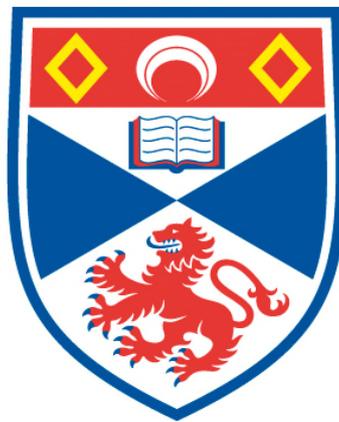


HUMAN RIGHTS AND GLOBAL CONSTITUTIONALISM

Jonathan Reilly

**A Thesis Submitted for the Degree of PhD
at the
University of St Andrews**



2015

**Full metadata for this item is available in
St Andrews Research Repository
at:**

<http://research-repository.st-andrews.ac.uk/>

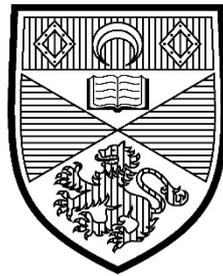
Please use this identifier to cite or link to this item:

<http://hdl.handle.net/10023/9474>

This item is protected by original copyright

Human Rights and Global Constitutionalism

Jonathan Reilly



University of
St Andrews

This thesis is submitted in partial fulfilment for the degree of PhD at the University of St Andrews.

Date:

Abstract

This thesis examines the contributions to the global constitutional process made by the human rights machinery of the United Nations. To do this, it considers the philosophical and theoretical positions related to understanding constitutionalism either as government or as governance. This contrast is then used to help develop the idea of the constitutional process, which is followed by a translation of these ideas into the international realm. Subsequently, it examines the United Nations Human Rights Council from the perspective of a polycentric international society. This is then followed by an examination of the Office of the United Nations High Commissioner for Human Rights from a cosmopolitan perspective. Ultimately, it is concluded that, whilst the existing contributions made by these organs are seemingly negligible, the particular theoretical approach undertaken is successful in highlighting certain opportunities for reforms that have hitherto been unexamined.

Contents

Chapter 1 Introduction	1
Chapter 2 Constitutional Divisions	18
Chapter 3 Rights and Constitutions	43
Chapter 4 Global Constitutionalism	70
Chapter 5 Global Human Rights	97
Chapter 6 The United Nations Human Rights Council	122
Chapter 7 The Office of the United Nations High Commissioner for Human Rights	147
Chapter 8 Conclusion	173
Bibliography	189

Detailed Contents

<i>Declarations</i>	<i>i</i>
<i>Acknowledgements</i>	<i>iii</i>
<i>Table of Materials</i>	<i>iv</i>

Chapter 1

Introduction	1
Overview	4
Literature Review	6
Methodology	11

Chapter 2

Constitutional Divisions	18
Classical Thought	19
The Medieval Era	23
The Early Modern Period	25
Constitutional Revolutions	30
Modern Constitutional Definitions	33
Constitutionalism as Government	36
Constitutionalism as Governance	39
Conclusions	42

Chapter 3

Rights and Constitutions	43
Governance: Rights as Morality	44
Government: Rights as Law	47
Constitutional Reconciliation	50
The Constitutional Process	55
Understanding Constitutionalism	61
Operating the Process	64
Conclusion	68

Chapter 4

Global Constitutionalism	70
Historical Global Systems	72
Contemporary Global Constitutionalism	80
International Society	86
Sovereignty as a Constitutional Value	89

<u>Chapter 5</u>	
Global Human Rights	97
State-Centred Global Constitutionalism	98
Rights of States in the Global Constitution	101
Global Separation of Powers	104
Individual Human Rights	109
Human Rights and a Polycentric Society	113
Global Cosmopolitanism	116
<u>Chapter 6</u>	
The United Nations Human Rights Council	122
Developing the Human Rights Council	123
Normative Integration	127
Membership of the HRC	128
Resolutions of the HRC	131
Polycentricity	134
The HRC and Other Human Rights Bodies	135
The HRC and States	139
The HRC and International Civil Society	142
The HRC and the Global Constitutional Process	145
<u>Chapter 7</u>	
The Office of the United Nations High Commissioner for Human Rights	147
Role of the Individual	148
Relationship to States	155
Relationships with Other International Bodies	160
The OHCHR and the United Nations	161
The OHCHR and Other State-based Bodies	165
The OHCHR and Non-Governmental Organisations	168
Contribution of the OHCHR to the Global Constitutional Process	171
<u>Chapter 8</u>	
Conclusion	173
Reforming the United Nations	174
Reforming the HRC	174
Reforming the OHCHR	178
The Great Power Approach	181
Human Rights and the Global Constitutional Process	184
Bibliography	189

Candidate's Declarations

I, Jonathan Reilly, hereby certify that this thesis, which is approximately 80,000 words in length, has been written by me, and that it is the record of work carried out by me or principally by myself in collaboration with others as acknowledged, and that it has not been submitted in any previous application for a higher degree.

I was admitted as a research student in September, 2011, and as a candidate for the degree of PhD in April, 2012; the higher study for which this is a record was carried out in the University of St Andrews between 2011 and 2015.

Signed

Date

Supervisor's Declarations

I hereby certify that the candidate has fulfilled the conditions of the Resolution and Regulations appropriate for the degree of PhD in the University of St Andrews and that the candidate is qualified to submit this thesis in application for that degree.

Signed

Date

Permission for Publication

In submitting this thesis to the University of St Andrews I understand that I am giving permission for it to be made available for use in accordance with the regulations of the University Library for the time being in force, subject to any copyright vested in the work not being affected thereby. I also understand that the title and the abstract will be published, and that a copy of the work may be made and supplied to any bona fide library or research worker, that my thesis will be electronically accessible for personal or research use unless exempt by award of an embargo as requested below, and that the library has the right to migrate my thesis into new electronic forms as required to ensure continued access to the thesis. I have obtained any third-party copyright permissions that may be required in order to allow such access and migration, or have requested the appropriate embargo below.

The following is an agreed request by candidate and supervisor regarding the publication of this thesis:

PRINTED COPY

No embargo on print copy.

ELECTRONIC COPY

No embargo on electronic copy.

Date:

Signature of Candidate:

Signature of Supervisor:

Acknowledgements

As with any work of this type, there is a vast number of people who have assisted with this project in all sorts of ways throughout its duration. In particular, I would like to thank my supervisors Tony Lang and Patrick Hayden for their invaluable encouragement, guidance and support. Nevertheless, despite the exceptional quality of their assistance, any mistakes remain, inevitably, my own.

Jonathan Reilly

Table of Materials

Cases

Marbury v. Madison, (1803) 5 US (1 Cranch) 137.

The Case of the S.S. "Lotus", (1927) Permanent Court of International Justice, Series A, No. 10.

Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003).

Mikolenko v. Estonia, European Court of Human Rights Decision, no. 16944/03, 5 January 2006.

R(Alvi) v. Secretary of State for the Home Department, [2012] UKSC 33.

European Commission and Others v. Yassin Abdullah Kadi, C-584/10 P, European Court of Justice (Grand Chamber), 18/7/2013.

Treaties

Charter of the United Nations, 26/6/1945.

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), (04/11/1950), United Nations Treaty Series I-2889.

International Convention on the Elimination of All Forms of Racial Discrimination, (21/12/1965), United Nations Treaty Series I-9464.

International Covenant on Civil and Political Rights, (16/12/1966), United Nations Treaty Series I-14668.

American Convention on Human Rights, (22/11/1969), United Nations Treaty Series I-17955.

African Charter on Human and Peoples' Rights (27/06/1981), United Nations Treaty Series I-26363.

United Nations Convention on the Law of the Sea, (10/12/1982), United Nations Treaty Series I-31363.

Rome Statute of the International Criminal Court, (17/07/1998), United Nations Treaty Series I-38544.

Material of the United Nations

Universal Declaration of Human Rights, United Nations General Assembly Resolution 217A (III), (10/12/1948).

United Nations Economic and Social Council Resolution 1503(XLVIII), 27/05/1970.

Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 19, *National Institutions for the Promotion and Protection of Human Rights*, April 1993.

Note by the Secretariat, Report by the General Rapporteur, Manfred Nowak, as adopted by the Final Plenary Session of the NGO-Forum, World Conference on Human Rights, A/CONF.157/7, (14/06/1993).

High Commissioner for the promotion and protection of all human rights, United Nations General Assembly Resolution, A/RES/48/141, (20/12/1993).

Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, (United Nations, 2004).

Report of the Panel of Eminent Persons on United Nations-Civil Society Relations, *We the peoples: civil society, the United Nations and global governance*, A/58/817, (11/06/2004).

In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, A/59/2005, (21/03/2005).

In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, Addendum, 'Plan of action submitted by the United Nations High Commissioner for Human Rights', A/59/2005/Add.3, (26/05/2005).

Human Rights Council, United Nations General Assembly Resolution, A/RES/60/251, (15/03/2006).

Institution-building of the United Nations Human Rights Council, United Nations Human Rights Council Resolution, A/HRC/RES/5/1, (18/06/2007).

Human rights, sexual orientation and gender identity, United Nations Human Rights Council Resolution, A/HRC/17/19, (15/06/2011).

Human rights, democracy and the rule of law, United Nations Human Rights Council Resolution, A/HRC/RES/19/36, (19/04/2012).

Conscientious objection to military service, United Nations Human Rights Council Resolution, A/HRC/RES/24/17, (27/09/2013).

United Nations Security Council Resolution 2118 (2013), S/RES/2118 (2013), (27/09/2013).

Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, United Nations Human Rights Council Resolution, A/HRC/RES/26/9, (14/07/2014).

Miscellaneous

The French *Code Civil*.

ASEAN Secretariat, *Terms of Reference of ASEAN Intergovernmental Commission on Human Rights*, (Jakarta, Indonesia: ASEAN Secretariat, 2009).

Chapter 1

Introduction

“It is a law of nature we overlook, that intellectual versatility is the compensation for change, danger, and trouble. An animal perfectly in harmony with its environment is a perfect mechanism. Nature never appeals to intelligence until habit and instinct are useless. There is no intelligence where there is no change and no need of change. Only those animals partake of intelligence that have to meet a huge variety of needs and dangers.”¹

As with many times throughout human history, it can be said that the present age gives rise to ‘a huge variety of needs and dangers’. Such a scenario, however, need not be interpreted as a negative thing. Instead, present deficiencies can be seen as highlighting opportunities for improvement; change and risk open up possibilities for the betterment of the human condition. In amongst the vast array of these opportunities and possibilities, there exists a position which maintains that “[t]he problem of international constitutionalism is the central challenge faced by international philosophers in the twenty-first century.”² Indeed, there are numerous examples “of how constitutional questions and claims are emerging beyond the state and how they require the input of different disciplines at the intersection of law and politics.”³

It is this concept of constitutionalism, this intersection of law and politics, which lies at the heart of the present investigation. This intermingling of diverse fields creates an inherent need for an approach which is somewhat syncretic in nature. It is an approach which, of necessity, must attempt “to cross the arbitrary and artificial mental frontiers which have

¹ Wells, H. G., *The Time Machine*, (London: Pan Books Ltd., 1953), p. 87.

² Allott, P., *The Health of Nations: Society and Law beyond the State*, (Cambridge: Cambridge University Press, 2002), (henceforth, Allott), p. 61.

³ Wiener, A., *et al*, ‘Global constitutionalism: Human rights, democracy and the rule of law’, (2012) 1(1) Global Constitutionalism 1, p. 1.

done so much harm to the creative potentiality of the human mind.”⁴ Adopting such an approach, however, need not equate to an absence of specificity as regards the precise matter under investigation. At a more exact level, then, it must be said that the essence of this present inquiry is an attempt to examine the extent to which the human rights machinery of the United Nations (UN) contributes to the operation of a constitutional process at the global level.

The central argument being advanced throughout this study is one which contends that, whilst such a contribution may be both possible and desirable for a variety of reasons, it is not currently one which can be considered as being either significant or inherently self-sustaining. Before reaching such a conclusion, however, there are a variety of subsidiary factors that must first be considered. For instance, before such matters can be addressed directly, attention must be paid to the more fundamental question of how human rights and a global constitutional process relate to one another, if at all. Additionally, if the emergence and expansion of constitutional questions is indeed a core challenge to contemporary international philosophers, is it not reasonable to presume that some attempts have already been made to address such issues? There are also questions to be asked regarding exactly what is meant by a ‘constitutional process’ and how it could possibly be ‘global’.

In order to more closely consider these, and other, issues, there is necessarily a degree of engagement with discussions of law, politics, philosophy and other areas of human thought and practice. The upcoming discussion, then, is at once legal and political. It is philosophical, and it is arguably even sociological, and yet it is simultaneously none of these things. It is, in essence, a *constitutional* discussion. The exact nature of constitutionalism itself, however, is a subject of some debate. It is for this reason that the discussion begins, in chapter 2, with a consideration of the distinction between a perspective of constitutionalism as government and one of constitutionalism as governance. Whilst this distinction is perhaps one of academic utility rather than practical application, it nevertheless provides the theoretical underpinning to much of the subsequent investigation into more nuanced areas of constitutional thought.

Before commencing such an inquiry itself, however, there are a number of other factors that must first be considered, albeit briefly. In particular, the point ought to be made that this is not an investigation into the concept or practices of human rights. There is

⁴ Allott, p. xii.

inevitably a certain extent to which claims regarding the tension between state sovereignty and global human rights norms are examined within this inquiry. Whilst doing so, however, it is not the aim of this inquiry to engage with the implications and conclusions that might arise regarding the actual human rights practices of individuals themselves. Instead, it is intended that this forms part of a discussion which takes place at the junction of human rights, the United Nations and issues of global constitutionalism. As such, the investigations into human rights and the United Nations system function principally as case studies in order to examine, elucidate and clarify the theoretical claims made in the inquiry into issues of global constitutionalism.

Simultaneously, and as stated above, it is primarily a *constitutional* discussion. As well as being distinct from a discussion focussed purely on human rights, this also distinguishes this investigation from many of the existing discussions surrounding what is known as ‘global governance’. Whilst there is inevitably a certain degree of overlap, this latter concept can be understood as “a back-and-forth *political* process carried out between all actors, at all levels, in an attempt to garner legitimacy, secure authority, and develop capacity to govern effectively.”⁵ In contrast to this approach, the constitutional approach adopted in the present inquiry, although it includes a certain degree of political considerations, also incorporates a greater element of legal, philosophical and sociological analysis which is sufficient as to distinguish it from the primarily political approach adopted within the majority of studies into global governance.

In order to more accurately delineate the mechanisms by which this investigation shall advance, this chapter proceeds in three parts. Initially, a brief synopsis of key arguments is provided, in order to outline certain principal themes, their connections and progression. Secondly, there is a review of the existing academic debate surrounding similar themes. Whilst this review is not intended to be exhaustive, its aim is to provide a general overview of how the upcoming discussions fit within the wider scholastic context. Finally, this chapter concludes with a brief examination of the methods by which the later, more detailed arguments shall advance.

⁵ Klick, M., ‘Configuring Global Order: Institutions, Processes, and Effects’, (2011) 17 *Global Governance* 557, pp. 557-8.

1.1 Overview

As stated above, it is the aim of this inquiry to examine the extent to which the UN's human rights machinery contributes to the operation of a constitutional process at the global level. On this basis, three distinct factors can be identified as providing a framework from which such an inquiry can proceed. Firstly, there is a need to determine the nature of 'a constitutional process'. Secondly, this must then be translated to the global level, if such a move is at all possible. Finally, there must also be a consideration of the role played by the human rights organs of the United Nations.

At a fundamental level, then, the upcoming discussion follows this basic, tripartite structure. Chapters 2 and 3 examine the concept of a constitutional process, how it can be operated and how it connects with the general concept of 'rights'. Chapters 4 and 5 then focus on translating these conclusions to the international realm, with chapters 6 and 7 concentrating on the human rights machinery of the UN itself. The discussion then concludes in chapter 8 with a consideration of certain implications that arise from the preceding analysis and attempts to provide some degree of resolution to the primary issue at hand.

More specifically, chapter 2 focuses on examining a distinction between constitutionalism as *government* and constitutionalism as *governance*. Whilst this distinction is not explored in any great detail in much of the existing academic literature, it is argued that its origins can be traced at least as far back as ancient Greece and Rome. Examining this history of constitutionalism forms a large part of this chapter, although attention is also paid to consideration of how this binary distinction continues to appear within contemporary constitutional thought.

Having explored this particular distinction, chapter 3 then progresses to more thoroughly investigate the ways in which these different perspectives on constitutionalism interact with concepts of rights. Underlying this analysis is the more fundamental question regarding whether or not such a bifurcation in constitutional thought is truly insurmountable. This results in the inquiry developing the idea of a constitutional process as a singular alternative that is capable of incorporating elements of both constitutionalism as government and as governance. As shall be seen, whilst the simple connection between a constitution and the idea of a process is not entirely novel, the distinct ways in which this vision of the constitutional process is originated allows for greater emphasis to be placed on certain key

elements. In particular, the combination of liberalism and constitutionalism is highlighted as a means by which rights can become integrated into the constitution itself, as opposed to being seen as entirely pre-constitutional, post-constitutional or completely external and unrelated to the constitution.

Having established a conceptual basis for understanding the relationship of rights to a constitutional process, the discussion then proceeds to examine whether or not this analysis can withstand being translated into the global sphere. Specifically, chapter 4 examines the tension between hierarchy and anarchy at the international level and connects this with contemporary debates surrounding ideas of global constitutionalism. The chapter then proceeds to investigate the values which may underpin a global constitutional process, arguing for a particular analogy between state sovereignty and individual liberty.

Chapter 5 then begins by exploring some of the consequences to accepting such an analogy. In particular, it attempts to assess the question that if liberal values and a constitutional process exist at an international level, as claimed in chapter 4, must this result in an integration of rights into the constitutional process, as considered in chapter 3? The primary difference observed is the distinction between states and individuals and the chapter proceeds to identify three principal mechanisms by which a liberal global constitutional process, founded on the sovereign equality of states, might be preserved.

The particular trichotomy identified consists of great powers, polycentricity and cosmopolitanism and chapter 5 progresses to assess the suitability of these approaches. Whilst reliance on the beneficence of great powers is rejected as being unsustainable, the remaining two alternatives are considered to be potentially viable. The chapter therefore considers each of these options in turn, establishing a connection between these possibilities and the human rights machinery of the United Nations. More precisely, on the one hand a link is developed between the idea of international polycentricity and the UN's Human Rights Council (HRC), and on the other a link is established between global cosmopolitanism and the UN's Office of High Commissioner for Human Rights (OHCHR).

As a result of these connections, the subsequent two chapters proceed to examine each of these institutions in turn. Chapter 6 focuses on the connection between the HRC and the idea of polycentricity in an attempt to assess the HRC's suitability for the role identified for it in chapter 5. Chapter 7 advances along similar lines regarding the link between the OHCHR and ideas of cosmopolitanism. Despite not forming the core focus of the overall discussion,

it is arguably this examination of the OHCHR from a cosmopolitan perspective which constitutes one of the most novel elements of this entire inquiry as, at the time of writing, there are no significant academic works which attempt a similar analysis. Having considered this position, chapter 8 then concludes this investigation with an attempt to provide some normative suggestions as to reforms that would be necessary were there a desire to correct a number of the deficiencies identified in chapters 6 and 7. Upon reaching such a position, it is then possible to more fully consider the extent to which the UN's human rights machinery contributes to the operation of a constitutional process at the global level.

1.2 Literature Review

Before embarking upon this inquiry, it would first be useful to provide a degree of intellectual context to the present discussion. In this regard, the first point to be noted has, in fact, already been stated. This is the argument that a constitutional approach necessarily involves the intermingling of a broad range of ideas and concepts, particularly from the realms of law and politics. Consequently, it can be said that a constitutional approach is a syncretic approach. It attempts to draw upon elements from a wide variety of different, and sometimes competing, perspectives. In doing so, however, such an approach must simultaneously refrain from being defined or restricted by these other, external concepts. As a result, the intellectual context in which this present discussion can be situated is also an environment which is not restricted to a specific pre-determined field of study or enquiry. Instead, it is those creations which, consciously or otherwise, cross boundaries and blur edges that are of most relevance, and most significance, to the current investigation.

In acknowledging this, however, it is also necessary to recognise the fact that the multidisciplinary nature of a particular work does not automatically prove its relevance to the present inquiry. Indeed, even a purely constitutional work, whilst arguably incorporating an appropriate blend of law and politics, might not be inherently useful unless it also considers the other concept referred to in the question stated above – human rights. Consequently, the discussions that are of most relevance to the one at hand are those which possess a constitutional nature yet also consider issues and questions of human rights.

In this regard, an initial piece worth noting is Stephen Gardbaum's work on *Human Rights and International Constitutionalism*.⁶ Whilst this is undoubtedly one of the few works to directly consider both human rights and constitutional issues at an international level, it is focused "less on the relationship between these two legal systems than on their differences and respective functions."⁷ The result is a work which is more akin to a comparative study of two discrete areas of international law rather than an in-depth analysis of how the concepts themselves relate to one another.

In many ways, this is a broadly similar approach to that presented by Joel Trachtman in *The Future of International Law*,⁸ as both human rights and international constitutionalism are treated as distinct functional areas of international law. One consequence of this functional approach is that it provides no natural link between constitutionalism and the concept of human rights. Whilst human rights themselves are not ignored, they are considered as simply another area in which international law can and does function. Indeed, they are seen as being "determined through political, constitutional, and essentially contractarian processes, which we can expect to differ to some extent in different states."⁹

This position stands in notable contrast to the understanding presented by Illan rua Wall in *Human Rights and Constituent Power*,¹⁰ which suggests "the opening of human rights by constituent power, a confluence of the two discourses."¹¹ In Trachtman's case, this distinction is expressed, at least in part, through an attempt to "avoid the vague term 'governance' in favor of the more concrete term 'government.'"¹² Whilst it could be said that the relative nature of a term as being vague or concrete depends in large part on the definitions being applied to them, this distinction is nevertheless a useful one and it is explored in greater detail in Chapter 2 of the present study.

Wall's analysis does also warrant some consideration, however, as it characterises human rights as a discourse which "takes its place at the junction of politics and law, [being]

⁶ Gardbaum, S., 'Human Rights and International Constitutionalism', in Dunoff, J. L., and Trachtman, J. P., (eds.), *Ruling the World?: Constitutionalism, International Law, and Global Governance*, (Cambridge: Cambridge University Press, 2009).

⁷ *Ibid.*, p. 233.

⁸ Trachtman, J. P., *The Future of International Law*, (Cambridge: Cambridge University Press, 2013), (henceforth, Trachtman).

⁹ *Ibid.*, p. 119.

¹⁰ Wall, I. R., *Human Rights and Constituent Power: Without Model or Warranty*, (Oxon: Routledge, 2012), (henceforth, Wall).

¹¹ *Ibid.*, p. 145.

¹² Trachtman, p. 8.

both a political demand and the juridical decision.”¹³ Such an understanding of human rights as simultaneously relating to both law and politics inevitably sites the concept firmly within the constitutional realm. From this position, an argument is advanced which attempts “to develop a sense of human rights as an event to be created each time rather than a property to be protected.”¹⁴ In doing so, however, the distinctiveness is lost between what is properly to be called human rights and what is properly constitutional. Instead, both are seen as relating to the act of constitution, where each “must be understood in its essence as creation *ex nihilo* ... the idea of creation from *the nothing*.”¹⁵ In this way, ‘human rights’ becomes an open-ended process of continual creation, one which “displaces the juridical metaphysics of sovereignty and instead proposes no transcendent solution, no model that might come with a guarantee from the experts of its definite success.”¹⁶

This vision of human rights and constituent power forming a communal and ongoing creative process does seem to possess a certain degree of utility, particularly as regards those works which argue that “international society would seem to be undergoing a process of constitutionalization.”¹⁷ One such work is *The Constitutionalization of International Law* by Jan Klabbbers, Anne Peters and Geir Ulfstein.¹⁸ The suggestion here is that constitutionalization is “a process, inspired by constitutional thought.”¹⁹ Whilst little precise detail is given, the process envisaged here does not appear to contain the same ongoing, open-ended and creative potential that seems to emanate from Wall’s work. In contrast, the suggestion is made that “the point of constitutionalization is, often enough, to remove matters from the ordinary political process.”²⁰ The very fact of stating that constitutionalization could have some kind of goal or purpose, or ‘point’, to it suggests that it is possible to conceive of a time when the process is complete and, therefore, no longer relevant. As discussed by Wall, however, an alternative form of process does exist and the possibility that a constitution could be thought of as a process itself, and not simply as the end result of a process of constitutionalization, is examined in chapter 3.

¹³ Wall, p. 1.

¹⁴ *Ibid.*, p. 133.

¹⁵ *Ibid.*, p. 143. Emphasis in original.

¹⁶ *Ibid.*, p. 146.

¹⁷ Klabbbers, J., ‘Setting the Scene’, in Klabbbers, J., *et al*, *The Constitutionalization of International Law*, (Oxford: Oxford University Press, 2009), p. 7.

¹⁸ See *ibid.*

¹⁹ *Ibid.*, p. 10.

²⁰ *Ibid.*, p. 19.

Despite the utility of this approach, however, it does not appear strictly necessary to understand a constitution as a process in order to link human rights and constitutional matters at the international level. One work that can be seen as achieving this, at least to some extent, is *Human Rights in the Emerging Global Order* by Kurt Mills.²¹ Whilst not being explicitly constitutional in scope, this work focuses on examining “increasing interdependence and a reconceptualization of sovereignty, ... incorporating human rights as a legitimating factor in the emerging global order.”²² This focus on sovereignty involves a necessary blend of law and politics that can arguably be seen as being constitutional, particularly to the extent that it incorporates an argument that “[i]nternational law has recast the relationship between the individual and the state, as well as between the individual and the broader international community.”²³ This tripartite relationship, between the individual, the state and the international realm, can be seen as forming the core area of concern for an examination of the relationship between human rights and global constitutionalism. In the course of examining this relationship, Mills advances the argument that “there are two constitutive principles of state legitimacy – human rights and popular sovereignty.”²⁴ By establishing a conceptual connection between the protection of human rights and the legitimacy of state authority and behaviour, this position ultimately lends support to the claim that “statehood is increasingly imbued with responsibility as well as rights”.²⁵

The prominence of human rights within this argument naturally leads to an emphasis on the particular responsibility of a state regarding the protection of its inhabitants. This responsibility to protect, or even just R2P, can arguably be seen, therefore, as containing substantial links to the discussions on the relationship between human rights and state sovereignty. Indeed, one definition of the concept of R2P has simply described it as the “principle that holds that sovereign states are responsible and accountable both to their own people and to the international society of states for the protection of their populations.”²⁶ Despite a significant overlap of particular themes, however, discussion of the responsibility to protect rarely uses the language of constitutionalism. Instead, the focus is primarily on issues of sovereignty and human rights, not unlike in Mills’ work referred to above. Nevertheless, it

²¹ Mills, K., *Human Rights in the Emerging Global Order: A New Sovereignty?*, (Basingstoke: Macmillan Press, 1998), (henceforth, Mills).

²² *Ibid.*, p. 2.

²³ *Ibid.*, p. 187.

²⁴ *Ibid.*, p. 43.

²⁵ *Ibid.*, p. 194.

²⁶ Glanville, L., *Sovereignty and the Responsibility to Protect: A New History*, (London: University of Chicago Press, 2014), p. 1.

must be conceded that certain themes do appear to be held in common and the nature of the link between sovereignty and constitutionalism at an international level is investigated more thoroughly in chapter 4 of the present study.

Despite appearing to hold certain themes in common, however, the present discussion is not principally concerned with either humanitarian interventions or the philosophical construction of sovereignty. Of greater relevance, therefore, are the principles on which the idea of R2P is grounded. In particular, the idea that “the state is nothing more than the sum of its parts”²⁷ is one which lays the groundwork for an argument that protecting the liberty of states requires protection of the liberty of the individual members of those states. This is an idea that is explored further in chapter 5.

Chapter 5 also gives greater consideration to the role played by the United Nations in a global constitutional process. In relation to this connection between the UN and global constitutionalism, a work that is particularly worth noting is *The United Nations Charter as the Constitution of the International Community* by Bardo Fassbender.²⁸ As might be expected, Fassbender presents the argument that the “constitutional law of the international community ... is built on and around the Charter of the United Nations”.²⁹ In making this claim, however, there is little discussion of the connections, if any, between rights and constitutions. Fassbender does raise the suggestion that the Universal Declaration of Human Rights helps provide “ample evidence of the fact that the Charter has left behind the traditional state-centric view of international law, by gearing its rules to the ultimate goal of the general welfare of peoples and individual human beings.”³⁰ Nevertheless, beyond such claims, there is little investigation into how these international human rights interact with an understanding of the UN charter as an international constitution. Furthermore, despite a focus on the UN, the emphasis is on the Charter itself and there is no discussion of the role played or contribution made by the UN’s human rights organs.

It is this particular analysis, then, which the present discussion is intended to address and which would appear to be a subject that is as yet unexplored by much of the existing academic literature. There are works which appear to note this gap and yet some, such as Gardbaum, proceed from an assumed and unexplained theoretical basis whilst others, such as

²⁷ Mills, p. 42.

²⁸ Fassbender, B., *The United Nations Charter as the Constitution of the International Community*, (Leiden: Martinus Nijhoff, 2009).

²⁹ *Ibid.*, p. 1.

³⁰ *Ibid.*, p.102.

Wall, discuss the abstract theoretical position at the expense of any international political or legal considerations. Other works, such as those by Klabbers or Fassbender, are relatively attentive to issues of international or global constitutionalism and yet pay scant attention to matters of human rights. Still others, such as Trachtman or Mills, imply particular opinions on the matter without fully exploring the reasoning or implications beyond what is necessary for the advancement of other arguments. It is, therefore, this particular void that the present investigation is intended to fill and it is to the debates surrounding such matters that, it is hoped, it will contribute.

1.3 Methodology

Before attempting to provide the contribution identified above, it might first prove useful to outline the approach being taken to address it. In this regard, one particularly relevant work is *The Health of Nations* by Philip Allott.³¹ This “essay is proposed as a contribution to the self-explaining of international society at the level of transcendental theory and pure theory”.³² In the course of the theoretical exploration of ideas that is presented therein, the suggestion is advanced that “[t]he idea of constitutionalism is a golden thread running through the better history of the human race, a perennial and universal possibility in humanity’s social self-constituting, a meta-cultural and meta-temporal theoretical potentiality.”³³ This somewhat hopeful, and somewhat abstract, understanding of constitutionalism is predicated upon an argument that a “society does not have a constitution. A society is a constituting, an unceasing process of self-creating. A society constitutes itself simultaneously in three dimensions – as ideas, as practice, and as law.”³⁴ As was indicated above, this idea of a constitution as an ongoing process that both affects and is affected by society is a concept that is taken up in chapter 3 of the present discussion.

In contrast to Allott’s approach, however, there is no strict adherence to the tripartite distinction between ideas, practice and law. Instead, there is a greater emphasis on the syncretism of constitutional theory and the constitutional process is presented as involving a particular combination of all these areas. However, in reaching towards this more practical, and more legal, view of constitutional thought, there is perhaps something of a

³¹ See *supra*, fn. 2.

³² Allott, p. 81.

³³ Allott, p. 342.

³⁴ Allott, p. 79.

rapprochement with Allott's view of history. Of particular note is the suggestion that "[t]he history of the human world is the history of the making of human reality, a self-consciousness of the self-creating activity of human consciousness, the mind's mirror of the mind."³⁵ To put it another way, amongst the areas touched upon in the present discussion is a particular strand of history. This is not to say, however, that this discussion is historical by nature. Instead, what is of relevance and importance is the understanding that can be gleaned from thoughts that have been developed and expressed in the past, rather than any attempt to establish an exact depiction of specific historical developments.³⁶

This consideration of historical thought highlights the way in which constitutional theory was not insulated from certain developments, particularly those whereby "[p]hilosophy very soon identified and appropriated ... the amazing universal power of dialectical thought."³⁷ It is in attempting to assess the significance of a particular binary approach to constitutional perspectives that this present discussion develops and outlines its own approach to the idea of a constitution as a process.³⁸ This process, however, is not presented as participating in this dualistic conceptualisation of human reality and there is instead a particular reluctance to embrace pre-determined dialectical narratives. As a result, this investigation can instead be positioned amongst those theories which attempt to develop a form of 'middle ground', where the aim is "to achieve reconciliation between the two positions, generally by respecting elements in each."³⁹

This synergy, between constitutionalism and attempts to develop a middle ground, gives added impetus to the rejection of the idea that a constitutional process is divisible into the ideal, the practical and the legal. In particular, it ought to be noted that, "[r]ather than the ideal, the style of middle-ground philosophical argument will tend to stay on the ground, close to the empirical facts of a case or to a sense perception."⁴⁰ It is in this way that the present discussion foregoes analysis of a 'pure' or 'transcendental' theory of constitutionalism and instead looks to particular circumstances and situations in the real world. It is a position which attempts to "start with the actual beliefs and values of existing

³⁵ Allott, p. 3.

³⁶ In particular, see *infra*, Chapter 2.

³⁷ Allott, p. 82. Emphasis removed.

³⁸ See *infra*, Chapter 3.

³⁹ Navari, C., 'The Terrain of the Middle Ground', in Navari, C., (ed.), *Ethical Reasoning in International Affairs: Arguments from the Middle Ground*, (Basingstoke: Palgrave Macmillan, 2013), p. 1.

⁴⁰ *Ibid.*, p. 7.

societies and look for tensions between these and the institutions of those societies”.⁴¹ Specifically, the institution of the United Nations is examined in relation to international society, not because it represents a pre-existing ideal, but because it *is* in existence.⁴²

This attempt to engage with actual beliefs and practices is similar, to some extent, to the approach taken by Mervyn Frost in *Constituting Human Rights*.⁴³ Here, the argument is presented that “[h]uman rights claims are central for any understanding of our contemporary world because of the way in which concepts of individual human rights are embedded in the internal structure of the two major global practices of our age”.⁴⁴ In essence, the suggestion is made that establishing a focus on certain human rights can help address “a somewhat excruciating ethical puzzle which is that the constitutive rules of global civil society seem to be pulling us in a strikingly different direction to the constitutive rules of the society of democratic and democratizing states.”⁴⁵

Despite utilising an arguably similar approach, however, the actual discussion and conclusions that Frost presents are less relevant to the present inquiry than they may at first appear. This is, at least in part, because that work is explicitly not directed at anyone who will “quite properly understand that I am without rights, I am a slave, a minion, a servant, a subject, a lackey of another who is my master, my lord, my owner.”⁴⁶ Thus, it presents an argument that human rights are ‘central for any understanding of our contemporary world’, but only to the extent that we already value, desire or utilise human rights in some way. In this manner, Frost’s work can be seen as participating in the “recurrent human aspiration, transmitted from one generation to another, throughout recent centuries, to construct an international legal order applicable both to States (and international organizations) and to individuals, pursuant to certain universal standards of justice.”⁴⁷

In comparison to such an approach, it would be misleading to describe the present discussion as ‘aspiring’ to ‘construct’ an international order in accordance with ‘universal standards of justice’. In contrast, the constitutional process is specifically presented as a

⁴¹ *Ibid.*, p. 13.

⁴² For greater discussion of the reasoning and justification behind a consideration of the United Nations, see *infra*, Chapter 5.

⁴³ Frost, M., *Constituting Human Rights: Global civil society and the society of democratic states*, (London: Routledge, 2002), (henceforth, Frost).

⁴⁴ *Ibid.*, p. 137.

⁴⁵ *Ibid.*, p. 16.

⁴⁶ *Ibid.*, p. 6.

⁴⁷ Trindade, A. A. C., *The Access of Individuals to International Justice*, (Oxford: Oxford University Press, 2011), p. 6.

position which is capable of acting as a vehicle for such normative aspirations without inherently requiring a commitment to any normative claims from which such aspirations might be constructed or construed.⁴⁸ It is, therefore, a position which can provide a framework for normative theory and yet does not require the adoption of normative arguments.

It would be equally misleading, however, to present the suggestion that this form of constitutional process is objectively neutral and entirely free of normative values and implications. For instance, a coherent argument could be made that this discussion is founded on an assumption that order is preferable to disorder, or one that holds knowledge to be preferable to ignorance. It must be conceded that there may be some truth to such contestations. Such a concession, however, does not inevitably invalidate any conclusions at which this discussion may arrive. Instead, it merely restricts the utility and applicability of these conclusions to a realm in which such assumptions are held in common.

At this point, the objection could naturally be raised that this is an inherently similar difficulty to the restriction that was identified in Frost's work above, thereby nullifying any attempt to differentiate the two. To a certain extent, this comparison can be seen as being broadly accurate. Particularly from an epistemological perspective, there is a shared focus on the 'middle ground' and attempts to explore and utilise the 'actual beliefs and practices of existing societies', as was discussed earlier. It is necessary, however, to distinguish the limitations and restrictions that have been identified.

In this particular work, Frost attempts "to show that claims about human rights are central to *any* understanding of contemporary world politics."⁴⁹ This conclusion, however, is predicated upon an understanding that there exists "a society without geographical borders ... [which] comprises all those who claim basic rights for themselves and recognize them in others."⁵⁰ In essence, therefore, it is an argument that human rights are important as long as we participate in a society of people who consider human rights to be important.

Whilst arguably sharing a particular epistemology, it cannot be said that the present discussion incorporates a similar degree of circularity. It can safely be conceded that the utility of the upcoming analysis rests on an assumption that world order is preferable to world

⁴⁸ See *infra*, Chapter 3.

⁴⁹ Frost, p. 137. Emphasis in original.

⁵⁰ *Ibid.*, p. 7.

disorder. To the extent, then, that one desires to establish or maintain chaos and disorder at the global level, this essay has little to contribute. In contrast to Frost's approach, however, it is not the intention of this discussion to promote a normative argument that a global constitutional order is, would be or could be desirable in any way. Were that to be the case, the present investigation would indeed be at risk of developing the same circularity that has been identified in Frost's work above. Instead, it must be taken as a founding assumption of the present discussion that developing a deeper understanding of world order in some way is a goal worth pursuing.⁵¹

In saying this, it perhaps ought to be noted that it would be perfectly plausible to argue against specific world orders, and even establish certain forms of disorder as being preferable to them. This is not in itself, however, an argument against the desirability of world order. Rather, it is a position that stems from a preference for certain forms of order over others. It has been argued, for instance, that even an anarchical system can be said to contain a particular form of order, provided that certain factors are present.⁵²

There is an extent, then, to which the upcoming inquiry can be said to share a particular epistemology with that of Frost. Equally, however, there is an attempt to avoid the adoption of a similar normative perspective and thereby restrict the possibility of developing the same degree of circularity. This is facilitated by an ontological understanding more akin to that of Allott, which focuses on the nature of a global constitutional process occurring in and amongst international society. If, however, this describes the particular ontological and epistemological context within which the present discussion can be situated, it remains unclear as to exactly how such an inquiry might progress.

Thus far, there has been a rejection of the normative approach taken by Frost and of the purely theoretical approach adopted by Allott. As a result, it is perhaps unsurprising to acknowledge the need to draw upon "a pluralistic methodology that aims to find ways of linking apparently disparate bodies of knowledge and understanding."⁵³ To some extent, such an approach could perhaps be situated within what has become known as the 'English

⁵¹ At this point, it is perhaps worth briefly noting the corollary argument – that if the present investigation is considered successful in developing a particular understanding of world *order*, then preventing the necessary developments or reversing certain arguments may also help develop a particular understanding of world *disorder*. Exploring this possibility, however, is outside the scope of the present inquiry.

⁵² See, for example, Bull, H., *The Anarchical Society: A Study of Order in World Politics*, (4th edn.), (Basingstoke: Palgrave Macmillan, 2012).

⁵³ Little, R., 'The English School's Contribution to the Study of International Relations', (2000) 6(3) *European Journal of International Relations* 395, p. 397.

School' of international relations. Labelling the present discussion in this way, however, has the potential to be as equally misleading as helpful, not least because it has "been argued that members of the English School have never adhered to a common perspective and so any attempt to link them together within a single tradition of thought inevitably results in a set of inconsistent and incoherent ideas."⁵⁴ Despite these drawbacks, acknowledging the inherent utility of, and need for, an approach grounded in methodological pluralism does allow for the development of an outline as to how the present discussion will proceed.

As was briefly discussed earlier, the following two chapters of this discussion intend to focus on the development of a particular perspective of constitutionalism, its operation and its interaction with concepts of rights. As a result, this section of the present inquiry adopts a principally theoretical approach that is perhaps closest in nature to Allot's work outlined above. The purpose of utilising such an approach is primarily to furnish the subsequent discussion with a sound theoretical background on which it is able to draw.

Having developed a theoretical basis from which to proceed, the analysis in chapters 4 and 5 attempts to apply this theory to the international realm. In developing this level of application, however, the discussion moves away from the predominantly theoretical approach of the earlier chapters. Instead, the methodology being applied is more akin to that identified in Frost's work above, in that there is a concern to focus on the actual and existing international realm as it currently is, rather than attempting to construct a theoretical and artificial understanding of the international sphere.

Building upon this more practice-oriented approach, chapters 6 and 7 proceed to examine the principal human rights organs of the United Nations. Coming at this point in the discussion, these chapters are able to utilise the theoretical understanding developed in chapters 2 and 3 with the benefit of the refinement and translation to the global level that have been applied in chapters 4 and 5. This enables a stronger analytical approach that is more concerned with examining and understanding these institutions than with providing further development to a particular theoretical perspective.

Finally, upon completing this level of the analysis, possibilities are opened up for a more normative approach. As a consequence, chapter 8 is able to consider certain normative claims that stem from the practical analysis of chapters 6 and 7 and yet are simultaneously

⁵⁴ *Ibid.*

grounded in the theoretical understanding developed over the course of the preceding chapters. This final chapter is then also in a position to be able to reflect on broader issues regarding the nature and implications of this study as a whole.

Chapter 2

Constitutional Divisions

As mentioned in the Introduction, it is the aim of this chapter to assess a particular distinction in constitutional analysis in order to assist in the differentiation and clarification of alternate theoretical strands. The division that shall be considered is that which can be said to exist between a perspective that views constitutionalism as *government* and one that views constitutionalism as *governance*. Although somewhat subtle, this distinction could be said to lie at the heart of many constitutional disagreements and, consequently, these categories shall be examined in due course. Before discussing the specifics of this primitive typology, however, it shall be necessary to consider certain historical approaches to constitutional philosophy.

