:

of decisions with limited authority that may be contested through diverse channels until some (perhaps provisional) closure might be achieved' (Krisch 2012, at 86).

In the end, what Krisch proposes is systemic pluralism plus, where a pluralist post-national legal order would follow the lines of radical pluralism with a single overriding principle as a conflict of law rule – public autonomy. The reason why Krisch proposes systemic pluralism plus is because he ultimately pursues a normative project. Systemic pluralism, on the other hand, has no demands on the world; it merely describes what it sees to be the features of the current emerging order. However, Krisch does not want to surrender post-national law to the forces of history, and consequently, proposes public autonomy as the system's rule of thumb when it comes to deciding which decision, (or more precisely whose authority), to adhere to.

For Krisch, public autonomy is closely tied to the idea of self-legislation of the ability to create norms for oneself. A crucial step when thinking about public autonomy in post-national law is the conceptualization of a system comprised of associations entered into voluntarily by individuals for whatever reasons. In a national setting, where the different associations hold divergent conceptions of justice and no neutral grounds can be found to adjudicate between them, the state has a minimal role of umpire. The associations owe each other mutual respect 'merely because they are forms of individual association' (Krisch 2012, at 92) and not any other overreaching qualities. The associations can agree or not; if there is a disagreement then the system is a plural one, if an agreement is reached then it is not. The basic principle around which the system is organized is the freedom of association (also see Kukatas 2003). Krisch wishes to take Kukatas' idea and expand it to the post-national system.

However, this in itself does not bring us to public autonomy, for public autonomy cannot be equated with individual self-legislation since my self-legislation can, at the same time, deny the self-legislation of others. It is only when this self-legislation is complemented by 'a specification of the conditions under which it can coincide with everybody else's self-legislation' – when it is a 'consequence of the equal autonomy of all' (Krisch 2012, at 99) can it come in the realm of public autonomy (Habermas 1996). In Habermasian terms, 'social practices deserve the attribute 'public autonomy' when they concretize the discursive requirements that allow all to be the authors of the rules to which they are subject' (Krisch 2012, at 99).

However, this Habermasian framework is designed with the nation state in mind where the national polity is pre-defined. If it were not the case, like in the situation of a post-national system, we would get in a problem of infinite regression, where the polity that specifies the conditions where my self-legislation coincides with everybody else's under the conditions of equal autonomy for all, has to be constituted under conditions of public autonomy, which is supposed to be specified by a polity that is constituted under conditions of public autonomy, and on and on. It is turtles all the way down.

This is where the notion of justification comes into play since an authority that wishes to be seen as legitimate and worthy of being followed also has to give an account of how it satisfies the conditions of public autonomy. Consequently, once we consider that the basic principle of organization within this system is public autonomy then the rule of thumb for deciding which authority to adhere to is to go with the one that better accounts for public autonomy. In Krisch's words 'where a polity shows a strong mobilization of deliberative resources or puts forward an effective claim to respect for particular values, it might gain standing vis-à-vis others, and it might endow institutions that represent it with a strong position in the global institutional interplay' (Krisch 2012) at 102.

Krisch offers a rich account of one of the possible ways in which we can organize post-national law. His main thrust is to offer Pluralism as a viable alternative to the constitutionalist narrative. Consequently, most of his critics of other post-national order narratives are aimed at

constitutionalists. He comes up with a proposal that has some grounding in actual phenomenon in the international system, stemming from his GAL background. What he tries to do is to walk a tightrope between, on the one hand giving an accurate description of the structure of the international system, and on the other of trying to imagine ways in which deciding which authorities to follow when an inevitable legal conflict ensues. The mediating principle here is public autonomy.

However, what he does not do is argue why public autonomy or self-legislation should be *the* organizing principle. If, as he seems to believe, there are no overarching values underpinning the system then why should we accept public autonomy as the organizing principle? Would another principle be as equally thin and produce similar results (conflict management)? Moreover, if the final justification for why we should have public autonomy as an organizing principle is another deeper principle then wouldn't it be better to put that principle as the overarching one? If, to give an example, the reason for protecting public autonomy is that sub-systems that value public autonomy treat individuals as if they were free and equal in autonomy and dignity, then wouldn't it be better to consider human dignity as the organizing principle and the rule of thumb to be that the authority/sub-system that protects human dignity better should be the one that we prioritize?

