DEVELOPMENTS

Book Review - The Quest for a Founding Norm: Constitutionalization of International Law Revisited – A Review of Nicholas Tsagourias, ed., *Transnational Constitutionalism: International and European Models* (2007)

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[Nicholas Tsagourias ed., *Transnational Constitutionalism: International and European Models* (2007) Cambridge University Press: Cambridge, ISBN: 978-0-521-87204-1, pp. 377]

A. Introduction: The Project of Constitutionalization of International Law

The topic of constitutionalization of international law (with European law to be considered for the present purposes as also being part of international law) has been under intense debate for at least the last couple of years,[1] and is the topic of the book edited by Nicholas Tsagourias, from the University of Bristol,[2] which I will review here. While there has been a lot of discussion on the subject, it still seems to be unclear whether the constitutionalization of international law can be labeled a "project" – meaning something that is being designed and yet to be accomplished – or a "phenomenon" – indicating something that already exists, and is only being described, or at worst refined by scholarship. The title of this section makes my stance on the subject clear: at the present moment there are in reality

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[1] See for instance the seminal book TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY (Ronald St. John MacDonald and Douglas M. Johnston eds., 2005).

[2] TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN MODELS (Nicholas Tsagourias ed., 2007).

https://doi.org/10.1017/S2071832200000869 Published online by Cambridge University Press

clear elements of a certain type of constitutionalization in international law, but these elements have not reached the maturity for one to speak of "phenomenon", at least not a generalized one.

One of the reasons for my having such an opinion is the lack of an overarching value-based fundamental norm (*Grundnorm*). This is naturally related to a rather thick version of constitutionalism, to use Tsagourias' distinction in the book's Introduction.[3] If one chooses a thinner version of constitutionalism to talk about the international level, then there probably are more elements to argue for the existence of constitutionalism as a phenomenon, even though I still believe a *Grundnorm* – or at least a version of it – is essential for both thick and thin versions of constitutionalism.

In this review, thus, I will outline the main points advanced by the various contributors. The structure of the review will be somewhat different from that of the book. I will first of all analyze the question of the comparison between municipal and international constitutionalism (with some regard to the notion of sovereignty), to subsequently look at the role that legal principles as abstract, generalized norms play in this project. I will also look at the institutional interfaces both at the European and general international levels, and finally I will briefly outline some of the main contrasts between European and general international constitutionalism. My main argument, outlined in the last part of this review, is that human rights should fill the void caused by the lack of a fundamental norm. In this sense, general international constitutionalism is to play a larger role, as European constitutionalism is, to a large extent, still oriented towards the achievement of economic goals, and, even when economic integration processes are pursuing non-economic goals, they are forced by their own discourse, upon which the European integration process was built, to translate other values into economic goals, or at least to highlight their effects on economic goals.

B. Internal and International Constitutionalism

A common feature of works examining international constitutionalism is that they try to compare international constitutionalism with state constitutionalism. As Tsagourias properly points out, though, the state should not be the standard for comparison, as the dynamics of post-state spaces are very different, and even state-

[3] Nicholas Tsagourias, *Introduction – Constitutionalism: a theoretical roadmap* in TRANSNATIONAL CONSTITUTIONALISM, 1, 2-3 (Nicholas Tsagourias ed., 2007).

based accounts of constitutionalism are often based on abstract and unreal models.[4] Furthermore, "the international has no 'demos' in the sense of a body-politic that can bind its members", and "in a polyvalent order such as the international, constitutionalism may be more about normative neutrality and accommodation of differences than about the projection of a common value system."[5]

These differences between the national and international systems are remarkable and cannot be overlooked, but the drawing of comparisons can be useful for understanding the processes of the international society, at least at an abstract and theoretical level, if these differences are taken into account. In many ways, these differences relate as well to the concept of sovereignty, the erosion of which is one of the main foundations for the project of the constitutionalization of international law. As the Westphalian concept of sovereignty is overcome, or at least re-invented, one can inquire into the possibility of establishing one universal state. The basic premise of Westphalian sovereignty is that states are self-enclosed units, and that states behave towards one another in constant mistrust, similar to the "state of nature" that precedes the social contract in municipal constitutional theory.