A principal reason behind adopting such an approach is that, before examining certain theories and practices relating to constitutions and constitutional politics, it can often be helpful to examine the historical developments that have preceded the current understanding of such ideas. In order to achieve this, it also becomes necessary to define what is meant by these, and similar, terms. Although it may be possible to forego any precise definition in the hope that one can “frame questions and claims with sufficient precision and specificity that the distinct - if related - ideas ... become clear in context”,⁵⁵ such a position risks accusations of arbitrariness and bias in the omission or inclusion of particular factors. Instead, it seems prudent to engage in a discussion, however brief, of the reasoning behind the definitions being used here and this, it is hoped, will help clarify any ensuing analysis. To that end, this chapter consists primarily of an all too brief exposition of the historical formulations of constitutional thought in an attempt to situate the discussions that are to follow in the context of their earlier precedents.

It must be noted at the outset that this discussion of the history of constitutional thought will, of necessity, be somewhat succinct. Whilst there is no doubt much that can be learned from a thorough examination of the developments that have led to modern

⁵⁵ Gardbaum, S., ‘Human Rights and International Constitutionalism’, (henceforth, Gardbaum), in Dunoff, J. L., and Trachtman, J. P., (eds.), *Ruling the World?: Constitutionalism, International Law, and Global Governance*, (Cambridge: Cambridge University Press, 2009), (henceforth, *Ruling the World?*), p. 234.

conceptions of constitutionalism, this is not the intended aim of the current project. With that in mind, therefore, what follows is a brief summation of particularly significant developments in constitutional history. This is done with the intention of demonstrating a certain continuity of thought between particular historical traditions and the analyses which are to follow within this project.

2.1 Classical Thought

To begin chronologically, then, it has been suggested that Greek philosophers such as Plato and Aristotle are amongst the earliest contributors to constitutional theory. Whilst legal systems in general could be said to date back to the Code of Hammurabi, if not earlier, it has been suggested that “[o]f all the varied meanings of which our word ‘constitution’ is susceptible, the Greek *politeia* conforms to one of the most ancient.”⁵⁶ In relation to these Hellenistic theorists, it has been stated that much of their continuing value

“lies in their recognition of the nature of constitutional problems and issues they set forth and discourse upon. ... Some of their political propositions are still viable; some, happily, have been discarded; and others that have been neglected may deserve consideration for possible application”.⁵⁷

Of the various contributions made by these thinkers, one of the most enduring has been a particular typology of governments. For Aristotle, “[t]he words constitution and government have the same meaning, and the government, which is the supreme authority in states, must be in the hands of one, or of a few, or of the many.”⁵⁸ Each of these numerically-sorted types is then subdivided into both positive and negative forms, thereby suggesting six basic systems of government, wherein “[t]he true forms of government ... govern with a view to the common interest; but governments which rule with a view to the private interest ... are perversions.”⁵⁹

Aristotle acknowledged, however, that the practicalities of political rule meant that few constitutions fitted neatly into these ‘pure’ categories and that, in certain circumstances,

⁵⁶ McIlwain, C. H., *Constitutionalism: Ancient and Modern*, (Revised edn.), (New York, USA: Cornell University Press, 1947), (henceforth, McIlwain), p. 26.

⁵⁷ Polin, R., *Plato and Aristotle on Constitutionalism*, (Aldershot: Ashgate, 1998), p. 8.

⁵⁸ Aristotle, *Politics III.7*, as appearing in Morgan, M. L., (ed.), *Classics of Moral and Political Theory*, (2nd edn.), (Cambridge: Hackett, 1996), (henceforth, *Classics*), p. 413.

⁵⁹ *Ibid.*

it may be either desirable or necessary to fuse or merge particular elements in order to create a ‘mixed’ constitution.⁶⁰ With a few alterations here and there, this concept of a mixed constitution was a theory “that Greek thinkers from Thucydides to Polybius (including some whose works are now lost) had developed.”⁶¹ Specific technical variations aside, this broad analysis of constitutional arrangements proved particularly influential for a relatively long period of time and

“Aristotle’s treatise on politics ... and Polybios’ [*sic*] account of the Roman constitution have been treated as major works in political thought right up to the modern period, and in the seventeenth and eighteenth centuries the constitution of England was commonly described as a mixed constitution”.⁶²

In the present context, however, what is particularly instructive is the consideration that “[t]he words constitution and government have the same meaning”.⁶³ Despite initial appearances, one must bear in mind that the precise term translated here as ‘constitution’ is the Greek *politeia* referred to above. This concept can be seen as meaning “the state as it actually is. It is a term which comprises all the innumerable characteristics which determine that state’s peculiar nature, and these include its whole economic and social texture as well as matters governmental”.⁶⁴ This perception of constitutional thought is supported by

“a close analogy between the organization of the State and the organism of the individual human being. They [the Greeks] thought that the two elements of body and mind ... had a parallel in two constitutive elements of the State, the rulers and the ruled.”⁶⁵

Plato, for instance, drew such an analogy between the constitution of the political body and the constitution of the physical body, stating that “the true city, in my opinion, is the one we’ve described, the healthy one as it were.”⁶⁶

As a consequence of this particular understanding of constitutionalism, the ancient Greeks could attempt to assess constitutions as being positive or negative, just or unjust.

⁶⁰ See, for example, *Politics IV.9, ibid.*, p. 435.

⁶¹ Marquez, X., ‘Cicero and the Stability of States’, (2011) 32(3) *History of Political Thought* 397, p. 397.

⁶² Hansen, M. H., ‘The Mixed Constitution versus the Separation of Powers: Monarchical and aristocratic aspects of modern democracy’, (2010) 31(3) *History of Political Thought* 509, p. 522.

⁶³ *Loc. cit.*, fn. 58.

⁶⁴ McIlwain, p. 26.

⁶⁵ Vinogradoff, P., *Outlines of Historical Jurisprudence*, (Vol. II), (London: Oxford University Press, 1922), p. 12.

⁶⁶ Plato, *Republic II*, 372e, as appearing in *Classics*, p. 65.

Through the lens of their particular political understanding, the concept of a 'constitution' can be seen as referring to "the whole nature or 'composure' of a thing. Such a conception of law may warrant one in saying that a particular enactment is bad, but never that it is not legitimate."⁶⁷ This, then, is one historical construction of constitutional thought - that constitutions are primarily descriptive, not prescriptive. They relate to the functions of government but are devoid of any substantive content that one might equate with a modern political ideology. For these thinkers, a constitution is a simple fact - it cannot be declared void or illegitimate, nor can it only be recognised if existing in a prescribed form. To put it another way, they considered that constitutional law (if such a thing could be conceived of at all) was "not coercive but only normative; and that constitutions have no sanction in our modern sense."⁶⁸

This constitutional philosophy of the ancient Greeks stands in marked contrast to many theories concerning the Roman republic - the other primary historical source of Western constitutional theory. In fact, it has been claimed that "[t]here is no change in political theory so startling in its completeness as the change from the theory of Aristotle to the later philosophical view represented by Cicero and Seneca."⁶⁹ Within this newer, Roman view, one of the more significant departures from Greek thought concerns the establishment of a form of 'natural law' that was somehow in existence before all other forms of human social organisation, and was therefore superior to them.

Claiming that this attribution of a prior and superior position to natural law was a distinct feature of Roman jurisprudence is not, however, a claim that the Greeks had no conception of natural law. Nevertheless, the Aristotelian proposition "is a moral law. It demands that a man be reasonable, but it permits him to be totally unreasonable if he so desires."⁷⁰ The Roman-Stoic view, by contrast, was of a powerful, coercive law that could be either embraced or resisted, but not ignored. It can be seen as being founded upon a perception "of law as a rational and just principle of life which is not enacted by men, but is the expression of the universal and natural reason and sense of justice."⁷¹ It is arguable that it was this more directive form of natural law that underpinned much of Roman constitutional thought and it is on this basis that one can suggest, for example, that the works of Cicero

⁶⁷ McIlwain, p. 36.

⁶⁸ *Ibid.*

⁶⁹ Carlyle, R. W., and Carlyle, A. J., *A History of Mediaeval Political Theory in the West*, (Vol. I), (London: William Blackwood and Sons, 1903), (henceforth, Carlyle), p. 8.

⁷⁰ Waugh, Fr. R. O'Brien, 'Natural Law', (1996) 16 *University of New Brunswick Law Journal* 34, p. 35.

⁷¹ Carlyle, p. 38.

provide “a picture of natural justice apt to inform higher-order constitutional norms and, as a corollary, the limits of popular legislation and the positive legal system.”⁷²

One such ‘higher-order’ norm could potentially be seen as being the idea of popular sovereignty. Whilst such terminology would no doubt have been somewhat alien to Roman jurists, the practical outworking of such a theoretical position would seem to be present in a variety of ways. For instance,

“[i]n the exhaustive list of the various kinds of Roman legal enactment which Gaius gives ... *lex* stands first, the enactment of the whole people; while the authority of every other form of Roman legislation invariably depends upon its relation to *lex*.”⁷³

On a theoretical level at least, therefore, patricians are seen as submitting to the authority of the whole people as enunciated in the *Lex Hortensia* when they obey the requirements of a simple plebiscite. Similarly, albeit much later, the authority of the Emperor can still be seen as being derived, at least theoretically, from the authority of the people, who are said to have conferred on him (by a *lex*) the entirety of their *imperium* and *potestas*.⁷⁴

Whilst the specific mechanics of the Roman legal system do not directly concern the present discussion, these examples do hint at a particular theoretical implication that contrasts sharply with the Greek perception of constitutionalism examined above. This implication is linked to the idea that if, somehow, particular legal enactments could not have their authority traced back to that of the *populus* as a whole, then those enactments would in some way be illegitimate or invalid. This is reinforced by the belief that “[l]aw in its general sense does not express the will of man, but is rather that which he rationally apprehends and obeys.”⁷⁵ In other words, the Roman idea of there being a ‘law above the law’, as it were, resulted in theorists no longer being restricted to assessing the *merits* of any given constitutional system (and the products thereof), but were also given a standard by which to assess their *legitimacy*. This is an option that does not appear to have been open to their more Hellenistic, or more precisely Aristotelian, counterparts.

⁷² Straumann, B., ‘Constitutional Thought in the Late Roman Republic’, (2011) 32(2) *History of Political Thought* 281, p. 290.

⁷³ McIlwain, pp. 44-5.

⁷⁴ See *ibid.*, p. 46.

⁷⁵ Carlyle, p. 38.

There remains, of course, a great deal that could be said about the Roman and Greek constitutional structures and theories. This is particularly true when one considers that, with each new detail, there are a number of competing claims and counter-claims as to the ‘correct’ interpretation of the available evidence.⁷⁶ However, it is equally true that many accounts of the history of constitutional thought “dwell lovingly on the Athenian democracy and the Roman republic - and then leap over the intervening centuries to take up the story again with Hobbes and Locke and the Glorious Revolution.”⁷⁷ In the interest of brevity, therefore, it shall suffice at present to note that, historically speaking, there would seem to be two major strands of constitutional thought. According to at least one interpretation, Greek thinking encourages a descriptive, factual account that relates constitutionalism to the institution of government itself. Roman theories, on the other hand, point towards a more prescriptive form of understanding constitutionalism through a government's relationship with society. To put it another way, Greek thought sees constitutionalism as government, whereas Roman thought views constitutionalism as governance.

2.2 The Medieval Era

The self-same brevity that urges this rapid progression, however, unfortunately also encourages the omission of a great many interesting accounts. It is with regret, therefore, that these ‘intervening centuries’ must be dealt with only lightly in the present discussion. With that in mind, a detailed account of the medieval period has been foregone in favour of an unfortunately brief summation of key developments.

To advance through the ages, then, it ought first to be noted that “[i]n the history of medieval government the greatest change of all was from feudal hierarchy to corporate state”⁷⁸ and this development can potentially be seen as correlating closely with the conflict between absolutism and limited government. From a theoretical perspective, this concept of ‘limited government’ is often treated as being synonymous with the term ‘constitutionalism’. It has, for example, been suggested “that in all its successive phases, constitutionalism has

⁷⁶ See, for example, the debate surrounding the distinction between ‘public’ and ‘private’ law in Hamza, G., ‘The Classification (*divisio*) into “Branches” of Modern Legal Systems (Orders) and Roman Law Traditions’, (2006) 8 *European Journal of Law Reform* 361.

⁷⁷ Tierney, B., *Church Law and Constitutional Thought in the Middle Ages*, (London: Variorum Reprints, 1979), (henceforth, Tierney), XV, p. 5.

⁷⁸ Tierney, I, p. 620

one essential quality: it is a legal limitation on government”.⁷⁹ In a similar vein, this particular interpretation of constitutional theory has sometimes been equated with the concept of ‘liberal democracy’.⁸⁰ It has even been argued that the practical implementation of this particular ideology was brought about as a result of certain constitutional changes in the medieval period, such as “the convocation of representative bodies, the crown’s accountability to law, the protection of personal liberties and freedoms, and the establishment of local self-government”.⁸¹

For all the practical changes that took place during this period, however, there seems to be little evidence of significant alterations to the fundamental understanding of the concept of constitutionalism. With the exception of certain outliers, “the trend of medieval political thought ... increasingly insisted on limited government adapted to particular conditions.”⁸² This approach, however, was not new. Indeed, throughout this period it is often the case that, “instead of simply making a gesture of respect toward Aristotle’s relativistic statements, some authors now embrace them wholeheartedly and insist on the absolute contingency of political organization.”⁸³ The Aristotelian influence on this period, however, was not exclusive, with authors producing arguments based on models found “in Aristotle’s examples of mixed constitutions, in the government of the ancient Jews, [and] in the Roman Republic”.⁸⁴

In effect, the various medieval efforts to implement limited government in one form or another can arguably be seen as little more than attempts to fulfil the application and realisation of these more ancient theories. Throughout this era, the Aristotelian categorisation of constitutional forms in particular appears to survive more or less intact, at least in a very general sense. The Ciceronian approach of believing in a ‘higher law’, however, is more often transformed and solidified into various formulations of ‘divine law’. Indeed, the medieval attempts to clarify the distinctions between divine law, natural law and higher law

⁷⁹ McIlwain, p. 21.

⁸⁰ See, for example, Rawls, J., *The Law of Peoples*, (London: Harvard University Press, 1999), p. 12. Here, Rawls actively conflates constitutionalism and liberalism, stating that he intends to “begin with a sketch of a reasonably just constitutional democratic society (hereafter sometimes referred to simply as a liberal society)”.

⁸¹ Downing, B. M., ‘Medieval Origins of Constitutional Government in the West’, (1989) 18(2) *Theory and Society* 213, p. 214.

⁸² Blythe, J. M., *Ideal Government and the Mixed Constitution in the Middle Ages*, (Oxford: Princeton University Press, 1992), p. 162.

⁸³ *Ibid.*, p. 165.

⁸⁴ *Ibid.*, p. 239.

are perhaps amongst the more nuanced debates within the legal philosophy of the age.⁸⁵ Although it cannot be denied that these are all very different terms, it remains equally true to suggest that they consistently provide a broadly similar perspective on constitutional issues, at least within the medieval period itself. This is because all these “lines of interpretation agree that the mores and laws of actual communities derive their legitimacy and majesty not from the authority of lawgivers but from the capacity to convince the conscience of their justice and rightness.”⁸⁶ Whilst the medieval era, therefore, can be said to have contained a number of significant developments in constitutional *practice*, the developments in constitutional *theory* can be predominantly related to the rediscovery and consequent implementation of Aristotelian and Ciceronian thought.

2.3 The Early Modern Period

It can perhaps, then, be justifiably argued that by the start of the seventeenth century there was a reasonably well-established conviction in the rightness of a higher law that enabled a distinction to be made between ‘good’ and ‘bad’ government. Significantly, however, this distinction could also be used to assist in determining the legitimacy of government and could therefore be seen as providing a theoretical basis on which one could justify resistance to an established government. Of particular note in this regard are the works of early modern authors such as Thomas Hobbes, John Locke and Hugo Grotius. Whilst not explicitly utilising such terms, these writers can arguably be said to be situated in the ancient traditions of constitutionalism, whether by restricting it to an Aristotelian assessment of ‘the authority of lawgivers’ or by relating it to some form of higher law, particularly as translated through the medieval notion of divine law.

To put it another way, these seventeenth-century writers can be seen as having developed, consciously or otherwise, ancient methods of constitutional assessment into theories concerning the legitimate processes and subjects of government rather than just its particular form. Locke, for example, suggested that “the state must respect rights, and when it does not, it acts *ultra vires* - beyond its proper powers - and imposes no duty of

⁸⁵ See, for instance, Crowe, M. B., ‘St. Thomas and Ulpian’s Natural Law’, in Gilson, E., (ed.), *St. Thomas Aquinas 1274-1974 Commemorative Studies*, (Vol. I), (Toronto, Canada: Pontifical Institute of Medieval Studies, 1974).

⁸⁶ Patrick, D., *Old Testament Law*, (London: SCM Press, 1985), p. 7.

obedience”⁸⁷ and this could be held true regardless of whether the state concerned was a monarchy or a republic. Even this, however, was founded upon a broadly Aristotelian distinction between democracy, oligarchy and monarchy.⁸⁸ Of all the various aspects of the theories advanced by such authors, those of most relevance to the present discussion are the ways in which rights-based dialogue began to be incorporated into constitutional and political philosophy. It is, therefore, this aspect that shall now be most closely examined.

To continue chronologically, then, the first theorist to be considered is the Dutchman Hugo Grotius. Writing in the first half of the seventeenth century, Grotius developed many of his ideas within a political environment that was closely tied to certain inherited aspects of the Roman legal system. Contrasting with the more Aristotelian approach utilised by Locke, within the Roman tradition inherited by Grotius it was generally “believed that political power was delegated or transferred to a sovereign by the community, and that the distinction between a monarch or an assembly as the recipients of this delegated power was relatively unimportant.”⁸⁹ However, the nature of these ‘recipients of delegated power’ began to be seen as important when writers such as Grotius considered the notion of liberty. This concept was linked to classical republicanism and “[i]n order to illuminate their argument, these republicans [including Grotius] turned to two ancient republics: one was Rome ... and the other ... was Athens.”⁹⁰ What is of interest at the present time, however, is neither Grotius’ republicanism nor his interest in liberty, at least not directly. Instead, it is the fact that Grotius can be described as having been amongst the “first of the natural lawyers to develop a fully fledged account of subjective natural rights”.⁹¹

As regards specifically legal philosophy, Grotius is famous for his depiction of a natural law that “would take place, though we should even grant, what without the greatest Wickedness cannot be granted, that there is no God, or that he takes no Care of human Affairs.”⁹² It can also be argued, however, that he “made important contributions to an influential doctrine of individual natural rights”⁹³ and the limits of the legitimate actions of government. Nevertheless, and as was discussed earlier, an account of governmental

⁸⁷ Edmundson, W. A., *An Introduction to Rights*, (Cambridge: Cambridge University Press, 2004), p. 30.

⁸⁸ See, for instance, Laslett, P., (ed.), *John Locke: Two Treatises of Government*, (Cambridge: Cambridge University Press, 1988). In particular, p. 354 (The Second Treatise, Chap. X).

⁸⁹ Tuck, R., *Philosophy and Government 1572-1651*, (Cambridge: Cambridge University Press, 1993), p. 157.

⁹⁰ *Ibid.*, p. 160.

⁹¹ Straumann, B., ‘Is Modern Liberty Ancient? Roman Remedies and Natural Rights in Hugo Grotius’s Early Works on Natural Law’, (2009) 27 *Law & History Review* 55, (henceforth, Straumann), p. 58.

⁹² Tuck, R., (ed.), *Hugo Grotius: The Rights of War and Peace*, (Indianapolis, USA: Liberty Fund, 2005), (henceforth, Grotius), Vol. I., p. 89 (The Preliminary Discourse, para. XI).

⁹³ Straumann, p. 55.

legitimacy being based on provisions of natural law was not necessarily a particular innovation of the early modern period. Indeed, it can be argued that Grotius explicitly links his account of natural rights to specific Roman remedies, as well as certain Ciceronian theories of natural law.⁹⁴

Of particular importance to the current discussion is that Grotius seemingly transforms these provisions of Roman law into universalizable precepts of a universal natural law. This development of the concept of natural, individual rights is then used to provide a standard by which to assess the legitimacy of governmental behaviour - the rights form part of a normative, coercive order of natural law which is superior to any earthly sovereign. Indeed, Grotius distinguishes between a ‘Right of Superiority’, connected to Aristotle, and a more fundamental ‘Right of Equality’, which he connects to Cicero and Seneca.⁹⁵ Whilst it is true, for the most part, that “Grotius’s Roman rights doctrine was conceived for the high seas, ... [it also] left domestic sovereignty in a more ambiguous condition, with space for certain rights to be claimed against public authorities.”⁹⁶ In this regard, for instance, he points out that “Contracts between a Prince and one of his Subjects require no other Rules than those which ought to be observed between two private Persons.”⁹⁷

In essence, Grotius can be said to have been concerned with establishing the means to assess the legitimacy, or otherwise, of a sovereign body’s interactions with its subjects and he did so through the mechanism of individual rights. Importantly, however, in Grotius’ work, the legitimacy of these interactions between sovereign and subjects precedes the recognition or establishment of that sovereign’s authority. Indeed, with the sole exception of the inheritance of debt, Grotius claims that “[b]y the bare Law of Nature no Man is bound by the Fact of another”.⁹⁸ The exception for the inheritance of debt is significant, as it enables Grotius to allow for the public seizure of private property in order to satisfy a debt incurred on behalf of the community as a whole.⁹⁹ In other words, the constitutional theory of Grotius can be seen as allowing for consideration of the goals of government and not merely its form. Whilst it would be difficult to suggest that this was the primary purpose behind his work, it can nevertheless be argued that, as a result of this approach, he was one of the first writers to supplement a theory of constitutions as governance with a theory of individual rights.

⁹⁴ See generally, Straumann. See also, Grotius, p. 75 (The Preliminary Discourse, para. II).

⁹⁵ See Grotius, pp. 136-7 (Book I, Ch. I, para. III).

⁹⁶ Straumann, p. 85.

⁹⁷ Grotius, p. 137, n. 16 (Book I, Ch. I, para. III, n. 16).

⁹⁸ Grotius, Vol. III, p. 1231 (Book III, Ch. II, para. I).

⁹⁹ See *ibid.* and following.

Following on from this development stands the theory proposed by Thomas Hobbes. For Hobbes, an Englishman writing slightly later than Grotius, “power is what it is all about.”¹⁰⁰ It is this emphasis on the role of power in political and legal relationships that can help validate a view of Hobbes as a precursor to modern theories of legal positivism, where law itself is seen as “a specific order or organization of power.”¹⁰¹ Hobbes’ discussion of power, however, does not preclude a theoretical acknowledgment of the existence of natural rights. Indeed, according to Hobbes, natural rights can be defined in relation to the power inherent in an individual, as

“[t]he Right of Nature ... is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto.”¹⁰²

Following on from this account of rights as simply the inherent liberty of an individual “to use his own power,” Hobbes proceeds to distinguish between the concept of natural *rights* and the idea of natural *law*. Instead of certain specific rights being granted by a normative, universal law, those rights that are innate to individuals *qua* individuals are seen as being a result of their inherent power. Indeed, Hobbes makes this distinction explicit, claiming that “they that speak of this subject, use to confound *Jus*, and *Lex*, *Right*, and *Law*; yet they ought to be distinguished; because ... Law, and Right, differ as much, as Obligation, and Liberty”.¹⁰³ Whilst it is left open to Hobbesian theorists to concede the existence of a moral form of natural law in the non-coercive, Aristotelian sense, it is not necessary for them to acknowledge the existence of a universal natural law that is both discernible and enforceable.

At the same time as Hobbes provides this separation of natural rights and natural law, however, it remains possible to suggest that “the essentials of modern constitutionalism are

¹⁰⁰ Harrison, R., *Hobbes, Locke, and Confusion's Masterpiece*, (Cambridge: Cambridge University Press, 2003), p. 45.

¹⁰¹ Kelsen, H., (trans., Wedberg, A.), *General Theory of Law and State*, (Cambridge, USA: Harvard University Press, 1946), (henceforth, Kelsen, *General Theory*), p. 121.

¹⁰² Tuck, R., (ed.), *Thomas Hobbes: Leviathan*, (Cambridge: Cambridge University Press, 1996), (henceforth, Hobbes), p. 91.

¹⁰³ *Ibid.*

still seen in their fundamentals in Hobbes's political philosophy of natural rights."¹⁰⁴ Indeed, in addition to this aforementioned division, Hobbes provides an account of constitutional theory that is centred upon the supremacy of the sovereign, in whatever form that might take, and a co-ordinated system of positive law. In contrast to Grotius, however, the constitutionalism of Hobbes can be described as being one of government rather than governance. Whereas Grotius provides a normative account of how individual rights can help assess the legitimacy of a sovereign's behaviour towards its subjects, Hobbes' discussion can instead be viewed as being of a more functional character.

This functional nature of Hobbes' work can be seen through the suggestion that "[t]hose who are the source of rules cannot themselves be held accountable to rules"¹⁰⁵ and that "[t]here must ultimately be someone who is the source of law as a human artifact [*sic*], and who is, thus, above the law and cannot be held accountable to law."¹⁰⁶ In presenting such a view, the constitutionalism of Hobbes can be seen as being primarily concerned with discussing the legitimacy of the sovereign itself, as opposed to the legitimacy of its interactions with society. Hobbes can even be seen as suggesting that legitimate sovereigns can *never* commit illegitimate acts in relation to their own subjects, arguing "that nothing the Sovereign Representative can doe to a subject, on what pretence soever, can properly be called Injustice, or Injury; because every Subject is Author of every act the Sovereign doth".¹⁰⁷

To put it another way, Hobbes' focus is on the legitimacy of a sovereign's *authority* as opposed to that of its *behaviour*. This is not to say that Hobbes views a sovereign as being entirely without limit, "it is merely that limits are not imposed on the sovereign by the subjects or citizens."¹⁰⁸ This is a fine distinction, perhaps, but a distinction nonetheless and one which shall be discussed in greater detail later. For the time being, however, it shall suffice to conclude that Hobbes' position can be seen as an almost complete reversal from the constitutionalism of Grotius. Indeed, Hobbes can be viewed as having introduced theories of natural rights into a perspective of constitutionalism as government in a similar manner to the way in which Grotius combined such theories with a view of constitutionalism as governance.

¹⁰⁴ McDowell, G. L., *The Language of Law and the Foundations of American Constitutionalism*, (Cambridge: Cambridge University Press, 2010), p. 81.

¹⁰⁵ Ostrom, V., 'Hobbes, Covenant, and Constitution', (1980) 10(4) *Publius* 83, p. 87.

¹⁰⁶ *Ibid.*

¹⁰⁷ Hobbes, p. 148.

¹⁰⁸ May, L., *Limiting Leviathan: Hobbes on Law and International Affairs*, (Oxford: Oxford University Press, 2013), p. 2.

Whilst there are undoubtedly many more individual theorists who could be considered in greater detail, such as Samuel Pufendorf or John Locke, the intention at this point is not to provide a thorough historical analysis of these various points of view. Indeed, none of the authors considered thus far has been examined in particularly extensive or exhaustive detail, as the purpose of this discussion is not to assess the intricacies of rights and constitutions as individual concepts. Rather, it is to provide a brief account of the historical development of constitutional thought, as both affecting and affected by development of the concept of rights. Between them, Grotius and Hobbes merely serve to highlight the differences between, respectively, a view of rights based in constitutionalism as governance and one based in constitutionalism as government. In the former, legal rights are a reflection of that which exists prior to a sovereign's active intervention; in the latter, they are consequent upon it.

2.4 Constitutional Revolutions

In acknowledging the significant contributions of such scholars as have just been discussed, care must be taken to avoid crediting them with knowledge they did not possess and theories they did not make. To that end, recognition must also be given to Thomas Paine and his contemporaries in the late eighteenth century for their contributions to what has often been regarded as a major turning-point in the history of constitutional thought. It has been suggested, for example, that “[o]nly with the late-eighteenth-century revolutions in North America and France ... was there a transition from a descriptive to a prescriptive concept”¹⁰⁹ of constitutionalism. Whilst there would appear to be some evidence linking this particular divide to the Greek and Roman views discussed above, there is no denying that these political revolutions had a significant constitutional impact.

In particular, these revolutions can justifiably be seen as presenting the emergence of the modern, written constitution. The relatively simple act of codification, however, was not necessarily as innovative as it may initially appear. Whilst it can certainly be said that the various revolutionaries implemented a variety of substantive political reforms, stating these reforms in a single text was not entirely without precedent. Indeed, English documents such as the Bill of Rights or the Magna Carta can be said to have served a similar purpose in their times. Furthermore, it can be argued that once proponents of reform had succeeded in

¹⁰⁹ Grimm, D., ‘The Constitution in the Process of Denationalization’, (2005) 12(4) *Constellations* 447, (henceforth, Grimm), p. 448.

forcing the government to submit to law, writing such laws down was simply a logical next step. From the perspective of constitutional history, therefore, it can be argued that the revolutionary documents (principally the *Constitution of the United States of America* and the *Déclaration des droits de l'homme et du citoyen*) are not necessarily significant simply because they might form 'documentary Constitutions'. The importance that they do carry, however, can be attached to their practical implementation of certain theoretical positions.

Whilst it regrettably remains impossible in the present discussion to fully analyse all the details of these events and Constitutions in anything approaching a satisfactory depth, a concise summary of the points that are particularly relevant to the upcoming investigations shall nevertheless be attempted. Of especial significance is the consideration that these revolutions did not alter the course of constitutional history by formulating something new, but rather by implementing something old. In North America, for example, the historical context of the colonists' rebellion can certainly be said to have encouraged the vision of revolutionaries creating a decisive break with the past and embarking on a new, inspirational political project. However, it remains equally true that these 'new' ideas and concepts "did not spring into being suddenly with the meeting of the Constitutional Convention, nor did the Declaration of Independence evoke them out of the void."¹¹⁰ A similar statement could be made, *mutatis mutandis*, for the principles of the French revolution.

The ideas that these revolutions advocated, therefore, were inescapably built on the ideas that had gone before. From the perspective of the present discussion, then, it might be argued that the American constitution can be seen as a practical attempt to implement theories that follow in the Greek tradition of constitutionalism as government. Similarly the French *Déclaration*, along with the earlier English Bill of Rights, can be seen as being situated in the predominantly Roman tradition of constitutionalism as governance. At first sight, this suggestion may appear somewhat counter-intuitive, particularly when one considers the traditional acceptance of the notion that "[i]n declaring a right and wrong of government behavior ... the American revolutionaries were the conscious heirs to a political theory that had been expounded in the preceding century to justify the English Revolution of 1688-9."¹¹¹ However, what is significant for present purposes is that "the American

¹¹⁰ Hockett, H. C., *The Constitutional History of the United States 1776-1826*, (New York, USA: Macmillan, 1939), p. vii.

¹¹¹ Kay, R. S., 'American Constitutionalism', in Alexander, L. (ed.), *Constitutionalism: Philosophical Foundations*, (Cambridge: Cambridge University Press, 1998), (henceforth, *Constitutionalism*), p. 17.

revolutionaries saw the principal vindication of these limits in the proper distribution of political authority.”¹¹²

In the American example, therefore, establishing constitutional protection of certain rights and liberties is *subsequent* to establishing the ‘correct’ formation of government. That is, whether or not a government will behave in the desired manner is seen as a consequence of it being formed in an ‘appropriate’ way. It could be said, for instance, that this perspective naturally leads to the establishment of judicial review in *Marbury v. Madison*,¹¹³ in which the question was posed as to “whether a law duly enacted by Congress and inconsistent with the Constitution was nonetheless valid.”¹¹⁴ The eventual decision was that to hold such a law “enforceable would undercut the very reason for having a written Constitution that places limits on legislative power.”¹¹⁵ This answer is merely indicative of the broader approach to constitutional issues inherent in the American system - an attempt to maintain a form of equilibrium between the legislative, executive and judicial functions of government is thought to inhibit any individual part from adversely affecting the lives of the governed. From this perspective, the concept of constitutionalism is seen as relating to governmental form and the maintenance of this system of ‘checks and balances’.

In contrast to this American approach, the European instances referred to above exhibit practical examples of an alternate understanding of constitutional thought. The implication here is that it is only by protecting certain rights that a particular form of government may be deemed to be ‘correct’, or at least legitimate. In other words, this perspective is primarily focused on the interactions between the government and society, as opposed to the interactions taking place within the government itself. From this point of view, it would seem entirely appropriate to see this perspective of constitutionalism as being concerned more with governance than government, placing it within the Ciceronian, as opposed to Aristotelian, tradition. It has even been observed, for instance, “that the ‘Fraternity’ of the [French] Revolution is only a later form of Cicero’s phrase, ‘By nature we are disposed to love men; this is the foundation of law.’”¹¹⁶

¹¹² *Ibid.*, p. 18.

¹¹³ (1803) 5 US (1 Cranch) 137.

¹¹⁴ Pollak, L. H., ‘*Marbury v. Madison*: What did John Marshall decide and why?’, (2004) 148(1) Proceedings of the American Philosophical Society 1, p. 10.

¹¹⁵ *Ibid.*

¹¹⁶ Carlyle, p. 9. Footnote omitted.

As has been mentioned, however, this distinction between the two approaches may appear to be somewhat counter-intuitive. This would seem particularly true when one considers the various social and political changes that have occurred throughout the nineteenth and twentieth centuries. Nevertheless, in the American example, the understanding that the constitution “constitutes a superior law ... [meaning] that ordinary law which conflicts with the constitution is invalid or inapplicable”¹¹⁷ does not appear to be derived from a Roman-Stoic concept of a natural law that is both commanding and authoritative. Instead, this approach to the American constitution is implemented as a derivative consequence of a theory that believes the constitution describes how different parts of the government should work together. On the other hand, the practical outworking of the European examples appears *less* directive as to governmental form. This is arguably because it stems from a concept that believes there is a law superior to government and, therefore, there are certain ways in which a government may not interact with society regardless of what form that government might take.

This distinction between constitutionalism as government and constitutionalism as governance is not, however, as clear and marked as it may initially appear. For a variety of reasons, not least because of a shared terminology, there are many systems in the contemporary world which would seem to combine practical elements of both these theories. Furthermore, this distinction should not be taken as having been evident to all the theorists mentioned thus far nor should they be seen as having consciously directed their work into one category or another. However, this discussion is merely intended to indicate that acknowledging a division between these two schools of constitutional thought is neither new nor revolutionary. In fact, it could be said to be one of the oldest and most durable distinctions in constitutional history.

2.5 Modern Constitutional Definitions

To progress, then, onto more contemporary discussions, it must be said that there are few materials which seem to take account of this apparently fundamental distinction in meaning. On the contrary, even the most cursory examination of such discourse reveals a number of disparate conceptions of ‘constitutionalism’. As a natural consequence of this

¹¹⁷ Raz, J., ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’, in *Constitutionalism*, p. 153.

variety, there are also competing claims as to the meanings of related terms such as ‘a constitution’ and ‘constitutional’.

The significance of definitions can often be highlighted when one considers that, in intellectual discourse, the use of alternate meanings for the same words leaves open the possibility of various academics failing to engage either one another or the real world with their ideas. For instance, in discussing *Human Rights and International Constitutionalism*, Stephen Gardbaum makes his case by “putting to one side the purely functional sense of constitutional law as any law containing one or more metarules for the organization and ordering of political authority”.¹¹⁸ In doing so, however, he sidelines the contributions of authors such as Alec Stone-Sweet, who has suggested that a constitution ought to be thought of as “a body of metanorms governing how lower-order norms are produced, applied and interpreted.”¹¹⁹ These contributions, whilst certainly not without merit in their own ways, are seemingly of little relevance to one another in the wider context of constitutional debate simply as a result of this definitional disagreement.

As has been discussed, however, this apparent dichotomy between alternate understandings of constitutionalism is nothing new. Although the precise terms in use may vary, a distinction between differing accounts of constitutional thought continues to be borne out in a number of ways by a variety of authors. Dieter Grimm, for example, suggests that “when we speak of constitutionalization, we always speak of the legal and not the factual constitution.”¹²⁰ Chris Thornhill, on the other hand, has described the constitution “as a gradually evolving and highly variable social phenomenon, extant to different degrees in different societies”¹²¹ and Dicey defined constitutional law as including “all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state.”¹²² Some authors, such as Neil Walker, have attempted to bridge these divides, describing constitutionalism as relating to “the special type of practical reason associated with ... the deepest and most collectively implicated questions of ‘how to decide how to

¹¹⁸ Gardbaum, p. 238.

¹¹⁹ Stone, A., ‘What is a supranational constitution? An essay in international relations theory’, (1994) 56(3) *Review of Politics* 441, p. 443.

¹²⁰ Grimm, p. 448.

¹²¹ Thornhill, C., *A Sociology of Constitutions*, (Cambridge: Cambridge University Press, 2011), (henceforth, Thornhill), p. 12.

¹²² Dicey, A. V., *Law of the Constitution*, (9th edn.), (London: Macmillan, 1939), (henceforth, Dicey), p. 23.

decide' how to act"¹²³ and yet his analysis also "demonstrates the resilience of the division between incremental and holistic understandings of constitutionalism."¹²⁴

As useful as this relatively abstract conceptualisation of constitutionalism may appear, there is often a further complication which is particularly noticeable when one examines jurisdictions that refer to a specific document as 'the Constitution'. In reference to the United States of America, for example, it has been noted that "[t]he Constitution (the document called the Constitution) is not identical to the Constitution (the norms that constitute 'the supreme Law')."¹²⁵ Discussing legal orders in general, Kelsen famously differentiated between the 'formal' and 'material' senses of a constitution, suggesting that

"a special form for constitutional laws, a constitutional form, or constitution in the formal sense of the term, is not indispensable, whereas the material constitution, that is to say norms regulating the creation of general norms and ... determining the organs and procedure of legislation, is an essential element of every legal order."¹²⁶

Instead of trying to unify these competing understandings of constitutional theory, some authors have simply tried to clarify the distinctions. Larry Alexander, for example, has attempted to "distinguish a constitution as a collection of agreed-upon symbols from a metaconstitution".¹²⁷ This latter construct bears some relation to Gardbaum's dismissed 'functional sense' of constitutionalism in that it is seen to consist of a set of metarules that are agreed as determining "which particular set of symbols is the constitution, who is to interpret those symbols, and whose semantic intentions shall count as the authoritative meaning of the symbols."¹²⁸

It would seem, then, that the historical distinction identified above, between constitutionalism as government and constitutionalism as governance, could well persist among contemporary constitutional discussions. This appears especially true when one considers that each of the apparent differences revealed in this brief summary of various positions can be interpreted as fitting within one or other of these more historic categories. It is to be hoped, therefore, that an attempt at making a more complete outline of this bipolar

¹²³ Walker, N., 'Taking Constitutionalism Beyond the State', (2008) 56(3) *Political Studies* 519, p. 524.

¹²⁴ *Ibid.*, p. 537.

¹²⁵ Perry, M. J., 'What is "the Constitution"? (and Other Fundamental Questions)', in *Constitutionalism*, p. 99.

¹²⁶ Kelsen, *General Theory*, p. 125.

¹²⁷ *Constitutionalism*, p. 3.

¹²⁸ *Ibid.*

distinction in constitutional thought may help provide a framework within which to assess alternative understandings of constitutional thought.

2.6 Constitutionalism as Government

As already discussed, a perspective that views constitutionalism as government can be associated with the philosophical approach of the ancient Greeks and is connected in many ways to the term *politeia*. Within this view, a constitution is a simple fact - it is a term that describes the overarching formation of any given social grouping. As a consequence, this perspective generally views constitutions as being more descriptive than normative, more functional than social and more positive than natural.

To examine the first of these distinctions, a claim that a constitution prioritises description over normative power does not of necessity imply that it is entirely without coercive force. Instead, it is merely one manner of stating the contention that a constitution is not inherently imbued with such force by nature of it being a constitution. In contrast, such coercive properties as it may possess are consequences of the ability of any given constitution to describe the political situation in the society concerned. That is, from this perspective, the coercive ability of a constitution is dependent upon its descriptive accuracy. If a constitution is seen as accurately describing how different aspects of government interact, then departures from that system may be duly regulated, controlled or penalised. On the other hand, however, “[i]f in the course of time real circumstances of constitutional life gravely depart from a norm which originally related to such conditions, the norm will lose its general power to control reality.”¹²⁹

One difficulty with this approach is that it may initiate some rather circular reasoning, particularly in relation to constitutional alteration. For example, if different aspects of the government interact with each other in a way that contradicts the constitution, is this simply unconstitutional behaviour or a flaw in the description of the government provided by the constitution? A potential solution to this conundrum is highlighted by the late-eighteenth-century constitutional developments discussed earlier. In particular, the codification of a constitution into documentary form would appear to greatly assist in the determination of which actions are unconstitutional and which are merely flaws in the description. This is

¹²⁹ Fassbender, B., *The United Nations Charter as the Constitution of the International Community*, (Leiden: Martinus Nijhoff, 2009), p. 117.

particularly true when combined with a constitutional authority that is not only theoretically superior to other governmental actions but also directly enforceable. It is in this way that the conclusions of *Marbury v. Madison*, discussed above,¹³⁰ can be seen as a natural consequence of attempting to implement a view of constitutional issues that focuses on government rather than governance.

This perception of constitutionalism as government can also be described as being more functional than social. This is because, from this perspective, the constitution is primarily concerned with interactions within the government itself (the functioning of government), as opposed to interactions between the government and society (the implementation of government). In this manner, it can be said that the constitution incorporates those “rules which define the members of the sovereign power, [and] all rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power, or the members thereof, exercise their authority.”¹³¹ That is, it is primarily concerned with “the mode in which” authority is exercised, rather than the purpose for which it is so used. To put it another way, a perspective of constitutionalism as government can be said to focus on the *authority* of the sovereign as opposed to its *behaviour*.

To say, however, that this interpretation of constitutionalism is not oriented towards society is not intended to imply that it views constitutions as being somehow immune from the influence of political ideas. Instead, it is merely intended to indicate that this perspective views constitutions as prioritising concern with the way government works rather than the goals it pursues. Whilst this concern with governmental function may indeed be motivated by an ideological belief that the ‘right’ government will necessarily pursue the ‘right’ goals, the ultimate outcome is a constitution that is concerned with maintaining governmental form rather than restraining governmental action.