### **International Law as Public Law**

Another placeholder of post-national order narratives is International Law as Public Law (IL as PL). As the name suggests, scholars in this field study the features of international law through the lens of Public Law. It is a project that has been pursued mostly by scholars centred around the Max Planck Institute<sup>2</sup> in Heidelberg and it involves using notions of law specifically developed for national (statist settings) and extending them as a way to understand certain features of Global Governance. Moreover, it is a *legal* response to studying Global Governance phenomena and its greatest concern lies with the impact of unilateral acts (through the exercise of unilateral authority) on individual freedom.

Specifically, 'Public law, at least in a liberal and democratic tradition, concerns the tension between unilateral authority and individual freedom, and is a necessary requirement for the legitimacy of public authority, which is both constituted and limited by public law' (von Bogdandy, Dann et al. 2010, at 5). Therefore, the focus of *legal* analysis should be on the exercise of international public authority by various actors. For them, an entity is a public authority when it poses 'the legal capacity to *determine* others and to reduce their freedom, i.e. to unilaterally shape their legal or factual situation' (von Bogdandy, Dann et al. 2010, at 11, emphasis in original).

The way that international public authorities exercise this capacity is by producing standard (usually legal) instruments which can be formally binding, such as decisions of international courts, or non-binding, like the UN human rights bodies' commentaries on their respective treaties. What is important is that this determination modifies the legal situation of the subject without their consent. The situation is considered modified if a subjects' subsequent action that conflicts with the authority's determination is deemed either illegal (if it is a binding/formal act) or if it incurs some cost for noncompliance (von Bogdandy, Dann et al. 2010, at 11-12).

What makes a public authority international, however, is the fact that it is created and exercises its public authority through an international act, be it binding or non-binding. Accordingly, they 'exercise authority attributed to them by [other] political collectives' (von

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<sup>2</sup> Max Planck Institute for Comparative Public Law and International Law based in Heidelberg, Germany.

Bogdandy, Dann et al. 2010, at 13) and it is this limitation to *legal* forms of analysis of *legal* acts and actions which separates IL as PL from other post-national law projects.

The ultimate goal of the analysis of IL as PL and international public authorities is to look at the problem of global governance from a legal perspective and to come to the table with solutions to the vacuum of legitimacy created by the changes in the international system. For IL as PL scholars, the readily available accounts of legitimacy found in liberal democratic theories of Public law proves too tempting to ignore. The challenge is to adapt those theories to a global setting.

One of the best accounts of this adaptation is von Bogdandy and Venzke's book, *In Whose Name* (Bogdandy and Venzke 2014). The book analyses international courts and tribunals (ICTs) as international public authorities and offers some clues as to how public law theories can be adapted to the international system to improve the (democratic) legitimacy of both the ICTs and the wider international system. Their argument is built on three building blocks: multifunctionality, international public authority, and democracy. They end with a discussion of the consequences of the different accounts of legitimacy on the way that ICTs should be (re)structured in order to better comply with those accounts.

They start their account with a discussion of three conceptions of ICTs: the state-oriented conception, the organs of the value based international community and the concept of ICTs as institutions of legal regimes. The yardstick for their analysis of these accounts is the praxis of the ICTs themselves and find the three accounts wanting especially in their understanding of ICTs, their multifunctionality and their power as public authorities.

The first account sees ICTs as one of many mechanisms of dispute settlement that states can turn to in order to solve their disputes. In this account, ICTs are consigned to managing the dispute in front of them; the ICTs themselves have no long term goals except to provide a service to states (e.g. Posner and Yoo 2005); the cases settled by ICTs have no legal effect outside of the case settled by them, in the words of Article 38 of the ICJ statute, judicial decisions are evidence of the law but never create the law. The legitimacy of ICTs is given and evaluated by states. For von Bogdandy and Venzke, this account fails to do justice to the praxis of ICTs in at least two ways: the fact that 'international disputes involving private actors are proliferating vigorously' nullifying the state-centric concept of a world order and that 'there is hardly a case that does *not* affect the general development of the law beyond the concrete context of a dispute' (Bogdandy and Venzke 2014, at 45).