This is what Patrick Capps examines in his chapter.[6] He analyzes the nature of legal obligations and how they can contribute to re-creating a sort of "social contract" in international law. He starts by affirming that international obligations are not generally binding on states as an objective set of norms, but rather that as a rule states voluntarily bind to the norms they choose to, and not to the whole body of them.[7]

He affirms next that the foundational norm of the international order is one that affirms that consent is law-creating for states, and that this foundational norm must have been consented to at some point.[8] While this fundamental norm seems to be what it takes to "rescue" the international legal order from a "state of nature-like" status, Hobbes, according to Capps's reading, argues that it is actually states' self-interest that causes states to act civilly towards one another, creating a minimum

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[4] *Id.*, 4-5.

[5] *Id.*, 6.

[6] Patrick Capps, *The rejection of the universal state*, in TRANSNATIONAL CONSTITUTIONALISM, 17 (Nicholas Tsagourias ed., 2007).

[7] *Id.*, 19.

[8] *Id.*, 20.

sociability, and thus a minimum social order.[9] However, this self-interest gives rise to mistrust, which will eventually spiral out of control and will only be ameliorated when a social contract is established.[10]

The minimum requirements of what the social contract is meant to achieve can also be seen, from a Lockean perspective, in the horizontal international society, namely, the existence of guarded co-operation (because of the mistrust amongst states) and government by a minimum set of rules (natural or positive), which are neither created nor enforced by a universal state.[11] But the logic that justifies the sovereign state does not necessarily imply the universal state, and this is referred to by Capps as the "discontinuity thesis".[12]

The discontinuity thesis offers three arguments in its favor. The first one is that the universal state is "impractical against standards of effectiveness or legitimacy". This means saying that a centralized rule-making authority, universal membership and a hierarchy of institutions cannot always be found in the international legal order.[13] The second is that the state behaves differently from natural individuals. This proposition can acquire several meanings: it can be interpreted as saying that states can auto-limit themselves in a way the impulsive human being cannot (partly because the states' legal order emanates from self-regulation, and is not imposed on them); that states can co-exist without a universal state; and that states are not as vulnerable as flesh and blood human beings.[14] The third argument presented to rebut the universal state is that the state cannot be perceived as an agent in the same fashion as individual human beings.[15]

Capps concludes his analysis by invoking the Kantian cosmopolitan ideal, and by affirming that, even if a full social contract in the fashion of those celebrated within individual states cannot be reached at the international level, the next best thing, or a "surrogate" to the idea of a universal state must be sought.[16] That is to say, while

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[9] *Id.*, 23.

[10] *Id.*, 24-25.

[11] *Id.*, 27-28.

[12] *Id.*, 28.

[13] *Id.*, 30.

[14] *Id.*, 32.

[15] *Id.*, 29.

[16] *Id.*, 41.

Westphalian sovereignty, and the "state of nature-like" situation created by it still exists, alternatives can and must be sought, at the expense of re-interpreting the boundaries of state sovereignty.

Another look at the municipal/international constitutionalism distinction is offered by Pavlos Eleftheriadis.[17] He essentially argues that analogies with internal constitutional efforts in the context of the European Union (EU) mislead people into neglecting the complexity of the EU. He defends a new and unique cosmopolitan framework for determining the role of states in the EU's institutional system.[18] He looks at four models of decision-making: (1) formal equality, in which states have equal representation on the formal basis of their sovereignty; (2) criterial equality, according to which states are represented based on some feature other than sovereignty; (3) formal inequality, in which states are treated differently independent of substantive criteria to justify the distinction; and (4) criterial inequality, in which some state is given less power based on some substantive criterion.[19]

Eleftheriadis transposes this general theory into the specific context of the EU, and uses it to come to the conclusion that the EU uses more than one of these categories in different areas of action.[20] He also concludes that the treaties are complied with based not only on a theory of constitutional legal positivism, but also on the idea of a duty of respect and solidarity towards the other parties.[21] In a way, this recalls Capps's argument that it is not subordination, but coordination and self-regulation that characterize the international legal order.