Finally, and perhaps most fundamentally, a perspective of constitutionalism as government can be identified as being dominated by a concentration on positive, as opposed to natural, law. This concept of positive law has been described as relating to

“a human, arbitrary order whose rules lack self-evident rightness [and which] necessarily requires an agency for the realization of acts of coercion and displays the inherent tendency to evolve from a coercive order into a

¹³⁰ See fn. 113 and accompanying text.

¹³¹ Dicey, p. 23.

specific coercive ‘organization.’ This coercive order, especially when it becomes an organization, is identical with the State.”¹³²

As government, then, constitutionalism is simply the description of the way in which the organisation that is “the State” maintains and co-ordinates the coercive order of positive law. Within this school of thought, the fundamental level of constitutionalism is the “basic norm” beyond which a purely positive legal theory cannot progress.

The character of this “basic norm”, however, serves to highlight the distinction between a view of constitutionalism as government and an entirely positive-law perspective of constitutionalism. This basic norm is, essentially, the postulation “that one ought to behave as the individual, or individuals, who laid down the first constitution have ordained”¹³³ and, because of its origins, this norm “is not - as a positive legal norm is - valid because it is created in a certain way by a legal act, but it is valid because it is presupposed to be valid”.¹³⁴ If, then, one is to engage in a discussion of the underlying validity of constitutional norms and principles, there is a certain extent to which one cannot avoid engaging with fundamental presuppositions that inevitably lie outside the scope of an approach grounded purely in positive law. In recognising this to some degree, it can be said that viewing constitutionalism as government, whilst being centred upon a consideration of the sphere of positive law, is not necessarily identical to a positive law approach to constitutional issues.

By taking a primarily positivist stance, however, this perspective on the nature of constitutionalism can find itself directly confronted by a number of questions, such as that of the unconstitutional amendment. That is, at what point does constitutional reformation become constitutional re-formation?¹³⁵ A question such as this serves to highlight the distinction between understanding a constitution as the founding principle of positive law and a perspective of constitutionalism as government. This is because any answer to the question of whether or not there can be constitutional limits to constitutional amendment must necessarily move outside the realm of positive law. To insist on a purely positivist solution to this issue is to “put marriage, religion, and private property solemnly under the protection of the constitution and in one and the same constitution offer the legal means for their

¹³² Kelsen, *General Theory*, p. 393.

¹³³ *Ibid.*, p. 115.

¹³⁴ *Ibid.*, p. 116.

¹³⁵ For a more detailed discussion of this issue, see Jacobson, G. J., ‘An Unconstitutional Constitution? A comparative perspective’, (2006) 4 *International Journal of Constitutional Law* 460.

elimination.”¹³⁶ On the other hand, however, to attempt to solve this dilemma through the invocation of such principles as popular sovereignty, natural rights or constitutional identity is merely to invite natural law theories into a positive legal system in a way that expresses “the irrepressible tendency of knowledge toward the unity of its object.”¹³⁷

It remains possible that an alternative approach to this predicament may be presented by a perspective that consistently incorporates theories of natural law throughout its development. It can be argued, however, that to do so results in such fundamental variations to the eventual outcome as to warrant an alternate form of description and categorisation. It is with that in mind, therefore, that theories of constitutionalism as governance shall now be examined.

2.7 Constitutionalism as Governance

As a broad category of perspectives on constitutional theory, a view of constitutionalism as governance can be broadly related to theories of natural law. As was discussed earlier, this has stronger connections with the judicial philosophy of ancient Rome than that of Greece. Whilst it has inevitably developed over the course of time, this perspective can generally be viewed as relating theories of constitutionalism to the ways in which a government may, or does, interact with society. That is, it incorporates those views whose focus is on the consideration that a constitution “creates legal conditions for the use of political power”¹³⁸ whilst neglecting, to a greater or lesser extent, regulation of the form that such political power might take. As opposed to constitutionalism as government, this alternative vision of constitutionalism can be seen as being primarily normative rather than descriptive, more social than functional and grounded more in natural than positive law.

A perspective of constitutionalism as governance, then, can be described as prioritising normative power over descriptive accuracy. This is because a constitution comes to be seen as enunciating general, foundational rules for the relevant political system to follow instead of being concerned with the minute arcana of how that system functions. Consequently, from this perspective, the authority of the constitution to regulate the actions of government is seen as being derived from the authority of the norms on which the

¹³⁶ Schmitt, C., *Legality and Legitimacy*, (London: Duke University Press, 2004), p.46.

¹³⁷ Kelsen, *General Theory*, p. 411.

¹³⁸ Thornhill, p. 12.

constitution itself relies. It is in this way, therefore, that a vision of constitutionalism as governance can be contrasted with one of constitutionalism as government through the terms 'normative' and 'descriptive'. That is, these expressions are not seen as relating to the role which constitutions are seen to perform themselves, but rather as illustrating the supposed source of constitutional authority. A perspective of constitutionalism as government sees such authority as being primarily dependent on the descriptive accuracy of the constitution, whereas a view that connects constitutionalism to governance can be said to relate the authority of a constitution to that of the norms which it embodies.

In a similar manner, these two alternate perspectives on constitutionalism can be contrasted through the terms 'social' and 'functional'. Whereas a view of constitutionalism as government can be described as being primarily functional, as examined earlier, a view of constitutionalism as governance can be seen as being primarily social. Such a description is not intended to imply that this perspective of constitutionalism is necessarily connected to any specific political or social ideology. Rather, it is simply used to highlight the fact that this account of constitutionalism connects to broader philosophical issues and ideas in a way that is not inherently required by depictions of constitutionalism as government. This is, at least in part, because viewing constitutionalism as governance can be seen as placing a greater emphasis on interactions between government and society than on the internal relationships between different aspects of the government itself. In other words, the concern lies with the justifications for a sovereign's behaviour as opposed to those for a sovereign's authority.

As an indicator of this apparent focus on the external relationships of government, theories of constitutionalism as governance can be seen as being more concerned with the substantive content of governmental decisions than with the deliberative process by which they are generated. When comparing these two visions of constitutionalism, however, this division between form and substance is not inevitably clear and distinct. Indeed, it is possible to argue that, "with regard to a constitution, form and substance are inseparable."¹³⁹ When analysing constitutional theories in such terms, therefore, it can be said that it is a question of the relative levels of emphasis on, as opposed to the mere presence of, such factors.

A potentially more marked difference between these two perspectives can arguably be found in the distinction between positive and natural law. Whilst it is arguable that theories

¹³⁹ Paulus, A. L., 'The International Legal System as a Constitution', in *Ruling the World?*, pp. 87-88.

of constitutionalism are not inherently restricted to approaches grounded in legal philosophy, involving as they do the intermingling of law and politics, a certain legal element is nevertheless inescapable. Broadly speaking, then, it can generally be said that approaches that view constitutionalism as governance can be placed more in the natural law tradition than that of positive law. This is because, as has already been stated, this perspective views constitutional authority as being derived from certain pre-existing norms. The nature, authority and even identity of these norms may vary but they are consistently viewed as being superior to both the government and the constitution itself.

Similarly, however, to the way in which constitutionalism as government relates to the concept of positive law, this alternative approach to establishing an understanding of constitutionalism is not identical to a perspective based entirely on natural law. Whilst the emphasis on natural law elements from within this perspective would generally seem to be greater than the prominence of discussion centred upon positive law, there is nevertheless a certain degree of examination of more positivist issues. This is because, if it is “[l]ooked at in terms of legal validity, constitutional law is the law that is highest in the validity chain. It validates lower-level law.”¹⁴⁰ Consequently, any theory concerning the status or nature of constitutional law must inevitably take into account the effects of this law on, as well as its relationship to, the domain of positive law.

In spite of this recognition of positive law, however, a perspective of constitutionalism as governance would seem to hold that the recognition of any particular document or set of rules as ‘the Constitution’ simply indicates that as being the most appropriate and currently available embodiment of whatever norms are considered to guide governmental behaviour. It is in this way, for example, that a constitution can safely be described as being “a written document establishing the main institutions of government, enumerating their powers, and specifying the norms that would regulate their relations.”¹⁴¹ As a consequence of this view, constitutional modification can be easily permitted provided that it does not violate those anterior, fundamental norms. Difficulties may arise, however, when there is disagreement as to the precise identity of the norms in question or uncertainty regarding the relationships between them.

¹⁴⁰ Alexander, L., ‘What are constitutions, and what should (and can) they do?’, (2011) 28(1) *Social Philosophy and Policy* 1, p. 3.

¹⁴¹ Loughlin, M., ‘What is Constitutionalisation?’, in Dobner, P., and Loughlin, M., (eds.), *The Twilight of Constitutionalism?*, (Oxford: Oxford University Press, 2010), p. 48.

2.8 Conclusions

To briefly summarise the preceding discussion, it can hopefully be seen that constitutional theories can generally be arranged into two broad schools of thought - those that view constitutionalism as government and those that view constitutionalism as governance. As has been considered, these perspectives can be said to have roots in ancient political philosophies, with the connections to government being broadly tied to Greek discussions of the *politeia* and the connections to governance containing a stronger link to the Roman-Stoic view of natural law. Whilst these opinions have inevitably undergone a certain level of development and refinement since their initial conception, it can nevertheless be said that they may still assist in the provision of relevant classifications for modern-day analyses of constitutional thought. Those theories which can principally be thought of as displaying a descriptive, functional and positivist approach to constitutionalism can be described as viewing the concept as being one of government. In contrast, theories which are primarily normative, social and based on natural law can perhaps be better illustrated through the terminology of constitutionalism as governance.

At this point, however, there is an important aspect of this admittedly broad classification that ought to be taken into consideration. This is the observation that nothing within the preceding examination of these two perspectives is intended as an attempt to establish the superiority of one school of thought over the other. Indeed, if it is true that the defining features of these perspectives relate to issues of emphasis on various spectra, as opposed to distinct and mutually exclusive categories, then the possibility remains open that there is a singular, unifying perspective of constitutional thought that is capable of incorporating both of these points of view. As a result, it now becomes necessary to more thoroughly examine certain of the distinctions and common features of these approaches to constitutionalism in order to more fully assess the viability of such a proposal.

Chapter 3

Rights and Constitutions

As was discussed in the previous chapter, the history of constitutions and constitutionalism is a long and complex one. Certain historical developments, however, have highlighted two particular approaches to constitutional thought that have proved remarkably resilient. On the one hand, there is a perspective of constitutionalism as government, which views constitutions as being primarily descriptive and functional in character and principally focuses on the relationship between a constitution and the realm of positive law. On the other hand, there is a perspective of constitutionalism as governance. This alternate perspective primarily views constitutions as being normative, social and focused on ideas of natural law. As already discussed, these positions can be related, respectively, to the works of Aristotle and of Cicero.¹⁴²

To attribute the fully-fledged development of such ideas to these ancient authors, however, would be to ignore the centuries of revision, modification and refinement that have been applied to these theories. In particular, these approaches to constitutional thought can be said to have undergone significant development in and around the seventeenth century, through the work of thinkers such as Hugo Grotius and Thomas Hobbes. For Grotius, the development of subjective natural rights helped provide “political theory with a yardstick for a moral evaluation of the extent of political power.”¹⁴³ Hobbes, by contrast, can be seen as distinguishing between natural rights and natural law and thereby contributing to a more government-based view of constitutionalism. It is this concept of rights, therefore, that can arguably be seen as providing the clearest area of common ground between these conflicting schools of thought. Simultaneously, however, it is this same concept that also presents the clearest distinctions and divisions between them.

As a result, any attempt to more fully investigate the possibility of a singular concept of constitutionalism must necessarily also engage with the concept of rights. This reasoning, in fact, cuts both ways, with it being equally true that “[n]o understanding of rights is

¹⁴² See *supra*, Chapter 2.

¹⁴³ Straumann, B., ‘Is Modern Liberty Ancient? Roman Remedies and Natural Rights in Hugo Grotius's Early Works on Natural Law’, (2009) 27 *Law & History Review* 55, p. 59.

thinkable in isolation from a broader theory of law.”¹⁴⁴ Whilst there is undoubtedly an important debate to be had surrounding how to understand the origins and nature of individual rights as a general concept, however, the present discussion is primarily aimed at viewing such a concept from the perspective of constitutional thought rather than as a specific theoretical approach in and of itself. With the current aim of more thoroughly examining the possibility of a unified approach to constitutional thought, therefore, it is these connections between rights and constitutions that shall now be considered in more detail and the primary historical and conceptual elements shall be treated as having been discussed elsewhere.

To begin this investigation, then, this chapter considers the differing opportunities for analysing the concept of rights that are presented by, alternately, perspectives of constitutionalism as governance and as government. At the heart of this discussion, however, is the enquiry as to whether or not this bipolar division within constitutional thought is truly insurmountable. As a result, this chapter then proceeds with an attempt to address these divisions in rights-based constitutional dialogue and asks whether or not there might be a way in which they may be overcome. Consequently, the final question to be addressed then concerns the implications for the links between rights and constitutions that are created by the success or failure of such an attempt.

3.1 Governance: Rights as Morality

Whilst both perspectives of constitutionalism may incorporate rights-based dialogue, it may initially appear that a view of constitutionalism as governance lends itself more easily to a rights-based approach than a perspective of constitutionalism as government. This would be because, simply put, viewing constitutionalism as governance enables rights to be seen as an expression of the norms that guide the constitution itself.

Within this view, ‘rights’ are seen as being primarily moral standards that, in one way or another, have some claim to legitimacy regardless of the provisions of any positive legal system that might be applied. As such, the positive-law rights that may be outlined in a documentary constitution or municipal statute can simply be described as being localised expressions of a fundamental morality. It is then this external concept of morality that validates, or invalidates, the entire sphere of positive law, including the constitution itself.

¹⁴⁴ Heinze, E., ‘Principles for a Meta-Discourse of Liberal Rights: The Example of the European Convention on Human Rights’, (1998-9) 9 *Indiana International and Comparative Law Review* 319, p. 320.

Whilst it may initially appear somewhat counter-intuitive, one of the consequences of adopting this perspective would seem to be that it places discussions about rights firmly in the legal, as opposed to the political, sphere. Indeed, one can make the argument that “[i]t is this rights focus that gives contemporary constitutionalism its whole juridical cast, whereby a constitution’s task is viewed as being to embody the substance of fundamental law rather than to provide a fundamental structure for law-making.”¹⁴⁵ As a result, purely moral and philosophical debates about rights are drained of any practical significance they may have had. Instead, their place is taken by legal dialogues that are no longer restricted to some form of textual interpretation but also contain broader and more normative implications for the society as a whole. Such developments have been witnessed recently in a number of jurisdictions engaged in the controversial debates surrounding the constitutional status of same-sex relationships. For example, in a number of American states, such as Massachusetts, it was primarily judicial activism that led to the equalisation of marriage rights with political debate playing, at most, a subsidiary role.¹⁴⁶

This is not to say that social and political debates in such an environment make no contribution whatsoever. After all, to the extent that judges are “political agents within concrete socio-political settings, they are never fully immune to the values shared by those who constitute dominant social forces in their societies.”¹⁴⁷ However, this view of rights as norms that govern the implementation of the constitution empowers a juridification of debates about rights that does not rely on legislative action. In this way, judicial activity becomes the initial catalyst for decisions about rights rather than, or even as well as, the final arbiter.

From this perspective, the concept of rights is seen as a substantive account of natural truths that are both prior and superior to the constitution itself. As such, rights can be seen as providing a framework of norms that governments can, indeed must, fit themselves around. Difficulties arise, however, in attempts to move beyond justificatory theories. Whilst a perspective of constitutionalism as governance may indeed provide a validation of the restriction of sovereignty through rights-based dialogue, no prescription is yet made for the exact content of such limitation. Nevertheless, although there remain unanswered questions

¹⁴⁵ Bellamy, R., *Political Constitutionalism*, (Cambridge: Cambridge University Press, 2007), (henceforth, Bellamy), p. 15.

¹⁴⁶ See *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

¹⁴⁷ Sadurski, W., *Moral Pluralism and Legal Neutrality*, (London: Kluwer Academic Publishers, 1990), (henceforth, Sadurski), p. 21.

concerning the precise identification and enumeration of these rights, as well as the necessary mechanisms for their implementation, their existence and status as anterior to the constitution are affirmed.

It is in attempting to identify these pre-existing rights that attention is drawn to more general theories of rights themselves. As such rights are believed to exist regardless of the state of the positive legal system, it is those theories that also do not rely on legal enumerations of rights that are of most direct relevance. In particular, whilst it is arguable that there is little direct causation between the two, there would appear to be a natural degree of correlation between this affirmation of constitutional inferiority to rights and an interest-based analysis of rights as an objective concept. Essentially, this approach argues

“that P can be said to have a right (in a moral theory or a legal system) whenever the protection or advancement of some interest of his is recognized (by the theory or the system) as a reason for imposing duties or obligations on others (whether duties and obligations are actually imposed or not).”¹⁴⁸

The mutual support between these two concepts is derived, at least in part, from their inherent complementarity. Whereas a governance-based view of rights appears somewhat lacking in detailed prescription of the substance of normative rights, an interest-based approach to rights can directly assist in this endeavour. This is the case regardless of the nature of the interests being examined - it does not matter whether the particular theory being applied is grounded in arguments of natural law, human security or some other permanent interest. The fact that is significant for present purposes is not exactly what rights are identified, but that rights are identified. It is this identificatory action that was lacking in a theory of constitutionalism as governance. Moreover, in utilising individual interests as the primary identifier of the existence of a right, this understanding of rights can be seen as directly corresponding with the governance-based argument that rights can and do exist independently of the constitutional situation in any given jurisdiction.

This is not to say, however, that the adoption of an interest theory of rights is entirely without its own difficulties. Indeed, the precise identification and delimitation of rights-holders remains one of the greater challenges within such theories. For the time being,

¹⁴⁸ Waldron, J., (ed.), *Theories of Rights*, (Oxford: Oxford University Press, 1984), (henceforth, *Theories of Rights*), p. 10.

however, the intention is not to provide an exhaustive account of competing theories of rights and it shall suffice to conclude that the conjunction of an interest theory of rights with a perspective of constitutionalism as governance is not only possible but also plausible.¹⁴⁹

On the whole, therefore, it can be suggested that a perspective of constitutionalism as governance generally views rights as existing outside of any specific or particular constitutional order. This position then encourages the adoption of a viewpoint that holds rights to stem from indelible human interests which form a distinct, often universal, morality through which, it is argued, constitutional systems should be measured and justified. An alternative understanding of this assessment is presented by a perspective of constitutionalism as government, and it is this position that shall now be examined.

3.2 Government: Rights as Law

In contrast to a governance-based approach, a perspective of constitutionalism as government connects with a somewhat different view of rights. Instead of being an embodiment of the norms which guide and justify the constitution, rights simply become a mechanism by which the constitution is implemented. From this standpoint, the enumeration of rights in a constitution (whatever form that might take) is simply one way in which the government described therein is empowered and facilitated to govern the society to which it relates. Depending on the particular political construction of the government, a constitutional enumeration of rights might consist of nothing more than statements of vague aspirations designed to be politically appealing. Alternatively, the language of rights might be used simply as a form of maintaining equilibrium between different branches of the government, thereby allowing some form of governmental self-regulation. From within this perspective, however, there also exists the possibility that a government, or a constitution, might grant directly enforceable legal rights to its citizens, thereby enabling the subjects of government to hold that government to account in one way or another.

This particular view of rights as a subsidiary legal mechanism does not necessarily preclude a belief in external norms that ought to guide the constitution. It recognises, however, a specific distinction between a system that *ought* to exist and the one that *is* in

¹⁴⁹ For a more detailed insight into the nature of the interest theory of rights, particularly concerning the problem of delimitation, see Kramer, M. H., 'Refining the Interest Theory of Rights', (2010) 55 American Journal of Jurisprudence 31.

existence. In doing so, the discussion of moral factors and philosophical justifications is set aside in favour of the claim that the positive legal system is “valid only on one assumption: that there is a basic norm which establishes the supreme, law-creating authority.”¹⁵⁰

One of the effects of attempting to maintain this perspective is, ironically, the removal of discussion about rights from the legal sphere. In contrast to the legal development of rights provided for in a governance-based view of constitutions, rights-based dialogue in a system of constitutionalism as government becomes a primarily political issue. Within such a system, legal discourse becomes restricted to semantic interpretation and technical implementation of whichever philosophical viewpoint is ultimately dominant. This is often justified through a deferential, almost reverential, approach to the foundational basic norm of the constitution. Where this is the concept of popular sovereignty, for instance, there is “a commitment to democratic decisionmaking [*sic*] [which] may underlie judicial hesitation about applying the ordinary law ... in the absence of clear legislative authorization.”¹⁵¹

This relative politicisation of the concept of rights can lead to a certain perspective on the constitutional role of rights that once again highlights the variance between a government-based view of constitutionalism and one of governance. As discussed earlier, viewing constitutionalism as governance supports the view of rights as substantive natural truths that precede the constitution in both time and authority. In contrast, a perspective of constitutionalism as government views rights as the results of political processes, thereby remaining open to the view that “the core rights in catalogues of constitutional rights are principles, and that principles are demands for optimization that must be applied on the basis of a proportionality analysis.”¹⁵² This perspective thereby lends its weight to the support of a theory that suggests rights are merely moral creations without coercive force and that both legal and political systems are therefore able to incorporate, interpret, balance or even reject them entirely. Thus the concept of ‘rights’ is seen as being concerned with general principles that are both subsequent and subject to the constitution itself.

Once again, this particular view of the relationship between rights and constitutions can be correlated with a particular theoretical viewpoint of the nature of rights themselves.

¹⁵⁰ Kelsen, H., (trans., Wedberg, A.), *General Theory of Law and State*, (Cambridge, USA: Harvard University Press, 1946), (henceforth, Kelsen, *General Theory*), p. 395.

¹⁵¹ Jackson, V. C., ‘Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence’, (2003) 35 *George Washington International Law Review* 521, p. 521.

¹⁵² Kumm, M., ‘Constitutional rights as principles: On the structure and domain of constitutional justice’, (2004) 2 *International Journal of Constitutional Law* 574, p. 576.

Whereas the adoption of a governance-based view of constitutionalism can be complemented with an interest theory of rights, a view that the existence of rights is contingent upon a degree of constitutional order can be correlated, to some extent, with a choice theory of rights. Sometimes referred to as a will-based theory, this is in essence a theory in which rights exist

“[w]hen an individual Q has a duty to do something, ... [and] there is some other individual P who is in a position to control that duty in the sense that his say-so would be sufficient to discharge Q from the requirement.”¹⁵³

In this scenario, P becomes the holder of the right as he has the power to choose whether or not to discharge Q from his or her duty. This theory “connotes a conception of the right-bearer as agent and chooser rather than merely potential victim or potential recipient of assistance”.¹⁵⁴ Alternatively, it is possible to suggest that the primary focus of this theory is not the aspect of choice but rather the claim “that having a right involves being in a position to control the performance of a duty.”¹⁵⁵ In either circumstance, however, this theory can be seen as differing substantially from the interest theory of rights that was earlier correlated with a governance-based view of constitutionalism.

Insofar as it makes explicit connections between rights and duties, this will theory of rights is intimately connected to the analysis of rights presented by W. N. Hohfeld, in which it was highlighted that “the term ‘rights’ tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense”.¹⁵⁶ This investigation into the nature of rights, however, was originally intended to challenge “the express or tacit assumption that all legal relations may be reduced to ‘rights’ and ‘duties’”.¹⁵⁷ It is a theory, therefore, that was explicitly restricted to examining the nature of legal rights. Whilst a translation of this theory into the area of moral rights is certainly not without precedent,¹⁵⁸ its origins would seem to suggest a more natural fit with a theory of post-constitutional rights. Thus, the will theory of rights can be seen as more naturally aligning with a government-based view of the constitution whereas the interest

¹⁵³ *Theories of Rights*, p. 9.

¹⁵⁴ *Ibid.*, p. 11.

¹⁵⁵ Graham, P., ‘The Will Theory of Rights: A Defence’, (1996) 15 *Law and Philosophy* 257, (henceforth, Graham), p. 260.

¹⁵⁶ Hohfeld, W. N., *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, (Westport, USA: Greenwood Press, 1919), (Reprinted, 1978), p. 36.

¹⁵⁷ *Ibid.*, p. 35.

¹⁵⁸ See, for example, Upton, H., ‘Right-Based Morality and Hohfeld’s Relations’, (2000) 4(3) *The Journal of Ethics* 237.

theory, in its determination of pre-legal and pre-constitutional interests, can be seen as being more easily correlated with viewing constitutionalism as governance.

As before, however, it should not be assumed that the adoption of a particular theory of rights is entirely unproblematic. Indeed, whereas one can argue that an interest theory risks being overly broad in its ascription of rights to particular entities, one can also suggest “that Will Theory is too narrow – that it cannot account for many of the items that we commonly identify as ‘rights’.”¹⁵⁹ Once again, however, the purpose of the present discussion is not to present a fully-formed analysis either in favour of or against any particular theory. Instead, this examination of these positions is merely intended to highlight the possible connections between particular theories of rights and potentially corresponding theories of constitutionalism. To that end, it can be suggested that a choice or will theory of rights can more easily complement a perspective of constitutionalism as government than one of constitutionalism as governance. Primarily, this would be because “it doesn’t rely upon an extra-legal moral theory in order to explain what it means to have a right”,¹⁶⁰ thereby supporting the government-based constitutional argument that rights are dependent upon the constitutional order, rather than justifications of it.

Whilst there are significant divergences and debates both within and between these two alternative understandings of the concept of rights, it is not the place of the present discussion to fully assess these differences. Instead, it shall suffice for the moment to consider the possibility that this ‘choice theory’ of rights can complement a perspective of constitutionalism as government through a shared general rejection of first-order natural truths and the utilisation of arguments grounded principally in the sphere of positive law. In contrast, a perspective of constitutionalism as governance can more easily be accompanied by an interest theory of rights that supports the notion of prior moral precepts influencing constitutional legitimacy.

3.3 Constitutional Reconciliation

In formulating this correlation between two theories of rights and two theories of constitutionalism, no advances have yet been made in the attempt to determine the possible viability of establishing a singular, unitary concept of constitutionalism, at least in so far as it

¹⁵⁹ van Duffel, S., ‘In Defence of the Will Theory of Rights’, (2012) 18 Res Publica 321, p. 321.

¹⁶⁰ Graham, p. 269.

relates to rights. To the extent that the correlations suggested thus far are accepted, however, it does become possible to suggest that investigating the possibility for reconciling these conceptions of rights might provide some insight into the potential reconciliation of the competing perspectives of constitutionalism. Nevertheless, at the same time as such an investigation might prove useful, it remains true that any attempt at reconciling these theories of rights cannot of itself constitute a solution to the divisions present within constitutional thought. At best, it would merely be indicative of potentially useful avenues of exploration. With that in mind, certain possibilities for overcoming this partition in theories of rights shall now be examined, with the hope that they may reveal a possible means of surmounting the bifurcation that has thus far been presented within constitutional enquiry.

One approach to reconciling these theories would be to support the suggestion that “the two prominent theoretical analyses of the concept of ‘a right’ – the Will Theory and the Interest Theory – are both revisionary theories which, if widely adopted, would require people to revise their usage of the term ‘a right’.”¹⁶¹ Adopting this approach would equate to the almost complete abandonment of both theories of rights and attempting to develop a non-revisionist theory in their place. The aim of this newer approach to rights would be to better explain how concepts relating to ‘rights’ are actually used outside academic circles. Whilst this might potentially be beneficial in a variety of ways, the underlying argument here is not that either theory is incorrect, merely that they are neither particularly useful nor influential.

In contrast to this approach, one might suggest that “both accounts [of rights] are better understood as providing characterizations of different ‘kinds’ of rights.”¹⁶² In doing so, one might attempt the establishment of a more general theory of rights that was intended to incorporate both elements, on the basis that the “truth about the nature of rights will not be found in an improved version of either Will Theory or Interest Theory.”¹⁶³ In doing so, this more comprehensive theory would then overcome these earlier differences through attempting to embrace and unify them rather than through their dismissal.

For the time being, then, whilst a definite solution is yet to be presented to the divisions between theories of rights, it may simply be accepted that this discussion suggests, at the least, two possible methods of reconciling the apparent distinction between viewing constitutionalism as government and viewing it as governance. On the one hand, both

¹⁶¹ Cruft, R., ‘Rights: Beyond Interest Theory and Will Theory?’, (2004) 23(4) *Law and Philosophy* 347, p. 347.

¹⁶² van Duffel, S., ‘The Nature of Rights Debate Rests on a Mistake’, (2012) 93 *Pacific Philosophical Quarterly* 104, p. 105.

¹⁶³ *Ibid.*, p. 120.

perspectives may be abandoned in favour of a third approach that is potentially broader and more inclusive in its definitions. Alternatively, certain aspects of each perspective may be retained and subsumed into a wider, more complete understanding of constitutionalism that incorporates elements of these more specific attempts at categorisation. To put it another way, an outline of the potential directions of analysis would appear to proceed as follows: Either both distinctions in constitutional thought may be abandoned in favour of a third understanding of constitutionalism that gives the impression of better explaining constitutional phenomena, or this partition may be accepted as simply providing alternate visions of a more fundamental and singular object. It is these options that shall now be considered.

In attempting to establish an appropriate analysis of constitutional issues, it may initially be somewhat appealing to follow the first of these options outlined above. That is, it may be discovered that the flaws inherent within both the governance and government based views of constitutionalism are simply too extensive to allow either position to be of any use. In endeavouring to establish a viable alternative, however, it is possible that the insights provided by this distinction might then become apparent. Were this to be the case, it might then turn out to be plausible to suggest that the second option for reconciliation, unification rather than abandonment, would be preferable to the first in order that some degree of benefit from these insights might be retained.

If, then, one turns first to a perspective of constitutionalism as governance, an initial criticism may develop from its relative emphasis on natural law, particularly regarding any provisions concerning the concept of rights. Indeed, it has been claimed that sustained attack on the very concept of 'natural rights' has been so strong as to create a situation whereby "no-one now uses the phrase except in a disparaging sense."¹⁶⁴ As a consequence of this, it can be said that there are a number of emergent "contemporary discussions which seek to build theoretical foundations for rights without recourse to discredited theories of natural rights and natural law."¹⁶⁵

Whilst an interest theory of rights is not inherently based in natural law and, therefore, might compensate for this criticism to some degree, the constitutional implementation of such a theory retains certain problematic elements. In particular, there is the argument that the

¹⁶⁴ Waldron, J., 'The Role of Rights in Practical Reasoning: "Rights" versus "Needs"', (2000) 4(1/2) *Journal of Ethics* 115, p. 119.

¹⁶⁵ Curran, E., 'Hobbes's Theory of Rights - A Modern Interest Theory', (2002) 6(1) *Journal of Ethics* 63, p. 64.

“incorporation of real moral rights into a constitution will undermine the settlement function of law unless it is understood that those rights are legally (if not morally) subordinate to some institution’s determination of their content.”¹⁶⁶ Consequently, it can be argued that adopting a perspective of constitutionalism as governance encourages the identification and enumeration of rights through a particular justification that is not sustainable if it is to be translated into the sphere of positive law. That is, this perspective would appear to encourage the adoption of a certain view of morality that seems to lack the persuasive force necessary to be universalizable without objection. As a result, when examined through the prism of rights, viewing constitutionalism as governance would appear to be, at best, undesirable due to its inability to provide a universally acceptable mechanism for their identification and enumeration.

If, then, governance-based constitutionalism is to be ultimately rejected as a prescriptive concept due to an apparent incapacity for standardising a particular moral conception of rights, one might consider instead a perspective of constitutionalism as government. Initially, this point of view may seem to hold an immediate appeal due to its general rejection of natural law arguments in favour of positive law elements that are seemingly more difficult to reject out of hand. Particularly when one examines the concept of rights, it might be considered that the more descriptive and functional character of government-based constitutionalism permits a certain degree of flexibility regarding the establishment, or otherwise, of any specific set of rights. This flexibility would seem to lend support to a claim that “[h]uman rights are not immutable truths, free-standing moral absolutes whose contents are self-evident. They are conventions, whose contents vary as circumstances and human interests vary.”¹⁶⁷

If accepted, this claim would appear to directly assist in the process of identifying and enumerating rights that was earlier taken to be problematic within a perspective of constitutionalism as governance. This would be because it contains an implied degree of acknowledgement that an institutional delimitation of the content and scope of rights could be both morally acceptable and constitutionally necessary. Whilst that may indeed be true, it must also be acknowledged that “reciting a list of liberties that the law should protect is just the beginning of an intellectual task, not its completion.”¹⁶⁸ Once such a list is institutionally

¹⁶⁶ Alexander, L., ‘What are constitutions, and what should (and can) they do?’, (2011) 28(1) *Social Philosophy and Policy* 1, (henceforth, Alexander), p. 6.

¹⁶⁷ Gray, J., *Two Faces of Liberalism*, (Cambridge: Polity Press, 2000), (henceforth, Gray), p. 106.

¹⁶⁸ Sadurski, p. 89.

determined, if it is to have any significance within the sphere of positive law then it must also be not only implemented within the particular society concerned, but also enforced in the case of any infraction. It is here that the drawbacks of viewing constitutionalism as government can become apparent.

If, as has been suggested, a perspective of constitutionalism as government is focused primarily on positive, as opposed to natural, law, then one can argue that the implementation and enforcement of this form of constitutionalism is valid on one primary principle: power. That is, a rejection of natural law arguments beyond those validating the ‘basic norm’ would seem to lend support to the conclusion that “[t]he State is a politically organized society because it is a community constituted by a coercive order, and this coercive order is the law.”¹⁶⁹ Even if one subscribes to “the belief that power in modernity is not simply repressive of deviant behaviours or actions but positively productive in terms of individualities and socialities”,¹⁷⁰ this does not directly contradict the suggestion that it is the coercive power of the State (that is, the very nature of positive law itself) that justifies the implementation and enforcement of the constitution.

It is at this point, however, that viewing constitutionalism as government would seem to become somewhat problematic. One immediate reason is that, as one develops this argument, an inherently circular element begins to emerge. In other words, the position that is ostensibly proposed is one which holds that the implementation and enforcement of any particular law is justified simply because it is law. This does not appear to be a proposition that is either logically or morally sustainable, as any argument that law should be obeyed is reduced to a self-evident tautology. Furthermore, the acceptance of institutionally-determined rights and the accompanying rejection of underlying natural truths deprives this viewpoint of the ability to convince others into its acceptance beyond that which is capable of being coerced.

To proceed with the options outlined earlier, the rejection of constitutionalism as either governance or government would seem to suggest a need for a third account which more satisfactorily explains constitutional phenomena. Within the context of an overall examination of the relationship between rights and constitutions it is possible to suggest that

¹⁶⁹ Kelsen, *General Theory*, p. 190.

¹⁷⁰ Martire, J., ‘Habermas Contra Foucault: Law, Power and the Forgotten Subject’, (2012) 23 *Law and Critique* 123, p. 125.

“there are three, and only three, possibilities here. First, the constitutional authors might be creating rights or making certain rights more determinate by means of rules granting various specific liberties and immunities. Second, the constitutional authors might not be creating or specifying rights through rules but might instead be incorporating real moral rights as they exist in the moral realm ... Third, the constitutional authors might be inventing or creating rights but without translating them into determinate rules.”¹⁷¹

The first two of these propositions can be taken to correspond with, respectively, constitutionalism as government and as governance. The third of these positions, however, would appear to offer an alternative solution. Nevertheless, in spite of this potential, closer examination reveals that, as regards its constitutional implications, it is almost identical to the first. This is because even in situations where a formal, documentary constitution does not provide determinate rules for the rights it creates, such rules will inevitably come into existence within the broader material constitution, provided that the rights are expected to have significance beyond their simple enunciation. In other words, the desire to both implement and enforce constitutional rights necessitates their specification in a determinate manner. Failure to do so leaves those who are expected to see to the implementation and enforcement of such rights “in the position of one who is told that a nonexistent creature - say, a unicorn - has a horselike body and a horn on its head, but is then asked to give its height, weight, color, and speed.”¹⁷² Such determinations would, inevitably, be almost completely arbitrary.

3.4 The Constitutional Process

At this point, it would seem as though all existing possibilities for establishing a singular understanding of constitutionalism through an examination of the relationship between rights and constitutions have been rejected as being unsatisfactory in one respect or another. Viewing constitutionalism as government cannot adequately justify the implementation and enforcement of constitutional rights beyond an argument that one must obey the law because it is law. On the other hand, however, a perspective of

¹⁷¹ Alexander, pp. 4-5.

¹⁷² *Ibid.*, p. 9.

constitutionalism as governance has been rejected as being unable to identify and enumerate an adequately universal set of rights that can reliably be translated from morality to law. Finally, a third possibility has been considered to be lacking clear identification and enumeration of constitutional rights as well as being, to all intents and purposes, entirely arbitrary in their implementation and enforcement. There is, however, one further option that has not yet been examined. As was discussed earlier, there may yet exist the possibility of unification rather than abandonment. That is, instead of entirely rejecting both government- and governance-based constitutionalism in an attempt to establish a more satisfactory interpretation, it might instead be possible to view them as relating to smaller parts of a greater whole. Consequently, by considering their potential complementarity instead of their potential obstacles, one might uncover a more fundamental perspective that incorporates elements of each.

An initial survey of the position this far, then, appears to reveal four particular factors that must be considered in any attempt to explain the practical operation of constitutional theory. These are its identification, enumeration, implementation and enforcement. To briefly expand on these terms, 'identification' can be considered as generally referring to the initial establishment or selection of general principles, regardless of the precise means by which this is achieved. Following on from this, the concept of 'enumeration' can be seen as signifying the process by which general principles are linked to determinate rules. Subsequently, 'implementation' can refer to the institutional delimitation of such rules in a manner that has practical significance beyond the context of the constitution itself. Finally, 'enforcement' can indicate the responses given to infractions of these rules.

These four stages can be seen as combining into a singular constitutional process. That is, one can begin with the suggestion that any constitutional theory is initially grounded in the realm of normative natural law, even if the only principle taken from such law is the basic norm that the very first constitution is valid for historic, religious, democratic or other reasons. The norms, or norm, taken from this natural law must first be identified. Once the identification of normative principles has taken place, determinate rules can then be provided through their enumeration. Having been enumerated, such rules can then be implemented and, once implemented, can then be enforced. This being done, the result is a constitutional order that can then form the foundation of a positive legal system. This is the constitutional process.

When dissected and analysed in such a manner, there does not necessarily appear to be any compelling reason as to why a governance-based focus on the normative and coercive force of an external moral order is inherently incompatible with a government-based concern for distinguishing between what ‘ought’ and what ‘is’. They can simply be seen as alternate operations of the same process. Initially, it must be conceded that there is undoubtedly a certain level of tension in attempts to reconcile a theory which claims certain norms are enforceable vis-à-vis the constitution with one which claims they are, in fact, subject to it. From the standpoint of the constitutional process, however, some clarification can begin to be brought to bear on the ways in which the analytical divisions of governance- or government-based constitutionalism could possibly be reconciled.

This is because this phasic analysis of the constitutional process helps separate the relative strengths and weaknesses of each perspective instead of requiring the imposition of a choice between them as if they were mutually exclusive, monolithic entities. For instance, as has been discussed, a view of constitutionalism as governance is able to harness the moral force of natural law arguments to provide clear justification for the implementation and enforcement of certain rights, although it fails to clearly specify a process for their identification and enumeration. Similarly, although a perspective that views constitutionalism as government can be said to be relatively clear about how rights are identified and enumerated, it lacks a normative and coercive force that can justify their implementation and enforcement independently of the authority of the law itself.

To reconcile these two perspectives, then, is not to simply try and absorb one into the other. Nor is it to simply try and discredit one for the benefit of the other. Instead, the result is the formation of a certain degree of middle ground, an overarching understanding that attempts to incorporate individual strengths.¹⁷³ From this perspective, rights can be identified and enumerated on the theoretical basis provided for in a position of constitutionalism as government, but they would be implemented and enforced on the grounds allowed for in a view of constitutionalism as governance. In other words, there would be an open acknowledgement that any rights identified and enumerated in a documentary constitution have been selected and delimited by the institutions described therein and are not necessarily indicative of fundamental, universal moral truths. Simultaneously, however, there would be a recognition that

¹⁷³ For a more detailed discussion of the nature of ‘middle ground’ theory, see generally, Navari, C., ‘The Terrain of the Middle Ground’, in Navari, C., (ed.), *Ethical Reasoning in International Affairs: Arguments from the Middle Ground*, (Basingstoke: Palgrave Macmillan, 2013).

“[f]or a constitution to come to life – to leap off the paper on which it is printed into the minds and hearts of the people and into the everyday realities of their lives – it needs to be observed, to be used, and to be enforced.”¹⁷⁴

Consequently, there would be an equal admission that to implement and enforce such constitutional rights without any normative and moral justifications for their existence would be to concede the possible legitimacy, or even existence, of arbitrary absolutism.

In spite of the apparent simplicity of this ‘joined-up’ constitutionalism, an immediate difficulty can quickly be seen to emerge. This is the argument that there is a general lack of internal consistency - inherent practicality is gained at the expense of theoretical purity. In contrast, perspectives of both constitutionalism as government and constitutionalism as governance, whilst not being without their own obstacles, can be said to have a minimal level of conceptual coherency. To accept this assessment, however, would be to admit the presumption that a justificatory argument that might be valid for a single stage is individually capable of validating the entire constitutional process. If, however, one accepts the proposition that there is a distinction between that which is necessary and that which is sufficient, then some degree of clarification may begin to emerge. This is particularly the case if one considers that it is the nature of the constitutional process itself that provides theoretical cohesion, rather than the arguments for or against any particular operation of it.

To take an example, a society might insist on the absolute supremacy of a particular sovereign entity, be that a monarch, a parliament or some other body. This sovereign entity would then be in a position to successfully identify and enumerate rights in a manner that utilised a view of constitutionalism as government. That is, the sovereign’s delimitation of rights would be taken as constitutional not because they reflected universal moral truths but because this delimitation occurred within the recognised constitutional order. If that constitutional order were to change, the rights delimited by it could be freely changed as well. The same approach could then be extended to justify the actual implementation and enforcement of those rights, perhaps through an insistence that the constitution, as an accurate depiction of the manner in which that particular positive legal system operated, was authoritative and therefore must be obeyed. To do so, however, would risk eroding the perception of legitimacy surrounding the constitution both internally and externally.