In the second account, ICTs are seen as organs of an international value based community. It is in the community's name that the ICTs render their decisions, and it is the community's values that are the yardsticks when interpreting international norms (e.g. (Robinson 2008). Consequently, ICTs not only resolve disputes but promote community values and interests at the same time. They have multiple functions and they derive their legitimacy from effectively performing these functions and not just from state consent (Bogdandy and Venzke 2014, 44-47). In this sense, international law has been transformed from law governing the peaceful relationships of states to *Humanity's Law* (Teitel 2011).

The problems with this account are numerous, least of all in the fact that it does not offer an account of the community itself. For one: is the community something that is larger than the sum of its parts (is it something greater and different than the combination of states)? How do the courts get access to the will of the community given the diversity within the members of this community, especially if we include non-state actors? Moreover, in a world resembling structural pluralism, whose values do the ICTs uphold? In the end the authors find that this account 'falls short in capturing the role of [ICTs] in the world economy' and as a basis for legitimacy 'that compliments states' consent remains largely nebulous' (Bogdandy and Venzke 2014, at 78).

The third account of ICTs as institutions of legal regimes starts with the expansion of international organizations (IO) and regimes in the twentieth century and their virtual explosion since the end of the cold war. As the influence of IOs and regimes grew so did that their institutions, ICTs among them gaining a particular prominence in a globalized world. As such ICTs have multiple functions, chiefly among is the maintenance of the regime itself. Moreover, in a fragmented world they increasingly set the regime's inside/outside rules.

The drawback with this account is that it hardly leaves room for international law at all in the sense that ICTs, by becoming regime institutions, take care of maintaining the regimes rules. In that sense international/post-national law either becomes a conglomerate of the rules found in regimes (especially inside/outside rules) or a residual, something that is left behind when all of the regime rules are subtracted. As an account of legitimacy, it is difficult to see how the legitimacy of the ICTs differs from the legitimacy account of the regimes themselves, a very piecemeal operation at best. (Bogdandy and Venzke 2014, 95-100).

Consequently, what the authors do is to view ICTs as public authorities created and constrained by public law; they are key actors in global governance. Following the criteria of assessment discussed above, they consider ICTs to be public authorities due to their rule creating nature and their impact on the rights and obligations of not just states but, at times, of individuals. These criteria provide 'a shared basic conception for national, supranational and international institutions' (Bogdandy and Venzke 2014, at 113). As public authorities and especially as legislators that can create positive law without going through the filter of national law-making process – they circumvent democratic accountability.

So how to bring back democracy into the picture? Rather than accepting one grand theory of democracy and extending it to the international field, what they attempt to do is to adapt already existing principles found in the EU Treaty (Lisbon) namely: 'citizenship (Article 9), representation (Article 10), transparency, deliberation, participation, responsiveness, and control (Article 11), as well as a reorientation of domestic parliamentarism (Article 12)' (Bogdandy and Venzke 2014, at 136) to the global order. One of the main reason for choosing these principles is that unlike any theory of global democracy, these principles have resulted from democratic politics.

As building blocks they need to be re-imagined when dealing with ICTs. For instance, the main democratic subject is not 'a people' or 'peoples' (think UN Charter) but citizens – individuals endowed with rights. Unlike a collective of peoples, they re-imagine the world as populated with citizens – equal and active participants in politics and self-rule. In this sense when they talk about citizenship they mean a cosmopolitan one with the centrality of the individual, their equality as human beings with bonds of global solidarity (Bogdandy and Venzke 2014, 143-144). While unlike the EU where the basis of EU citizenship is found in its founding treaties, the basis of this new international citizenship is 'individual rights that flow from supranational sources' (Bogdandy and Venzke 2014, at 142) enforceable against national and supranational acts alike.

Nevertheless, while individuals are central, states are not completely left behind. Rather, this concept is a concept of dual democracy. The problem that arises here is that while participation by democratic national institutions in the governance of the EU is a given within the EU system, the concept breaks down when if extended to global governance. Therefore, a different type of participation or inclusion is necessary, since global collective self-determination (absent a global demos) is not a possibility.