The issue of sovereignty also occupies Bardo Fassbender in the book.[22] He argues that to discuss the idea of an international constitutional order necessarily means discussing sovereignty.[23] The transfer of constitutional ideas and language has

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[17] Pavlos Eleftheriadis, *The standing of states in the European Union*, in TRANSNATIONAL CONSTITUTIONALISM, 44 (Nicholas Tsagourias ed., 2007).

[18] *Id.*, 45-46.

[19] *Id.*, 50-53.

[20] *Id.*, 69.

[21] *Id.*, 57.

[22] Bardo Fassbender, *The meaning of international constitutional law*, in TRANSNATIONAL CONSTITUTIONALISM, 307 (Nicholas Tsagourias ed., 2007).

[23] *Id.*, 308.

become almost uncontroversial nowadays,[24] and it is understood that one can speak of international constitutionalism without meaning a "world state".

Fassbender concludes that the project of constitutionalization of international law is not necessarily a threat to state sovereignty. If anything, a constitution of the world community protects the legal authority and autonomy of states against unlawful interventions, similar to the protection of fundamental rights and freedoms of individuals at the municipal constitutional level.[25]

Wouter Werner also discusses the project of international constitutionalism in light of municipal constitutional language.[26] He argues that the "way of using the language of constitutionalism is based on two desiderata: to remain within the boundaries of positive law, and to contribute to a normative, internationalist project."[27] Werner suggests that international constitutionalism draws on national constitutionalism and borrows "the notion of the constitution as the foundation of a hierarchically structured legal order that unifies a community and regulates (limits) the exercise of political power".[28]

C. The Role of Principles

In the debate over municipal and transnational constitutionalism, Elftheriadis mentions the importance of the principles of subsidiarity and proportionality in determining the roles to be played by states in the European Union.[29] A closer look at the role of principles in general is given by Nicholas Tsagourias.[30]

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[24] *Id.*, 309.

[25] *Id.*, 326.

[26] Wouter Werner, *The never-ending closure: constitutionalism and international law*, in TRANSNATIONAL CONSTITUTIONALISM, 329 (Nicholas Tsagourias ed., 2007).

[27] *Id.*, 330.

[28] *Id.*, 353.

[29] See, *supra,* note 17, 56-62.

[30] Nicholas Tsagourias, *The constitutional role of general principles of law in international and European jurisprudence*, in TRANSNATIONAL CONSTITUTIONALISM 71 (Nicholas Tsagourias ed., 2007).

Tsagourias starts by offering a typology of general principles of law. After saying that these principles often refer to legal technique or logic,[31] he goes on to explore the nature of these principles. According to one view expressed by the European Court of Justice (ECJ), general principles of law are not the lowest common denominator amongst states, but rather solutions that best advance the goals of the legal system in which they operate.[32] Even though this view was expressed in the specific context of the EU, it is clear that it can be transplanted to the municipal and general international spheres.

General principles, according to Tsagourias, are "primary propositions that refer to values or goals",[33] which "represent, define and explain the constitution of a polity and when they enter its constitutional conscience as legal precepts they become general principles of law in the sense that they translate in legal terms the normative and organisation [sic] principles of the polity".[34] These principles can be either normative-ideational or structural-organizational. The first category refers to the creator spirit behind a certain legal order (such as humanity, human rights and peace), while the second type refers to coordinates of a particular order to better organize the relations in it (such as equality, non-intervention and self-determination). Structural-organizational principles derive from normative-ideational principles and maintain some order in the general structure.[35] The *Grundnorm* that is necessary for the project of constitutionalization to get even closer to being a reality must be a normative-ideational principle. According to Tsagourias, though, international constitutionalism is more structural than normative.[36]

Tsagourias then looks at the use of general principles of law in the jurisprudence of the ECJ and the International Court of Justice (ICJ). He affirms that the choice to apply or not to apply a certain principle in many instances comes down to a question of whether to prioritize politics or law in a certain case. He suggests that the affirmation of a certain principle in political fora helps in its application in

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[31] *Id.*, 72.