¹⁷⁴ Ghai, Y., and Cottrell, J., *The Millennium Declaration, Rights, and Constitutions*, (Oxford: Oxford University Press, 2011), pp. 69-70.

Internally, as there would be, at the least, resentment from those sectors of the populace who did not share the sovereign entity's understanding of how certain rights ought to be delimited. Externally, from sectors of the international community who also had an alternative understanding of what norms should be incorporated into positive law and how this should be achieved.

Less abstractly, perhaps, the Moroccan constitution of the 1960s "allowed the king dominance over the executive and administration, and strong authority over the legislative and judicial functions of the state."¹⁷⁵ In this way, it was the monarch, as the supreme sovereign entity within the state, that was able to direct the identification and enumeration of any rights that were to exist within the Moroccan law of the time. Attempting to enforce and implement the monarch's understanding of political life along the same lines, however, resulted in internal resentment that was only curtailed when "the king proclaimed a state of emergency and suspended the parliament."¹⁷⁶

In contrast to this approach, a sense of legitimacy could possibly be maintained if the constitution were to justify such implementation and enforcement through reasons grounded in a view of constitutionalism as governance, thereby containing a stronger appeal to the fundamental and universal nature of the rights concerned. To constitutionally identify and enumerate such rights on the same basis, however, would be to once again risk the erosion of legitimacy in the eyes of those whose personal identification and enumeration of such rights did not match those appearing in the constitution. By maintaining an acknowledgement of the role of the sovereign in identifying and enumerating these rights, such a disagreement is transformed from a rejection of the overall constitutional order into questions regarding the legitimacy of, and respect for, the authority of the sovereign.

Ultimately, then, it can be said that both the government-based justification for identification and enumeration and the governance-based justification for implementation and enforcement are simultaneously individually necessary and cumulatively sufficient for consolidating the overall legitimacy of the entire constitutional process. As separate entities, however, neither perspective can maintain the overall sense of legitimacy required to justify the entire procedure. Consequently, viewing the constitution as a process can provide an overall sense of unity between competing constitutionalisms.

¹⁷⁵ Brown, N. J., *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government*, (New York, USA: State University of New York Press, 2002), (henceforth, Brown), p. 52.

¹⁷⁶ *Ibid.*

At this point, however, there would seem to be a certain number of significant questions that remain to be answered. In particular, one such point of enquiry relates to the observation that the development of all law can be seen as occurring in a similar manner to the process described above. The question then arises as to what it is that makes this process specifically constitutional, as opposed to being a general legal process. To conflate the legal and the constitutional in this way, however, is simply to confuse product and process. Inasmuch as they are identified, enumerated, implemented and enforced, laws are the end result, the final product, of this procedure. The constitution, on the other hand, *is* this procedure. To label the process ‘constitutional’ is perhaps somewhat misleading, as it is the process itself that comprises the constitution. To put it another way, it can be said that a “society does not have a constitution. A society is a constituting, an unceasing process of self-creating.”¹⁷⁷ More simply, perhaps, the constitutional process can be seen as “the process of the constitution” rather than the more general interpretation of “the process that is in accordance with the constitution”.

Once seen in such a light, it becomes clearer how the legal can be distinguished from the constitutional and how laws might be described as being unconstitutional. That is, laws can be depicted as being in conflict with the constitution when they fail to progress through each distinct phase of the constitutional process. For example, when attempting to adjudicate on the potential constitutionality of any particular law, one must first attempt to discover “what *substantive constitutional principles* define restrictions on governmental discretion”.¹⁷⁸ Similarly, a law that is consistent with the principles of the constitution and yet has not been adequately enumerated can also be declared unconstitutional.¹⁷⁹ Likewise, attempts to enforce a law which has not been appropriately implemented, perhaps through a lack of suitable promulgation, could reasonably be described as being unconstitutional.¹⁸⁰ Finally, and in a similar vein, a law that is not enforced can also be regarded as being constitutionally unacceptable, in addition to the inherently redundant nature of such a provision. Thus, whilst it is entirely possible for laws to exist outside of this process, such laws cannot reasonably be referred to as being ‘constitutional’.

¹⁷⁷ Allott, P., *The Health of Nations: Society and Law beyond the State*, (Cambridge: Cambridge University Press, 2002), p. 79.

¹⁷⁸ Chang, D., ‘Structuring Constitutional Doctrine: Principles, Proof, and the Functions of Judicial Review’, 58 *Rutgers Law Review* 777, p. 780. Emphasis in original.

¹⁷⁹ See, for instance, the British case of *R(Alvi) v. Secretary of State for the Home Department*, [2012] UKSC 33, in which certain immigration provisions were held to be unconstitutional as they had not undergone an appropriate level of scrutiny and, therefore, enumeration, by parliament.

¹⁸⁰ See, for example, Art. 1 of the French *Code Civil*. Many other jurisdictions have similar provisions.

This process-based depiction of the constitution, therefore, can be seen as facilitating an analysis of the constitutionality of legal provisions that is independent of the nature or status of “the constitution” within a given jurisdiction. In other words, it can be seen as assisting in the development of a form of constitutionalism that is neither tied to any specific philosophical viewpoint nor beholden to the bidding of any particular sovereign entity. It is, therefore, a unitary form of constitutionalism. Nevertheless, it remains unclear as to exactly how, and if, this constitutional process is capable of incorporating the rights-based dialogue that has already been considered as being present in both constitutionalism as governance and as government. For the time being, however, it shall suffice to note that this constitutional process is distinct, both from alternative understandings of the constitution and from a broad characterisation of the nature of legal development in general.

3.5 Understanding Constitutionalism

If, as has been suggested, the totality of this process can be viewed as forming the constitution of any given jurisdiction, questions may still remain over what is then meant by the terms ‘constitutional’ and ‘constitutionalism’. As already referred to, the term ‘constitutional’ would seem to have two distinct meanings and it would appear to be relatively simple to distinguish one from the other. In one sense, this term can refer to those things which form part of, or somehow relate to, the constitution itself, as is meant by the phrase ‘constitutional process’ or ‘constitutional law’. Alternatively, it can indicate those actions or provisions which are deemed to be in accordance with the constitution, such as when a particular enactment is described as being ‘constitutional’. Whilst the context being used might usually help distinguish the intended meaning of this particular term, the question still stands as to precisely what might be meant by the term ‘constitutionalism’.

From the preceding discussions, a number of diverse interpretations can be discerned. On the one hand, constitutionalism can be viewed as a form of ‘constitutionology’, in that it can simply relate to the study and examination of constitutions and related issues. Additionally, there is the definition arrived at above whereby constitutionalism can be seen as a neutral term that refers to the way in which the constitutional process is operated, regardless of the manner in which this is carried out. It is in this sense that “constitutionalism is a

generic framework of universal application”.¹⁸¹ In contrast, however, constitutionalism may also be understood as a particular theoretical or political ideal, leading to claims that, amongst other things, “constitutionalism has one essential quality: it is a legal limitation on government”.¹⁸²

When constitutionalism is understood as referring to a particular, idealised means of operating the constitutional process, an additional signification of the term ‘constitutional’ can be revealed. This is the consideration that a provision might only be considered constitutional when it has progressed through the stages of the constitutional process in a way which is in accordance with the ideals held to by the particular vision of constitutionalism concerned. It is in this way, for example, that it becomes possible to have non-constitutional constitutions.¹⁸³

The possibility of labelling some constitutions as being non- or unconstitutional can only achieve significance, however, within the context of an established and predominant vision of constitutionalism that overshadows most others. Whilst there are potentially as many different ideological forms of constitutionalism as there are theories of politics and society, it is arguable that current discussions of constitutionalism are dominated by a liberal, democratic vision that is often treated as being synonymous with the more fundamental concept of constitutionalism as a process. Indeed, one could argue that “[t]he increasingly dominant view is that constitutions enshrine and secure the rights central to a democratic society.”¹⁸⁴ This is a normative perception of constitutionalism that is not without its challengers, such as theocratic constitutionalism,¹⁸⁵ yet these alternatives remain understood in contrast to “[t]he conventional view [which] was that constitutionalism aimed primarily at limiting the powers of rulers and protecting individuals and groups against the arbitrary and despotic exercise of authority by government.”¹⁸⁶

The strength of this link between constitutionalism and a liberal political ideology is highlighted by John Rawls when he states that “a reasonably just constitutional democratic

¹⁸¹ Deng, F. M., *Identity, Diversity, and Constitutionalism in Africa*, (Washington, USA: US Institute of Peace Press, 2008), (henceforth, Deng), p. 12.

¹⁸² McIlwain, C. H., *Constitutionalism: Ancient and modern*, (Revised edn.), (New York, USA: Cornell University Press, 1947), p. 21.

¹⁸³ For example, see generally, Brown.

¹⁸⁴ Bellamy, p.1.

¹⁸⁵ Theocratic constitutionalism being that which has “argued that one or another of the current crop of universalist religions ought to serve as the foundation of normative disciplining of constitution making.” Backer, L. C., ‘Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering’, (2009) 16 *Indiana Journal of Global Legal Studies* 85, p. 91.

¹⁸⁶ Deng, p. 13.

society ... [is] sometimes referred to simply as a liberal society”.¹⁸⁷ Although conflating these ideas in this way suggests a lack of appreciation for the nuances inherent in these very different terms, this particular combination of concepts does go some way towards indicating why such a conflation can occur. In essence, this liberal form of constitutionalism can be seen as seeking to maintain certain fundamental principles regarding what it sees as the ideal way in which to operate the constitutional process. In this regard, the argument has been presented that “[d]ignity, liberty, and equality are cornerstones of constitutionalism.”¹⁸⁸ As examined, however, such values can be seen simply as cornerstones of *liberal* constitutionalism, as distinct from the constitutional process in and of itself.

A thorough exploration of the nature and status of the exact values that underpin liberal thought is unfortunately beyond the scope of the present discussion. Two principles that are particularly relevant, however, are the desire for liberty and a belief in the importance of equality, as expressed through the ideals of popular sovereignty inherent in a democratic system. To some extent, these values can be seen as the ‘constitutive norms’ of a liberal approach to the constitutional process. Such norms are those which exist “within a practice, [and] adherence to which is required of anyone wishing to be considered an actor in good standing within that practice.”¹⁸⁹ In other words, support for liberty and support for equality can be seen as the basic elements required of any actor wishing to retain good standing within the practice of liberal constitutionalism. Whilst not yet directly addressing the question of how rights and constitutions relate to one another, this combination of liberty and equality with a general approval of constitutional mechanisms does highlight two particular aspects of the constitutional process that have thus far remained unaddressed. This is particularly the case when the somewhat vague and nebulous terms of liberty and equality are translated into more practical, and arguably more constitutional, ideas regarding a separation of powers and the rule of law. The questions that these ideas raise concern the matters of *who* operates the process and *how* they go about it and the answers to these questions can be considered as defining the nature of the constitutionalism that is being discussed.

¹⁸⁷ Rawls, J., *The Law of Peoples*, (London: Harvard University Press, 1999), p. 12.

¹⁸⁸ Baer, S., ‘Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism’, (2009) 59 *University of Toronto Law Journal* 417, p. 467.

¹⁸⁹ Frost, M., *Constituting Human Rights: Global civil society and the society of democratic states*, (London: Routledge, 2002), p. 14. Emphasis removed.

3.6 Operating the Process

As considered above, in order to more fully appreciate the ways in which the constitutional process relates to theories of constitutionalism, it becomes necessary to examine the more practical dimensions of who operates the constitutional process and how they go about it. From within the dominant ideology of liberal constitutionalism, the two principles which have been considered particularly important in this regard are those of liberty and equality. At a more practical level, these principles can be interpreted as being expressed as a desire for both a separation of powers and the rule of law. It has been suggested, for example, that a government, to be properly called as such, must “have legislative power, executive power and judicial power”¹⁹⁰ and “[t]he modern constitutional state ... is one which has developed a very definite set of rules and regulations for the working of these three functions of government.”¹⁹¹ The possibility has also been raised that, in some jurisdictions at least, the rule of law should be seen as a constitutional principle of fundamental importance.¹⁹² Whilst these various concepts are not without definitional and theoretical issues of their own, it shall suffice for present purposes to understand such terms as referring to broad groupings of theories that can be seen as indicating the answers of liberal constitutionalism to the questions of how the constitutional process is operated and by whom.

The concept of the separation of powers can be seen as referring to who, or what institution, is expected to conduct the operation of any given stage of the constitutional process. In a ‘pure’ or ‘strict’ sense, albeit a slightly simplistic one, the “separation of powers holds that the legislative, executive and judicial arms [of government] should be separate of each other, in respect of both their functions and their personnel.”¹⁹³ When transposed into a theory of the constitutional process, this can essentially be viewed as an argument in favour of having each phase of the process being conducted by an institution that is fully independent of those institutions that are carrying out other stages of the same process. Thus, the executive might identify principles to be enshrined in law, a legislature might enumerate such a law, an independent bureaucracy might implement the law and then an

¹⁹⁰ Strong, C. F., *Modern Political Constitutions*, (London: Sidgwick and Jackson, 1930), p. 7.

¹⁹¹ *Ibid.*, p. 10.

¹⁹² See generally, McCorkindale, C., and McKerrell, N., ‘Assessing the Relationship between Legislative and Judicial Supremacy in the UK: Parliament and the Rule of Law after *Jackson*’, (2012) 101(4) *The Round Table* 341.

¹⁹³ Masterman, R., *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom*, (Cambridge: Cambridge University Press, 2010), p. 11.

independent judiciary would enforce it. The nature of the constitutional process, however, does not dictate that dividing the functions of government in this way is necessary; it is merely desirable from within the context of liberal constitutionalism as a political ideology.

In a similar manner, the concept of the rule of law can be seen as referring to how separate and independent institutions are expected to operate the stage, or stages, of the constitutional process for which they have been given responsibility. Whilst the notion of the rule of law is potentially as ambiguous and malleable as that of the separation of powers, it can generally be understood as a means “to affect the state-individual relationship by introducing (‘legal’) curbs on sovereign power to the individual’s benefit.”¹⁹⁴ Whilst not entirely neglecting the identification and enumeration stages of the constitutional process, this theory of the rule of law can arguably be said to focus on the means by which laws are to be implemented and enforced, at least in so far as it emphasises principles such as the imposition of “meaningful limits on the state and state actors, ... the supremacy of law, and equality of all before the law.”¹⁹⁵ Consequently, this particular vision of constitutionalism can then be further supplemented with other political ideas, such as strongly democratic theories, that seemingly prioritise the methods behind the identification and enumeration aspects of the constitution.

This artificial division, however, into democratic theories being used to justify the stages of identification and enumeration and rule of law theories underpinning the implementation and enforcement phases can often lead to a degree of tension between the two concepts. A clear example of this tension can be found in the ‘strong’ form of judicial review, expressed in the United States through the case of *Marbury v. Madison*,¹⁹⁶ as was discussed earlier. Through judicial review, the linear nature of the constitutional process becomes supplemented with an internal loop whereby judges, at the final stage of the process, are able to resubmit legislation to the earlier stages before it becomes finalised as an acceptable, and therefore constitutional, act. Compromising a pure separation of powers in this way so that the judiciary becomes able to enforce certain values on those responsible for identification and enumeration is one method by which consistency of values can be maintained across the entire constitutional process.

¹⁹⁴ Costa, P., ‘The Rule of Law: A Historical Introduction’, in Costa, P., and Zolo, D., (eds.), *The Rule of Law: History, Theory, Criticism*, (Dordrecht: Springer, 2007), p. 74.

¹⁹⁵ Zurn, M., *et al*, ‘Rule of Law Dynamics in an Era of International and Transnational Governance’, in Zurn, M., *et al*, *Rule of Law Dynamics in an Era of International and Transnational Governance*, (Cambridge: Cambridge University Press, 2012), p. 1, fn. 1.

¹⁹⁶ (1803) 5 US (1 Cranch) 137. See *supra*, Chapter 2.

It is only at this point, after establishing the who and how of its operation, that liberal constitutionalism is capable of introducing concepts of rights into the constitutional process. It must be conceded, therefore, that other forms of constitutionalism, such as an autocratic or communist constitutionalism, might conceive of and integrate rights in very different ways, if at all. There are, however, four, and only four, ways in which rights can relate to the constitutional process. Firstly, rights might be pre-constitutional, in that they exist prior to the constitution and thus inform its development, or they might be seen as being post-constitutional, in that they are subject to the constitution and are thus controlled by its development. Alternatively, rights might be extra-constitutional, in that they exist independently of the constitution and relate to it in the same way as any other field of human activity, or they might be intra-constitutional, in that they are integral to the very concept of a constitution and thus the two ideas are inseparable.

In attempting to make a determination between these various possible relationships, an understanding of a constitution as a process would seem to indicate the lack of any necessary causal link. Instead, each of these options is simply an alternate means of operating the process and the operator of that process is free to decide between them. At the present time, however, it is unfortunately impossible to fully account for every theoretical proposal regarding politics and society, their relationships to the constitutional process and their attendant treatment of the concept of rights. Instead, the concept of liberal democracy shall be taken as the dominant vision of constitutional thought and assessed accordingly, as discussed above. Whether or not such dominance is justifiable, appropriate or beneficial are assessments that must, however, be made elsewhere.

To work through the possibilities, then, it is not inconceivable that one could adopt a position that supports both liberal constitutionalism and a pre-constitutional vision of rights. Such a position “fuses legal and moral issues, by making the validity of a law depend on the answer to complex moral problems, like the problem of whether a particular statute respects the inherent equality of all men.”¹⁹⁷ This position becomes difficult to sustain, however, as the support for pre-existing and pre-eminent moral values implies that all governmental forms would be subject to the same constraints. In this way, the need for a separation of powers is negated, with the sole solution being to absorb such a separation into the realm of pre-existing, and potentially self-evident, moral requirements. As a result, a situation may arise

¹⁹⁷ Dworkin, R., *Taking Rights Seriously*, (London: Duckworth, 2009), (henceforth, Dworkin), p. 185.

in which “[l]iberal societies claim to be the only legitimate embodiment of universal values ... [and a]ll others are judged as approximations to themselves.”¹⁹⁸

If such a scenario is to be avoided, a different relationship model must be considered. There is, for example, an argument “that no rights or duties of any sort can exist except by virtue of a uniform social practice of recognizing these rights and duties.”¹⁹⁹ In essence, this position centres upon the establishment of a ‘rule of recognition’ which “will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.”²⁰⁰ In this way, rights become necessarily post-constitutional as there is a general rejection of first-order natural truths in favour of deference towards “a person or body of persons whose orders the great majority of the society habitually obey and who does not habitually obey any other person or persons.”²⁰¹ Whilst this is, in and of itself, an entirely plausible mechanism by which to operate the constitutional process, it would appear to be incompatible with the liberal democratic constitutionalism outlined above. This is because it contains an inherent threat to the separation of powers on the basis that the institution responsible for the identificatory stage of the process, the would-be recipient of the majority’s habitual obedience, becomes able to dictate what values are to operate every other stage.

If, then, a separation between the institutions conducting each phase of the process is to be maintained, an alternative means of operating the constitutional process must be sought. Attempting to understand rights as being extra-constitutional, however, is similarly fraught with difficulty. For instance, it is entirely possible to argue “that not everything that can somehow be brought within the scope of a right guaranteed without limits is actually constitutionally protected.”²⁰² When a lawsuit is brought from within such a perspective, however, the judge has the

“discretion’ to decide the case either way. His opinion is written in language that seems to assume that one or the other party had a pre-existing right to win the suit, but that idea is only a fiction. In reality he has

¹⁹⁸ Gray, p. 22.

¹⁹⁹ Dworkin, p. 48.

²⁰⁰ Hart, H. L. A., *The Concept of Law*, (3rd edn.), (Oxford: Oxford University Press, 2012), p. 94.

²⁰¹ *Ibid.*, p. 50.

²⁰² Alexy, R., *A Theory of Constitutional Rights*, (Oxford: Oxford University Press, 2002), p. 72.

legislated new legal rights, and then applied them retrospectively to the case at hand.”²⁰³

Such a perspective, therefore, gives preference to the judicial enforcement phase of the constitutional process in a manner similar to the preference given to the identificatory stage by a post-constitutional view of rights.

As a consequence of these difficulties, then, the adoption of liberal constitutionalism necessitates the development of an intra-constitutional view of rights. In this way, rights become viewed as a mechanism by which the constitutional process can itself be operated, thereby enabling them to assist in balancing the tensions between democracy, equality and the rule of law by acting as a unifying construct that can underpin the operation of all aspects of the constitutional process. In this manner, one can perceive democracy to be “not merely a matter of collective choice, but the expression of ‘rights’ to an equal voice in the determination of those collective choices.”²⁰⁴ Similarly, the determination of rights can be seen as central to the authority of judicial review, in that “ambitious schemes of judicial review that ignore, unduly minimise or somehow seek to trump ... disagreements over the meaning and bearing of rights prove hubristic ... [and] risk making judicial decisions appear arbitrary”.²⁰⁵ Thus the language of rights becomes integral to the operation of the entire constitutional process.

This level of integration at the foundational level differentiates this connection between rights and constitutions from the alternatives that were discussed previously. By being a fundamental means by which the constitution itself is developed, rights are neither an independent set of values that the constitution should be formulated to protect nor a result purely born out of political bargaining and compromise. Instead, rights become seen as an essential and integral part of any interaction at the constitutional level.

3.7 Conclusion

Up to this point, then, this idea of a phase-based constitutional process, as discussed above, seems to encourage the adoption of a viewpoint on constitutionalism which contains elements from, and can therefore give rise to, both constitutionalism as governance and as

²⁰³ Dworkin, p. 81.

²⁰⁴ Nedelsky, J., ‘Reconceiving Rights and Constitutionalism’, (2008) 7(2) *Journal of Human Rights* 139, p. 144.

²⁰⁵ Bellamy, p. 16.

government. Shared with each of these perspectives is a position which appears to be grounded simultaneously in both natural and positive law. Indeed, the idea of constitutionalism as a process would seem to reject a view of 'a constitution' as a monolithic singularity that must fit neatly within one sphere of legal philosophy or the other. Instead, it reveals the possibility for constitutions to be seen as occupying the grey space in between the two, in some respects acting as the mechanism whereby one is actually converted into the other.

If accepted, this understanding of a constitution as a process highlights alternative means by which theories of rights can be linked to theories of constitutionalism. By providing the initial value base from which the operation begins, different values and principles can develop into different mechanisms for conducting the overall process. For instance, combining this understanding of a constitution as a process with visions of liberalism and democracy as politically desirable constructs, reveals the necessity of integrating rights throughout the operation of the constitutional process. What must not be forgotten, however, is that the acceptance of such a link is tied to the acceptance of a particular ideological form of constitutionalism that seeks to uphold political liberalism through the establishment and maintenance of both democracy and the rule of law. As a result, it is only through an acceptance of the basic, and incommensurable, norms of liberty and equality that rights become an integral part of the constitutional process.

To put this in other words, the constitutional process can be seen as being completely neutral and void of any preconceived social or political directives or ideologies. Changes to the fundamental values that are used to determine who operates the process and how this is done result in changes to the products of the process. The process itself, however, remains constant. It is only through the abandonment of this process that governmental actions can accurately be described as being unconstitutional.

Having established, then, what is understood by 'a constitution' and similar terms, the present discussion may now progress onto an examination of whether or not such a concept can be translated to the international realm. This is a matter that shall be considered in the next chapter.

Chapter 4

Global Constitutionalism

Over the course of the previous chapters, an examination has been conducted into the nature of a constitution and the attendant conceptual relationships between rights and constitutions. Having examined this matter at a theoretical level, this position can now be utilised to examine this relationship at the global level. If the same analytical process is to be followed, this investigation must first begin with an examination of global constitutionalism before a determination can be made as to the level of integration, or lack thereof, of concepts of rights. As might be expected, however, the very concept of global constitutionalism is at least as indeterminate as the concept of constitutionalism in general. Arguably, it is an even more debatable term as there is the added adjective of ‘global’ to be taken into consideration. Any attempt to examine ‘global constitutionalism’ is, therefore, immediately faced by two primary concerns - what is ‘constitutionalism’ and how can it be ‘global’?

Initially, it must be considered that discussions in previous chapters have already attempted to examine the nature of constitutionalism, concluding that it can be thought of simply as the operation of the constitutional process.²⁰⁶ As a result, the discussion that is to follow here is not intended to examine such claims in any great detail. Instead, the focus shall be on the particular difficulties, objections and alternatives that can arise specifically from an attempt to translate such a theory into the global, or at least international, arena.

Before engaging with such an endeavour, however, it is first necessary to revisit some of the more historical aspects of the discussion. This is principally with the aim of connecting more contemporary analyses with their historical precedents. Whilst the primary concern is to show the historical development of global constitutionalism as a constitutional process, a further consideration that has thus far remained unexamined is the possibility that *global* constitutionalism has already been developed historically in a way which is incompatible with, or at least significantly divergent from, domestic constitutionalism. A slightly broader view of history is taken, therefore, in an attempt to reveal some of the historical reasons underlying the difficulties faced by contemporary efforts to analyse global

²⁰⁶ See *supra*, Chapter 3.

constitutionalism. It is only then that the viability of the constitutional process as a means of examining global constitutionalism can be more fully addressed.

In addition to this aim of uncovering important factors to be considered regarding the nature of any constitutional process operating at the global level, this brief historical investigation also goes some way towards addressing the allegedly ‘global’ nature of this discussion. Specifically, this is the consideration that, to some extent, it is all rather European. The earlier discussion on constitutionalism, for instance, examined Plato, Grotius, Hobbes and others, all of whom were European.²⁰⁷ As a result, this upcoming look at the historical development of global constitutional thought will also attempt to consider ideas and systems from a broader range of geographical areas.

Following on from this historical discussion is an examination of some of the contemporary debates surrounding global constitutionalism. This is done with the aim of assessing the potential utility of the constitutional process as a means of analysing global constitutionalism. In order to adequately complete such an assessment, however, there are a number of further questions that must be addressed. In particular, there are issues surrounding how such a process is being operated at the global level, what values are being used to instigate it and what actors are involved in its operation. In attempting to answer some of these questions, the discussion then moves on to enquire as to whether or not there already exist theories of international relations that might present possible explanations or solutions.

In conducting this brief enquiry into international relations, particular attention is paid to theories of international society, as these would seem to present possible solutions to the dilemmas presented by many of the contemporary, and even historic, analyses of global constitutionalism. In particular, it reveals the necessity of more closely considering the underlying values and principles that may determine who operates a global constitutional process and on what basis. In doing so, the concept of sovereignty is identified as meriting a more detailed examination and thus this part concludes with an examination of sovereignty as it can or does relate to any existing constitutional process at the global level.

²⁰⁷ See *supra*, Chapter 2. It might also be pertinent to point out that these were also all men. As interesting and revealing as it might be, however, a gender-based analysis of these issues is unfortunately outwith the scope of the present discussion.

4.1 Historical Global Systems

The concept of global constitutionalism involves a perception of the international system whose history can be as contested as the idea itself. In particular, the historical development of global constitutional ideas can often be conflated with a history of international law. This is, perhaps, to be particularly expected from within a point of view that understands constitutionalism as relating to the initial formulation of law, transforming normative principles into legal rules. Such a view is, in some ways, at the core of the constitutional process that has previously been examined and, as already stated, it is this understanding of constitutions that shall form the basis of the upcoming discussion.²⁰⁸ Consequently, whilst the present intention is to trace the development of global constitutionalism, there is an inevitable degree to which this will converge with a discussion of certain historical aspects of international law.

The examination of such legal elements, however, is undertaken from a constitutional perspective and it is these constitutional factors that are of principal interest for the time being. At the same time, it is arguable that ideas of global constitutionalism and international law are as synonymous as ideas of constitutionalism and law in a domestic context. That is, there are a number of connections and relationships that can be seen as existing between them and yet they are also distinctly separate concepts. It is with this in mind, therefore, that the following discussion is to proceed. In a similar manner to the earlier historical discussion of constitutional thought, the aim of this discussion is not to provide a detached and discrete analysis of the entire history of global constitutionalism. Instead, as has been suggested, it is presented with a view to revealing some of the connections between certain historical developments and the more contemporary analyses which are to follow.

Attempting to outline an understanding of the early foundations of global constitutionalism is, however, not without controversy. After all,

“[w]hat does a treaty, in which one party declares itself as ‘the sun’ to the other party, or whose parties curse themselves by swearing oaths to their gods for the event of breach of contract, have in common with a treaty

²⁰⁸ See *supra*, Chapter 3.

drawn up in accordance with the Vienna Convention of the Law of Treaties of 1969?”²⁰⁹

One possible solution, it would seem, might be to focus on issues of subject matter rather than those of content and form. In other words, there may indeed be certain enunciations and formulations of historical international law that appear to be particularly anachronistic to the modern mind. From within these somewhat archaic points of view, however, it may nevertheless remain possible to identify attempts at articulating practical solutions to common issues that might currently be categorised as issues of ‘global constitutionalism’.

An oft-cited example in this regard is the Roman concept of the *ius gentium*, or ‘law of peoples’. In essence, this was regarded as the law as it related to Roman dealings with non-Romans, being “imposed by Roman magistrates on foreigners ... who were in no sense the equals of Romans.”²¹⁰ Whilst it may be entirely plausible to consider this legal regulation of relations between members of different societies as an early form of international law, it was nevertheless an aspect of *Roman* law. That is, it consisted of law that was produced by, understood within and limited to the specific context of Roman politics and its sphere of influence. Similar criticisms can be levelled at other systems which might be considered as candidates for revealing historical developments in international law. Indeed, despite political claims of universality, one can make the argument that systems as varied as “the Islamocentric *siyar*, the Sinocentric tribute system or Eurocentric law of nations ... were nothing other than regional normative systems which were applied in only a limited area of the earth and lasted for a limited period of time.”²¹¹

Whilst the use of any of these systems as a demonstration of the universality of certain aspects of international law might indeed be flawed, there is nevertheless potential for them to prove useful in charting the development of global constitutionalism, or at least one particular understanding of it. That is, despite numerous variations and differences, these systems all seem to present a similar understanding of overall global dynamics. They depict a particular structure of human society wherein “there is always a centre around which the

²⁰⁹ Steiger, H., ‘From the International Law of Christianity to the International Law of the World Citizen’, (2001) 3 *Journal of the History of International Law* 180, p. 181.

²¹⁰ Remer, G., ‘Ciceronian *Ius Gentium* and World Legislation’, (2011) 8 *International Organizations Law Review* 225, p. 227. Footnote omitted.

²¹¹ Yasuaki, O., ‘When was the Law of International Society Born? - An Inquiry of the History of International Law from an Intercivilizational Perspective’, (2000) 2 *Journal of the History of International Law* 1, p. 7.

whole world revolves and a hierarchy that places the centre at the top.”²¹² This is a perception of the world that is predicated upon a monolithic and hierarchical construction of international orders, thereby implying a significant degree of divergence from the more modern concept of the sovereign equality of independent states.

It is possible, however, to identify aspects indicative of an alternate trend within historical conceptions of the international system. In Greece, for example, the development of early cosmopolitan ideas can be attributed to the Cynics, who in doing so “adopted a different cognitive perspective from the ego-, ethno-, and geo-centric perspective of Aristotle”.²¹³ Similarly, a sense of interdependent, non-hierarchical relationships can be drawn from within the African concept of *ubuntu*, which can be loosely translated as signifying “that each individual’s humanity is ideally expressed in relationship with others and in relationships individuality is truly expressed.”²¹⁴

These alternative ways of perceiving inter- and intra-society relationships, however, can arguably be said to have been considerably less influential on the development of the international sphere than their more centralised, hierarchical counterparts. This can, at least in part, be attributed simply to the nature of historical events rather than for any principled philosophical justifications. For instance, it has been observed that

“[i]n India and China, there were sporadic ... cynics, sceptics, democrats and cosmopolitans in various forms of manifestation, but hierarchical agrarian-military empires tended to adopt and enforce ideologies that were in important ways similar to the world-views of Plato, Aristotle and/or Stoics.”²¹⁵

The competition between these ideas is perhaps particularly evident in the example of Japan, where the more communally-organised peasant federations, or *ikki*, were eventually subdued by the hierarchically-ordered military forces of Oda Nobunaga.²¹⁶ In this way, then, it is possible to discern two competing visions for the operation of an international, or possibly

²¹² Patomäki, H., ‘Cosmological sources of critical cosmopolitanism’, (2010) 36 (S1) *Review of International Studies* 181, (henceforth, Patomäki), p. 188.

²¹³ *Ibid.*, p. 186.

²¹⁴ Le Grange, L., ‘*Ubuntu, Ukama and the Healing of Nature, Self and Society*’, (2012) 44 (S2) *Educational Philosophy and Theory* 56, p. 61.

²¹⁵ Patomäki, p. 187.

²¹⁶ See Naohiro, A., and Susser, B., ‘The Sixteenth-Century Unification’ in Hall, J. W., *The Cambridge History of Japan Volume 4: Early Modern Japan*, (Cambridge: Cambridge University Press, 1991), particularly at pp. 43-45.

inter-national, system. One view presents a hierarchical system with a dominant centre and marginalised peripheries. The other exhibits a more complex web of interdependent and decentralised relationships.

Despite the potential utility of this somewhat dualistic interpretation of the international sphere, it must nevertheless be acknowledged that these positions are rather broad generalisations. Within each point of view there is plenty of room for divergence and disagreement regarding both fine details and general principles. For now, however, this overall categorisation can still prove useful for understanding the gradual clarification of ideas relating to global constitutionalism. This is particularly the case if one examines the tension and competition between these two visions and uses this as a lens through which to view the historical development of what might later be viewed as global constitutionalism.

It is in this regard that one might consider more closely the specific case of certain European developments. This would not be because European history is more significant than that of other regions of the world, but simply due to the fact that Europe provides a clear, well-documented example of the issues currently being discussed. Of particular interest is the point at which Europeans started to traverse the Atlantic and begin to interact with societies which had not previously been incorporated into a European understanding of the international system. Around this time, Europe was being “shaped in complex ways by the events of the Renaissance, Reformation and Counter-Reformation, by the growth of Habsburg power and by resistance to it”²¹⁷ and it is from within such a seemingly chaotic environment that questions needed to be raised, and answered, regarding the nature and status of these newly encountered peoples.²¹⁸

On one side of the debate was the position that

“Spanish title over the Indies was conventionally accounted for by applying the jurisprudence developed by the [Roman Catholic] Church out of the several centuries of interaction between the Christian and heathen worlds.

²¹⁷ Tuck, R., *Philosophy and Government 1572 - 1651*, (Cambridge: Cambridge University Press, 1993), p. 1.

²¹⁸ By this same logic, the incorporation of European societies into indigenous American approaches to the international system would provide an equally interesting and informative account of similar issues. An interpretation of the European engagement with these events has been chosen simply for reasons of accessibility to the historical record.

Within this framework, the Indians could be characterized as Saracens, as heathens, and their rights and duties determined accordingly.”²¹⁹

In other words, one option was the seemingly simple incorporation of the indigenous populations into the pre-existing hierarchy of a legal and moral framework centred upon the authority of Rome. At the other extreme, however, was an outlook that viewed autochthonous groups as being fully equal to their European counterparts and thereby deserving of treatment that reflected this fact. Various permutations of this latter view have often been ascribed to thinkers such as Francisco de Vitoria and Bartolomé de las Casas, although the precise views of these scholars are complex and disputed.²²⁰

Nevertheless, even this more cosmopolitan, or potentially egalitarian, view can be described as being predominantly Eurocentric. In Vitoria’s work, for instance, rights were “guaranteed to all persons according to the precepts of the ‘law of nations’ or *ius gentium*.”²²¹ As mentioned earlier, this *ius gentium* was grounded in Roman history and practice. Consequently, it was not a system of international engagement with which aboriginal populations of the Americas could have been expected to be familiar. As a result, this dependence upon European norms and principles leaves even this attempt to justify peaceful diplomatic relations open to the accusation that it “finally legitimizes endless Spanish incursions into Indian society ... [as] any Indian attempt to resist penetration amounts to an act of war that justifies retaliation.”²²²

In spite of these more cosmopolitan efforts, therefore, it is possible to view the history of the initial European engagements with the Americas as the development and exportation of a hierarchical political structure that placed Europe itself at the centre. At this time, however, Europe was far from being a single, unified force that was ready to assert its dominance over external territories. Indeed, it can be argued that “[w]hile new empires (Spain and Germany), powerful monarchies (France and England), and a supremacy-claiming papal state [had] emerged, the struggle for pre-eminence among the unequal polities of Europe remained

²¹⁹ Anghie, A., ‘Francisco de Vitoria and the Colonial Origins of International Law’, (henceforth Anghie), in Darian-Smith, E., and Fitzpatrick, P., (eds.), *Laws of the Postcolonial*, (Ann Arbor, USA: University of Michigan Press, 1999), (henceforth *Laws of the Postcolonial*), p. 91.

²²⁰ For a more detailed account of the views of these authors, as well as an overview of the debates surrounding them, see Boast, R. P., ‘The “Spanish” Origins of International Law: A Historiographical Review’, (2010) 41 *Victoria University of Wellington Law Review* 235.

²²¹ Salas, V. M., ‘Francisco de Vitoria on the *Ius Gentium* and the American *Indios*’, (2011-12) 10(2) *Ave Maria Law Review* 331, p. 332.

²²² Anghie, p. 95.

undecided.”²²³ Positioning Europe at the centre of an intercontinental hierarchy, therefore, can be seen as simply increasing the stakes for whoever was to prove victorious in Europe's internal political and religious struggles.

These struggles, however, proved indecisive. Instead of resulting in the emergence of a single, dominant power that could anchor a Eurocentric hierarchy, agreements were reached whereby a multiplicity of actors were recognised as having equal, albeit territorially-bound, status. These agreements were the Treaties of Westphalia in 1648 and they can be seen as having “symbolized a transformation from a system of political rule based in the hierarchical structures of medieval Christianity to one ordered in terms of independent sovereign states: a transition from hierarchy to anarchy.”²²⁴ Whilst the significance of the Westphalian system as regards the internal character of states remains disputable,²²⁵ it can nevertheless be seen as at least promoting, if not establishing, a non-hierarchical political structure within the confines of Europe. It can be argued, therefore, that by the early modern period an international order was beginning to emerge that was both hierarchical and Eurocentric. Simultaneously, however, the European centre was itself non-hierarchical and primarily founded upon notions of territorially-restricted sovereign equality.²²⁶

The potential for such developments can also be seen in the history of other regions of the world. Indeed, it can be argued that,

“[s]imilar to the early modern European system, the ancient Chinese system experienced disintegration of feudal hierarchy, prevalence of war, conditions of international anarchy, emergence of sovereign territorial states, configuration of the balance of power, and attempts at universal domination. ... However, unlike [European leaders] ... the state of Qin overcame such countervailing forces by self-strengthening reforms, divide-and-conquer strategies, and cunning and brutish stratagems.”²²⁷

²²³ Teschke, B., *The Myth of 1648: Class, Geopolitics, and the Making of Modern International Relations*, (London: Verso, 2009), p. 110.

²²⁴ Larkins, J., *From Hierarchy to Anarchy*, (New York, USA: Palgrave Macmillan, 2009), p. 3.

²²⁵ See, for example, *ibid.* and fn. 223.

²²⁶ See, for example, Little, R., *The Balance of Power in International Relations*, (Cambridge: Cambridge University Press, 2007), (henceforth, Little), Figure 8.4, p. 273.

²²⁷ Hui, V. T., ‘The Triumph of Domination in the Ancient Chinese System’, in Kaufman, S. J., *et al.*, (eds.), *The Balance of Power in World History*, (Basingstoke: Palgrave Macmillan, 2007), p. 122.

It can be argued, therefore, that it was the uniquely indecisive nature of the internal conflicts of Europe that led to the particular juxtaposition of a hierarchical intercontinental system with an anarchic system of state sovereignty.

It was not until much later, however, that this Westphalian system of exclusive territorial sovereignty was exported to other parts of the globe. In the meantime, these newly-defined states can be seen as having attempted to maintain a system of hierarchical domination both internally within their own territories and externally in their relations with those areas which were, from a Eurocentric perspective, peripheral. Nevertheless, this was not a completely unobstructed process. England's 'Glorious Revolution', the American War of Independence and the French revolution of 1789 can all be seen as attempts to oppose the internal hierarchies of participants in the Westphalian system. The relationship between such events and domestic concepts of constitutionalism has, however, been discussed elsewhere.²²⁸ Nevertheless, contemporaneous to these developments were a number of attempts to conceptualise opposition to the *external* hierarchy that was proving increasingly dominant.

One early example from within a fairly specific context is closely associated with the figure of Hugo Grotius.²²⁹ Regarding the more generalised aspects of his theories, it has been observed that "Vitoria had presented the outlines of an international moral community, and Grotius repeatedly referred to him, stressing that the Spaniard was right."²³⁰ In addition to building upon this idea, however, Grotius also made some more specific contributions to the development of an international doctrine regarding the freedom of the high seas. In essence, Grotius helped advance an "argument that by the Law of Nations navigation is free to all persons whatsoever".²³¹ Whilst arguably being of somewhat restricted significance, a general international acceptance of maritime freedom can be seen as a practical means of countering efforts to impose a hierarchical domination of the marine environment.

These attempts are arguably highlighted still further when one considers the law on piracy. It is in this regard, for instance, that the Italian Alberico "Gentili may be seen to posit the principle of 'international punishment' based on the idea of the world community, and

²²⁸ See *supra*, Chapter 2.

²²⁹ For an admittedly brief discussion of some of Grotius' contributions to theories of individual rights and constitutionalism in general, see *supra*, Chapter 2.

²³⁰ Cavallar, G., 'Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?', (2008) 10 *Journal of the History of International Law* 181, p. 193.

²³¹ Butler, W. E., 'Grotius and the Law of the Sea', in Bull, H., *et al*, (eds.), *Hugo Grotius and International Relations*, (Oxford: Oxford University Press, 1992), p. 213.

designed to support the ‘common law of mankind’.”²³² Care should naturally be taken, however, with attempts to interpret hierarchical, anarchical or cosmopolitan elements into the work of writers who did not present their arguments in such terms. Indeed, to take Grotius as an example, it can be said that there is arguably a certain degree of flexibility inherent in much of his work and “[o]ne consequence of this ambiguity is that Grotius can be posthumously all things to all men; he is interpretable in various ways.”²³³

As discussed, however, the inherent tension between hierarchical and non-hierarchical methods of structuring and understanding the international system is still visible in such works despite this apparent degree of ambiguity. Indeed, for present purposes, the exact views and conclusions of such authors could perhaps be seen as less important than the simple fact that rudimentary forms of these ideas can be identified within their works.