Participation is the key word here since courts are, by design, not representative but rather isolated from daily politics. Judges do not stand for periodic elections; they are not accountable to the general electorate for a particular decision; even more they are expected to be counter majoritarian. Therefore, a direct democratic legitimation of their public authority is out of the question. However, the participation of other democratic institutions is key. For the

EU that is provided by the dual representation of the EU Parliament (representative of the EU citizens) and the European Council (as the representative of EU Member governments) both of which are involved in the election of the Court of Justice of the EU (CJEU).

Again, what works for the EU would not easily work for global governance. While some representative institutions exist, especially on a regional level, like the parliamentary assemblies of the Council of Europe, or NATO, it can hardly be said that the democratic principle would be satisfied by such institutions, even if they would be ubiquitous throughout the various regimes. If they are not enough, then how can democracy be supplemented in a global governance setting?

Again the EU comes as an inspiration through Article 11 promoting ‘public debates and open, transparent, regular dialogue between institutions and citizens’ (Bogdandy and Venzke 2014, at 151). Institutions legitimated through indirect elections (like parliamentary assemblies mentioned above) can contribute to democratic legitimation ‘if their procedures and practices are inclusive’ (Bogdandy and Venzke 2014 *ibid*, emphasis in original). Their contribution can be, when ICTs are concerned, through the election of judges or the production of soft law. Consequently, when ICTs draw upon soft law they should consider the inclusiveness of the process that produced them.

However, representation alone, while indispensable is also not exhaustive of the principle of democracy. ‘Transparency, the involvement of affected individuals, and dialogue’ (Bogdandy and Venzke 2014, at 152) are of particular importance. While they deepen democratic legitimation, they cannot supplant it. ICTs find themselves on both sides of transparency: the judicial process should be conducted through a transparent procedure as much as possible; on the other side they contribute to the transparency of other institutions by ‘lay[ing] out clearly the principled arguments, the de facto assumptions, and the objectives aimed for’ (Bogdandy and Venzke 2014, at 153). Moreover, the ICT should allow for greater participation by affected parties, not just the disputing parties (e.g. through third party participation or *amicus* briefs of NGOs) and allow for a real dialogue with them through answering their substantive arguments.

The rest of the book implements the building blocks and comes out with concrete proposals for increasing the democratic legitimacy of ICTs: through the procedures for the selecting of judges, through the changes in the judicial process to allow for more participation and dialogue, through methods of justification and argumentation. In the end it finishes with a discussion that echoes the book’s title: in whose name should ICTs deliver their judgments?

The book is an expansion and a test of the international law as public law proposal for a post-national legal order. It strives to re-imagine legitimacy in the global governance. It’s unstated aim is to displace the current teaching of international law from the familiar discussion on subjects (states), objects (their relations) and sources towards a study of institutions and the fundamental *legal* norms that constitute and define them. And yes, it is also a foray in re-imagining the legitimacy of the international system by injecting principles of democracy as *the* source of legitimacy. As a proposal it a mixture of constitutionalism and GAL and uses elements of both in their discussion. In the next part I will elaborate more on constitutionalism accounts of post-national law.

## **Constitutionalism Beyond the State**

As the title suggests, Constitutionalism beyond the state is closely connected to the rise of Constitutionalism within the state. As a period it can be traced back to the end of the twentieth century when many of the former dictatorships started crumbling. As a concept it is closely connected to the idea of taming politics, or at least the political options of powerful actors, within the confines of the law i.e. a constitution. Crucially, it is not just that politics as

a process is constrained by creating procedures by which governments can make decisions, but through the creation of rights catalogues.

Constitutionalism beyond the state is just that, creating legal constraints on the decision-making of international actors (Klabbers, Peters et al. 2009) with some proponents putting human rights at its centre. There are variations to the view of such Constitutionalism, with some looking at Constitutionalism as an amalgam of constitutional type arrangements which produce thick rules of thumb that manage global governance, namely: legality or rule of law, human rights, subsidiarity, complementarity, due process, reasonableness, proportionality. It goes beyond the traditional notion of *jus cogens* as norms above all norms; the norms listed above are not *jus cogens* (like the prohibition of aggression), but rather that they are indispensable to a well-functioning international system. Moreover, they maybe legitimacy criteria for the system of global governance.