[32] *Id.*, 73.

[33] *Id.*, 75.

[34] *Id.*, 76.

[35] *Id.*, 76-77.

[36] *Id.*, 81.

judicial practice.[37] Based on this use of principles, he concludes that both the EU and the international legal order possess "constitutional mindsets", but to different degrees.[38]

Julian Rivers also examines principles, but focuses on proportionality and discretion.[39] He examines the way in which discretion, or "discretionary devices", have been used to soften the use of the principle of proportionality.[40] Discretion is an "inevitable component" of a proportionality analysis, but the extent to which it is used varies tremendously, from the strict use of proportionality to the complete abandonment of some parts of the proportionality test.[41] He outlines three different types of discretion: (1) policy-choice discretion; (2) cultural discretion; and (3) empirical discretion.[42]

Policy-choice discretion is at least partly based on considerations of efficiency or Pareto-optimality,[43] thus being connected to a "Law and Economics" approach to the issue. Cultural discretion, on the other hand, is related to differences in substantive equality within a given polity. Respect for diversity is the interest that may lead an international court to make use of this type of discretion.[44] And empirical or evidential discretion is based on the assumption that the judiciary simply cannot assume that harm will not occur in a given case if the state of affairs is not changed by the judicial decision.[45] She finally argues that loosely connected communities, such as the international one, will tend to make more use of policy-choice and cultural discretion, while evidential discretion is a tool typically adopted by the ECJ, which is the judicial body of a more closely bound community of states.[46]

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[37] *Id.*, 98.

[38] *Id.*, 103.

[39] Julian Rivers, *Proportionality and discretion in international and European law*, in TRANSNATIONAL CONSTITUTIONALISM 107 (Nicholas Tsagourias ed., 2007).

[40] *Id.*, 107.

[41] *Id.*, 108.

[42] *Id.*, 114.

[43] *Id.*, 115.

[44] *Id.*, 119.

[45] *Id.*, 120.

[46] *Id.*, 124-127.

A different take on a specific principle is offered by Achilles Skordas.[47] He starts by distinguishing two separate dimensions of the principle of self-determination, the self-determination of peoples and the self-determination of regimes, the latter a feature of global governance.[48] Self-determination is a foundational principle, as it guarantees the reproduction of the system's internal operations, as well as the maintenance of its distinction and separation from its environment.[49]

Skordas analyzes the structural elements of self-determination (state, people, "self"),[50] and uses this as a platform to discuss external and internal self-determination.[51] He then looks at the principle of self-determination as an "emerging" principle of the global society, precisely because of its mutating character.[52] By virtue of globalization, self-determination must be redefined in a broader sense, accommodating state and non-state global actors alike. The interactions of these actors give rise to a much more general application of self-determination to the construction of a global polity.[53]

D. The Institutional Interfaces

The institutional dimension is essential if one is to think of supranational constitutionalism. There can be no overarching normativity without appropriate institutions; if this happens, the normativity will be void of force. However, one recurring phenomenon in international law is the multiplicity of international organizations, and to understand the way in which they relate is essential for the project of constitutionalization. Nigel D. White offers an excursus into the idea of hierarchy between regional bodies and the United Nations (UN).[54]

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[47] Achilles Skordas, *Self-determination of peoples and transnational regimes: a foundational principle of global governance*, in TRANSNATIONAL CONSTITUTIONALISM 207 (Nicholas Tsagourias ed., 2007).

[48] *Id.*, 208.

[49] *Id.*

[50] *Id.*, 209-220.

[51] *Id.*, 220-238.

[52] *Id.*, 238.

[53] *Id.*, 241-242.

[54] Nigel D. White, *Hierarchy in organisations: regional bodies and the United Nations*, in TRANSNATIONAL CONSTITUTIONALISM 135 (Nicholas Tsagourias ed., 2007).