A later author who can arguably be seen as more clearly expressing some of these ideas is the philosopher Immanuel Kant. Spending almost the entirety of his life and career in and around the Prussian city of Königsberg, Kant was arguably “the first truly important modern philosopher to spend his career almost exclusively as a university teacher, indeed as a teacher in a single university in the town of his birth.”²³⁴ Given this somewhat sedentary background, it is perhaps a little surprising to consider Kant as having developed significant principles regarding the international system. It is not without reason, therefore, that Kant is arguably better known for his contributions to issues of ethics, metaphysics and philosophy than to theories of international relations.²³⁵

In spite of this initial scepticism, however, the political aspects of Kant's works can be seen as laying important foundations in the development of non-hierarchical, associational methods of international interaction. Of particular relevance is his advancement of cosmopolitanism as “[a]n alternative way of dissolving international relations ... not by hoping for uniformity and harmony between states, but by dissolving them into component human beings.”²³⁶ To put it another way, Kant can be seen as opposing the hierarchical domination that would flow from the existence of a singular ‘global state’ and as suggesting instead the development of an “association [that] is noncoercive and does not have a

²³² Panizza, D., ‘The “Freedom of the Sea” and the “Modern Cosmopolis” in Alberico Gentili’s *De Iure Belli*’, (2009) 30 *Grotiana* 88, p. 102.

²³³ Wight, M., *Four Seminal Thinkers in International Theory: Machiavelli, Grotius, Kant, and Mazzini*, (Oxford: Oxford University Press, 2004), (henceforth, Wight, *Four Seminal Thinkers*), p. 32.

²³⁴ Guyer, P., *Kant*, (London: Routledge, 2006), p. 15.

²³⁵ See, for example, *ibid.*.

²³⁶ Wight, *Four Seminal Thinkers*, p. 74.

centralized executive coercive power.”²³⁷ Nevertheless, in attempting to promote a more cosmopolitan understanding, even reformation, of the international system, “Kant does not specifically advocate the creation of a cosmopolitan constitution. For Kant, constitutionalism seems to refer mainly to a condition of right under a mutually recognized collection of laws.”²³⁸ That is, it can be argued that Kant promotes the development of one particular operation of the constitutional process on a global scale, but one that is not restricted by the international adoption of a specific documentary constitution.

In specifically connecting the constitutional and the international in this way, Kant can legitimately be seen as a direct precursor to modern debates surrounding notions of global constitutionalism. As has been discussed, however, this is predicated upon a seemingly inherent tension within the international system between processes of hierarchical domination and methods of more egalitarian co-operation. This tension is arguably one that remains unresolved. It has been suggested, for instance, that contemporary “world politics is properly seen as a realm of variegated hierarchy [where s]ome states do interact with one another under anarchy, but many have ceded at least partial authority ... to the United States or other states.”²³⁹ It is from within this context that more recent discussions of global constitutionalism shall now be examined.

4.2 Contemporary Global Constitutionalism

As was noted earlier, there is a large variety of definitions available when one considers issues of constitutions and constitutionalism.²⁴⁰ It is perhaps not altogether surprising, then, that this variety is often continued, or even extended, at the global level. Indeed, there seem to be a large number of understandings of global constitutionalism within contemporary academic literature, not all of which appear mutually compatible. As might be expected, many of these divisions can be traced back to the more fundamental divisions in understanding the concept of constitutionalism itself, which have already been discussed. Introduction of the global dimension, however, does appear to contribute a number of difficulties of its own.

²³⁷ Capps, P., and Rivers, J., ‘Kant’s Concept of International Law’, (2010) 16(4) *Legal Theory* 229, p. 245.

²³⁸ Brown, G. W., ‘Kantian Cosmopolitan Law and the Idea of a Cosmopolitan Constitution’, (2006) 27(4) *History of Political Thought* 661, p. 673.

²³⁹ Lake, D., *Hierarchy in International Relations*, (London: Cornell University Press, 2009), p. 175.

²⁴⁰ See *supra*, Chapter 2.

One initial interpretation of global constitutionalism that can be dispensed with at this point relates to the studying of “changes in the content of the world’s written constitutions”.²⁴¹ In other words, the term can be legitimately used to refer to the potential, or possibly ongoing, globalization of constitutional law within the domestic environment. Generally speaking, this position concerns the observation that “globalization has fostered ... [a] type of constitutional comparativism by lowering both natural and man-made barriers to cross-border interaction.”²⁴² This position, however, is inherently restricted to examining the international arena only in so far as it affects the national context. Consequently, whilst this interpretation may indeed be termed global constitutionalism, it may be more accurate, and more helpful, to consider it as a form of large-scale comparative constitutionalism instead.

Even if, however, the scope of enquiry is limited to those definitions concerning constitutionalism at an international level, there remains a significant degree of divergence within existing discussions of the field. It has even been suggested that “[w]hen the need to define global constitutionalization arises, any attempt at a common definition causes disagreement”,²⁴³ and as has been mentioned, there is a certain extent to which one can trace the origins of these divisions back to disagreement surrounding the concept of constitutionalism itself.

For instance, in advocating for an interpretation of the Charter of the United Nations as a global constitution, Bardo Fassbender has argued that “a constitution almost universally presents itself as a complex of fundamental norms governing the organization and performance of governmental functions in a given state (‘frame of government’), and the relationship between the government (broadly understood) and the citizens.”²⁴⁴ Whilst recognising both the functional and social aspects of constitutionalism, however, Fassbender argues that the Charter’s “rules must remain in line with the basic actual conditions of the international system.”²⁴⁵ This account, therefore, can be seen as an example of government-based constitutionalism since any normative element of the constitution becomes dependent upon its descriptive accuracy.

²⁴¹ Law, D. S., and Versteeg, M., ‘The Evolution and Ideology of Global Constitutionalism’, (2011) 99 *California Law Review* 1163, p. 1172.

²⁴² *Ibid.*, p. 1166.

²⁴³ Milewicz, K., ‘Emerging Patterns of Global Constitutionalization: Toward a Conceptual Framework’, (2009) 16(2) *Indiana Journal of Global Legal Studies* 413, (henceforth, Milewicz), p. 413.

²⁴⁴ Fassbender, B., *The United Nations Charter as the Constitution of the International Community*, (Leiden: Martinus Nijhoff, 2009), (henceforth, Fassbender), pp. 22-3.

²⁴⁵ *Ibid.*, p. 117.

On the other hand, advocates of alternative visions of global constitutionalism can be seen as grounding their arguments in an understanding of constitutionalism as governance. In proposing a form of ‘organic global constitutionalism’, for example, Christine Schwöbel attempts “to reorient the debate away from its current trajectories towards a more flexible, participation-centred model.”²⁴⁶ In doing so, there is an explicit rejection of predetermined political forms in favour of “a participatory and discursive methodology of specifying which issues are viewed as ‘constitutional’.”²⁴⁷ Simultaneously, there is an argument in favour of flexibility as this “leaves room for the recognition of diversity and plurality.”²⁴⁸ However, participation, diversity and plurality are themselves both normative values and centred around the relationship between government and society. Organic global constitutionalism can therefore be seen as presenting a social and normative approach in a similar manner to other governance-based understandings of constitutionalism.

In addition to the distinction between governance- and government-based constitutionalism, contemporary efforts to define global constitutionalism are faced with the tension between hierarchy and cosmopolitanism. As discussed above, this tension is revealed when attempting to examine historical developments in theories of global constitutionalism and, as yet, it would appear to remain unresolved. At one end of the spectrum, is the suggestion that global constitutionalism is an attempt, or a collection of attempts, “to justify different models of a world state (or other supranational amalgamation)”.²⁴⁹ This hierarchical view of global constitutionalism can be considered analogous to a certain view of domestic constitutionalism, wherein the constitution is “a superior law ... [meaning] that ordinary law which conflicts with the constitution is invalid or inapplicable.”²⁵⁰

This hierarchical view of global constitutionalism stands in marked contrast to more cosmopolitan perspectives. In discussing the increasing interdependence of international regulation, for instance, Jürgen Habermas has suggested that “the first addressees for this ‘project’ are not governments. They are social movements and non-governmental organizations; the active members of a civil society that stretches beyond national

²⁴⁶ Schwöbel, C. E. J., ‘Organic Global Constitutionalism’, (2010) 23 *Leiden Journal of International Law* 529, p.538.

²⁴⁷ *Ibid.*, p. 543.

²⁴⁸ *Ibid.*, p. 542

²⁴⁹ Maus, I., ‘From Nation-State to Global State, or the Decline of Democracy’, (2006) 13(4) *Constellations* 465, p. 465.

²⁵⁰ Raz, J., ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’, in Alexander, L., (ed.), *Constitutionalism: philosophical foundations*, (Cambridge: Cambridge University Press, 1998), p. 153.

borders.”²⁵¹ Similarly, Mattias Kumm has argued that “[t]he statist paradigm of constitutionalism needs to be replaced by a cosmopolitan paradigm of constitutionalism.”²⁵²

However useful these distinctions might be, this is clearly not an exhaustive list of the ways in which discussions of global constitutionalism might be divided. One could, for example, focus “on the idealized distinction between unity and plurality of international law, ... [or] on societal versus state-based constitutionalization.”²⁵³ Indeed, the potential for divergence is so extensive that almost every writer who attempts to address issues of global constitutionalism appears to feel obligated “to survey various understandings of these terms [‘constitution’ and ‘constitutionalism’] in order to situate ... [their] claims”.²⁵⁴

Perhaps as a result of this substantial variation, there have been some attempts at simply organising or systematising these debates without necessarily providing a possible solution. It has been suggested, for instance, that it might be possible to categorise discussions “according to their respective answer to the question of whether they consider mapping or shaping the central activity of global constitutionalism.”²⁵⁵ In this context, ‘mapping’ “means identifying and explaining the processes of constitutionalism at the global level, while ‘shaping’ means contributing to the actual processes of constitutionalism through concrete proposals for legal or political innovation.”²⁵⁶ Alternatively, discussions might be grouped together on the basis “of the four dimensions of social, institutional, normative, and analogical constitutionalism”.²⁵⁷ Another option might be to categorise discussions based on

²⁵¹ Habermas, J., (trans., Pensky, M.), *The Postnational Constellation*, (Cambridge: Polity Press, 2001), p. 57.

²⁵² Kumm, M., ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’, in Dunoff, J. L., and Trachtman, J. P., (eds.), *Ruling the World?: constitutionalism, international law and global governance*, (Cambridge: Cambridge University Press, 2009), (henceforth, *Ruling the World?*), p. 263.

²⁵³ Milewicz, p. 425.

²⁵⁴ Stone-Sweet, A., ‘Constitutionalism, Legal Pluralism and International Regimes’, (2009) 16(2) *Indiana Journal of Global Legal Studies* 621, p. 623. For a selection of other examples, see: Volk, C., ‘Why Global Constitutionalism Does not Live up to its Promises’, (2012) 4 *Goettingen Journal of International Law* 551, p. 554; Brown, G. W., ‘The constitutionalization of what?’, (2012) 1(2) *Global Constitutionalism* 201, p. 203; van Mulligen, J. G., ‘Global Constitutionalism and the Objective Purport of the International Legal Order’, (2011) 24 *Leiden Journal of International Law* 277, p. 278, fn. 5; Peters, A., and Armingeon, K., ‘Global Constitutionalism from an Interdisciplinary Perspective’, (2009) 16(2) *Indiana Journal of Global Legal Studies* 385, p. 386.

²⁵⁵ Wiener, A., *et al.*, ‘Global constitutionalism: Human rights, democracy and the rule of law’, (2012) 1(1) *Global Constitutionalism* 1, p. 8.

²⁵⁶ *Ibid.*

²⁵⁷ Schwöbel, C., ‘Situating the Debate’, (2010) 8(3) *International Journal of Constitutional Law* 611, p. 612.

their relation to one or more of the “three important functions that international constitutional norms play”.²⁵⁸

This apparent multiplicity of attempts to circumvent the need for a precise definition could be seen as simply lending support to a position that “global constitutionalism is an umbrella concept uniting many different authors”.²⁵⁹ If the definition stops there, however, the term ‘global constitutionalism’ is left as nothing more than a reference point for a generalised field of study with no clear or distinct boundaries. As potentially useful as these distinctions, categorisations and generalisations might be, there remains the underlying question as to what, if anything, unites this wide variety of perspectives. Even if the term merely provides a common reference point for wildly divergent views, the inherent implication is that there is a certain degree of commonality. In spite of the apparently mutually exclusive perspectives that can be contained within the expression, the label ‘global constitutionalism’ would still seem to bear some degree of identificatory utility.

One attempt at examining this commonality has outlined three apparently fundamental elements. These are “the formal principle of the international rule of law, the substantive dimension representing human rights provisions, and the time factor allowing for gradual emergence of a global constitutional order.”²⁶⁰ Even this attempt, however, is not without its difficulties and divisions. In promoting a formalised understanding of substantive content, for instance, it exhibits a certain degree of hierarchical tendencies which are at odds with more flexible, cosmopolitan-oriented perspectives. Similarly, in insisting on a gradual temporal element, it can be seen as being at odds with theories that stress the significance of specific constitutional moments.²⁶¹ It would seem to be possible, then, for some discussions of global constitutionalism to succumb to the very divisions which they are attempting to overcome.

In order to avoid this possibility, it is perhaps necessary to leave behind “Western thought [which] has always revolved around juxtaposing antagonistic bipolar opposites, such

²⁵⁸ These three functions being “(1) enabling the formation of international law (i.e., enabling constitutionalization), (2) constraining the formation of international law (i.e., constraining constitutionalization), and (3) filling gaps in domestic constitutional law that arise as a result of globalization (i.e., supplemental constitutionalization).” See Dunoff, J. L., and Trachtman, J. P., ‘A Functional Approach to International Constitutionalization’, in *Ruling the World?*, p. 10.

²⁵⁹ Volk, C., ‘Why Global Constitutionalism Does not Live up to its Promises’, (2012) 4 *Goettingen Journal of International Law* 551, p. 554.

²⁶⁰ Milewicz, p. 433.

²⁶¹ See, for example, Slaughter, A-M., and Burke-White, W., ‘An International Constitutional Moment’, (2002) 43 *Harvard International Law Journal* 1.

as order/chaos, good/evil, or just/unjust.”²⁶² In contrast to this analytical, and somewhat artificial, bifurcation of ideas,

“Taoist philosophy is among the traditions of thought that explicitly questioned such dualistic conceptualizing. Instead of thinking in the form of dichotomies, opposites are considered complementary because neither side can exist by itself. Since order, for instance, can only exist and be appreciated by virtue of its opposite - disorder - both form an inseparable and interdependent unit in which one element is absolutely necessary for the articulation of the other.”²⁶³

When seen in this manner, it becomes increasingly difficult to maintain a position of global constitutionalism as either hierarchical or cosmopolitan, unitary or pluralist, societal or state-based. Instead of being seen as a specific product on one particular side of these, and other, divisions, global constitutionalism becomes a description of the tension itself. From this position, global constitutionalism does not equate to the promotion of a singular ‘world state’, though that is one possible conception. Likewise, the term does not automatically signify a project of utopian cosmopolitanism, though such a conception is also possible. It is neither inherently hierarchical nor egalitarian, though both extremes fall within its purview.

Instead of being a specific product or outcome of these seemingly synthetic categorisations, global constitutionalism can be seen as referring to the underlying process which gives rise to such a diverse range of possibilities. That is, in its most fundamental form, global constitutionalism can be seen as nothing more than a description of the operation of the constitutional process at a global level. In other words, it is an investigation into the identification, enumeration, implementation and enforcement of norms within the international sphere.²⁶⁴ When seen in such a way, discussions about the hierarchical nature of the international system, for example, are not debating the existence of a global constitution, merely investigating what form it takes. Likewise, conclusions about the unitary or fragmented nature of international law do not prove or disprove global constitutionalism, they only reveal its current composition. If, however, global constitutionalism is simply an account of the constitutional process at an international level, questions still remain as to

²⁶² Bleiker, R., ‘Order and Disorder in World Politics’, in Bellamy, A. J., (ed.), *International Society and its Critics*, (Oxford: Oxford University Press, 2005), (henceforth, *International Society*), p. 188.

²⁶³ *Ibid.*, pp. 188-9.

²⁶⁴ See *supra*, Chapter 3.

what form this process currently takes, who operates this process and how they do so. It is this line of enquiry that shall now be addressed.

4.3 International Society

If, as discussed above, global constitutionalism can be seen as referring to the operation of the constitutional process at the global level, what does such operation look like? As has been mentioned, there are certain difficulties inherent in any attempt to restrict the answer to an exclusive description of either a singular, hierarchical model of a particular form of government or of a more anarchic, cosmopolitan and egalitarian worldview. It is perhaps more useful, therefore, to focus on the tension between these competing ideas.

Nevertheless, traditional approaches to understanding international relations have tended to focus on one or other of these extremes. On the one hand, for example, is “[t]he conventional view [which] holds that in the period since 1648 European, and subsequently world, politics can be characterized as an anarchical system comprising the interactions of like units (states)”.²⁶⁵ Conversely, there is also a claim that there are “at least two well-established schools that examine various forms of hierarchy”.²⁶⁶ As has been suggested, however, an examination of global constitutionalism does not seem to necessitate a tendency in favour of either one of these positions. On the contrary, the nature of global constitutionalism would seem to support a view that this particular dichotomy is “a conceptual error that significantly impedes understanding the nature of international inequalities.”²⁶⁷

It would appear, then, that an attempt to examine the constitution of the contemporary international system cannot assume either hierarchical or anarchical relationships as a predetermined starting point. As an alternative, it is perhaps useful to consider the contention that “these categories are not watertight, with an abrupt transition from one to another. The range of states systems is rather a continuum, like wavelengths of light in a rainbow, which

²⁶⁵ Hobson, J. M., and Sharman, J. C., ‘The Enduring Place of Hierarchy in World Politics: Tracing the Social Logics of Hierarchy and Political Change’, (2005) 11(1) *European Journal of International Relations* 63, pp. 63-64.

²⁶⁶ These being the ‘hegemonic stability school’ and the ‘preponderance of power school’. Kang, D. C., ‘Hierarchy, Balancing and Empirical Puzzles in Asian International Relations’, (2003/4) 28(3) *International Security* 165, p. 169.

²⁶⁷ Donnelly, J., ‘Sovereign Inequalities and Hierarchy in Anarchy: American Power and International Society’, (2006) 12(2) *European Journal of International Relations* 139, p. 141.

we find it convenient to divide into different colours.”²⁶⁸ Viewing these categorisations simply as different points along a continuous spectrum highlights the possibility that, between the two extremes, “states [can] form an international society shaped by ideas, values, identities, and norms that are - to a greater or lesser extent - common to all.”²⁶⁹ This view of an ‘international society’ would seem to incorporate both hierarchical and anarchical views, at least to some degree. For instance, there is an acknowledgement that there are interactions between states that are often unequal and prevent the system from being truly anarchical. At the same time, however, there is a recognition of states as independent entities, thereby rejecting the model of a singular, monolithic hierarchy. Consequently, there is an acceptance that whilst hierarchy is not “incompatible with an anarchical society ... [w]hat would be incompatible with international society is any unchecked primacy.”²⁷⁰

It is through this theory of international society that the underlying concerns of global constitutionalism can be more easily revealed. This can be attributed, at least in part, to the rejection of “an assumed preeminence [*sic*] of state actors over international structures”.²⁷¹ Viewing a global constitution as an ‘international structure’ that can exist independently of the will or behaviour of specific states facilitates an investigation into the operation of this global constitutional process. This is because, in an international society, concerns such as the hierarchical or anarchical nature of the international system, or the unitary or fragmentary nature of international law, cease to be seen as preeminent and foundational issues. Instead, these issues, and others like them, can be seen as being consequent upon, rather than determinative of, the nature of the global constitution. Through a viewpoint based on the idea of an international society, each one of these issues can be seen as being dependent on the constitutionalisation of pre-existing ‘ideas, values, identities and norms’ rather than encapsulating the entirety of global constitutionalism in and of themselves. That is, they must first pass through the process of the constitution before they can be considered as fundamental to the conduct of international society.

This is not to say, however, that theories of international society are entirely without their own problems, nor should they be accepted uncritically. To that end, certain claims of such theories must be more closely examined, at least to the extent that they can be

²⁶⁸ Watson, A., ‘Systems of States’, (1990) 16(2) *Review of International Studies* 99, p. 104.

²⁶⁹ Bellamy, A. J., ‘Introduction: International Society and the English School’, in *International Society*, p. 2.

²⁷⁰ Clark, I., ‘How Hierarchical Can International Society Be?’, (2009) 23 *International Relations* 464, p. 476.

²⁷¹ Christov, T., ‘Liberal Internationalism Revisited: Grotius, Vattel, and the International Order of States’, (2005) 10(6) *The European Legacy* 561, p. 572.

interpreted as claims regarding who operates the constitutional process at the global level and how they go about doing so. In particular, it must be noted that “the idea of an international society has traditionally presupposed the existence of states that share common interests and values”.²⁷² In other words, having divorced global constitutionalism from the primacy of state actors, it can then be claimed that “it is states themselves that are the principal institutions of the society of states.”²⁷³ In order to clarify this matter, a distinction must be made that, whilst subtle, is not entirely circular. Specifically, it can be argued that although a global constitution can legitimately be seen as an entity in itself, independent of sovereign states, it can also be simultaneously agreed that such a constitution is, in fact, operated by state actors and, as a result, their pre-eminence is retained. Whilst the nature and existence of the state is accepted and retained within this theory, therefore, it is not pre-supposed as either a necessary requirement or inevitable consequence of the operation of a global constitutional process.

This primacy of the state is not unique to theories of international society. Indeed, at the beginning of the twentieth century, it was considered, at least by some theorists, that “a necessary precondition of international law ... [was] that there exist independent States of approximately equal power that owing to common culture and interests engage in frequent contacts on a secular basis.”²⁷⁴ Even earlier, and perhaps more famously, Emerich de Vattel suggested that “[o]f all the rights possessed by a Nation that of sovereignty is doubtless the most important, and the one which others should most carefully respect”.²⁷⁵ To the extent, then, that the very existence of multiple, independent states is conceptually dependent upon a system of exclusive territorial sovereignty, this notion of sovereignty could be considered to be a foundational principle of international society. This is because its maintenance would be essential to the continuing operation of the constitutional process as an institution of that society as it currently stands.

At this point, then, it can be said that the current operation of a global constitutional process is founded upon the idea of an international society of sovereign states.

²⁷² Little, p. 269.

²⁷³ Bull, H., *The Anarchical Society: A Study of Order in World Politics*, (4th edn.), (Basingstoke: Palgrave Macmillan, 2012), p. 68.

²⁷⁴ Koskenniemi, M., *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, (Cambridge: Cambridge University Press, 2002), (henceforth, *The Gentle Civilizer of Nations*), p. 102. In this regard, Koskenniemi is specifically discussing the work of Franz von Liszt in *Das Völkerrecht Systematisch dargestellt*, (5th edn.), (Berlin: Häring, 1907), pp. 15-38.

²⁷⁵ de Vattel, E., (trans. Fenwick, C. G.), *The Law of Nations or The Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, (Washington, USA: Carnegie Institution of Washington, 1916), Vol. III, p. 131, or Book II, Ch. IV, para. 54.

Consequently, it now becomes necessary to more fully examine this idea of sovereignty in order to attempt an assessment of the way, or ways, in which it relates to this global constitutional process. Primarily, the underlying aim of such an examination is to more thoroughly consider whether or not values of sovereignty are indeed maintained throughout the operation of such a process. In particular, the question arises as to whether or not this concept of sovereignty is a constitutionalised product of a particular process operating at a global level, or whether it is in fact a fundamental principle on which such a process depends. In other words, a brief consideration of whether or not, and in what ways, exclusive territorial sovereignty has been enforced, implemented, enumerated and identified may prove beneficial to an attempt to determine the underlying values being applied to the constitutional process in a global arena.

4.4 Sovereignty as a Constitutional Value

When one considers the relationship between exclusive territorial sovereignty and the constitutional process, even a cursory examination of the available evidence would seem to indicate that it is a principle that is, at best, only intermittently enforced. For instance, the 1978 invasion of Cambodia by Vietnam was generally opposed “[f]or the sake of ideals emanating from a fundamental concern with protecting state sovereignty”.²⁷⁶ In contrast, however, when the United Nations Security Council was debating intervention in Libya in 2011, “no state chose to vote against the resolution authorizing military intervention in the affairs of a non-consenting sovereign state.”²⁷⁷ Whilst the timings of these examples might be indicative of an ongoing trend within the international system, this would be a trend towards enforcing sovereignty less, not more. Furthermore, this potential trend would seem to be belied by the debates over Syria in 2013, during which the Security Council chose to reaffirm “its strong commitment to the sovereignty, independence and territorial integrity of the Syrian Arab Republic.”²⁷⁸

Insomuch as it is still invoked as a concept worth protecting, it might be argued that the idea of exclusive territorial sovereignty still retains some level of significance within the

²⁷⁶ Narine, S., ‘Humanitarian Intervention and the Question of Sovereignty: The Case of ASEAN’, (2005) 4(3/4) *Perspectives on Global Development and Technology* 465, p. 477.

²⁷⁷ Glanville, L., ‘Intervention in Libya: From Sovereign Consent to Regional Consent’, (2013) 14 *International Studies Perspectives* 325, p. 335.

²⁷⁸ United Nations Security Council Resolution 2118 (2013), S/RES/2118 (2013), (27/09/2013), Preamble.

international sphere. Having such an intermittent level of enforcement, however, would seem to indicate that, in and of itself, this principle does not exist as a fundamental value that shapes the entire domain of international interaction. Nevertheless, the question remains as to whether or not there is an underlying value that can be seen as determining when such enforcement might or might not occur. One natural explanation might be that it is only enforced to the extent that it has already been implemented. Consequently, this examination must regress a step further into the constitutional process and consider the level of international implementation of exclusive territorial sovereignty.

Upon doing so, it can be seen that this concept of exclusive territorial sovereignty has been accepted, at least in rhetoric if not in practice, almost universally. Indeed, as stated earlier, an understanding of international politics being constructed around a system of sovereign states, whether anarchic or not, has often formed a core part, or even core assumption, of many theories of international relations.²⁷⁹ As a purely factual observation this position would seem fairly accurate since, with a few possible exceptions, a large proportion of the surface of the earth has been politically divided into areas that fall under the exclusive jurisdiction of a single sovereign state.²⁸⁰ This observation, however, presents a constitutional dilemma as the near-universal implementation of the principle of exclusive territorial sovereignty would appear to be at odds with an apparently selective and partial level of enforcement. This partial enforcement, therefore, cannot be said to derive from equally partial implementation. As a result, the next question is whether or not it is a principle that has been enumerated in such a way as to allow for selective enforcement, if indeed it has been specifically enumerated at all.

If, as was discussed in the earlier historical analysis, a system of exclusive territorial sovereignty can be derived from the Peace of Westphalia, then it might be expected that an appropriate enumeration of this idea could be found therein. Indeed, it has been suggested that this peace

²⁷⁹ There are numerous examples of this being either directly stated or simply assumed. Some of the most well-known include Morgenthau, H. J., *Politics Among Nations: The struggle for power and peace*, (7th edn.), (Boston, USA: McGraw-Hill Higher Education, 2006); Waltz, K. N., *Theory of International Politics*, (London: McGraw-Hill, 1979) and Wendt, A., 'Anarchy is What States Make of It: the social construction of power politics', (1992) 46(2) *International Organization* 391.

²⁸⁰ Potential exceptions include those areas deemed to be "the common heritage of mankind" (see, for example, the United Nations Convention on the Law of the Sea, (10/12/1982), United Nations Treaty Series I-31363, Art. 136 and 137) and areas subject to a special regime of *condominium* (see Brownlie, I., *Principles of Public International Law*, (6th edn.), (Oxford: Oxford University Press, 2003), p. 113).

“marked man's abandonment of the idea of a hierarchical structure of society and his option for a new system characterized by the coexistence of a multiplicity of states, each sovereign within its territory, equal to one another, and free from any external earthly authority.”²⁸¹

A point that has already been made, however, is that this system was only applied within the confines of Europe. Furthermore, the significance of the actual treaties of Westphalia for the development of this system is somewhat disputable.²⁸² Consequently, an appropriate source for a possible enumeration of the concept of exclusive territorial sovereignty, at least as it applies to those territories outside Europe, must be sought elsewhere.

In attempting to discover a source for such enumeration, an appropriate line of enquiry has already been revealed. This relates to the historical observation that the Westphalian system was both European and co-existent with a system of intercontinental hierarchy. Thus, any near-universal system currently in operation has been developed *after* the Peace of Westphalia in the mid-seventeenth century. Furthermore, if one accepts the suggestion that a system of exclusive territorial sovereignty has indeed been implemented almost universally, there is a natural question as to what became of the intercontinental hierarchy that co-existed with the European anarchy represented by Westphalia.

There are, arguably, some ways in which it could be said that remnants of this hierarchical system still exist and continue to influence the operation of the international system to a greater or lesser extent.²⁸³ As an officially recognised method of conducting the overtly political aspects of international affairs, however, the political discussions surrounding issues of enforcement would seem to suggest that notions of formalised hierarchy have been replaced by official adherence to a particular concept of sovereignty.²⁸⁴ To uncover a possible enumeration of this concept, then, the question must be asked as to when this particular transition took place.

Such a transition, however, has been relatively recent. It can be considered, for instance, that “the nineteenth century had closed with imperial domination, methodological

²⁸¹ Gross, L., ‘The Peace of Westphalia, 1648-1948’, (1948) 42(1) *American Journal of International Law* 20, pp. 28-9.

²⁸² See, for example, Glanville, L., ‘The Myth of “Traditional” Sovereignty’, (2013) 57 *International Studies Quarterly* 79 and Stirk, P. M. R., ‘The Westphalian model and sovereign equality’, (2012) 38 *Review of International Studies* 641.

²⁸³ For example, see *supra*, fn. 239.

²⁸⁴ For example, see *supra*, fn. 278.

enslavement of populations, and war.”²⁸⁵ The universality of exclusive territorial sovereignty can, in fact, be considered not to have taken shape until the hierarchies of this ‘imperial domination’ began to break down. Indeed, it can be argued that

“[d]ecolonization effectively universalized the European State as the only form of government that would provide equal status in the organized international community ... it had thoroughly integrated Western ideas about the State form as the only viable shell within which to develop into modernity.”²⁸⁶

This connection can be attributed, at least in part, to the fact that “[t]he prewar framework of international law and legitimacy drew a sharp distinction between Europeans ... and non-Europeans: only the former were unquestionably entitled to sovereign statehood.”²⁸⁷ In this way, a noticeable link can be established between decolonization and the near-universalization of the previously European concept of exclusive territorial sovereignty expressed in the form of statehood.

The process of decolonization, however, was not a singular event that occurred simultaneously in all parts of the world. Events as divergent as the independence of Brazil in 1822 and that of East Timor in 2002, as well as a host of others before, after and between, can all be considered as examples of decolonization. Consequently, in order to uncover a specific enumeration of the concept of exclusive territorial sovereignty that accounts for a near-universal implementation of this principle, it becomes necessary to consider what, if anything, might unify such a great variety of attempts at decolonisation.

Whilst it may not always have been expressed in such terms, this commonality is often drawn from the language of self-determination. That is, notwithstanding complexities surrounding distinctions between ‘indigenous’ and ‘national’,²⁸⁸ this process of decolonization can be connected to dialogues of national self-determination. It was arguably this “distinctive *norm* of self-determination that propelled decolonization in the 1950s and

²⁸⁵ *The Gentle Civilizer of Nations*, p. 98. This is given as an observation by Enrico Catellani in ‘Le droit international au commencement du XXe siècle’, (1901) VIII *Revue générale de droit international public* at p. 585.

²⁸⁶ *The Gentle Civilizer of Nations*, p. 175.

²⁸⁷ Jackson, R. H., *Quasi-states: Sovereignty, International Relations and the Third World*, (Cambridge: Cambridge University Press, 1990), (henceforth, Jackson), p. 16.

²⁸⁸ See, for example, Perrin, C., ‘Approaching Anxiety: The Insistence of the Postcolonial in the Declaration on the Rights of Indigenous Peoples’, in *Laws of the Postcolonial*, p. 19, particularly at pp. 20-21.

1960s”²⁸⁹ and, whilst not necessarily originating with these developments, this “idea of self-determination underpinned by international law was enshrined in the charter of the United Nations”.²⁹⁰ In the search for an enumeration of the principle of exclusive territorial sovereignty, therefore, it is possible that one might be found within the charter of the United Nations (UN).

The UN Charter, however, is not considered because it possesses constitutional significance in and of itself, as that is a different debate.²⁹¹ Nevertheless, it can be seen as a document which lays out what its members consider to be important foundations for the operation of the international community in which they participate. These foundations are directly expressed in Chapter I of the Charter, which states the purposes the UN desires to achieve and the principles on which the organisation is based. To the extent, then, that ideas of self-determination and exclusive territorial sovereignty can be found therein, this may be considered as a suitable enumeration of the principles that have been examined thus far.

Upon examining Chapter I of the UN Charter, however, a number of conceptual distinctions are brought to light that are not immediately apparent from an investigation into the enforcement or implementation of the idea of exclusive territorial sovereignty. To begin with, a brief survey of the extent of implementation that this concept has received revealed a connection, at least at the theoretical level, between exclusive territorial sovereignty and national self-determination. The UN Charter, however, states that “The Purposes of the United Nations are ... [*inter alia*, t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”.²⁹² In this way, the concept of self-determination is not linked to sovereignty, but rather to pursuing peaceful and friendly diplomatic relations. Thus, while the near-universal implementation of exclusive territorial sovereignty may have derived a great deal of political impetus from dialogues of national self-determination, this would not seem to be a principle on which the idea itself is grounded.

This marking of a distinction between sovereignty and self-determination is only exacerbated once it is noted that “[t]he new doctrine [of sovereignty] explicitly denies self-

²⁸⁹ Scott, D., ‘Norms of Self-Determination: Thinking Sovereignty Through’, (2012) 4 Middle East Law and Governance 195, p. 202. Emphasis in original.

²⁹⁰ Deng, F. M., *Identity, Diversity, and Constitutionalism in Africa*, (Washington, USA: United States Institute of Peace Press, 2008), pp. 46-47.

²⁹¹ See, for example, Fassbender.

²⁹² Charter of the United Nations, 26/6/1945, (UN Charter), Art. 1 and 1(2).

determination to ethnonationalities since if it were granted most existing ex-colonial states would be broken up”.²⁹³ Furthermore, the UN Charter goes on to state that the United Nations “is based on the principle of the sovereign equality of all its Members”²⁹⁴ and requires that these members “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”.²⁹⁵ Thus, whilst the Charter purports to uphold them all, it specifically distinguishes between the concepts of sovereignty, territorial integrity and political independence. At the same time, while explicitly embracing ‘sovereign equality’, the Charter refuses to “authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state”,²⁹⁶ thereby implying a distinction between sovereignty, which is to be held equally by all members, and domestic jurisdiction, which is not to be interfered with.

The idea of exclusive territorial sovereignty, therefore, is one whose direct and specific enumeration appears to be lacking in the Charter of the United Nations. Indeed, sovereignty is differentiated from territorial, even domestic, jurisdiction and a connection is made instead between sovereignty and equality. This apparent absence of enumeration, as well as the somewhat intermittent level of enforcement, would seem to indicate that the concept of exclusive territorial sovereignty cannot be seen as a constitutional element of the international community. A less restrictive concept of sovereignty, however, would seem to remain a contender as it is one which all members of the United Nations purport to both possess and uphold.

In particular, abandoning the adjectives of ‘exclusive’ and ‘territorial’ allows for a broader conception of sovereignty that is neither distinctly monolithic nor explicitly hierarchical. It is this broader conceptualisation of sovereignty that allows for the development of circumstances in which, “[i]nstead of being a threat to sovereignty and perhaps even statehood, political weakness and economic underdevelopment are now considered reasons for exemption from the more strenuous classical international competition between states.”²⁹⁷ Through this departure from a monolithic, present-or-absent

²⁹³ Jackson, p. 78.

²⁹⁴ UN Charter, Art. 2(1).

²⁹⁵ *Ibid.*, Art. 2(4).

²⁹⁶ *Ibid.*, Art. 2(7).

²⁹⁷ Jackson, p. 24.

understanding of sovereignty, it becomes possible to recognise that entities may “possess juridical statehood while as yet disclosing little evidence of empirical statehood.”²⁹⁸

In attempting to establish what values this broader understanding of sovereignty is intended to embody, however, it becomes necessary to examine the identificatory stage of the constitutional process. In this instance, however, the mere act of identification is less revealing than an examination of who can be seen as having completed this stage of the process. As the UN Charter is, technically, a treaty between independent States, it can be seen as having derived from the negotiations that were conducted prior to the formulation and creation of the Charter itself. Those who conducted these negotiations were, to all intents and purposes, representatives of sovereign States. In this way, sovereignty can be seen as a precursor to the operation of the constitutional process at an international level as it is a value which is used to determine who operates the process, rather than being a value that is somehow incorporated into the operation of that process. Consequently, it is possible to suggest that, insofar as it precedes the operation of a global constitutional process, the concept of sovereignty forms one of the founding principles of such a process.

This centrality of sovereignty to the international community is highlighted yet further when one revisits the content of the UN Charter. In particular, as was mentioned above, it centres the UN “on the principle of the sovereign equality of all its Members.”²⁹⁹ Significantly, however, the sovereignty that forms this foundational principle is not the sovereignty of political independence and autonomy, as that is enumerated separately.³⁰⁰ Likewise, it is not the sovereignty of supremacy, authority and control, as that is also to be protected as a distinct concept.³⁰¹ It cannot be a vague notion of sovereignty that is restricted to cross-border interactions, as such sovereignty would of necessity create interdependence between states, thereby negating a commitment to non-interference.³⁰² Finally, it is also not recognised as a formalised, monolithic entity that is either present or absent, as this would construct the phrase ‘sovereign equality’ as a meaningless tautology.³⁰³ Instead, this combination suggests that the sovereignty that forms a foundational element of the

²⁹⁸ *Ibid.*, p. 25.

²⁹⁹ UN Charter, Art. 2(1).

³⁰⁰ *Ibid.*, Art. 2(4).

³⁰¹ *Ibid.*, Art. 2(7).

³⁰² *Ibid.*

³⁰³ These forms of sovereignty can be related, respectively, to the models of Westphalian sovereignty, domestic sovereignty, interdependence sovereignty and international legal sovereignty as presented by Stephen Krasner in *Sovereignty: Organized Hypocrisy*, (Princeton, New Jersey: Princeton University Press, 1999) at pp. 3-4.

international community can be seen as a principle that is desired in tandem with equality and is not inherently indicative of it.

It can be argued, therefore, that this foundational form of sovereignty is neither the sovereignty of autonomy nor that of authority. It is, rather, the sovereignty of autarchy, of self-government. Despite the close similarities, however, to describe sovereignty as autarchy is not coterminous with its description as relating to political independence, legal supremacy or any of the other factors that have already been discussed. Instead, these factors can be seen as natural, if not necessary, outworkings of the theoretical contradictions inherent in the communal autarchy that is statehood. If, then, each separate and distinct autarchic community, also known as states, are seen as sovereign, this concept of sovereignty can itself be seen as nothing other than the freedom of these units to act as they see fit. To put it another way, sovereignty at the international level can be seen as synonymous with liberty at a domestic level. Insofar as it is founded upon ideals of 'sovereign equality', therefore, the international community which has formed, and formed around, the UN system can be seen as having two foundational principles - liberty and equality. This is, however, the liberty and equality of the autarchic units that comprise that system, not that of the individuals within such communities. The implications arising from this particular insight shall be investigated further in the next chapter.

Chapter 5

Global Human Rights

In the previous chapter, theories of international society were adopted in order to better comprehend the distinction between hierarchical and anarchical interpretations of a global constitution. As was discussed, this particular school of thought encourages perception of the global constitution as a process that exists independently of sovereign states and yet is also operated by them. This relationship of sovereign states to the constitutional process highlights the importance of sovereignty as a foundational value upon which the contemporary operation of the global constitutional process currently depends. This particular concept of sovereignty was then related to individual liberty at the national level. Consequently, to the extent that the international states system is operated on the basis of the sovereign equality of its members, it can be seen as a system that is founded on ideals of liberty and equality. It can be described, therefore, as a system of liberal constitutionalism.

As has been examined, however, liberal constitutionalism is frequently made manifest through concepts such as democracy, the separation of powers and the rule of law. In particular, it was suggested that this form of liberal constitutionalism necessitates the development of an intra-constitutional view of rights that is integral to the operation of the entire constitutional process.³⁰⁴ As a result, any attempt to apply such a perspective to the international system creates a number of difficulties that ought to be addressed. These difficulties are principally centred around the observation that “modern democratic theory is incompatible with robust global governance.”³⁰⁵ In other words, the manifestations of liberal constitutionalism within the state do not appear to be evident, or perhaps are not even possible, at the global level.

One potential explanation for this apparent disparity could be the somewhat simplistic response that it is actually erroneous to talk of global constitutionalism at all, at least in the form of global liberal constitutionalism. The conclusions of the previous chapter, however,

³⁰⁴ See *supra*, Chapter 3.

³⁰⁵ Goodhart, M., and Taninchev, S. B., ‘The New Sovereigntist Challenge for Global Governance: Democracy without Sovereignty’, (2011) 55 *International Studies Quarterly* 1047, p. 1048. Emphasis removed.

would seem to suggest that this is not the case.³⁰⁶ Instead of this, it is possible that the introduction of the ‘global’ element creates radically different factors that cause the same underlying values and principles to be made manifest in very different ways. The primary difference in this regard relates to the observation that was made at the end of the previous chapter. This is the contention that the global constitutional process is founded on the liberty and equality of states and not that of individuals. Consequently, it becomes necessary to further examine the nature of the existing global constitutional process in order to more fully assess if and how such a process is operated.