One of the thicker accounts of Constitutionalism beyond the state is *The Constitutionalization of International Law* (Klabbers, Peters et al. 2009). The argument in the book covers both current legal developments that point toward a constitutionalized system and re-imagining the future system and its legitimacy. The crust of the legitimacy argument is an exploration into rethinking democracy in a globalized world.

The book starts with mapping the various international institutions and their jurisdiction, highlighting the issues of the relationship between them, the relationship with their members and their accountability underscored by the rule of law. It continues with an exploration into the changes of law-making within international law and the complexities that that reveals for the classical international law narrative on legitimacy.

The exploration into global democracy starts with a discussion of what is it to say that there is such a thing as an international legal community. A community is more than the sum of its parts; it accounts for closeness and the existence of mutual relationships between its members. Moreover, being a *legal* community, those relationships are governed by law as opposed to force. In addition, once we conceive the legal community as a constitutional one, it invokes the principle of democracy and the possibility that in the long term natural persons will be involved in the making of international law (Klabbers, Peters et al. 2009, 153-155).

For Peters, the way towards getting individual involvement in international law-making is through the individual right to participation. This starts from NGO participation in the workings of different international institutions like their consultation and input in the making of soft-law instruments. Moreover, certain international programs, like the World Bank, issue guidelines which require that World Bank funded projects which affects indigenous peoples need go through a process of free, prior and informed consultation. In addition, the Human Rights Committee interprets Article 27 of the ICCPR<sup>3</sup> (Minority rights) to require states to allow for the participation of representatives of minorities when adopting government regulation that affects the rights of the minority. Likewise, individuals enjoy standing to initiate legal proceedings against acts which affect them, allowing for arguments created by individuals to circumvent the Article 38 process of law-making and become norms through judicial legislation.

Moreover, it is not only that individuals have the possibility to participate or be consulted in norm-making, they also have the capability to individually enforce their rights. In a multi-level world order national courts can often enforce rights for which an international enforcement mechanism is lacking through their implementation procedures. This goes beyond core human rights and includes legal rights gained through investment protection. In a post-

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<sup>3</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> (accessed 29 June 2016)

national order, the inside/outside barrier between national and international law/right is not as crisp (Klabbers, Peters et al. 2009, 172-178)

A further shift in a constitutionalist mind-set is the notion that states are not only constituent powers of the international system, they are also constituted powers, in the sense that post-national law defines what states are and what powers they possess. This, furthermore, prompts the question: is there a quality that the states need to possess for them to be considered constituent powers in a world of global governance? What the discussion regarding the right to democracy (Marks 2000), and the Responsibility to Protect (R2P) and the military interventions, like the one in Kosovo, certainly point towards a quality that states need to possess in order to exercise full sovereignty. Moreover, holding states responsible despite their exercise of sovereignty certainly points towards 'the transformation of international law into a constitutionalized system' (Klabbers, Peters et al. 2009 at 190). In addition, in a constitutionalized order, 'states are not ends in themselves, but merely instrumental for the rights and needs of individuals' (Klabbers, Peters et al. 2009 at 201).

All this brings us to the question of dual democracy. However, unlike the dual democracy talked about von Bogdandy and Venzke, Peters has in mind something else. For her, even if all states become democratic and, therefore, allow for democratic input into international law-making (the first track), this would not fix the legitimacy problem of international law. In a constitutionalist setting, citizens, 'as the ultimate source of political authority, must be enabled to bypass [...] the states, and take democratic action on the supra-state level' (Klabbers, Peters et al. 2009 at 265). Unlike von Bogdandy and Venzke's dual democracy, here the ultimate goal is dual accountability: global governance institutions are to be accountable to 'a dual constituency: states and citizens' (Klabbers, Peters et al. 2009 at 265).