White speaks of "UN constitutional laws" in the field of economic, social and human rights matters, developed from the customary obligations of article 2 of the UN Charter.[55] In response to the idea that only states can be bound by international law, he argues that, especially in the field of human rights, the fact that the UN was the main motor force behind these treaties (as were many other international organizations) means necessarily that it is bound by these treaties "in a constitutional sense", even if not formally party to them.[56] He argues that in general the UN creates the closest possible thing to a "world constitution", and article 103 determines the primacy of the UN over international arrangements. In his view, then, the fact that the UN Charter takes precedence over the constitutive charters of other international organizations offers sufficient elements to see in the UN the seed of the world institution that shall govern the project of international constitutionalism.[57]

Fassbender argues that constitutionalization is a solution to the so-called "fragmentation" of international law,[58] and he cites Habermas in affirming that the UN Charter is central for the project of constitutionalization.[59] Fassbender suggests that the UN Charter, even though originally conceived only as a treaty, has evolved in the last 60 years to become the substantive and formal constitution of the international community.[60] Referring to Pierre-Marie Dupuy, he calls the UN Charter a "founding act of a new international order".[61]

He also argues that, even though there is in theory some room for international law existing outside the UN Charter, to consider the UN Charter to be "the" constitution of the world community offers the great advantage of clearly determining the set of rules upon which the international community is built.[62] To have a clear set of rules is essential for accomplishing greater normativization of the international space, even if subsidiarity is to play a much greater role than in

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[55] *Id.*, 142.

[56] *Id.*, 143.

[57] *Id.*, 158-159.

[58] See, *supra*, note 22, 311.

[59] *Id.*, 314-315.

[60] *Id.*, 322.

[61] *Id.*, 323.

[62] *Id.*, 324.

national constitutions, precisely because there is no need for the replication of such an exhaustive allocation of competencies as one normally sees in national constitutions.[63]

Ramses A. Wessel looks at how institutionalism plays out in the relations between an international organization and other international actors, mainly states.[64] He uses Verdross's concept of constitution – "a sustainable institutional basis of a legal community" – as a starting point to inquiring whether there are constitutional elements in the EU, an international organization "that increasingly starts to look like a state".[65] He considers European external relations as a core element to the emergence of a multilevel constitution in Europe, to the extent it means that the EU is exercising foreign relations, which is traditionally one of the constitutive elements of statehood.[66]

Wessel concludes by affirming that both states and international organizations are sub-systems of an "overall supranational order",[67] and that the principles of information and consultation,[68] loyalty[69] and subsidiarity[70] serve as the foundations for the supranational constitutional arrangements between the EU and member states. Similarly, the direct effect of external relations norms in national legal systems serves as further evidence of this integration.[71]

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[63] *Id.*, 325.

[64] Ramses A. Wessel, *The multilevel constitution of European foreign relations*, in TRANSNATIONAL CONSTITUTIONALISM 160 (Nicholas Tsagourias ed., 2007).

[65] *Id.*, 161-162.

[66] *Id.*, 167-169.

[67] *Id.*, 177.

[68] *Id.*, 179-181.

[69] *Id.*, 181-183.

[70] *Id.*, 183-186.

[71] *Id.*, 189-195.

E. European v. International Constitutionalism

The best exercise in comparing these two types of transnational constitutionalism is done by Nicholas Tsagourias.[72] He begins by describing the international constitutional order with respect to general principles of law, affirming that international constitutionalism is more reticent towards the use of normative principles, and prefers structural principles, which are more value-neutral and thus less debatable, to build its legitimacy.[73] The European legal order, on the other hand, has borrowed elements from the international order but subsequently closed itself in an autochthonous and self-contained regime, which finds in the relatively homogeneous constitutional traditions of its member states the support to search for normative principles and build the foundations of the European constitutional project around them.[74] The international order, on the other hand, tries to deflect national influences, as these may threaten its legitimacy as a total legal order.[75]

This structural difference is at least partly reflected in the role of adjudicatory bodies in each system. According to Tsagourias, the ICJ cannot claim for itself a clear constitutional role, precisely because the international order is acentric and there is no place for a central court to adjudicate disputes. The ICJ cannot assert its authority because it lacks links with national courts, and cannot thus mobilize internal actors to force compliance with its decisions.[76] The ECJ, on the other hand, has internalized concepts of international law such as *jus cogens* and applied them in a much more pungent manner than its international counterpart.[77]

Another difference between European and International constitutionalism is that, while the latter sees security issues to be at the very core of constitutionalism (due to the normative principle of peace), the European Union does not see its security and foreign affairs regime as constitutional.[78]

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[72] See, *supra*, note 30.