Nevertheless, having examined the details of a global constitutional process, there remain questions as to the ways in which this process interacts with concepts of rights. As stated above, it has previously been concluded that liberal constitutionalism results in the integration of rights into the operation of the constitutional process.³⁰⁷ If the global constitutional process does indeed follow principles of liberal constitutionalism, it might be expected that such integration also takes place at the global level. It is in examining the possible development of such integration, however, that two particular possibilities come to light. These are the development of a stronger separation of powers within a state-centred global constitution or a decline in the state-centred nature of the global constitutional process. It is these possibilities that the following discussion proceeds to consider.

5.1 State-Centred Global Constitutionalism

At the end of the previous chapter, it was concluded that the contemporary global constitutional process is founded upon ideals of the liberty and equality of the autarchic communities that are states.³⁰⁸ On this basis, it could reasonably be expected that certain expressions of liberal constitutionalism would be visible within the international realm. However, it has been argued that “it is neither plausible nor adequate to apply theories of democracy, legitimation, and self-legislation which were designed against the backdrop of the nation State constellation par for par to structures, institutions, and processes of global governance.”³⁰⁹ The possibility must be considered, therefore, that the introduction of a global element to theories of constitutionalism has an effect so significant as to render

³⁰⁶ See *supra*, Chapter 4.

³⁰⁷ See *supra*, Chapter 3.

³⁰⁸ See *supra*, Chapter 4.

³⁰⁹ Volk, C., ‘Why Global Constitutionalism Does not Live up to its Promises’, (2012) 4 *Goettingen Journal of International Law* 551, p. 564.

ineffectual any attempt to formulate a transition of such concepts between the national and international spheres.

To a certain extent, such criticism appears reasonably justifiable. There is no world government, much less one subject to a separation of powers, and there remains “no immediate prospect whatever of [global] federal union being carried out.”³¹⁰ Furthermore, it can also be said that global political institutions such as the United Nations “Security Council cannot be subject to the rule of law in any meaningful way”.³¹¹ To critique the global constitutional process in such a way, however, is to forget that which has been established as being its contemporary subject. To the extent that principles such as a separation of powers and the rule of law have been developed in the context of *individual* liberty and equality, they cannot be expected to be made manifest in the same way once transferred to a system that is based upon the liberty and equality of *states*. Inasmuch as the global constitutional process is founded upon the liberty of states, therefore, it is state practices and state behaviours that must be considered. A deficit of protection for individual liberty and equality cannot form a basis for legitimate criticism of this process so long as it is the society of states that forms its primary subject.

The question naturally arises, then, as to how the liberty of states can be seen to be made manifest in the operation of a global constitutional process, if at all. The idea that states are generally free to act as they see fit is, however, clearly evident within much of international law. For instance, the principle of *pacta tertiis nec nocent nec prosunt* embodies the notion that states cannot be bound by an international treaty without their consent. Whilst there may well be exceptions to this, such as in response to the application of customary international law or as a result of *erga omnes* obligations, the initial presumption is one in favour of a state’s sovereignty.³¹² States are presumed to have the legal freedom to act as they see fit unless other principles can be shown to take effect. The international legal system can therefore be described as being based upon a presumption in favour of the negative liberty of states. This position was declared clearly in the *Lotus* case, where the Permanent Court of International Justice stated that “[i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from

³¹⁰ Ewing, A. C., *The Individual, The State and World Government*, (New York, USA: Macmillan, 1947), (henceforth, Ewing), p. 277.

³¹¹ Gray, C., ‘The Security Council and the Rule of Law: An Overview’ in Chesterman, S., *et al*, ‘The Security Council and the Rule of Law’, (2009) 103 *American Society of International Law Proceedings* 245, p. 246.

³¹² For more detail on the *pacta tertiis* principle, see Brownlie, I., *Principles of Public International Law*, (6th edn.), (Oxford: Oxford University Press, 2003), (henceforth, Brownlie), p. 598.

their own free will ... Restrictions upon the independence of States cannot therefore be presumed.”³¹³

An immediate critique of this position, however, stems from the same arguments as a general critique directed at much of international law. This is the suggestion that international law, in its position as “a specific order or organization of power”,³¹⁴ is somewhat lacking in coercive force. There is, in fact, a “very wide discrepancy existing between the law as they [states] pronounce it to be and the reality of state practice.”³¹⁵ However, the relative efficacy of international law, or absence thereof, does not negate an argument that the international legal system is based upon the liberty of states. In contrast, the contention that international law is weak and ineffective actually strengthens the suggestion that the global constitutional process prioritises the freedom of states to act as they see fit.

This particular criticism, however, does raise a further point that ought to be addressed. Whilst it may well be conceded that the international society of states operates according to a constitutionalised precept regarding the liberty of its members, perhaps the same cannot be said for their equality. After all, it could be argued that “[t]he history of the international system is a history of inequality par excellence. ... In their physical extent, population, natural resources, and geographic position, states are, as it were, born unequal”.³¹⁶ This apparent inequality, however, is not restricted to the various resources states may have at their disposal. A classic example of political inequality within the international system is often drawn from “[t]he Charter of the United Nations [which] confers upon five great powers the privilege of the so-called veto right”.³¹⁷ This privileged position, however, coexists with the statement that the United Nations “is based on the principle of the sovereign equality of all its Members.”³¹⁸ This apparent tension can be reconciled through recognising that the equality upon which the global constitutional process is based

“is evidently not equality in the law, but equality before the law ... Equality before the law means that the law-applying organs, in applying the law,

³¹³ *The Case of the S.S. “Lotus”*, (1927) Permanent Court of International Justice, Series A, No. 10, p. 18.

³¹⁴ Kelsen, H., (trans., Wedberg, A.), *General Theory of Law and State*, (Cambridge, USA: Harvard University Press, 1946), p. 121.

³¹⁵ Watson, J. S., ‘Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law’, [1979] (3) *University of Illinois Law Forum* 609, p. 610.

³¹⁶ Tucker, R., *The Inequality of Nations*, (London: Martin Robertson, 1977), p. 3.

³¹⁷ Kelsen, H., *Principles of International Law*, (New York, USA: Rinehart and Company, Inc., 1952), (henceforth, Kelsen, *International Law*), p. 155.

³¹⁸ Charter of the United Nations, 26/6/1945, (henceforth, UN Charter), Art. 2(1).

must not make a difference which is not recognized by the law, that the law shall be applied as the law intends to be applied. Equality before the law means application of the law in conformity with the law”.³¹⁹

It can be said, therefore, that the global constitutional process is founded upon a formalised, legal conception of equality. Variations and disparities in the military, economic and cultural influence of states do not negate the recognition of an equalised distribution of formal legal liberty.

At this point, then, it can be determined that the global constitutional process is operated on the basis of the liberty and equality of states. This state-centred approach, however, causes such principles to manifest themselves in ways which are distinct from their manifestations within individual-centred national constitutional processes. Such distinctions, however, do not prohibit a conclusion that “[t]he sovereignty and equality of states represent the basic constitutional doctrine of the law of nations”.³²⁰ It has previously been concluded, however, that the acceptance of liberty and equality as basic norms leads to the integration of rights throughout the operation of the constitutional process.³²¹ Whether or not such a proposition remains true within state-centred global constitutionalism is a possibility that must now be examined.

5.2 Rights of States in the Global Constitution

It has been suggested that “just as within a nation the juridical and political equality of all citizens ... is the basis of a democratic order, so the equality of all nations ... [is] the only sound basis for an international order.”³²² The question that now arises, however, relates to the political and legal consequences of such equality. As was discussed above, the liberty and equality of states would seem to result in political and legal manifestations of these principles in ways that differ sharply from such manifestations at the national level. The question must now be asked, therefore, as to whether or not the same differences appear regarding the integration of rights into the global constitution.

³¹⁹ Kelsen, *International Law*, p. 155.

³²⁰ Brownlie, p. 287.

³²¹ See *supra*, Chapter 3.

³²² Poznanski, C., *The Rights of Nations*, (London: Routledge, 1942), p. 3.

It was established earlier that a constitutional process founded on ideals of liberty and equality can result in the development of an intra-constitutional view of rights that integrates individual rights into the various stages of operation of the constitutional process.³²³ If such a proposition holds true, then it ought to be expected that a process founded upon the liberty and equality of states would similarly integrate the rights of those states into its stages of operation. This suggestion, however, is immediately confronted with a number of difficulties. In particular, there is the contention that sovereignty and equality

“are moral or political principles, and not legal principles, and consequently cannot impose legal duties or confer legal rights upon men or states as long as these principles are not stipulated by legislation, custom, or treaties. As legal principles they are not the source or basis of the legal order by which they are stipulated; on the contrary, the positive legal order is their basis or source.”³²⁴

In other words, there is an argument that any rights of states that might exist within the international society of states are necessarily post-constitutional rights. That is, they are consequent upon the global constitutional order rather than determinative of it.

At the national level, however, such a position has previously been identified as being unsustainable.³²⁵ This was attributed to the threat that such an arrangement poses to the separation of powers within a national government. Post-constitutional rights, it was argued, grant an excess of power to those responsible for the identificatory stage of the constitutional process, as any rights that do exist can simply be altered or removed by the identification of alternative principles of government. Within international society, however, there are significant difficulties in ascribing a clear separation of powers to a global governmental institution. Instead, it is states themselves that can be seen as fulfilling the various functions of the global constitutional process.

This presence of states within all phases of the global constitutional process, and the attendant absence of a separation of powers, results in a view of state rights that differs significantly from the position of individual rights within national constitutions. An initial consequence of this absence of a separation of powers is the absence of any counterpoint to a post-constitutional view of rights. Whereas checks and balances within a national

³²³ See *supra*, Chapter 3.

³²⁴ Kelsen, *International Law*, p. 151.

³²⁵ See *supra*, Chapter 3.

constitutional process are able to prevent the accumulation of power within any individual stage, such a possibility does not exist where there is no separation of powers. Consequently, at the global level, it is those states which are most able to influence others regarding their identification of preliminary principles that have the power to determine what rights exist within the international states system. As a result, the operation, and even existence, of the global constitutional process becomes dependent upon the power and influence of the states involved.

Because of this dependence on state power, the development and preservation of rights within international society is only sustainable as long as the states responsible for the identificatory phase can maintain order and stability, both internally within themselves and externally in regards to their privileged position within the global constitution. As long as these 'great powers' are "exploiting their preponderance in such a way as to impart a degree of central direction to the affairs of international society as a whole"³²⁶ then the liberty and equality of states upon which the contemporary global constitution is founded are able to be preserved. In contrast, however, should these states choose to direct international society away from liberty and equality and towards authority, ethnocentrism or some other principle, then there would be no possibility, legal or otherwise, of preventing such a move.

Whilst its continuation cannot therefore be presumed, a post-constitutional understanding of rights can be seen as a result of the absence of a separation of powers at the global level. As was suggested earlier, this idea of a separation of powers can be seen simply as a manifestation of the desire to protect a constitutional focus on liberty. Within international society, however, the need for such protection is often considered unnecessary due to the adoption of a position that sees liberty, in the form of state sovereignty, as a pre-constitutional right. That is, whilst all other rights of states can be seen as being post-constitutional, "[s]overeignty in this sense is not the right of a state, for it is a condition under which a community is a state and has the rights of a state under international law."³²⁷ In other words, as long as the very nature of statehood is seen as imbuing an autarchic community with liberty as sovereignty, there is not seen to be any need for a global separation of powers that would preserve such sovereignty. The absence of this separation of powers then creates the circumstances by which all other rights of states are seen as being post-constitutional. The very existence of such rights is, consequently, subjected to the

³²⁶ Bull, H., *The Anarchical Society: A Study of Order in World Politics*, (4th edn.), (Basingstoke: Palgrave Macmillan, 2012), (henceforth, *The Anarchical Society*), p. 200.

³²⁷ Kelsen, *International Law*, p. 157.

vagaries of international politics and the potentially conflicting desires of powerful states. As a result, the foundational principle of liberty is itself left vulnerable to disruption and abandonment, thereby disproving the original assumption that sovereignty is a pre-constitutional right, an automatic inheritance of the quality of statehood. States seeking to preserve their liberty, therefore, cannot and should not insist on a pre-constitutional 'right' to sovereignty.

In order to preserve their own liberty, then, states are left with three distinct opportunities. Firstly, there is the possibility of viewing all rights of states, including a right to sovereignty, as being extra-constitutional. If, however, state rights are seen as being disconnected from processes of global constitutionalism, or potentially non-existent, then this leaves the equality of international society in a particularly vulnerable position as weaker states have no basis on which to challenge the demands of more powerful states. Accordingly, in order to preserve both the liberty and equality, or the sovereign equality, of states, an intra-constitutional view of rights must be adopted. Following the reasoning already outlined, a desire to protect the liberty of states, and the intra-constitutional rights it implies, would appear to leave open only two options. The first of these possibilities would be to introduce a separation of powers at the global level, thereby reducing the influence of states conducting the identificatory phase of the constitutional process. The alternative would be to allow for a decline in the role of the state. If it is the state-centred nature of global constitutionalism that is threatening the preservation of state sovereignty, then perhaps a smaller role for the state within the global constitutional process would actually help preserve its liberty. It is these two possibilities that shall now be considered.

5.3 Global Separation of Powers

In a like manner to developments at a national level, a global separation of powers provides a potential solution to the question of who is to operate the constitutional process. Whilst, as already suggested, it is states that are responsible for operating the global constitutional process, there does not currently appear to be any distinction between different phases of this process. Thus, states that are able to identify peremptory norms are also able to take responsibility for their enumeration, implementation and enforcement. As a consequence, the existence or otherwise of such norms, or even much of general international

law, is not a question of constitutionality but rather a question of power. A global separation of powers challenges this reality.

Such a proposition, however, is not synonymous with the introduction of a global government. Instead, it refers to the possibility of retaining the role of the state within the global constitutional process and yet simultaneously withdrawing from a situation in which all states are responsible for all phases of the process at all times. In some ways, it is connected to theories regarding the balance of power, although

“[m]ost discussions of balance of power in international affairs focus on states balancing each other in order to protect their interests. A balance of power, however, can also function in a constitutional way when it prevents any one actor from being more powerful than any other.”³²⁸

In order to achieve this, polycentric legal and political systems are developed that overlap and compete, thereby preventing any single system, or any single state, from achieving overall control. It is centred on an understanding that, “in an increasingly interdependent world, different legal orders will have to try to accommodate each other’s jurisdictional claims.”³²⁹ In this way, power becomes dispersed and the influence of both systems and states is restrained by the conflicting and competing influence of other systems and states.

In certain areas, the beginnings of a transition towards such a situation can potentially be identified. It has been observed, for example, that

“[a]t present we are living through a curious combination of the technology of the late twentieth century, the free trade of the nineteenth, and the rebirth of the sort of interstitial centres characteristic of world trade in the Middle Ages. City states like Hong Kong and Singapore revive, extraterritorial ‘industrial zones’ multiply inside technically sovereign nation-states like Hanseatic Steelyards, and so do offshore tax-havens in otherwise valueless islands”.³³⁰

³²⁸ Lang Jr., A., ‘Global Constitutionalism as a Middle-Ground Ethic’, in Navari, C., (ed.), *Ethical Reasoning in International Affairs: Arguments from the Middle Ground*, (Basingstoke: Palgrave Macmillan, 2013), p. 108.

³²⁹ Cohen, J. L., *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*, (Cambridge: Cambridge University Press, 2012), (henceforth, Cohen), p. 75.

³³⁰ Hobsbawm, E. J., *Nations and Nationalism Since 1780: programme, myth, reality*, (2nd edn.), (Cambridge: Cambridge University Press, 1992), p. 182.

This ‘curious combination’ has led some to suggest “that the states system may be giving place to a secular reincarnation of the system of overlapping or segmented authority that characterised mediaeval Christendom”.³³¹

At first, it may seem somewhat counter-intuitive to suggest that this polycentric and neomedieval approach may help preserve the sovereignty of the state. Indeed, it is possible to suggest that it is because of these ideas that “the very notion of the ‘public interest’ and the viability of the national state as a form of political community are being questioned.”³³² What this approach challenges, however, is not the sovereignty of the state *per se*. Rather, the challenge is issued to the exclusive territorial jurisdiction of the state. It is centred around the possibility that “the idea of geography as a basis for the organization of politics and economics may be losing meaning.”³³³ However, when sovereignty is understood as the liberty of the autarchic communities that we call states, upon which the global constitutional process is founded, it is not directly threatened.

In fact, as mentioned above, sovereignty-as-liberty can actually be preserved and maintained through the development of polycentric international legal and political systems. This is because such systems begin to occupy the same role that is fulfilled by a separation of powers at the national level. Due to a retention of a focus on the state, however, the comparison is not exact. Within such an environment, for example, states retain the ability to participate in multiple phases of the constitutional process. Nevertheless, the competition between legal and political systems that is introduced by such polycentricity prevents the dominance of any single vision for the overall society in an analogous manner to that achieved by a strict separation of powers at the national level. For instance, the European Court of Justice has been able to indirectly balance the supremacy of the United Nations Security Council, noting that

“the Courts of the European Union must, in accordance with the powers conferred on them by the Treaties, ensure the review ... of such measures as

³³¹ *The Anarchical Society*, p. 254.

³³² Cerny, P. G., ‘Neomedievalism, Civil War and the New Security Dilemma: Globalisation as Durable Disorder’, (1998) 1(1) *Civil Wars* 36, p. 37.

³³³ Kobrin, S. J., ‘Back to the Future: Neomedievalism and the Postmodern Digital World Economy’, (1998) 51(2) *Journal of International Affairs* 361, p. 369.

are designed to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations”.³³⁴

In a similar manner, there is an increasing level of direct interaction between the different international legal regimes of Europe, with decisions of the European Union becoming subject to review by the European Court of Human Rights.³³⁵

At this point, the argument could be raised that the maintenance and preservation of this polycentric society necessitates the inevitable development of a global state - a centre to run all centres. This is particularly the case from a perspective which considers that “[f]ormal legal rules should be devised to regulate these new practices and understandings of competences and jurisdiction.”³³⁶ The formal regulation of these potentially overlapping jurisdictions would seem to imply a need for a specific body to be invested with the competence to adjudicate any cross-jurisdictional conflicts, thus negating the polycentric nature of the system. This would put these developments into the same category as other hierarchical and hegemonic conceptions of global constitutionalism.

Conversely, however, such a progression would not be inevitable. Hedley Bull is among those writers who have “denied that it was only the existence of central state power which could make possible the emergence of a society, or could prevent its collapse or disintegration; anarchy *is* compatible with society, because the state is not the only reason for obeying rules in society.”³³⁷ The management of this polycentricity would not be inherently dependent on the authority of a powerful super-state, rather it would depend on the will of independent states to freely and voluntarily associate themselves with the systems and institutions of the polycentric society.

Such a voluntary association, however, does necessitate a certain degree of maintenance. To the extent that enforcement procedures comprise a distinct phase of the constitutional process, a system that makes no provision for such enforcement cannot rightly be called constitutional. Consequently, a system whereby states are able to disassociate themselves at will in order to avoid enforcement-related sanctions and prohibitions is not a

³³⁴ *European Commission and Others v. Yassin Abdullah Kadi*, C-584/10 P, European Court of Justice (Grand Chamber), 18/7/2013, para. 97.

³³⁵ See, for example, Craig, P., ‘EU Accession to the ECHR: Competence, Procedure and Substance’, (2013) 36 *Fordham International Law Journal* 1114; Eckes, C., ‘EU Accession to the ECHR: Between Autonomy and Adaptation’, (2013) 76(2) *Modern Law Review* 254.

³³⁶ Cohen, p. 76.

³³⁷ Hoffmann, S., ‘International Society’, in Miller, J. D. B., and Vincent, R. J., *Order and Violence: Hedley Bull and International Relations*, (Oxford: Clarendon Press, 1990), p. 23. Emphasis in original.

constitutional system. In order, therefore, for a polycentric society to maintain a certain degree of constitutionality, there must exist a mechanism of association and disassociation that acts independently from the regular enforcement mechanisms that occur within the society.

This form of voluntary association can be said to occur when states come “to perceive common interests in a structure of coexistence and co-operation, and tacitly or explicitly to consent to common rules and institutions.”³³⁸ In this way, the preservation of liberal global constitutionalism through polycentric social systems is accompanied by an inherent level of tension as the dispersal of power brought about by increased polycentricity must be balanced by an acceptance of common rules and institutions. To some extent, this position can be seen as a natural consequence of an analysis developed from theories of international society, as “the idea of an international society has traditionally presupposed the existence of states that share common interests and values and are willing to be bound by agreed rules and to operate on the basis of common institutions.”³³⁹

As has been stated, this apparent tension does not necessarily compel the development of a singular global state. However, a willingness of states ‘to operate on the basis of common institutions’ would certainly imply that the potential for such a development does exist. Within the contemporary international sphere, increasing polycentricity can be correlated with the development of the United Nations “as a single, universal international organisation, and thus as a symbol of a sense of common interests and values that underlies the discord of the present international system.”³⁴⁰ Whilst the United Nations has been criticised for representing “little more than good intentions”,³⁴¹ it has also been suggested that, through it, “we have real international government”.³⁴² Following the arguments that have been discussed, however, a desire to preserve liberal global constitutionalism through the operation of a polycentric system would seem to require the maintenance of the United Nations as an embodiment of common interests and values and yet simultaneously look to balance its direct legal and political influence through the operation of alternative mechanisms in these areas.

³³⁸ Bull, H., ‘The Emergence of a Universal International Society’, in Bull, H., and Watson, A., (eds.), *The Expansion of International Society*, (Oxford: Clarendon Press, 1984), p. 120.

³³⁹ Little, R., *The Balance of Power in International Relations*, (Cambridge: Cambridge University Press, 2007), p. 269.

³⁴⁰ *The Anarchical Society*, p. 250.

³⁴¹ Yunker, J. A., *The Idea of World Government*, (Oxon: Routledge, 2011), (henceforth, Yunker), p. 101.

³⁴² Ewing, p. 279.

Acknowledging this perspective, however, is not to deny that alternative routes to developing and preserving international polycentricity may yet exist. Particularly from the point of view of physical security, it has been suggested that, “given the specter [*sic*] of a hierarchical world state, and the statelike architectures of the United Nations, the path to a [global] nuclear union of restraint is around, not through, the United Nations.”³⁴³ Nevertheless, the very existence of the United Nations warrants a certain degree of consideration, if only as an attempt to analyse present realities rather than succumbing to the abstract conceptualisation of ideal theories. As a consequence, an examination of contemporary global constitutionalism cannot evade consideration of the United Nations as an international organisation. What must be considered, however, is the relative ability, or otherwise, of the organisation to establish and maintain common values and interests amongst its members whilst simultaneously refraining from the development of formal legal and enforcement-based cohesion. With the United Nations possessing a near-global membership,³⁴⁴ it is reasonable to refer to such common values as being global norms.

At this point, then, it would seem that one mechanism by which the liberal character of the global constitutional process can be preserved is through a global separation of powers. However, this is not identical to a separation of powers at the national level and is instead centred on the development of a plurality of legal, political and social centres so that the whole society can be deemed to be polycentric. Such polycentricity is in turn dependent on the maintenance of common values within and across the society. This must be achieved, however, without negatively impacting on the preservation of the polycentricity itself. Consequently, whilst the United Nations can be considered as a symbol of global values, it is not its role as a political and legal centre that must be examined. The aspect that must be assessed is, rather, its role in establishing, preserving and disseminating global norms.

5.4 Individual Human Rights

When it comes to an assessment of the globally normative role of the United Nations, there initially appear to be a number of options that could be considered. These norms relate to “what may be called the institutions of international society: the balance of power,

³⁴³ Deudney, D. H., *Bounding Power: Republican Security Theory from the Polis to the Global Village*, (Woodstock: Princeton University Press, 2007), p. 263.

³⁴⁴ At the time of writing, there are 193 member states of the United Nations - see <http://www.un.org/en/members/index.shtml> (last accessed, 06/05/15).

international law, the diplomatic mechanism, the managerial system of the great powers, and war.”³⁴⁵ All such institutions, however, presuppose a certain level of political and legal cohesion. If the maintenance of a polycentric society is dependent on the continuation of normative conformity without legal unity, such institutions cannot form the basis for the normative order that underlies the society. Requiring the participants in society to conform to specific legal and political institutions usurps the role of the polycentricity upon which the society is founded. Consequently, the norms to which the members of society are asked to conform cannot be norms which directly affect the operation of relationships between members of that society. As a result, the maintenance of cohesion within a polycentric society becomes dependent on the preservation of norms which directly relate to objects other than the society’s members. These norms act independently of the relationships between members of the society, leaving such relationships to be regulated by the multiple, and competing, centres.

With this in mind, therefore, it can be said that attempting to preserve the sovereign equality of states by way of a global separation of powers leads to the development of a polycentric international society. In turn, this polycentricity necessitates a shift in focus in the development of global norms. This shift is one in which emphasis is transferred away from interstate behaviour, allowing this to be regulated by the polycentric nature of the society, and towards the interactions between states and non-state actors. Within the context of the United Nations, the distinct set of norms that achieve this position can be said to be those which relate to its purpose “in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.³⁴⁶

Within contemporary international society, however, there are two alternative domains which could potentially fulfil this requirement at least as effectively, or potentially more so, than the field of human rights. These concern the development of international trade, principally through the regulation of trans- and multi-national corporations, and protection of the physical environment. Both the environment itself and international corporations are not participants within the international society of states and, therefore, regulation of these areas can potentially be seen as fulfilling the requirement of establishing norms which do not directly affect the relationships between states themselves.

³⁴⁵ *The Anarchical Society*, p. 71.

³⁴⁶ UN Charter, Art. 1(3).

To focus initially on international trade, it does appear as though this could act as a suitable alternative to human rights regarding the maintenance of a polycentric international society. In particular, it has been suggested that the World Trade Organisation (WTO) “helps promote a structure of limited government like that espoused in the U.S. Constitution because it replicates the idea of federalism on the international level.”³⁴⁷ This idea begins to gain strength once it is noted “that theoretically the WTO is fair and democratic indeed. No agreement is settled without each member agreeing. This seems to give even smaller and poorer countries a significant capability to have their say in the negotiations.”³⁴⁸ This apparent protection for the liberty and equality of states, combined with the promotion of controlled government, does give the impression that recognition of, and participation in, the WTO system of governance is as equally capable of maintaining a polycentric international society as participation within the United Nations’ human rights mechanisms.

When considered more closely, however, such a position becomes inherently problematic. For example, it must be noted that, despite the apparent equality within the WTO, “a number of [other] organizations in the field of economic governance have developed weighted voting to account for the economic size and power of their members.”³⁴⁹ Additionally, it can be also be said that from within the economic context there is currently “a trend in global governance away from formal institutional structures towards looser networks ... [which] allows states, primarily the powerful players, to remain in control of developments.”³⁵⁰ In essence, consideration must be given to the fact that states are themselves participants in the international economy, with their own interests and relationships. States have economic connections with other states and, consequently, it cannot be seen as an area that is sufficiently independent of inter-state relationships to act as the basis for the common norms and values necessary for the maintenance of a polycentric international society.

In contrast, however, protection of the physical environment does not appear to present the same drawbacks. For instance, there is a view “that man’s excessive worldwide cumulative emissions of greenhouse gases ... are significantly changing the chemical

³⁴⁷ McGinnis, J. O., ‘The World Trade Organization As A Structure of Liberty’, (2004) 1(28) *Harvard Journal of Law & Public Policy* 81, p. 81.

³⁴⁸ Eskelinen, T., ‘Global basic structure and institutions: The WTO as a practical example’, (2011) 7(1) *Journal of Global Ethics* 47, p. 50.

³⁴⁹ Wouters, J., and Odermatt, J., ‘Comparing the “Four Pillars” of Global Economic Governance: A Critical Analysis of the Institutional Design of the FSB, IMF, World Bank, and WTO’, (2014) 17 *Journal of International Economic Law* 49, pp. 58-9.

³⁵⁰ *Ibid.*, p. 74.

composition of the planet's atmosphere"³⁵¹ and yet, simultaneously, "not one country on its own releases enough emissions to cause dangerous climate change by itself."³⁵² At least partly as a result of this, "it has been argued that initial targets for an environmental regime must be weak in their stringency but wide in their participation".³⁵³ In such a way, environmental protection can be seen as a prime candidate for a domain in which states can pursue normative consistency without directly affecting the political and legal relationships between them.

This position is only reinforced once it is also noted that "[m]ultilateral environmental agreements addressing climate change, ozone depletion, hazardous chemicals, or endangered species are still very much state-driven."³⁵⁴ That is, the realm of environmental protection remains one whose management is very much within state control. Additionally, within the "complex international system for environmental governance, no single organisation ... possesses the authority or political strength to effectively coordinate all international environmental efforts".³⁵⁵ This combination of factors would seem to suggest that environmental protection could indeed be a subject area capable of supporting a polycentric global constitutional process.

Before abandoning the examination of human rights, however, it must also be considered that

"there is a general consensus that the IEG [international environmental governance] system is not adequate to deal with the many environmental problems in this world ... [and] factors contributing to such inefficiency include ... the lack of enforcement, implementation and effectiveness of IEG".³⁵⁶

This lack of effective implementation and enforcement highlights the fact that the international environmental system is not, or at least not yet, a constitutional system.

Furthermore, in an environmental context, states "remain far from developing the sense of

³⁵¹ Cox, R. H. J., 'The Liability of European States for Climate Change', (2014) 30(78) *Utrecht Journal of International and European Law* 125, p. 125.

³⁵² *Ibid.*, p. 131.

³⁵³ Parson, E. A., *Protecting the Ozone Layer: Science and Strategy*, (Oxford: Oxford University Press, 2003), p. 271.

³⁵⁴ Bodansky, D., 'Is There an International Environmental Constitution?', (2009) 16(2) *Indiana Journal of Global Legal Studies* 565, (henceforth, Bodansky), p. 577.

³⁵⁵ Vijke, M. J., 'The promise of new institutionalism: explaining the absence of a World or United Nations Environment Organisation', (2013) 13 *International Environmental Agreements* 153, p. 154.

³⁵⁶ *Ibid.*, pp. 154-5.

community that underlies constitutional governance.”³⁵⁷ In an examination of the present international framework, therefore, environmental protection cannot be considered as a suitable alternative to human rights in its ability to provide normative integration without legal conformity. Whilst there does not appear to be any inherent quality relating to environmental protection that would prevent this from changing in the future, the contemporary situation does not seem to support the environmental governance regime as a viable contender for the fulfilment of this role.

As a consequence, then, it falls to an examination of human rights to assess the ongoing development, or otherwise, of a global constitutional process. It is these notions of human rights that can be seen as providing an arena that does not compel interference in inter-state relationships and yet simultaneously allows for the development of normative cohesion through the provision of common international standards and values. Due to this role in providing cohesion to a polycentric society, these human rights norms retain a focus on the nature, role and position of the state. As their name suggests, however, they also deal with human beings at a more fragmented level than that of the state itself. As discussed, this duality is a consequence of the unique, perhaps contradictory, position of human rights norms within international society. This is a position which seeks to maintain inter-state normative cohesion whilst simultaneously avoiding direct interference in inter-state relationships. As can be seen, however, this dualistic nature creates a number of issues of its own.

5.5 Human Rights and A Polycentric Society

A particular question that warrants further investigation at this point relates to the connections, if any, between human rights and the concept of polycentricity itself. Specifically, questions are raised as to whether and how these norms of human rights support or undermine the maintenance of international polycentricity. If, as discussed above, the concern is with human rights as produced and expressed through the United Nations system, this centralisation could perhaps be seen as counteracting the polycentricity that such norms allegedly help maintain. In essence, there is an inherent tension “stemming from the fact that while international human rights law can provide an impetus for legal pluralism, it can also

³⁵⁷ Bodansky, p. 584.

act as a constraint on its existence or manner of operation.”³⁵⁸ This tension is reflected in the long-running debates surrounding the universal or culturally relative nature of human rights. However, the “conflicting accounts of the use and potential abuse of the cultural relativism argument are now well rehearsed.”³⁵⁹ For present purposes, what is potentially more revealing is the relationship between these norms of human rights and notions of state sovereignty.

Initially, of course, there is a certain degree of overlap between arguments for cultural relativism and support for state sovereignty. Both positions, for instance, posit the view that human rights are best expressed and interpreted at a local, or at least non-global, level. The belief that the current human rights regime is too Westernised, and potentially imperialist, is only reinforced by instances of Western powers appearing to violate accepted standards of sovereignty and impose their views on non-Western states in one way or another.³⁶⁰ This perception poses a number of difficulties for the present suggestion that a globalisation of human rights norms is a potential route to preserving state sovereignty. Indeed, it can be said that “[t]he traditional international human rights law narrative poses a conflict between sovereignty represented by Article 2(7) of the UN Charter and the supervisory mechanisms in the UN human rights declarations, covenants and treaties.”³⁶¹ It has even been suggested that the very concept of human rights “is the most subversive of the early ideas emanating from the UN system”.³⁶²

This conflict between state sovereignty and international oversight can be mitigated to some extent by an acknowledgement that “[i]n the first instance, it is for the state to decide on the necessary measures to bring domestic law into line with its international obligations.”³⁶³ Whilst this position might not lead to an immediately perfect implementation of human rights norms, it does allow for an approach that is more respectful of local customs and

³⁵⁸ Quane, H., ‘Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?’, (2013) 33(4) *Oxford Journal of Legal Studies* 675, (henceforth, Quane), p. 677.

³⁵⁹ Harris-Short, S., ‘International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child’, (2003) 25(1) *Human Rights Quarterly* 130, p. 133.

³⁶⁰ See, for instance, Vlcek, W., ‘Crafting human rights in a constitution: Gay rights in the Cayman Islands and the limits to global norm diffusion’, (2013) 2(3) *Global Constitutionalism* 345.

³⁶¹ Wall, I. R., *Human Rights and Constituent Power: Without Model or Warranty*, (Oxon: Routledge, 2012), p. 117. Footnote omitted.

³⁶² Weiss, T. G., *et al*, *Ahead of the Curve? UN Ideas and Global Challenges*, (Bloomington, USA: Indiana University Press, 2001), p. 24.

³⁶³ Quane, p. 699

traditions.³⁶⁴ Additionally, this response does hint at a potential resolution to the issue presently at hand. This is the idea that such norms do not challenge state sovereignty as long as they are established by the states themselves and not an outside force. In this way, they can be said to represent the states' "choice to bind themselves, the sovereign choice to accept limits to sovereignty. The overall logic of the phenomenon does not, therefore, appear to be that of expropriation, but rather that of *assignment, transfer, or delegation*."³⁶⁵ Consequently, it can be said that the centralisation of norm creation within the United Nations human rights mechanisms does not contradict the polycentric nature of international society to the extent that it is the members of this society that determine the nature and content of such norms.

Furthermore, the argument can also be put forward that

"although the international legal norms and rules regarding the prerogatives of sovereign states have changed, sovereignty has not been displaced by human rights as the basic principle of the international legal order.

International human rights treaties are not designed to abolish state sovereignty or to replace it with global governance and global law but to prod states to erect and commit to a common international standard".³⁶⁶

It is this provision of a 'common international standard' that can be seen as providing the framework of norms necessary for the maintenance of a polycentric society. As stated, however, this maintenance is only possible to the extent that such norms and standards do not interfere with state-to-state interaction and concentrate instead on the relationships between states and non-state actors.

Following this logic, then, the United Nations cannot act as an external force that imposes human rights obligations on states from outside their own determinations. To do so would be to undermine the coherence of a polycentric international society and allow the societal nature of the international system to be overridden by the influence of particular legal and political centres. It would, therefore, be inimical to the liberty of states. Simultaneously, however, states that wish to preserve their sovereignty must engage with a normative system of human rights, participation in which governs association with international society.

³⁶⁴ See, for instance, Kumar, R. A., 'Customary Law and Human Rights in Botswana: Accredited Survival of Conflicts', (2010) 2 City University of Hong Kong Law Review 277.

³⁶⁵ Condorelli, L., and Cassese, A., 'Is Leviathan Still Holding Sway over International Dealings?', in Cassese, A., (ed.), *Realizing Utopia: The Future of International Law*, (Oxford: Oxford University Press, 2012), (henceforth, *Realizing Utopia*), p. 16. Emphasis in original.

³⁶⁶ Cohen, p. 162.

Failure to engage with this system results in a state positioning itself outside the polycentric society. This type of realignment would enable other states to view the departing state as a pariah, rogue or enemy, without the entitlements to liberty or equality that are afforded to states continuing to share in the common norms and values of the polycentric society. It is also for this reason that regional and national declarations of human rights protection must be considered as subsidiary to universal norms in cases of conflict.

So far, then, it can be said that a global constitutionalism that is both state-centred and liberal in its operation can be preserved through the development of a global separation of powers as expressed in a polycentric international society. In turn, maintenance of this polycentricity requires members of this society to share in the development of human rights norms, leaving inter-state relationships to be regulated by the polycentric society itself. This approach, however, is distinctly not intended as a form of prescriptive edict or prophecy, nor could it function as such. Instead, it is to be “operated much more as a critical standpoint from which to attack any present (functional) architecture for falling short of the ideal of freedom than a constructive platform on which to impose any particular blueprint on the world.”³⁶⁷ Consequently, it is not an abstract, theoretical proposal that must be considered in this regard, but rather the actual, observable international systems that are presently in operation.

This combination of a focus on state-developed human rights norms with an examination of contemporary international institutions necessitates an inquiry into the United Nations Human Rights Council. The precise details of such an investigation, however, shall be considered later.³⁶⁸ For the time being, there remains an alternative route by which liberal global constitutionalism might be maintained that has, as yet, been left unexplored. This is the possibility that, as it is the state-centred nature of global constitutionalism that is threatening state sovereignty, such sovereignty may yet be preserved through a decline in the constitutional role of the state at the global level.

5.6 Global Cosmopolitanism

Having appraised the potential for, and nature of, a global separation of powers, there remains an alternative consideration that must now be examined. This is the possibility that

³⁶⁷ Koskenniemi, M., ‘The Subjective Dangers of Projects of World Community’, in *Realizing Utopia*, p. 12.

³⁶⁸ See *infra*, Chapter 6.

the sovereign equality of states, and the attendant intra-constitutional rights implied by the resulting liberal form of global constitutionalism, is only unsustainable to the extent that the global constitutional process is centred upon the autarchic communities that are states. In shifting the focus from the state to the individual, it can be argued that a situation might be created which actually assists in the preservation of liberal global constitutionalism. The logic behind this view is far simpler and less convoluted than that behind the global separation of powers outlined above.

In essence, this cosmopolitan tradition suggests that “[t]he traditional linear model of the individual having a political relationship with the world at large only via his state as the required intermediary is breaking down”.³⁶⁹ As a consequence, the appropriate source of political and legal authority within the international realm gradually ceases to be seen as the autarchic communities of states. This then leads to a crisis of legitimacy within international law and politics, with the argument being put forward that “[t]he heart of the problem is the continued adherence to state consent as the exclusive indispensable source of legitimacy”.³⁷⁰

In response, the contention is made “that sovereignty can have no other source but the minds of men and women”.³⁷¹ In other words, the emphasis shifts from considering a series of autarchic communities to an examination of the individuals who comprise those communities. Once this shift is made, however, this cosmopolitan line of thought can become manifest in a variety of different ways. These can range from attempts to establish “a universal political order encompassing the entire world”³⁷² to the more abstract arguments urging “that all humanity embrace a ‘new way of thinking’ and develop a sense of global community, of brotherhood transcending national boundaries and embracing the entire human family.”³⁷³ In amongst this diversity, however, there remains a common idea that, when it comes to matters of international governance, the individual is at least as important as the state itself.

It would be misleading, however, to create the impression that there exists a necessary conflict between the individual and the state, with cosmopolitan thought giving preference to the former over the latter. Instead, this perspective can be seen as maintaining the argument that “the state exists only for the purpose of enabling the individuals who comprise the state

³⁶⁹ Heater, D., *World Citizenship and Government*, (London: Macmillan Press, 1996), p. 180.

³⁷⁰ Teitel, R., *Humanity's Law*, (Oxford: Oxford University Press, 2011), (henceforth, Teitel), p. 173.

³⁷¹ Pemberton, J., *Sovereignty: Interpretations*, (Basingstoke: Palgrave Macmillan, 2009), p. 212.

³⁷² Yunker, p. 98.

³⁷³ Yunker, p. 113.

to live their lives relatively peacefully, and for no other purpose”.³⁷⁴ In turn, this position then leads to placing greater emphasis on the argument that

“what individuals value ... are their civilian rights enjoyed in global civil society *and* their citizenship rights enjoyed in sovereign states. The practices are not rivals, but must be understood as complementing one another. The way in which the two practices are made to cohere is through the provision that states must respect the civilian rights people enjoy in GCS [global civil society].”³⁷⁵

From within this perspective, therefore, protecting the sovereignty of states necessitates protecting the liberty and equality of the individuals that comprise those states.

As a consequence of this position, this more cosmopolitan point of view “imagines a global order in which the idea of human rights is an operative principle of justice, with mechanisms of global governance established specifically for their protection.”³⁷⁶ As such, it is not only a position which advocates for an increased role of the individual within international affairs, but also one in which human rights are accepted as being universalized, or at least capable of becoming so. To put it another way, this position argues for an “increased significance for legitimacy of the normative substance of the law relative to formal acts of state consent”.³⁷⁷

At this point, however, it must be acknowledged that “[c]osmopolitan thought has come under attack for all manner of alleged deficiencies.”³⁷⁸ Many of these criticisms centre around “the cosmopolitan project for a ‘state of peoples’ (or ‘cosmopolitan state’) that limits and ultimately fully absorbs the sovereignty of the nation states.”³⁷⁹ Indeed, it has even been “argued that a world state will emerge whether or not anyone intends to bring it about.”³⁸⁰ As discussed in the earlier examination of polycentricity, such a hierarchical ordering of the world is not restricted to cosmopolitan theories. However, to the extent that the aim of the

³⁷⁴ Mills, K., *Human Rights in the Emerging Global Order: A New Sovereignty?*, (Basingstoke: Macmillan Press, 1998), p. 37.

³⁷⁵ Frost, M., *Global Ethics: Anarchy, Freedom and International Relations*, (London: Routledge, 2009), p. 108. Emphasis in original.

³⁷⁶ Fine, R., ‘Cosmopolitanism and Human Rights: Radicalism in a Global Age’, (2009) 40(1) *Metaphilosophy* 8, (henceforth, Fine), p. 8.