After reviewing 'informal' (deliberation, participation and contestation) as opposed to 'formal' democratic models she concludes that they 'are not real substitute[s] for formal democracy' (Klabbers, Peters et al. 2009 at 270). They are, however, crucial first steps into democratization of global governance. Therefore, the democratization of global governance should proceed on two tracks: the first, the democratization of global governance through democratic nation states; and the second the establishment of a global (cosmopolitan) citizenship, increasing the role of global Civil Society actors and changing the institutional design of non-state actors to facilitate democratic deliberation (like participation of NGOs, notice and comment, hearings). The end state is not the creation of a global demos but certainly of making individuals the source of political authority in the international setting.

### **Post-national law as the law at the end of History?**

What Fukuyama envisioned in his book *the End of History* was a world in which liberal democracies not only flourish, but are virtually ubiquitous. In Fukuyama's global political map, it makes sense that the legal system is post-national. In a world of liberal democracies having a democratic legitimacy to global governance institutions is crucial if we wish to have legitimate law.

Unfortunately, we do not live in Fukuyama's world and trends suggest that it will not come about in the foreseeable future. For instance, Freedom House reports that in 2016 of 195 states 44% are free, 30% are partially free and 26 % are not free. In terms the world's population 40% live in states that are deemed free, while 24% and 36% in partially free and not free states, respectively.<sup>4</sup> Moreover, the trend of increasing freedom in the world that marked the end of

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<sup>4</sup> Anxious Dictators, Wavering Democracies: Global Freedom under Pressure, Freedom in the World 2016, Freedom House, 2016, available at: <http://www.freedomhouse.org/report/freedom-world/freedom-world-2016> (accessed 06 July 2016).

the Cold War is now in its tenth year of decline. In short, it is not only that liberal democracy has not prevailed, it is in retreat.

And yet, some of the best minds in the international legal world work on proposals for shaping the future of the international legal order that seem to be a perfect fit for Fukuyama's end of History. What most of the reform proposals are driven by is critics of global governance's democratic deficit. Even the umbrella GAL studies are in part driven not just by the desire to discover what global governance actually looks like and what are its consequences, but to offer reform proposals for what it sees as un-democratic practices (Napolitano 2015, Savino 2015). Moreover, its suggestions like: transparency, notice and comment and participation of affected groups are taken un-critically from their domestic law counterparts without the necessary reflection of whether all or even most of the world share the values that those suggestions are designed to protect.

And this brings me to the crux of the problem with the post-national law proposals – they do not justify why the global governance phenomenon needs to be democratic. It is an unsubstantiated and often overlooked assumption that what the world needs and wants is more democracy. It is not that the authors use crude and unsophisticated analysis of the current state of the world, but quite the opposite. They come to the table with all the tools of post-modern thought regarding the world's diversity; it is just that they are convinced that the different theories on the table, like cosmopolitan democracy or Habermas' democratic discourse theory offers a viable buffer for it. Even Krisch's radical pluralism plus proposal balks at the obvious consequences – at times, judged from their internal points of reference, the different layers of global governance will think of themselves as in the right and the other wrong and that the criteria for answering the question who decides in such cases will not reflect the layers' values.

It is not only that not everyone wants to be 'modern' (think the Islamic State). Rather some (think China or Russia) try to re-define what it means to *be* modern. The way they see it, it is possible to have industrialization and the technological trappings of modernity without liberal democracy and market economy. Democracy and rights are an option rather than a necessary step in the pursuit of development. Have them if you so desire but they are not essential to the fight against poverty or the creation of a middle class, they would say. And in terms of the link between democracy, rights and development, they may be correct.<sup>5</sup>

By not publically defending our commitment to liberal democracy (and rights), by not saying why it is a good thing, we miss an opportunity to both remind ourselves of why it matters or why it is so closely tied to the concept of human dignity; and to convince others of liberal democracy's virtues and strengths. Moreover, by not acknowledging our assumptions, by assuming that they are reasonable and shared by all (at least all who are honest in their statements) we talk down to others, dismiss their arguments out of hand and appear arrogant. At best we are silent, at worst we are condescending. Liberal democracy (and rights) is an ideology and we have ceded the ground in this ideological struggle. It is time we take it back.

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<sup>5</sup> Human rights & democracy statistics, Gapminder Foundation, available at: <https://www.youtube.com/watch?v=QNX31t7Cees> (last accessed 6 July 2016).

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