[73] *Id.*, 80-81.

[74] *Id.*, 84.

[75] *Id.*, 83.

[76] *Id.*, 88-89.

[77] *Id.*, 94-95.

[78] See, *supra*, note 64, 205-206.

One must take into consideration what is perhaps the key difference between the EU and the international system. While the international system is usually political and security-oriented, the EU is based on economic linkages, and is market-oriented, which "arm[s] the regime with strong auto-constitutional structures".[79] Therefore, international economic integration regimes are presumably stronger in relation to other regimes that arise solely out of norms of international legal co-operation and existence.[80]

Some of these same constitutional elements can also be seen in the World Trade Organization's (WTO) regime,[81] but to find stronger constitutionalism there than in other international regimes would imply acknowledging that economic welfare is closer to being the *Grundnorm* of the international system than other competing values, a proposition which I reject. I will now look at other suggestions related to the fundamental norm of the project of international constitutionalism.

A slightly different perspective on the debate between European and global constitutionalism is provided by Tonia Novitz's study of the corporatism and deliberative governance in labor standards.[82] She discusses the idea of interest groups and their influence in policy-making,[83] using the International Labor Organization (ILO) as a case study at the global level. Deliberative democracy and governance, she argues, has grown as a response to legitimacy crises faced by modern states, and challenges several of the assumptions of corporatism.[84] For one, it is more inclusive and allows for society as a whole – as opposed to only representatives of certain sectors – to be involved in the process. Also, it transcends the interests of these groups and aims at reaching solutions based on consensus, and attending to the interests of all.[85]

The ILO's tripartite system of composition (in which each state is represented by diplomats of the state, as well as representatives of employers and employees) is

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[79] See, *supra*, note 47, 243.

[80] *Id*.

[81] *Id*., 243-244 and 250-267.

[82] Tonia Novitz, *Challenges to international and European corporatism presented by deliberative trends in governance*, in TRANSNATIONAL CONSTITUTIONALISM 269 (Nicholas Tsagourias ed., 2007).

[83] *Id*., 270.

[84] *Id*., 272-273.

[85] *Id*., 274.

the best example of the operation of the ILO, as related to its standard-setting capacity.[86] It does, however, resemble a classic form of corporatism, which is not in consonance with emerging concerns for deliberative participation and governance. This is more inclusive and takes into account the interests of the whole of society, and not only the few main parties directly involved.[87] However, once one considers the alternatives for more deliberative participation (that is, the inclusion of civil society through NGOs), it might be the case that representativeness is in fact diminished, since NGOs tend to come from industrialized countries, and thus increasing their role would alter the geographical balance within the ILO.[88]

On the EU's side, there are two versions as to why employers and employees get involved in decision-making: the first, related to external scrutiny and democratic structures within the EU, defends that this participation is a regulatory strategy to influence the content of laws binding on the member states; the second, related to accountability of employers and employees towards those they represent, says that this inclusion is simply the recognition of collective bargaining at the European level.[89] Regardless of the version adopted, what matters is that the democratic deficit in EU governance has been diminished in this sector, and that this is attributable to inclusive participation. Even though EC social dialogue has received criticisms as to its democratic deficit,[90] this has been addressed by the Commission and a version of "horizontal" subsidiarity, according to which decisions should be taken as close to the employers and employees as possible, has been adopted.[91] This has eliminated the "state" element, and a bipartite model involving only employers and employees has been adopted.