³⁷⁷ Teitel, pp. 173-4.

³⁷⁸ Fine, p. 9.

³⁷⁹ Zolo, D., ‘A Cosmopolitan Philosophy of International Law? A Realist Approach’, (1999) 12(4) *Ratio Juris* 429, p. 431.

³⁸⁰ Wendt, A., ‘Why a World State is Inevitable’, (2003) 9(4) *European Journal of International Relations* 491, p. 529.

present analysis is to examine the potential for preserving the liberty of states through an exploration of cosmopolitan thought, it can safely be assumed that the complete abolition of the state would not be conducive to achieving this goal.

Other criticisms of cosmopolitan thought highlight “the cosmopolitan requirement of a universal ground of legitimacy, one that does not depend on political agreement or on compromise between diverse multivariate political and moral claims.”³⁸¹ As referred to above, this ‘universal ground of legitimacy’ is often expressed through human rights as ‘an operative principle of justice’ and, when taken on a purely moral basis, there may well be genuine reasons as to why human rights cannot be adequately universal.³⁸² Whether or not this is the case, however, is not as relevant to the present discussion as it may initially appear. This is because, as examined elsewhere, a desire to preserve individual liberty and equality within a constitutional process cannot easily coexist with a pre-constitutional view of rights as universal moral entities. Instead, such a desire leads to the development of the intra-constitutional rights of individuals.³⁸³ From a cosmopolitan perspective, therefore, the argument cannot depend on the universality of human rights, but rather on the neutrality of the constitutional process.

This position can then be seen as acting in combination with the cosmopolitan suggestion that preserving the liberty and equality of states means preserving the liberty and equality of the individuals within them. However, this comparison should not be taken as being synonymous with an insistence “that all normative attributes of states ought to be reducible to the normative attributes of individual persons.”³⁸⁴ Instead, the cosmopolitan focus on the nature and status of the individual can simply be seen as containing an inherent continuation of the concept of human rights into the international sphere. Significantly, however, this is not an internationalisation of a single list of ‘universal’ rights. It is, rather, the extension of the individual, intra-constitutional view of rights established within liberal constitutionalism into the realm of liberal *global* constitutionalism.

As a result, the appropriate question to ask of a cosmopolitan approach to liberal global constitutionalism does not concern how this position might incorporate individual

³⁸¹ Teitel, p. 167.

³⁸² For a more detailed discussion on the universal nature of human rights see, *inter alia*, Donnelly, J., *Universal Human Rights in Theory and Practice*, (3rd edn.), (London: Cornell University Press, 2013), particularly at pp. 93-118.

³⁸³ See *supra*, Chapter 3.

³⁸⁴ Chwaszcza, C., ‘Beyond cosmopolitanism: towards a non-ideal account of transnational justice’, (2008) 1(3) *Ethics & Global Politics* 115, p. 116.

human rights into a state-based international system. Instead, the question is how it might envisage the incorporation of state rights into a person-based international system. In attempting to address such a question, however, it must be remembered that this cannot be achieved through the somewhat simplistic abolition of numerous autarchic communities and their replacement with a singular, global state. It has already been established that such a utopian, or dystopian, project would not be compatible with the preservation of liberal global constitutionalism in its contemporary form. As an alternative, this approach takes a position which supports an argument “that focusing on states as moral agents must in no way depart from traditional liberal values or abandon ethical individualism.”³⁸⁵

Consequently, a cosmopolitan approach to the global constitutional process necessarily involves the maintenance of a degree of respect for the concept of statehood whilst simultaneously recognising the significance of individual personhood at the international level. In doing so, however, care must be taken to avoid purely theoretical idealism. Instead, the aspect of cosmopolitanism that is most relevant is the points at which,

“[i]nstead of calling human beings to begin from scratch, with an ideal institutional project, it directs attention to the more humble (yet more realistic) avenue of working with institutions we have now - not because they are good, or because they already represent a utopian design, but because they are what real humans have to deal with when we try to make reality of our freedom now.”³⁸⁶

This cosmopolitan approach, then, highlights two aspects to be considered when examining the maintenance of liberal global constitutionalism through reducing the constitutional role of the state. These are the importance of individual human rights, as a means of protecting the liberty and equality of the individuals who constitute the states, and the role of contemporary international institutions, as opposed to abstract utopianism. Taken together, these two factors principally result in a need to consider the United Nations as it is

“[t]he institutions of the UN, and the basic principles of international law expressed in the UN charter, [that] embody what Hegel would have called a piece of ‘existential reason’ - a small portion of the idea [of a just and

³⁸⁵ *Ibid.*, p. 134.

³⁸⁶ Koskeniemi, M., ‘The Subjective Dangers of Projects of World Community’, in *Realizing Utopia*, p. 12.

peaceful cosmopolitan order] that Kant had already clearly formulated two hundred years ago.”³⁸⁷

Similarly to the earlier focus on the UN, it is once again the human rights work of the organisation that needs to be taken into account. In contrast to the earlier discussion, however, it is not the Human Rights Council that ought to be considered. This is because it is

“necessary to distinguish between the two identities of the UN ... The First UN is constituted by its staff, an international secretariat or bureaucracy located in New York, Geneva, and other regional headquarters. ... The Second UN is a collectivity formed by almost all the states of the world; it consists of its member states, who employ an international secretariat to support their joint deliberations and activities.”³⁸⁸

To the extent that the Human Rights Council contributes to the preservation of an international society that is both coherent and polycentric, it can be seen as forming part of this ‘Second UN’. If the reason for pursuing a more cosmopolitan approach, however, is to reduce the constitutional role of the state within liberal global constitutionalism, then it would be illogical to seek such an approach within a state-centred organ such as the Human Rights Council. Consequently, an alternative must be sought for within the ‘First UN’.

This alternative option is the UN’s Office of High Commissioner for Human Rights (OHCHR). Forming part of the ‘First UN’, the OHCHR is not explicitly dominated by any particular state or states and would seem more able, therefore, to focus on the individuality within human rights-related activities than the state-centred work of the Human Rights Council. A more detailed examination of the work of the OHCHR in this regard shall, however, proceed later.³⁸⁹ For the time being, it shall suffice to conclude that the individualisation of the global constitutional process presents one option for preserving the sovereign equality of participating states through a globalisation of the conditions that contribute to a preservation of liberal constitutionalism at the national level.

³⁸⁷ Habermas, J., *The Past as Future*, (Cambridge: Polity Press, 1994), p. 22.

³⁸⁸ Claude, Jr., I. L., ‘Peace and Security: Prospective Roles for the Two United Nations’, (1996) 2 *Global Governance* 289, pp. 290-291.

³⁸⁹ See *infra*, Chapter 7.

Chapter 6

The United Nations Human Rights Council

Up to this point, it has been suggested that the contemporary global constitutional process is founded upon ideals of the liberty and equality of states. Three distinct mechanisms have also been noted as having the capacity to maintain this focus on liberty and equality. Firstly, there is the ‘great power’ mechanism, by which powerful states direct the operation of the global constitutional process along the paths they desire. Secondly, there is the polycentric mechanism, in which a polycentric international social system is fostered in order to replicate the effects of a separation of powers. Finally, there is the cosmopolitan mechanism, which allows for an increased role for individuals and non-state actors within the international community.³⁹⁰

In the course of the previous chapter, it was noted that there is nothing inherent to an approach based on great powers that necessitates the development of a liberal and equal society. By its very nature, therefore, such an approach is ultimately self-defeating, or at least unsustainable. The alternative approaches, however, both remain viable options, albeit in need of more detailed consideration. The polycentric mechanism requires the development and implementation of common values and norms to which all members of international society are able to subscribe without negating the polycentricity itself. Whilst not necessarily succumbing to this particular difficulty, it remains unclear how the cosmopolitan approach might assist in the preservation of state-based sovereignty whilst simultaneously increasing the role of the individual within international affairs.

In order to assess these, and other, aspects, both of these latter approaches have identified a need to consider the work of the United Nations (UN) in the field of human rights. The polycentric approach highlights the role of the Human Rights Council whilst the cosmopolitan perspective places greater emphasis on the Office of High Commissioner for Human Rights. It falls to the following chapter to more thoroughly investigate this

³⁹⁰ For more detail on these perspectives, see *supra*, Chapter 5.

cosmopolitan approach.³⁹¹ For the time being, it is the United Nations Human Rights Council, or HRC, that must be examined.

In order to conduct this more complete assessment into the overall contributions of the HRC towards the global constitutional process, two further questions must be addressed. Firstly, there is a need to establish the extent to which the HRC is able to, or actually does, provide a level of normative integration across international society. Secondly, there is a need to assess the extent to which attempts to standardise or centralise such provision interferes with the polycentric nature of a global separation of powers. Once these issues are examined, it becomes possible to consider more fully the nature of the HRC's contributions, or potential contributions, to the processes of global constitutionalism. Consequently, it is these matters that this chapter shall proceed to discuss.

Before doing so, however, the first matter to be addressed in such an undertaking concerns the initial development of the HRC itself. Despite the focus on the HRC that was established in the previous chapter, there remain questions as to both its origins and its practices. In order to accurately gauge the contributions of the HRC in the areas already outlined, it becomes necessary to more fully understand the HRC itself. Consequently, a brief examination of its history may well serve to highlight appropriate lines of enquiry for the more detailed exploration that shall proceed later. It is with this historical dimension, therefore, that this discussion begins.

6.1 Developing the Human Rights Council

At its creation, signatories to the Charter of the United Nations agreed that “[t]he Economic and Social Council shall set up commissions ... for the promotion of human rights”.³⁹² Doing precisely this, a Commission on Human Rights (CHR) was established, with it being decided that it

“would be composed of representatives of governments following instructions rather than independent experts on human rights; individual petitions complaining about human rights abuses by governments would not be openly received or acted upon; and its work be confined to general

³⁹¹ See *infra*, Chapter 7. For more detail on the reasoning that led to the adoption of these approaches, see *supra*, Chapter 5.

³⁹² Charter of the United Nations, 26/6/1945, (henceforth, UN Charter), Art. 68.

statements of principle rather than any binding commitments or enforcement mechanisms”.³⁹³

From its inception, then, the CHR was a state-based body whose work focused on the adoption of normative standards and principles rather than their direct implementation and enforcement.

At least partly as a result of these limitations, the CHR attracted significant criticism throughout its lifetime. In particular, “the Commission became a magnet for criticism as states with questionable human rights records gained seats.”³⁹⁴ Ultimately, however, it has also been suggested that “[w]hen these constraints ... are considered fully, what is remarkable is not that the Commission on Human Rights would eventually fall short of the dreams of its most ardent supporters, but that it would accomplish anything at all.”³⁹⁵ Nevertheless, the CHR was not entirely unresponsive to its critics and some reforms were attempted, including the development of an ability to investigate those complaints “which appear to reveal a consistent pattern of gross and reliably attested violations of human rights”.³⁹⁶ In spite of some such innovations in its capacity to investigate allegations of human rights abuses, however, it remained predominantly the case that “the changes that were agreed by the CHR were piecemeal and procedural rather than revolutionary.”³⁹⁷

As a result, a situation developed in which “[m]any in the human rights field ... came to be highly critical of the political energy invested by States at the CHR in order to avoid criticism rather than defend human rights.”³⁹⁸ This negative view of the CHR was eventually voiced by actors within the UN system itself, with the publication of a report stating that “the Commission’s capacity to perform ... [its] tasks has been undermined by eroding credibility and professionalism. ... The Commission cannot be credible if it is seen to be maintaining

³⁹³ Lauren, P. G., “‘To Preserve and Build on its Achievements and to Redress its Shortcomings’: The Journey from the Commission on Human Rights to the Human Rights Council”, (2007) 29 *Human Rights Quarterly* 307, (henceforth, Lauren), p. 316.

³⁹⁴ Edwards, M. S., *et al*, ‘Sins of Commission? Understanding Membership Patterns on the United Nations Human Rights Commission’, (2008) 61(3) *Political Research Quarterly* 390, (henceforth, Edwards, *et al*), p. 391.

³⁹⁵ Lauren, p. 317.

³⁹⁶ United Nations Economic and Social Council Resolution 1503(XLVIII), 27/05/1970, Art. 1, as available at <http://www.staff.city.ac.uk/p.willets/HR-DOCS/ERES1503.HTM> (last accessed, 06/05/15). At the time of writing, this text is currently unavailable through the official United Nations system, accessible at <http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/Resolutions.aspx> (last accessed, 06/05/15).

³⁹⁷ Ghana, N., ‘From UN Commission on Human Rights to UN Human Rights Council: One Step Forwards or Two Steps Sideways?’, (2006) 55(3) *International and Comparative Law Quarterly* 695, (henceforth, Ghana, N.), p. 695.

³⁹⁸ *Ibid.*, p. 697.

double standards in addressing human rights concerns.”³⁹⁹ Gradually, such criticism gained momentum and ultimately led to a “decision to replace the ... [CHR] with a new UN Human Rights Council ... [which] was taken by governments at the September 2005 World Summit and adopted as a General Assembly ... resolution on 15 March 2006.”⁴⁰⁰

As a result of these developments, there is little that could be gleaned by considering the relative accuracy of criticism of the CHR that would be beneficial within the context of the present discussion. For present purposes, the extent and accuracy of such criticism is less significant than the fact of the CHR’s replacement by the HRC. Consequently, it becomes necessary to focus on the construction and operation of the HRC and the extent to which it has attempted to address the perceived criticisms of the CHR, whether or not such criticism was actually justified.

The first aspect to be noted in this regard is the consideration that “the most difficult and sensitive issue relating to the Commission on Human Rights is that of membership.”⁴⁰¹ This issue of membership is particularly significant to the discussion currently at hand. This is because the extent to which the HRC is capable of providing normative integration and cohesion across international society can be directly related to the level at which that society participates in the activities and decisions of the HRC. However, if the focus is to be on the capacity of the HRC to assist in the normative integration of international society, its membership and composition is not the only factor that needs to be taken into account. This is particularly the case once it is noted that, as regards the CHR, “the ex post effectiveness of the institution seems to have been driven by perverse ex ante incentives regarding membership.”⁴⁰² Consequently, it cannot be assumed that formal membership alone is naturally indicative of agreement with the decisions of the HRC, nor is it necessarily a sign of participation in its deliberations. As a result, attention must also be paid to the methods by which the HRC formulates and adopts its opinions in order to provide a more complete assessment of the extent to which the HRC infuses international society with a common normative framework.

An additional element that is revealed by considering the criticism of the CHR is the extent to which “[t]he founders of the [Human Rights C]ouncil have sought to diffuse the

³⁹⁹ Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, (United Nations, 2004), (henceforth, *A More Secure World*), p. 89, para. 283.

⁴⁰⁰ Ghanaea, p. 695.

⁴⁰¹ *A More Secure World*, p. 89, para. 285.

⁴⁰² Edwards, *et al.*, p. 392.

rising tide of politicization ... by instituting a system that is intended to ... work with, not against, states under review.”⁴⁰³ This relationship between the HRC and states is, therefore, a further aspect that ought to be considered. This is particularly the case in an assessment of the HRC’s ability to influence the maintenance and development of international polycentricity as limitations and restrictions on the freedom of action to which states are entitled could be seen as unduly inhibiting the polycentric nature of the international system.

In this regard, however, the relationship between the HRC and states is not the only factor that warrants consideration. When first establishing the HRC, the General Assembly of the UN agreed that this new body should “[w]ork in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions and civil society”.⁴⁰⁴ Prior to this, there was also a proposal put forward which suggested that, when reforming the CHR, the UN “Member States should consider upgrading the Commission to become a ‘Human Rights Council’ that is no longer subsidiary to the Economic and Social Council but a Charter body standing alongside it and the Security Council”.⁴⁰⁵ Combined with the decision to ask the HRC to cooperate with regional organizations and national human rights institutions, it would consequently seem appropriate to also examine the status of the HRC in relation to a broader framework of institutional organs and systems than simply states and national governments.

There is a final sector, mentioned above, whose connection to the HRC must also be considered. This is the role of ‘civil society’. This is particularly relevant to a discussion on international polycentricity, as there exists “a mode of argument that projects the idea of a global civil society as the societal accompaniment to the supposedly inexorable and unalterable processes of economic and cultural globalization”.⁴⁰⁶ The question must be asked, therefore, as to whether or not the HRC is capable of maintaining an international polycentric system when faced with the ‘inexorable and unalterable’ advance of a global civil society.

A brief foray into the history of the HRC, then, can be seen to reveal a number of lines of enquiry that are particularly pertinent to the discussion at hand. Specifically, and in relation to the provision of normative integration across international society, the membership

⁴⁰³ Davies, M., ‘Rhetorical Inaction? Compliance and the Human Rights Council of the United Nations’, (2010) 35(4) *Alternatives: Global, Local, Political* 449, (henceforth, Davies), p. 450.

⁴⁰⁴ Human Rights Council, United Nations General Assembly Resolution, A/RES/60/251, (15/03/2006), (henceforth, UNGA Res. 60/251), Art. 5(h).

⁴⁰⁵ *A More Secure World*, p. 90, para. 291.

⁴⁰⁶ Kenny, M., and Germain, R., ‘The idea(l) of global civil society’ in Germain, R., and Kenny, M., (eds.), *The Idea of Global Civil Society: Politics and ethics in a globalizing era*, (London: Routledge, 2005), p. 2.

and procedures of the HRC must both be considered. Additionally, the association between the HRC and international polycentricity must be examined through a consideration of the relationships between the HRC and states, as well as an examination of the way the HRC relates to other institutional bodies. Finally, there is also a need to consider the relationship between the HRC and civil society. It is, therefore, these areas that shall now be discussed.

6.2 Normative Integration

As discussed above, when conducting an assessment of the degree to which the HRC is capable of providing normative integration across international society, there are two principal factors that ought to be considered. These are the membership of the HRC as well as its internal operations and proceedings. If proposals of the HRC are to be considered as providing integration and cohesion across international society, then it ought to be expected that all members of that society participate in, or are at least represented in, its proceedings. In contrast, if the HRC cannot be considered as being broadly representative of the international society to which it relates, it will struggle to integrate the different members into a singular, cohesive society. This would particularly be the case where such members possessed competing visions for the norms and values they considered as necessary to provide direction to the international society as a whole.

In addition to the membership of the HRC, the nature and status of any decisions, opinions and resolutions developed within its proceedings must also come under scrutiny. Whilst membership may indeed be sufficiently representative as to incorporate the entirety of international society, the HRC cannot profess to espouse common standards and values unless all members are able to have their views considered and accommodated in some way. There is a natural overlap between this facet of the HRC's work and the degree to which members might or might not comply with its decisions. Before that particular aspect of the HRC can be examined, however, it is the initial development and formulation of its decisions that must be considered.

6.2.1 Membership of the HRC

To begin by considering its membership, then, it must first be considered as to whether or not participation within the HRC can be seen as being broadly representative of the international society within which it claims to be centred. As an organ of the United Nations system, it is appropriate to consider the members of that system as forming the society to which the HRC relates. At the time of writing, there are currently 193 member states participating in this broader UN system.⁴⁰⁷ Given the relatively broad spectrum of this membership, it appears reasonable to view this system as encompassing a large portion of the globe. As a result, and with the caveat that the term ‘global’ refers only to those areas already incorporated into this United Nations system, it is therefore possible to consider the HRC as a vehicle for the creation and promulgation of genuinely global values. Such a view, however, is only viable to the extent that membership of the HRC is identical to, or suitably representative of, membership of this larger organisation.

When examining possible reforms to the United Nations’ previous human rights system, it was suggested “that, given the highly difficult and sensitive issue of who should be included or excluded from serving as members of the Commission on Human Rights, the membership should become universal and include all states”.⁴⁰⁸ Had this proposal been taken forward, this universality of membership would certainly have been sufficient as to provide for a global level of normative integration. Instead, however, when debating the composition of the HRC the United Nations’

“General Assembly ultimately chose a membership of 47, with the following regional distribution: 13 African states; 13 Asian states; six Eastern European states; eight Latin American and Caribbean states; and seven Western European and other states. The assembly also determined that the HRC's members would serve for a period of three years and would not be eligible for immediate re-election after two consecutive terms.”⁴⁰⁹

Representing a slight reduction in the number of members as compared to the former, and now defunct, Commission on Human Rights, this smaller level of membership translates to approximately 24% of all UN member states directly participating in the activities of the

⁴⁰⁷ See <http://www.un.org/en/members/index.shtml> (last accessed 06/05/15).

⁴⁰⁸ Lauren, p. 331. See also, *A More Secure World*, p. 89, para. 285.

⁴⁰⁹ Ramcharan, B. G., *The UN Human Rights Council*, (London: Routledge, 2011), (henceforth, Ramcharan), p. 35. See also, UNGA Res. 60/251, Art. 7.

HRC. Additionally, the proportion of membership attributed to each of the regional groups within the HRC is directly comparable to membership of the relevant groups within the wider UN system.⁴¹⁰ This acts in combination with regular elections and limits on terms of service to produce a result that could be considered broadly representative of the full range of UN members.

On a related but somewhat tangential note, this is one reason as to why it must be the HRC that is considered, as opposed to any of the various bodies established under treaties such as the International Covenant on Civil and Political Rights or the International Convention on the Elimination of All Forms of Racial Discrimination.⁴¹¹ The membership of such bodies being restricted to states that have ratified the relevant treaty, the range and scope of actions available to these treaty bodies is naturally more restricted than those open to the HRC. Additionally, such bodies are generally restricted to the norms already enumerated in the relevant treaty and, consequently, are much more limited in their capacity to develop and promulgate completely new and original normative standards. It must also be acknowledged that “[t]he treaty bodies have nothing resembling the Human Rights Council’s public discussion procedures or confidential procedures for looking at situations of consistent patterns of gross violations of human rights.”⁴¹² As a result, an attempt to assess the degree of normative integration available at a global level, must naturally consider the body with a larger membership and broader remit.

In spite of it having a broader membership and remit than these treaty bodies, however, neither the electoral processes nor the possibility of compulsory rotation of membership of the HRC were entirely without controversy. For instance, it was at one point “argued that the United States and the other permanent members of the Security Council were entitled to automatically possess ‘guaranteed seating’ on the new Human Rights Council (and thus never be barred from membership)”.⁴¹³ Whilst this proposal was not adopted, it was

⁴¹⁰ A list of the membership of these regional groups is available here: <http://www.un.org/depts/DGACM/RegionalGroups.shtml> (last accessed, 06/05/15). The proportion of members attributed to each regional group varies by less than a single percentage point between membership of the HRC and membership of the wider UN system.

⁴¹¹ See, for instance, the International Covenant on Civil and Political Rights, (16/12/1966), United Nations Treaty Series I-14668, Part IV, or the International Convention on the Elimination of All Forms of Racial Discrimination, (21/12/1965), United Nations Treaty Series I-9464, Part II. A more complete list of such international instruments and their associated monitoring bodies is available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last accessed, 06/05/15).

⁴¹² Rodley, N., ‘The United Nations Human Rights Council, Its Special Procedures, and Its Relationship with the Treaty Bodies: Complementarity or Competition?’, (henceforth, Rodley), in Boyle, K., (ed.), *New Institutions for Human Rights Protection*, (Oxford: Oxford University Press, 2009), p. 71.

⁴¹³ Lauren, pp. 333-4.

decided that election to the new body would be by a majority vote of the UN's General Assembly. Whilst not as demanding as some had hoped, this requirement "represents a much higher threshold of an affirmative vote [than for the former Commission on Human Rights] and thus an opportunity for human rights supporters to block the election of states that severely violate human rights."⁴¹⁴ In addition, the General Assembly specified that, "when electing members of the [Human Rights] Council, Member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto".⁴¹⁵ Despite the innovation behind such a requirement, the demand for states to 'take into account' a candidate's human rights record remains relatively weak. Consequently, it is perhaps not surprising that, "[i]n practice, regional slates have continued. ... [I]f there are vacancies on the council in a particular region and the same number of candidates is presented from that region, in all likelihood the candidates presented will be elected."⁴¹⁶

Given the apparent continuation of these regional slates, and combined with a distribution of seats that is based almost entirely on geographic criteria, a conclusion that the HRC can be seen as being broadly representative may appear somewhat unlikely. This is especially so when the existing arrangements are compared to the more radical proposal for universal membership of the HRC. Furthermore, this is only exacerbated when it is considered that "[a]s discontent with the performance of the Commission [on Human Rights] grew ... the issue of its composition became both the lightning rod that attracted much of the criticism and a convenient explanation for its inability to function effectively."⁴¹⁷ In spite of the relatively minor modifications and alterations, however, "the possibility of any meaningful restrictions on member states fell by the wayside during the negotiation process."⁴¹⁸ As a result, the primary factor within the selection process for membership of the HRC remains an attempt to achieve the "representation of different cultures and legal systems through a geographical balance."⁴¹⁹

However, this implied connection between cultures, legal systems and geography is never explored or explained. Consequently, whilst membership of the HRC can be

⁴¹⁴ Lauren, p. 335.

⁴¹⁵ UNGA Res. 60/251, Art. 8.

⁴¹⁶ Ramcharan, p. 35.

⁴¹⁷ Alston, P., 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council', (2006) 7 *Melbourne Journal of International Law* 185, (henceforth, Alston), pp. 188-9.

⁴¹⁸ Cox, E., 'State Interests and the Creation and Functioning of the United Nations Human Rights Council', (2010) 6(1) *Journal of International Law and International Relations* 87, (henceforth, Cox), p. 107.

⁴¹⁹ Alston, p. 191.

considered broadly representative of international society, this must be restricted to representation of a purely geographic distribution of UN member states. It remains to be seen, therefore, whether such geographic representation is capable of producing genuine normative integration through the adoption and promulgation of global standards and values. This is especially the case when it is considered that the entire concept of polycentric international governance is intimately linked to the notion that “the idea of geography as a basis for the organization of politics and economics may be losing meaning.”⁴²⁰ Consequently, to more fully assess the HRC’s ability to provide normative integration and cohesion within a polycentric international society, the nature and status of the HRC’s opinions and decisions must themselves be more closely examined.

6.2.2 Resolutions of the HRC

When considering the mechanisms by which the HRC formally develops and expresses its opinions, it must initially be noted that, “[i]n principle the HRC applies the rules of procedure of the General Assembly’s main committees, as applicable.”⁴²¹ As a consequence, the processes leading to decisions and resolutions of the HRC, as well as the particular configuration of any formal outcome, cannot be said to be any more or less capable of providing for normative integration than other aspects of the wider UN system. Furthermore, and as discussed above, the HRC has a membership that, whilst being geographically representative, is not universal. The combination of these factors suggest that other aspects of the UN system, such as the General Assembly, might be better suited to providing for the development of normative integration within international society.

As previously examined, however, it is the unique focus of the HRC on issues of human rights that is the primary driver as to why this, and not other organs of the UN, is the appropriate focus for developing normative integration. It is understandably disappointing, therefore, that the HRC has received substantial criticism for its lack of a genuine focus on human rights issues. The HRC, for example, has been compared to “a contaminated egg because of its singular lack of a principled approach in dealing with situations of gross

⁴²⁰ Kobrin, S. J., ‘Back to the Future: Neomedievalism and the Postmodern Digital World Economy’, (1998) 51(2) *Journal of International Affairs* 361, p. 369.

⁴²¹ Ramcharan, p. 39.

violations of human rights.”⁴²² Perhaps more colourfully, it has also been described as being a “caterpillar with lipstick”.⁴²³

Nevertheless, despite the existence of such criticisms, it must be noted that the success or failure of the HRC in tackling human rights issues is not the primary concern of the present discussion. Instead, what is of interest is whether or not it is capable of providing common values and standards that contribute to the normative integration of a polycentric international society. Given the lack of significant distinction within its processes and procedures, however, it is primarily the substance, rather than the form, of its decisions that must be considered.

When considering this more substantive dimension of the HRC, it would initially appear as though a certain degree of normative integration is the natural outcome of its work. Indeed, it can be said that “[t]he Human Rights Council has taken forward the standard-setting role of its predecessor and has so far contributed a fair set of new standards”.⁴²⁴ Some of the more recent developments in this area include attempts to elaborate the human rights demands on transnational corporations, elaboration of the right to conscientious objection to military service and discussion of the relationship between human rights, democracy and the rule of law.⁴²⁵ The ability of the HRC to develop, or at least explore, such common norms and standards is perhaps to be expected when one considers that a driving factor behind reform of the former Commission on Human Rights and the creation of the HRC was an attempt to emphasise “the development of common standards and the pursuit of a ‘cooperative’ approach to human rights.”⁴²⁶

As was stated earlier, however, the HRC has not been welcomed uncritically and it has been suggested “that the criticisms leveled [*sic*] against the UNHRC's predecessor have not lost all their relevance.”⁴²⁷ Such criticism, however, does present a possible line of enquiry. Although on its own it is not a decisive factor, the very fact that such criticism

⁴²² *Ibid.*, p. 120.

⁴²³ See generally, Rajagopal, B., ‘Lipstick on a Caterpillar? Assessing the New U.N. Human Rights Council through Historical Reflection’, (2007) 13 Buffalo Human Rights Law Review 7.

⁴²⁴ *Ibid.*, p. 99.

⁴²⁵ The relevant United Nations Human Rights Council Resolutions being the following: Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, A/HRC/RES/26/9, (14/07/2014); Conscientious objection to military service, A/HRC/RES/24/17, (27/09/2013); Human rights, democracy and the rule of law, A/HRC/RES/19/36, (19/04/2012).

⁴²⁶ Cox, p. 89.

⁴²⁷ Hug, S., and Lukács, R., ‘Preferences or blocs? Voting in the United Nations Human Rights Council’, (2014) 9 Review of International Organizations 83, (henceforth, Hug and Lukács), p. 103.

exists is indicative of the difficulties faced by the HRC in attempting to establish and promote common values across a diverse range of states.

In this regard, one particularly noteworthy critique is the argument that “power politics and raw state interest have had a heavy influence on the council.”⁴²⁸ This is particularly evident in discussions targeting specific states. In the early years of the council, for example, “just three states - Israel, Sudan and Myanmar [Burma] - have accounted for 72% of all country-specific resolutions.”⁴²⁹ Particular criticism has been raised against the HRC’s apparent focus on Israel, with it being observed that, in these discussions, the HRC “was expected to serve as a political battleground between Western democracies and the developing world.”⁴³⁰ More broadly, difficulties in adopting common standards and values have been observed at an empirical level, where it has been remarked that “[w]hile a large majority of all resolutions [of the HRC] are adopted without opposition or only abstentions, 70 votes between 2006 and 2010 ... revealed clear divergences of opinion with some countries opposing the proposal.”⁴³¹ Thus, whilst there are clearly some attempts at establishing and promoting common goals, there would seem to remain a diverse range of opinions within the HRC as to exactly what those goals should be.

This diversity of opinion being expressed within the HRC suggests that it is generally incapable of providing genuine normative integration across international society. Whilst its membership can be considered as being broadly representative of the geographic distribution of the states to which the HRC relates, such representative membership does not appear sufficient to enable the adoption and promulgation of common norms and values. It ought to be noted, perhaps, that issues of representation and normative integration are not unique to the HRC itself.⁴³² Nevertheless, as outlined earlier, it is the extent to which the HRC provides an institutional framework for addressing these questions at the global level that is of most concern at present. Before discounting the HRC entirely, however, it must be considered that disagreements in the development of a resolution are not by themselves problematic. Indeed, they may still be considered as global standards if those who disagree

⁴²⁸ Ramcharan, p. 15.

⁴²⁹ Cox, p. 111.

⁴³⁰ Seligman, S., ‘Politics and principle at the UN Human Rights Commission and Council (1992-2008)’, (2011) 17(4) *Israel Affairs* 520, p. 538.

⁴³¹ Hug and Lukács, p. 84.

⁴³² Indeed, similar questions can be seen as confronting the international human rights system more broadly, particularly in the case of south-east Asia. For instance, see generally, Ryu, Y., and Ortuoste, M., ‘Democratization, regional integration, and human rights: the case of the ASEAN intergovernmental commission on human rights’, (2014) 27(3) *The Pacific Review* 357.

with the values being adopted remain willing to modify and adapt their own preferences to reflect changes in the global norms being advanced by the HRC. It becomes necessary, therefore, to examine the mechanisms by which the HRC can compel or encourage compliance with its decisions and, in doing so, consider the extent to which it does or does not interfere with the development of international polycentricity.

6.3 Polycentricity

As highlighted through the earlier historical examination of the HRC, there are three principal sectors to be taken into consideration in examining the relationship between the HRC and the maintenance of polycentricity within international society. The first of these relates to the relationship between the HRC and other institutional organs and systems. This particularly concerns the HRC's interactions with other intergovernmental bodies, specifically in the field of human rights. If other state-based bodies assigned to examine human rights issues display a forced compliance with decisions of the HRC, this might suggest a degree of centralisation of the field which would be incompatible with a polycentric system. On the other hand, if these other bodies voluntarily follow and comply with the HRC, these relationships could be examined for the existence of common norms and values which could be seen as sustaining the polycentric relationships among them. A final alternative that might be discovered is that such bodies do not pay significant attention to the HRC at all. In such a scenario, the existence of a certain degree of normative integration amongst the members of international society might remain possible, but this would not arise through the HRC.

The remaining factors to be considered concern the associations between the HRC and states on the one hand and between the HRC and civil society on the other. Regarding the ways in which the HRC relates to states themselves, the focus must be on the practical impact of the HRC's debates and decisions. In a similar manner to the preceding discussion regarding other human rights bodies, the relationships between the HRC and the states participating in international society as a whole must be examined in order to determine the degree to which compliance is forced, encouraged or evaded. Regarding the HRC's relationship with civil society, however, the question is not one of compliance but rather one of influence. If the opinions of the HRC are heavily influenced by a strong and vocal civil society, it could be suggested that this is inimical to the idea of polycentricity. Alternatively,

an HRC that is able to function as a fully independent centre, implementing its own decisions and opinions, could be seen as at least being indicative of an international polycentric system. Consequently, it is these dimensions which the following discussion proceeds to consider.

6.3.1 The HRC and Other Human Rights Bodies

An initial aspect to be examined regarding the relationship between the HRC and other human rights bodies is the fact that, like the former Commission on Human Rights, the HRC

“is intended to be the lead organ, watching over the human rights field, spotting areas where existing instruments might be inadequate or where new instruments might be needed, and generally monitoring the consistency, integration, and systematization of the international code of human rights.”⁴³³

This apparent pre-eminence of the HRC would seem to suggest that it primarily functions as a centralising body, influencing other human rights bodies in excess of what might be expected within a polycentric system. Combined with its nature as a state-based organ, a centralising role for the HRC would seem to grant the states who participate in it a degree of power and influence that would be incompatible with the idea of an international separation of powers.

This perception is particularly evident when one considers the powers and responsibilities with which the HRC was imbued at its creation. In particular, the HRC was given the responsibility to “promote the effective coordination and the mainstreaming of human rights within the United Nations system”.⁴³⁴ This suggests a role of supervision and oversight in excess of what might be expected within a polycentric system. In spite of these reservations, however, what must be borne in mind is that there is no suggestion of the UN itself being a self-contained polycentric system. Rather, the concern is with the maintenance of polycentricity within international society as a whole. As this aspect of the HRC’s work that relates to the consolidation and co-ordination of human rights efforts is only applicable in the context of the United Nations, there remains scope for the HRC to preserve some degree of international polycentricity.

⁴³³ Ramcharan, pp. 66-7.

⁴³⁴ UNGA Res. 60/251, Art. 3.

In order to assess this possibility, attention must naturally be paid to developments outside the UN system. Whilst the present discussion has generally been limited to the framework of the United Nations, membership of the UN does not exclude states from participating in other international bodies and organisations. Although it is expected that UN member states prioritise their obligations under the UN over conflicting international agreements,⁴³⁵ this does not prevent them from giving preference to action in other regional or thematic systems as an alternative to utilising the UN framework. Indeed, the freedom to act in alternative spheres of influence would be expected from within a polycentric society. Consequently, the HRC might still be considered to support a polycentric system if its coordinating and centralising role was restricted to mechanisms within the United Nations. In contrast, the HRC cannot be said to support polycentricity if participation within the HRC also grants states an ability to directly coordinate and influence human rights bodies that are otherwise external to the UN system. It is, therefore, the relationship between these non-UN bodies and the HRC that must be explored further.

Of these non-UN human rights systems and organisations, particular attention must be paid to the primary regional mechanisms for human rights protection. The principal mechanisms concerned are those associated with the European Convention on Human Rights (ECHR), the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.⁴³⁶ More recently, the Association of Southeast Asian Nations (ASEAN) has also begun to progress in a similar direction with the establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR).⁴³⁷

Of these regional systems, “[i]t has long been argued that the [European] Convention remains by far the most successful manifestation of the aspiration of the UDHR and that it has created the most effective system of international protection of human rights in existence.”⁴³⁸ This ‘UDHR’ being the United Nations’ Universal Declaration of Human Rights,⁴³⁹ there would seem to be clear links between both the UN and European systems.

⁴³⁵ See UN Charter, Art. 103.

⁴³⁶ The relevant treaties being, in order, the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), (04/11/1950), United Nations Treaty Series I-2889, (henceforth, ECHR); the American Convention on Human Rights, (22/11/1969), United Nations Treaty Series I-17955, (henceforth, ACHR); and the African Charter on Human and Peoples' Rights (27/06/1981), United Nations Treaty Series I-26363, (henceforth, ACHPR).

⁴³⁷ See generally, <http://aichr.org/about/> (last accessed, 06/05/15).

⁴³⁸ Bates, E., *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, (Oxford: Oxford University Press, 2010), (henceforth, Bates), p. 2.

⁴³⁹ Universal Declaration of Human Rights, United Nations General Assembly Resolution 217A (III), (10/12/1948).

Indeed, the Preamble to the ECHR states that it aims “to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration”.⁴⁴⁰ Similarly, the American system is established “in accordance with the Universal Declaration of Human Rights”⁴⁴¹ and the African mechanism seeks to have “due regard to the Charter of the United Nations and the Universal Declaration of Human Rights”.⁴⁴² Finally, and in a like manner, one of several purposes of the AICHR is “[t]o uphold international human rights standards as prescribed by the Universal Declaration of Human Rights”.⁴⁴³

It is possible, however, that this apparent influence over the founding of these regional mechanisms is simply reflective of a degree of normative commonality within and between these regions and not indicative of centralised authority emanating from the UN system. Additionally, the normative influence of the UDHR, adopted in 1948, does not automatically translate to direct political and legal control belonging to the HRC, which was only established in 2006.⁴⁴⁴ In fact, in the years preceding the creation of the HRC, such political and legal influence seemed to be flowing in the opposite direction, with some suggestions for remodelling the UN system being based on the example set by the European model.⁴⁴⁵ Consequently, it would appear as though any influence exerted by the HRC over these alternative human rights mechanisms is both minimal and indirect.

Such a conclusion is only reinforced by an examination of the practices within these regional systems. For example, whilst the ECHR does institute a judicial mechanism for assessing human rights complaints, the court that it establishes is prevented from hearing any matter which “has already been submitted to another procedure of international investigation or settlement”.⁴⁴⁶ On the surface, this would seem to suggest deference of the European system to other international organs, which would include the HRC. In relation to the former UN Commission on Human Rights, however, the European court was of the opinion that this was not the case as the Commission “is essentially an inter-governmental organ composed of

⁴⁴⁰ ECHR, Preamble.

⁴⁴¹ ACHR, Preamble.

⁴⁴² ACHPR, Preamble.

⁴⁴³ ASEAN Secretariat, *Terms of Reference of ASEAN Intergovernmental Commission on Human Rights*, (Jakarta, Indonesia: ASEAN Secretariat, 2009), Art. 1.6. Available at <http://aichr.org/documents/> (last accessed, 06/05/15).

⁴⁴⁴ UNGA Res. 60/251.

⁴⁴⁵ See, for instance, Wilkins, B., ‘International Human Rights and National Discretion’, (2002) 6(4) *Journal of Ethics* 373.

⁴⁴⁶ ECHR, Art. 35(2)(b).

State representatives, which deals with situations rather than individual complaints and which offers no redress to individual victims.”⁴⁴⁷

Whilst it is true that such a decision was based on the procedures established as part of the Commission on Human Rights, similar procedures have been translated into the work of the HRC.⁴⁴⁸ Of particular note is the fact that it was at least partly the inter-governmental and state-centred nature of the former Commission which led to the European court's rejection of its procedures as amounting to a process of ‘international investigation or settlement’. Whilst the newer procedures established by the HRC appear to slightly diminish the official role given to states when addressing specific complaints, it remains to be seen as to whether this will be sufficient as to alter this perception of the overall process.⁴⁴⁹

However, this apparent diminution in the role of states is not the only factor to be considered. Unlike the procedures established by its predecessor, and more akin to the ECHR provision outlined above, the complaints procedure of the HRC is expected to declare as inadmissible any complaints which are “already being dealt with by a special procedure, a treaty body or other United Nations or similar regional complaints procedure in the field of human rights”.⁴⁵⁰ This would seem to provide a direct contradiction to the suggestion that the HRC has a direct, controlling and supervisory role in relation to other human rights bodies, even within the UN system. Instead, in an apparent attempt to reduce the overlap in the work of international human rights bodies, the HRC appears unwilling, or potentially even unable, to exercise a role that is supervisory or appeals-based in nature.

It must be acknowledged, however, that this conclusion is limited to the work of the HRC in relation to its receipt of specific, individual complaints. Nevertheless, this can be considered as being reflective of its ability to set and promulgate human rights standards. Were there to be significant conflict between the norms advocated by the HRC and those adopted within the various regional human rights mechanisms, the reluctance of the HRC to admit complaints being dealt with elsewhere would suggest, at best, an inability to generate compliance with its own normative values.

⁴⁴⁷ *Mikolenko v. Estonia*, European Court of Human Rights Decision, no. 16944/03, 5 January 2006. The specific procedure being addressed was that established under ECOSOC Resolution 1503(XLVIII) of 27 May 1970, as amended (see *supra*, fn. 396).

⁴⁴⁸ See Institution-building of the United Nations Human Rights Council, United Nations Human Rights Council Resolution, A/HRC/RES/5/1, (18/06/2007), Art. 86.

⁴⁴⁹ See *ibid.*, Art. 96 and 97.

⁴⁵⁰ *Ibid.*, Art. 87(f).