This implies, unfortunately, that the democratic representativeness at the EU level is not as effective as within the ILO,[92] or at least that it does not contribute nearly as significantly to the project of constitutionalization as one might expect. If the institutional element is dispensed with, and everything is better resolved at the

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[86] *Id.*, 281.

[87] *Id.*, 283.

[88] *Id.*, 288.

[89] *Id.*, 289.

[90] *Id.*, 295.

[91] *Id.*, 299.

[92] *Id.*, 299-300.

local level, then it might be the case that transnational constitutionalism might not be the best alternative in this specific case.

Novitz's analysis can also serve as a reminder that it is not always that the European experience of transnational constitutionalism takes the lead in the matter. Her chapter shows one instance in which global constitutionalism is more developed and more prepared to deal with matters of representativeness, essential for the very idea of constitutionalism. It does not, however, address the idea of the fundamental norm of the transnational society, which is the discussion I undertake next.

F. Finding the Fundamental Norm

In his contribution, Wessel suggests that the rule of *pacta sunt servanda* should be the *Grundnorm* of the international community.[93] This represents to a certain extent a return to voluntarism and the social contract theory at the international level that has also been analyzed by other contributors in the book.[94] However, this norm is only a structural-organizational principle, and as such cannot serve as the fundamental norm for the international community.

It has also been suggested that norms of *jus cogens* should play the role of a *Grundnorm* in the international legal system.[95] However, as Tsagourias observes, *jus cogens* norms are structural-organizational principles, and not normative-ideological ones.[96] As such, they lack the strength to become a fundamental norm to justify the foundation of an entire constitutional system, even if only a thin form of it.

However, a critique of the role of *jus cogens* norms as a foundation for a constitutional international legal order does not mean the project should be given up altogether. There is still the idea of human rights, at least inasmuch as human rights derive from the principle of humanity, which, as suggested by Tsagourias, is

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[93] See, *supra*, note 64, 178.

[94] See, notably, Nicholas Tsagourias's Introduction and Patrick Capps's chapter.

[95] See, Axelle Reiter, *Going Global: Individual Rights, Universal Norms and the Existence of an Overarching Normative Hierarchy in International Law*, 2 EUROPEAN JOURNAL OF LEGAL STUDIES, 87 (2008).

[96] See, *supra*, note 30, 93.

a normative-ideological principle.[97] The fact that *jus cogens* norms are structural-organizational principles does not mean there are not normative-ideological principles that can serve as this *Grundnorm*. In fact, as Fassbender reminds us, *jus cogens* norms very often serve human rights purposes.[98] Using human rights does not necessarily imply a thick version of constitutionalism, especially if one considers the role of cultural discretion in human rights adjudication explored by Rivers.[99]

Furthermore, as Werner points out, the idea of a "world order" challenges a more traditional reading of international law precisely through the sphere of human rights protection.[100] He comes to the point of suggesting that the International Covenant on Civil and Political Rights (ICCPR) is a constitutional by-law to the UN Charter, which is "the" constitution of the world (agreeing with Fassbender).[101]

G. Concluding Remarks

Transnational constitutionalism is an uneven project, which in several instances is already a reality. To the extent that the UN Charter is considered to be the constitution of the world community, and regional economic integration processes advance in promoting commonly shared values inside and outside of those merely related to trade, the world (or at least parts of it) seems to be walking towards a new type of global society. What seems to be missing at the moment is a fundamental norm, an overarching idea that can ethically guide and bind all the members of the world community.

Value-free legal orders cannot exist for long, as past constitutional experience has shown (an experience that has precisely led to the creation of the United Nations). As the UN in its own foundation rejects the idea of an order not guided by strong ethic commitments, and the idea of human rights increasingly offers the ethical backbone for international action, it is to be expected that a fuller embrace of human rights in international constitutional debates will finally offer the *Grundnorm* needed for a just, truly cosmopolitan phenomenon.

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[97] *Id.*, 76.

[98] See, *supra*, note 22, 318.

[99] See, *supra*, note 39, 122-126.

[100] See, *supra*, note 26, 338.

[101] *Id.*, 352-353.