It remains inconclusive, therefore, as to whether the HRC can be seen as leading other human rights bodies in the adoption of normative values or simply following global trends that have been initiated elsewhere. What can be concluded, however, is that the relationships between the HRC and other human rights bodies do not present a significant threat to the establishment or maintenance of international polycentricity. There does not appear to be a significant risk that those states participating in the HRC will develop an ability to influence and control other international systems in a manner that would be incompatible with a global separation of powers. At the same time, however, the distinct lack of coordinating and supervisory capabilities suggests that the HRC would struggle to maintain such polycentricity beyond that which is enabled by its role as an arena for the development of normative integration. It remains possible, however, that the HRC is more capable of maintaining polycentricity through its relationships with states themselves. It is consequently this aspect of its work that shall now be considered.

6.3.2 The HRC and States

When examining the relationship between the HRC and states, it must first be acknowledged that the HRC is itself a state-based body. Consequently, there are two categories of states which must be considered. These relate to the states who directly participate in the decision-making processes of the HRC and those who do not. This second category could be further sub-divided, distinguishing UN member states who do not participate in the HRC from those states that do not participate in the UN system at all. However, when discussing the degree to which the HRC hinders or supports international polycentricity, the primary factor to be considered is the level of influence it exerts over those states who can be seen as participating, either directly or indirectly, in its processes and procedures. Consequently, the relevant states to be considered are those which actively participate as full members of the UN system, whether or not they directly participate within the HRC.

As outlined earlier, there are three possible ways in which these states might be influenced by the statements and decisions of the HRC. It might be the case that the HRC exerts an investigatory and punitive capacity sufficient as to view it as directly inhibiting the liberty of states to act as they see fit. Such an eventuality would be inimical to the maintenance of an international polycentric system. In contrast, states might be in a position

where they can recognise the commonality of the norms and standards being promulgated through the HRC and thus voluntarily follow and comply with its decisions. This voluntary relationship would support a view that the HRC promotes the cohesion and integration of an international society and is therefore supportive of international polycentricity. Finally, there remains the possibility that states view statements and resolutions of the HRC as being completely optional and devoid of any coercive force, voluntary or otherwise. Such an outcome, whilst being indicative of the state-based liberty underlying the global constitutional process, would have little to offer to support and maintain the sovereign equality of states through a polycentric international system.

Initially, it must be noted that the activities of the United Nations system generally as regards human rights can be categorised as relating to either their ‘promotion’ or their ‘protection’. Of these, it is the element relating to human rights protection which “embraces activities that may be more sensitive or confrontational ... such as investigations, monitoring, casework, public reporting, and advocacy.”⁴⁵¹ Even from within this potentially more invasive aspect, however, the HRC has no power to directly punish and penalise states who act against its advice or opinions. In some ways, this approach can be seen as a remnant of an attitude prevalent within the HRC’s predecessor, in which there was “a belief [held] by many of the member states of the organization in its early days that scrutiny of any individual state’s human rights practices constituted improper intervention in matters essentially within the domestic jurisdiction of states”.⁴⁵² During the transformation into the HRC, the UN’s General Assembly did become entitled to “suspend the rights of membership in the [Human Rights] Council of a member of the Council that commits gross and systematic violations of human rights”.⁴⁵³ Such punishment, however, is not only administered by the General Assembly and not the HRC directly, it also appears somewhat limited in its significance and, at the time of writing, has not yet been applied.

In spite of this apparent shortfall in its capacity to enforce compliance, the HRC does possess considerable ability to investigate, reprimand and chastise states with whom it disagrees or of whom it disapproves.⁴⁵⁴ This disapproval, however, can often be seen as being politically sensitive. Indeed, “[i]n the HRC’s work thus far there is incontrovertible

⁴⁵¹ Darrow, M., and Arbour, L., ‘The Pillar of Glass: Human Rights in the Development Operations of the United Nations’, (2009) 103 *American Journal of International Law* 446, p. 476.

⁴⁵² Rodley, p. 51.

⁴⁵³ UNGA Res. 60/251, Art. 8.

⁴⁵⁴ See generally, UNGA Res. 60/251. See also, Ramcharan.

evidence that different weights and measures are applied to governments favored by the council majority and those disfavored.”⁴⁵⁵ As was noted earlier, this purely political element of the HRC has been particularly marked in the case of Israel as “[b]y the council’s second year, Israel had been criticized fifteen times and Myanmar [Burma] only once.”⁴⁵⁶

In spite of this political sensitivity, the HRC does possess at least one investigatory mechanism that would appear to avoid this apparent bias, at least on the surface. This is the Universal Periodic Review (UPR). The UPR is a peer-review system and “[b]y virtue of this mechanism, every state has the opportunity to review the human rights performance of every other UN member state.”⁴⁵⁷ This universality would seem to afford the UPR a degree of protection from accusations of political bias. However, whilst arguably counteracting the potential for displays of partiality and prejudice in the work of the HRC, this universality also results in a process with little, if any, direct coercive force. Instead, it is “[s]haring good practices among peers, as well as offering constructive technical assistance and other forms of capacity building, [which] are cornerstones of the process”.⁴⁵⁸ These practical ways in which the UPR has thus far been implemented would seem to suggest that the “mechanism benefits those states most concerned with preventing UN intervention in their domestic affairs, at the expense of those that wish to more intensely promote human rights standards around the world.”⁴⁵⁹ Consequently, it cannot be said that the UPR is a means by which the HRC is able to enforce state compliance with human rights standards, although it may be a mechanism for their promotion and encouragement.

In contrast to the broad universality of the UPR, the HRC is also capable of instituting a variety of more specific and targeted proceedings. In particular, there is a variety of special rapporteurs, working groups and others that can be collectively termed ‘Special Procedures’. Inherited from the former Commission on Human Rights, these special procedures form “a unique and effective mechanism that allows independent, periodic, on-the-ground scrutiny of a country’s record of respect for human rights.”⁴⁶⁰ Despite their significant capacity for investigative work, however, these special procedures remain subordinate to the HRC itself,

⁴⁵⁵ Ramcharan, p. 93.

⁴⁵⁶ Weiss, T. G., *et al*, *The United Nations and Changing World Politics*, (7th edn.), (Boulder, USA: Westview Press, 2014), (henceforth, *The UN and Changing World Politics*), p. 213.

⁴⁵⁷ Smith, R., “‘To see Themselves as Others see Them’: The Five Permanent Members of the Security Council and the Human Rights Council’s Universal Periodic Review”, (2013) 35 Human Rights Quarterly 1, p. 2.

⁴⁵⁸ *Ibid.*, p. 9.

⁴⁵⁹ Cox, p. 116.

⁴⁶⁰ Piccone, T., ‘The contribution of the UN’s special procedures to national level implementation of human rights norms’, (2011) 15(2) *The International Journal of Human Rights* 206, p. 209.

which has “not always appreciated the labours of those they have mandated to discharge the functions of a special rapporteur.”⁴⁶¹ Furthermore, and in a similar manner to the lack of direct enforcement action possible within the UPR, there remains a large extent to which the various special procedures “must rely on political pressure and moral persuasion to influence state behaviour.”⁴⁶² The combination of these factors creates an environment whereby the special procedures of the HRC cannot be said to have a particularly significant impact on the maintenance of international polycentricity.

Whether, then, through its special procedures or the more recent developments of the UPR, it does not appear as though the HRC can be seen as having a direct legal and political influence that would prevent the development of an international polycentric system. In contrast, it would seem to have developed “a political strategy to promote compliance that hybridizes an awareness of power imbalances in politics with the insights about depoliticization and discourse that emerge from the study of persuasion.”⁴⁶³ The overall picture, therefore, would seem to be one of an HRC which encourages compliance through ‘political pressure and moral persuasion’ but without direct enforcement capabilities.

6.3.3 The HRC and International Civil Society

The apparent lack of direct enforcement capabilities on the part of the HRC could perhaps mitigate the significance of its relationship with civil society. If the HRC is unable to directly enforce its decisions against the will of sovereign states, then whether or not the HRC is able to act as a centre that is independent of the opinions of civil society is a question that loses a degree of its immediate importance. As discussed, however, the HRC is able to encourage compliance through the exertion of pressure and persuasion and, as a result, its relationship to civil society is not entirely insignificant. If it is found that the HRC is itself directly influenced by the opinions of civil society, then it could be argued that this is inimical to international polycentricity as the HRC would not be acting as an independent centre capable of counterbalancing other international legal and political centres.

In addressing this issue, the first matter of concern is the establishment of exactly what is meant by the term ‘civil society’. From within the founding resolution of the HRC,

⁴⁶¹ Rodley, N. S., ‘On the responsibility of special rapporteurs’, (2011) 15(2) *The International Journal of Human Rights* 319, p. 319.

⁴⁶² *Ibid.*, p. 210.

⁴⁶³ Davies, p. 460.

this is not entirely clear. As mentioned above, the HRC is required to “[w]ork in close cooperation in the field of human rights with ... civil society”,⁴⁶⁴ yet this is as far as that section of the resolution goes. At one end of the scale, it is possible to understand this term as relating to the entire arena in which “social life (the public sphere) is modelled on exchange and persons meet in order to arbitrate their pre-existing interests which have been ‘self-authored’ (chosen in the private sphere).”⁴⁶⁵ At the other end of the spectrum, however, the same resolution that creates this relationship with civil society also provides for “the participation of and consultation with observers [at the HRC], including ... non-governmental organisations”.⁴⁶⁶ Consequently, whilst it may be entirely plausible to understand civil society as a much broader concept than referring simply to non-governmental organisations (NGOs), it would seem to be this narrower definition that is of principal concern at the present moment.

At this point, then, the question immediately at hand concerns the ways in which these NGOs and the HRC actually relate to one another. In relation to the former CHR, it has been claimed that it was NGOs which succeeded in placing “human rights on the international agenda and ... [these] NGOs have occupied a central place in the development of international human rights from the very beginning.”⁴⁶⁷ This close connection between the CHR and NGOs can arguably be seen as having continued until its abolition, with it being “[h]uman rights NGOs, in particular, who had followed the work of the Commission since its inception, [and] paid tribute to what they had described as its ‘remarkable achievements’.”⁴⁶⁸ As a consequence of the relatively recent nature of the creation of the HRC, however, it is less clear as to whether or not this close relationship has been perpetuated.

As mentioned above, the HRC is asked to work “in close cooperation” with NGOs, who may participate as “observers”, yet this creates no compulsion on the HRC to act in accordance with the opinions of these other organisations.⁴⁶⁹ Significantly, however, the General Assembly of the UN decided that, at the HRC, the “participation of and consultation with [these] observers ... shall be based on arrangements ... and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these

⁴⁶⁴ UNGA Res. 60/251, Art. 5(h).

⁴⁶⁵ Hopgood, S., ‘Reading the Small Print in Global Civil Society: The Inexorable Hegemony of the Liberal Self’, in Frost, M., (ed.), *International Ethics*, (Vol. 2), (London: Sage, 2011), p. 25.

⁴⁶⁶ UNGA Res. 60/251, Art. 11.

⁴⁶⁷ Mitoma, G. T., ‘Civil Society and International Human Rights: The Commission to Study the Organization of Peace and the Origins of the UN Human Rights Regime’, (2008) 30 *Human Rights Quarterly* 607, p. 609.

⁴⁶⁸ Lauren, p. 317.

⁴⁶⁹ See UNGA Res. 60/251, Art. 5(h) and Art. 11.

entities”.⁴⁷⁰ The implication, therefore, is that whilst the opinions of NGOs by themselves may not be sufficiently influential as to dictate and direct the development of the HRC’s work, they must nevertheless be accounted for and taken into consideration. This has been particularly evident in the operation of the Universal Periodic Review, in which “there was substantial success in injecting human rights concerns raised by NGOs into the UPR process, but states showed considerable resistance to accepting NGO recommendations.”⁴⁷¹

This apparent resistance of states to the recommendations of NGOs is not the only difficulty faced by attempts to influence the HRC through civil society. Whilst there does exist an expectation that the HRC consider the input and opinions of a variety of NGOs, there are also a variety of practical obstacles to such participation. In particular, these challenges include

“(1) the difficult process of obtaining consultative status for those that do not already have it; (2) the high financial costs and the unavailability of staff to participate in the sessions in Geneva; (3) the lack of familiarity with the workings and procedure in the HRC; (4) the lack of access to information, including language barriers; and (5) the difficulty [of] deriving any tangible benefits from this participation in the day-to-day work in their countries of origin.”⁴⁷²

At least partly as a result of such difficulties, and despite the expected involvement of NGOs at the HRC, it remains true “that responsibility for the success of the HRC lies squarely with the countries that comprise the new body.”⁴⁷³

As a result, it may well be considered that the HRC is technically capable of acting as an independent centre within a wider polycentric system. The strength of this independence, however, is called into question by the degree to which the HRC is responsive to the opinions of the various NGOs to whom it relates. Nevertheless, it may yet be argued that this relationship between the HRC and NGOs is not significant enough as to exclude the possibility of the HRC maintaining and supporting a form of international polycentricity. In

⁴⁷⁰ UNGA Res. 60/251, Art. 11.

⁴⁷¹ Moss, L. C., ‘Opportunities for Nongovernmental Organization Advocacy in the Universal Periodic Review Process at the UN Human Rights Council’, (2010) 2(1) *Journal of Human Rights Practice* 122, p. 123.

⁴⁷² Nader, L., ‘The Role of NGOs in the UN Human Rights Council’, (2007) 7(4) *International Journal on Human Rights* 7, p. 10.

⁴⁷³ *Ibid.*

order to more fully assess this possibility, however, a wider view must be taken of the relationship between the HRC and the broader global constitutional process.

6.4 The HRC and the Global Constitutional Process

Having more closely examined the relationship between the HRC and the maintenance of an international polycentric system, it is now possible to more fully consider its connection to the wider process of global constitutionalism. In particular, there remains the question as to whether the HRC is capable of supporting a global separation of powers through a polycentric international society. It must be remembered, however, that this is addressed with the aim of establishing the extent to which such polycentricity might be able to preserve the state-based liberty and equality upon which the contemporary global constitutional process is founded.

In this regard, and as discussed above, the first point to be noted is that the HRC as it currently exists does not appear to pose a significant threat to the maintenance of international polycentricity. Although its own independence is arguably threatened by an intentionally close relationship with NGOs, the strength of this relationship does not appear sufficient as to counteract the independence of its role in other areas. It is particularly worth noting that, whilst the HRC does appear to have a centralising and co-ordinating role in relation to other aspects of the UN human rights system, this does not extend further. For instance, the HRC does not dictate legal or normative standards to the various regional human rights bodies, nor does it have the capacity to directly enforce its wishes upon states, whether or not such states are active participants within the UN system. Indeed, the primary mechanisms for enforcement of the HRC's decisions appear to be through attempts at political and moral persuasion. This approach to implementation and enforcement techniques would seem to suggest that the HRC is capable of providing a degree of normative integration to international society, whilst simultaneously refraining from direct interference in the maintenance of international polycentricity.

Once subjected to a more thorough examination, however, this provision of normative integration would seem to be, at best, difficult to sustain. A representative system that is based purely on the geographic distribution of states seems to create a situation in which the HRC becomes highly politicised and divisive. This has been particularly evident in the initial identification and enumeration of potential global norms, such as the "Human Rights

Council's biased and unbalanced focus on Israel [which] drew a rare rebuke by Secretary-General Ban".⁴⁷⁴ This failure to overcome the criticisms directed at its predecessor suggest that the maintenance of purely geographic criteria for membership on the HRC provides an insufficient level of integration to overcome the different political and cultural outlooks of its various members. As a result, and in spite of several successes, many of the HRC's decisions remain politically controversial even after their adoption and promulgation. In a system that relies upon political persuasion for its enforcement capabilities, such controversy signifies a distinct absence of ability to co-ordinate and consolidate differing perspectives within international society. To put it another way, there appears to be a lack of normative agreement and integration within the workings of the HRC and this is not overcome by a system of representation constructed exclusively around the geographic distribution of member states.

This absence of normative agreement within the HRC must also be combined with a recognition that, from a state-based perspective, there does not appear to be any inherent quality of human rights themselves that would provide this cohesion where the political process does not.⁴⁷⁵ As a result, it cannot be said that the HRC is currently in a position to directly support and maintain the liberty and equality of states within the global constitutional process. Whilst its own processes and internal workings might be considered as manifestations of these values, this internal machinery of the HRC cannot be said to directly contribute to their preservation. Although there is no direct interference with international polycentricity, and therefore an implied support for the liberty of states, the HRC is unable to provide normative integration and cohesion to international society. As a result, the maintenance of a focus on the liberty and equality of states, and arguably the maintenance of international society itself, reverts to the 'great power' model that has already been established as being both insufficient and unsustainable.

There remains, however, an alternative option that may yet be pursued. This is the possibility that, by lessening the constitutional participation of the states themselves, the overall constitutional process may preserve their liberty and equality. It falls to the next chapter, then, to examine this possibility more closely, through the UN's Office of High Commissioner for Human Rights.

⁴⁷⁴ *The UN and Changing World Politics*, p. 213.

⁴⁷⁵ It must be noted, however, that alternative options to a human rights-based approach do exist. For instance, see the discussion on international environmental governance in Chapter 5.

Chapter 7

The Office of the United Nations High Commissioner for Human Rights

In the previous chapter, it was established that the United Nations Human Rights Council (HRC) is currently incapable of preserving a constitutional process that is both liberal and global. An alternative option exists, however, through a pursuit of more cosmopolitan theories. From the focus on the individual that is developed within such perspectives, there emerges the possibility that an examination of the Office of the United Nations High Commissioner for Human Rights (OHCHR) may yet prove able to preserve the liberty and equality of states within the global constitutional process.⁴⁷⁶

In order to examine this possibility in more detail, however, there are a number of factors that must be considered. To begin with, the relationship between the OHCHR and theories of cosmopolitanism warrants a more detailed examination. Specifically, there is the question of whether or not the OHCHR actually assists in the incorporation of a focus on the individual into processes of international law. If, in fact, it is primarily a state-based organ along similar lines to the HRC, then further discussion of its relationship to the global constitutional process begins to lose any significance it may have had.

Secondly, an investigation into the constitutional role of the OHCHR must necessarily consider its relationship to states themselves, particularly as regards their status as being sovereign equals. Such an investigation must pay particular attention to the extent to which the OHCHR is capable of integrating its relationship to states with its relationship to individuals within those states. If the integration of these two apparently competing ideas does not, or cannot, take place, this would negate the possibility that this cosmopolitan approach might be capable of preserving the contemporary liberal form of the global constitutional process. Having already dismissed a polycentric approach through the HRC, and in the absence of any potential reforms to the UN system, this would leave the great power method as being the only viable, albeit flawed, option currently available.

⁴⁷⁶ See *supra*, Chapter 5.

It is possible, however, that the OHCHR does prove capable of integrating the role of individuals with the liberty and equality of states. If that is the case, it then becomes necessary to more closely examine the extent to which the OHCHR is able to incorporate an intra-constitutional view of rights into the overall process of the global constitution. In order to do so, the relationship between the OHCHR and other international bodies must also be explored. Having undergone such an investigation, it ultimately becomes possible to assess the overall contribution of the OHCHR to the maintenance of a liberal global constitutional process.

7.1 Role of the Individual

As mentioned above, the first aspect of the OHCHR that must be established is the extent to which it incorporates, or is at least capable of incorporating, the individual into processes of international law and global constitutionalism. In order to do so, a brief foray into the origins of the OHCHR may prove beneficial. In relation to both the HRC and the Commission which preceded it, it has been said that “[t]he paradox of asking States, who are violators of human rights, to be the sole enforcers against themselves, has never been resolved. ... States acquire an incentive to protect each other’s dirty secrets.”⁴⁷⁷ In contrast to this state-based enforcement mechanism, various alternative suggestions have been proposed. For instance, prior to the establishment of the UN system itself, there were calls for the creation of a ‘High Commission of the Rights of Man’, which “shall consist of independent persons of the highest distinction”.⁴⁷⁸ This idea of human rights protection being independent from the actions and desires of states was continued when, “during the drafting of the Universal Declaration of Human Rights, Professor René Cassin from France put forward the idea of an Attorney-General for Human Rights.”⁴⁷⁹

Whilst these ideas occasionally resurfaced in various forms, they ultimately came to fruition in 1993 with the creation of the UN’s Office of High Commissioner for Human Rights.⁴⁸⁰ In creating this office, the General Assembly decided that the person of the High

⁴⁷⁷ Rajagopal, B., ‘Lipstick on a Caterpillar? Assessing the New U.N. Human Rights Council Through Historical Reflection’, (2007) 13 Buffalo Human Rights Law Review 7, p. 15.

⁴⁷⁸ Lauterpacht, H., *An International Bill of the Rights of Man*, (Oxford: Oxford University Press, 1945), (Reprinted 2013), p. 196.

⁴⁷⁹ Clapham, A., ‘Creating the High Commissioner for Human Rights: The Outside Story’, (1994) 5 European Journal of International Law 556, (henceforth, Clapham), p. 556.

⁴⁸⁰ See generally, *ibid.*

Commissioner “shall be the United Nations official with principal responsibility for United Nations human rights activities”.⁴⁸¹ Accordingly, the High Commissioner is issued with an extensive and varied mandate covering a wide range of circumstances in which human rights issues are, or might be, raised. The extent of this mandate is reflected in the considerable, and often conflicting, expectations that have been placed upon the office. For instance,

“advocates have urged the High Commissioner to be a champion who opposes all human rights abuses wherever found and a critic of states large and small and governments powerful and weak. The High Commissioner has been called on to engage with victims of abuse yet at the same time speak truth to power. The High Commissioner is asked to reach the world's top diplomats and prime ministers and to be a consensus-builder with the power to convince even the cruelest among them to change their abusive practices. At the same time, the High Commissioner is instructed to respond to human rights crises, as well as to take preventive action to avert future emergencies. As if this were not enough, the High Commissioner is also mandated to carry out the instructions of governments acting through the Human Rights Council and to be an administrator, coordinator and manager for OHCHR.”⁴⁸²

Given the breadth and scope of such a considerable remit, as well as the accompanying expectations placed upon the office, it is perhaps to be expected that “the individuals nominated and selected for the post of High Commissioner have felt the pressure of trying to satisfy them.”⁴⁸³

It is precisely these individuals, however, who can arguably be seen as presenting the strongest link between the OHCHR and the incorporation of human individuality into international law, through the role of the High Commissioner herself or himself. Whilst not explicitly stated in the resolution establishing the position, there is an expectation that the High Commissioner for Human Rights is as independent of states as any other member of the UN’s administrative machinery. This is due, at least in part, to the fact that “[t]he High

⁴⁸¹ High Commissioner for the promotion and protection of all human rights, United Nations General Assembly Resolution, A/RES/48/141, (20/12/1993), (henceforth, UNGA Res. 48/141), Art. 4.

⁴⁸² Gaer, F. D., and Broecker, C. L., ‘Introduction’, (henceforth, Gaer and Broecker), in Gaer, F. D., and Broecker, C. L., (eds.), *The United Nations High Commissioner for Human Rights: Conscience for the World*, (Leiden: Martinus Nijhoff, 2014), (henceforth, *Conscience for the World*), pp. 17-18.

⁴⁸³ *Ibid.*, p. 18.

Commissioner is a department of the UN secretariat, not an independent agency or body of the organization.”⁴⁸⁴ As a result, appointments made to the position, although subject to approval by the General Assembly, are made directly by the UN’s Secretary-General.⁴⁸⁵ Furthermore, it is expected that the appointee “[b]e a person of high moral standing and personal integrity and [that they] shall possess expertise ... necessary for impartial, objective, non-selective and effective performance of the duties of the High Commissioner”.⁴⁸⁶

This requirement for impartiality allows the High Commissioner to act in a way which is not automatically dependent on the wishes and opinions of the states themselves. Instead, there is an expectation that whoever occupies this post shall “act to protect individuals from abuse and promote dignity, equality, and freedom for all.”⁴⁸⁷ Despite having such seemingly lofty goals, however, the question remains as to whether or not these aspirations have proven capable of augmenting the integration of the individual into processes of global constitutionalism. In order to more fully assess the contribution of the OHCHR in this area, it becomes necessary to return to theories of cosmopolitanism. Specifically, consideration must be given to the extent to which the High Commissioner for Human Rights, as well as the OHCHR more broadly, is capable of imbuing international law with a perspective that “the ultimate units of concern are human beings, or persons - rather than, say, family lines, tribes, ethnic, cultural, or religious communities, nations, or states.”⁴⁸⁸

As referred to above, the position of High Commissioner can be seen as integrating the role of a single, specific individual into the development of certain aspects of global governance. There remains a degree of uncertainty, however, as to whether or not this extends beyond the role of the OHCHR and its position within the UN system. Given the evidence presented up to this point, it could perhaps be argued that the Secretary-General of the UN is a more appropriate embodiment of these ideas. Nevertheless, the specific remit and mandate of the OHCHR, whilst being both broad and generalised, is restricted enough to offer some clues as to its particular role in this area.

Before examining this remit, however, it ought to be recalled that the very reason the OHCHR was thought to be worth consideration was because of its focus on issues relating to

⁴⁸⁴ Boyle, K., ‘The United Nations Human Rights Council: Origins, Antecedents, and Prospects’, (henceforth, Boyle), in Boyle, K., (ed.), *New Institutions for Human Rights Protection*, (Oxford: Oxford University Press, 2009), p. 43.

⁴⁸⁵ See UNGA Res. 48/141, Art. 2(b).

⁴⁸⁶ UNGA Res. 48/141, Art. 2(a).

⁴⁸⁷ Gaer and Broecker in *Conscience for the World*, p. 31.

⁴⁸⁸ Pogge, T., ‘Cosmopolitanism and Sovereignty’, (1992) 103 *Ethics* 48, p. 48. Footnote omitted.

human rights. Indeed, it was argued that the cosmopolitan suggestion “that every human being has a global stature as an ultimate unit of moral concern”⁴⁸⁹ creates an inherent expectation that the political development of cosmopolitan ideas will naturally incorporate elements of human rights thought and practice.⁴⁹⁰ Whilst there remains significant debate about the philosophical nature and status of universal human rights, for present purposes it suffices to note that the OHCHR is to “[b]e guided by the recognition that all human rights ... are universal, indivisible, interdependent and interrelated”.⁴⁹¹ What is of relevance to the present discussion is simply the approach taken by the OHCHR as it conducts itself within international legal and political processes. The philosophical justifications that underlie the beliefs upon which it is founded are of less immediate concern. Consequently, to the extent that the OHCHR is seen to be guided by a belief in the universality of human rights, it can be seen as fulfilling the cosmopolitan expectation that such rights form an integral part of the development of international law and politics.

However, it cannot be assumed that this universalist position is inherently self-sustaining. In particular, it must be noted that “[t]he growth of identity-based politics in the context of globalization has fuelled the challenge to the principle of universality”.⁴⁹² Nevertheless, it must be equally recognised that “despite the cultural, political, regional, and economic diversity of the contemporary world, there is near universal agreement on not only the existence but also the substance of internationally recognized human rights.”⁴⁹³ It is possible to conclude, therefore, that the OHCHR is adequately justified in working from a position that assumes the inherently universal application of the concept of human rights. Simultaneously, however, whilst such a position may indeed be compatible with particular forms of cosmopolitan individualism, this does not by itself signify that a cosmopolitan approach has been undertaken. As a result, whilst formal reliance on the universality of human rights can be taken as indicative of this cosmopolitan approach, it is not by itself sufficient to establish the extent to which the OHCHR incorporates the individual into the global constitutional process.

⁴⁸⁹ Pogge, T., *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, (2nd edn.), (Cambridge: Polity Press, 2008), (henceforth, *World Poverty and Human Rights*), p. 175.

⁴⁹⁰ See *supra*, Chapter 5.

⁴⁹¹ UNGA Res. 48/141, Art. 3(b).

⁴⁹² Abeysekera, S., ‘The High Commissioners’ Promotion of Universality of Human Rights’, (henceforth, Abeysekera), in *Conscience for the World*, p. 121.

⁴⁹³ Donnelly, J., *Universal Human Rights in Theory and Practice*, (3rd edn.), (London: Cornell University Press, 2013), p. 95.

These difficulties in establishing a more detailed examination of the relationship between individuals and the OHCHR are exacerbated by a closer inspection of the official mandate given to the High Commissioner. For example, the HRC does possess an ability, albeit somewhat restricted, to examine any individual complaints that are placed before it.⁴⁹⁴ In contrast, the OHCHR is not directly mandated as being involved in these considerations. Instead, there is an expectation that the High Commissioner “coordinate relevant United Nations education and public information programmes”⁴⁹⁵ and that they “rationalize, adapt, strengthen and streamline the United Nations machinery in the field of human rights”.⁴⁹⁶ This administrative and managerial impression is only enhanced by expectations that the High Commissioner “carry out the tasks assigned to him/her by the competent bodies of the United Nations system”⁴⁹⁷ and “engage in a dialogue with all Governments”.⁴⁹⁸ From a consideration of this official remit, the OHCHR can be seen as primarily relating to member states of the UN and the wider United Nations system. Whilst this provision of support and co-ordination in human rights matters does appear to strengthen the OHCHR’s relationship to broader processes of global constitutionalism, it does not provide evidence of its integration of a cosmopolitan perspective into such a process.

This absence of an official mandate to consider individualised circumstances has the result of shifting the direction of the present enquiry. Instead of examining the formal remit received upon its creation, consideration must be given to the practical activities of the OHCHR and the ways in which its conduct affects the incorporation of the individual into the global constitutional process. Of particular note are the ways in which

“[t]he High Commissioners have accomplished the expansion of UN human rights activities outside Geneva as a result of both the merging of the Centre for Human Rights into the [OHCHR] ... and, more significantly, the establishment of an impressive network of field presences.”⁴⁹⁹

⁴⁹⁴ See *supra*, Chapter 6.

⁴⁹⁵ UNGA Res. 48/141, Art. 4(e).

⁴⁹⁶ *Ibid.*, Art. 4(j).

⁴⁹⁷ *Ibid.*, Art. 4(b).

⁴⁹⁸ *Ibid.*, Art. 4(g).

⁴⁹⁹ Broecker, C. L., ‘Protection through Presence: The Office of the High Commissioner for Human Rights in the Field’, in *Conscience for the World*, p. 159.

The proliferation of these field presences has been facilitated by the fact that, in order to establish them, the OHCHR is under “no specific requirement to seek the approval of the political organs of the UN”.⁵⁰⁰

This freedom of action has allowed the OHCHR to establish numerous field presences in a variety of locations and with a variety of mandates.⁵⁰¹ However, these operations appear to be primarily directed at engaging with governments rather than citizens. Indeed, it must be acknowledged that

“[t]he main objectives of the majority of field presences include (1) to contribute to the establishment of structures for the protection and promotion of human rights at national and regional levels and (2) to establish a coordination mechanism for human rights activities both at national and regional levels.”⁵⁰²

This engagement with, and focus on, formal structures and mechanisms can be seen as reflecting the expectation that “[e]ngagement and dialogue with countries will be the primary means through which OHCHR works to ensure the implementation of human rights.”⁵⁰³

This engagement and dialogue with countries themselves would seem to indicate a lack of attention being paid to individual human beings in those locales. Such a perception is only reinforced by a position that focuses on the structures and mechanisms available at the national and regional levels, rather than the personal circumstances of specific cases. The two perspectives, however, are not inherently mutually exclusive. Instead, it can be argued that the adoption of an “integrated approach allows the HCHR to be frank with a government by defining human rights problems, but as opposed to simply denouncing these violations, allows the HCHR to form a productive working relation to jointly establish targets for improvement.”⁵⁰⁴ Indeed, in many cases, “[t]he results that OHCHR achieved cannot be

⁵⁰⁰ *Ibid.*

⁵⁰¹ See generally, *ibid.*

⁵⁰² Alizadeh, H., ‘A Proposal for How to Realize Human Rights at the National and Regional Level: A Three-Pillar Strategy’, (2011) 33 Human Rights Quarterly 826, p. 828.

⁵⁰³ *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General, Addendum, ‘Plan of action submitted by the United Nations High Commissioner for Human Rights’, A/59/2005/Add.3, (26/05/2005), p. 28, para. 127.

⁵⁰⁴ Howland, T., ‘Mirage, Magic, or Mixed Bag? The United Nations High Commissioner for Human Rights’ Field Operation in Rwanda’, (1999) 21 Human Rights Quarterly 1, p. 44.

attributed to individual actions or to specific advocacy measures but is the outcome of their combined and flexible application.”⁵⁰⁵

In other words, there is a certain degree of flexibility and variety within the field operations of the OHCHR which does seem to enable the incorporation of a view of individual human beings into its official work. Nevertheless, this is not achieved through the direct contributions and involvement of private actors within the scope of the OHCHR’s activities. Instead, there is a view of the individual predominantly as a passive recipient and beneficiary of human rights protection that is attributed to them on the basis of agreements concluded between states rather than seeing them as being active contributors to the development and implementation of human rights. As a result, it remains the case that, whilst the principal focus might be individual human beings, the primary origin of the work performed by and through the OHCHR remains states rather than individuals. Individuals can be seen as benefitting from such work, but such a view is not significantly different from that attributable to other international bodies that attempt to protect human rights. Consequently, it might potentially be concluded that the OHCHR does not incorporate a direct consideration of the individual into processes of international law and politics any more than other international human rights bodies.

Significantly, however, there are a number of key factors that ought to be considered before settling upon such a conclusion. In particular, the mandate given to the High Commissioner includes the ability “[t]o play an *active* role in removing the current obstacles and in meeting the challenges to the full realization of all human rights and in *preventing* the continuation of human rights violations throughout the world”.⁵⁰⁶ This active and preventative role enables the OHCHR to be more proactive in its engagement with human rights issues than more response-oriented bodies. This is highlighted through the very existence of the field presences of the OHCHR, which allow for a more direct and integrated approach to human rights developments than either the more abstract standard-setting work or the purely responsive complaints procedure of the HRC.

A potentially more decisive factor, however, is the fact that the OHCHR is not a state-based organ of the UN. Whilst this wider organisation is centred upon the activities of its member states, the OHCHR is an officially neutral and impartial body. It is thereby capable

⁵⁰⁵ Volkmann, C. S., ‘Evaluating the Impact of Human Rights Work: The Office of the United Nations High Commissioner for Human Rights and the Reduction of Extrajudicial Executions in Colombia’, (2012) 4(3) *Journal of Human Rights Practice* 396, (henceforth, Volkmann), p. 439.

⁵⁰⁶ UNGA Res. 48/141, Art. 4(f). Emphasis added.

of functioning without having to depend directly on the wishes of states. Consequently, the OHCHR can be seen as providing oversight of, and contributions to, the development of international human rights systems in a way which is not exclusively derived from the whims of the states that comprise the membership of those same systems.

It would be mistaken, therefore, to rush to a decision that the OHCHR is no different from other international human rights bodies. It must be acknowledged that it would be difficult to describe the OHCHR as being democratic or truly representative of human individuality in any way. Additionally, the apparent grounding in a universalist vision of human rights suggests a pre-constitutional understanding of such rights that has already been established as being incompatible with liberal constitutionalism. However, the particular combination of a focus on human rights issues with an absence of a state-oriented composition does enable the OHCHR to be seen as a more cosmopolitan approach to the global constitutional process than other polycentric or state-based approaches. This conclusion is reinforced by a consideration of the presence of the OHCHR in the field. Such operations can be seen as enabling greater attention to be paid to specific cases, despite the involvement of individuals not being as extensive as might be expected from a 'pure' cosmopolitan position.

At the same time, however, an acknowledgement of the close relationship between the OHCHR and state governments does raise another concern. In particular, there is the possibility that, in engaging with states and promoting human rights within particular state-controlled territories, the OHCHR encourages an interference in state sovereignty that would be incompatible with a liberal global constitutional process. In order to assess this possibility, the relationship between the OHCHR and states themselves must be more closely examined.

7.2 Relationship to States

As has already been established, the OHCHR is not composed of state representatives, nor are its activities directed by any particular government or governments. Simultaneously, however, there does seem to be a general expectation that the OHCHR work in and with states and their governments. From the perspective of liberal global constitutionalism, this can appear somewhat problematic as there does exist the suggestion that a cosmopolitan approach necessarily "requires a global institutional reform with significant reductions in

national sovereignty.”⁵⁰⁷ Additionally, this state-oriented activity takes place within a framework which claims to emphasise the importance of individual human rights within international law and politics. Indeed, it has even been suggested that “[h]uman rights discourse often seems to wish for an eventual disappearance of states in favor of universal human rights”.⁵⁰⁸ Questions naturally arise, therefore, as to the extent to which the OHCHR undermines, influences or otherwise affects the maintenance of the sovereign equality of the states to which it relates.

Regarding the relationship between the OHCHR and states themselves, the first aspect to note concerns a return to the original mandate of the High Commissioner. Through this mandate, there is an expectation that the OHCHR “provide ... advisory services and technical and financial assistance, *at the request of the state concerned*”.⁵⁰⁹ Making the provision of assistance conditional upon the desire of the state affected would seem to indicate a strong tendency to support the concept of state sovereignty. This is supported by the way in which the High Commissioner is expected to “engage in a dialogue with all Governments”.⁵¹⁰ There is also a requirement that the work of the High Commissioner “respect the sovereignty, territorial integrity and domestic jurisdiction of States”.⁵¹¹ The official remit received by the High Commissioner, therefore, would seem to suggest that the position maintains a strong degree of support for the sovereignty of individual states. As a result, it can be said that the overall impression is of an office that is subservient to states.

Once again, however, the original text of the mandate given to the High Commissioner for Human Rights is less significant than the ways in which this mandate has been applied and implemented in practice. Of particular note is “the support for the establishment and strengthening of national human rights institutions by OHCHR [which] has certainly contributed to the large increase in the number of these institutions and their impact in the promotion and protection of human rights”.⁵¹² Conducted under the auspices of providing ‘advisory, technical and financial’ assistance to governments, these relationships between the OHCHR and national human rights institutions can potentially be seen as undermining the sovereignty of the states concerned. Such a risk was particularly evident

⁵⁰⁷ *World Poverty and Human Rights*, p. 201.

⁵⁰⁸ de Mello, S. V., ‘Symposium on the United Nations High Commissioner for Human Rights: The First Ten Years of the Office, and the Next: Remarks’, (2003-4) 35 *Columbia Human Rights Law Review* 509, p. 513.

⁵⁰⁹ UNGA Res. 48/141, Art. 4(d). Emphasis added.

⁵¹⁰ *Ibid.*, Art. 4(g).

⁵¹¹ *Ibid.*, Art. 3(a).

⁵¹² Thipanyane, T., ‘The High Commissioner and National Human Rights Institutions’, in *Conscience for the World*, p. 217.

during a period in which there were many of these institutions “with enormous teething problems, [and] who still need an ongoing measure of both technical support and external political support to get up and running.”⁵¹³

The provision of this support by the OHCHR could potentially be seen as circumventing the proper authority of the state concerned. Nevertheless, in suggesting such a view, recognition must be given to the fact that these national institutions typically form part of the governmental infrastructure of a state, as opposed to being truly independent of it. At the same time, however, by relating directly to such an institution, the OHCHR is capable of bypassing the established authority structures within the state and promoting its own agenda within that state’s institutions. This is particularly the case where “[t]he overall goal of OHCHR involvement in national mechanisms is to sponsor the creation of human rights institutions that would serve as impartial, independent, and autonomous entities to enforce national and international human rights norms.”⁵¹⁴ An attempt to establish an independent institution that is capable of enforcing international norms against the wishes of the state concerned would seem to be a clear infringement on the liberty of that state to act as it sees fit.

A perception that this is an attack on the sovereignty of a state is only enhanced by the High Commissioner’s “role in highlighting human rights abuses in specific countries, and in specific situations”.⁵¹⁵ Whilst there has been noticeable variation in the practices adopted by specific High Commissioners, it has also been observed that, “[o]ver the last twenty years, the High Commissioner has had to transition from quiet diplomacy in the corridors of power to public diplomacy through the global media.”⁵¹⁶ At least one reason behind this general transition is quite simply an acknowledgement that “[t]he strategy of ‘quiet diplomacy’ did not work.”⁵¹⁷ Although indirect, the more public commentary on the human rights record of specific states increases the extent to which the High Commissioner is capable of applying political and moral influence on a state in order to bring about a change in its policies or behaviour.

⁵¹³ Aoláin, F. N., ‘Symposium on the United Nations High Commissioner for Human Rights: The First Ten Years of the Office, and the Next: Remarks’, (2003-4) 35 *Columbia Human Rights Law Review* 523, p. 523.

⁵¹⁴ Mertus, J. A., *The United Nations and Human Rights: A guide for a new era*, (2nd edn.), (New York, USA: Routledge, 2009), (henceforth, Mertus), p. 28. See also, Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 19, *National Institutions for the Promotion and Protection of Human Rights*, April 1993.

⁵¹⁵ Abeysekera, p. 126.

⁵¹⁶ Ignatieff, M., ‘Rights Inflation and Role Conflict in the Office of the High Commissioner for Human Rights’, in *Conscience for the World*, p. 37.

⁵¹⁷ Volkmann, p. 426.

It must naturally be acknowledged that offering public criticism of the human rights record of specific states is not in and of itself an infringement of that state's sovereignty. However, acting in combination with the direct relationship between the OHCHR and national human rights institutions, this encourages a situation in which there is potential for the OHCHR to be viewed as bypassing the legitimate role of the government itself. This threat to the sovereignty of states is particularly noticeable from within an OHCHR which makes its support

“contingent on a demonstrated willingness to meet internationally accepted standards and a genuine commitment to produce results. In the case of institutions which are subservient to Governments that violate their international human rights obligations, support has not been forthcoming - nor will it be.”⁵¹⁸

The OHCHR, therefore, can be seen as actively promoting the independence of national human rights institutions from their own governments. This lends additional support to a view that the methods employed by the OHCHR threaten the preservation of state sovereignty. This is enhanced still further by the apparent attempts of the OHCHR to make its advice and assistance to states dependent on their willingness to cooperate. As a result, it would appear as though there is a degree to which the OHCHR can be seen as inhibiting the ability of states to act without restraint.

Placing these limitations on the sovereignty of states, however, can only legitimately be seen as restricting their sovereignty to the extent that these states were already reliant on external support. A state that does not see itself as being in need of advice or guidance from the OHCHR is unlikely to change its behaviour in order to receive any such assistance. This only serves to highlight, therefore, that “[i]t has been particularly difficult for the High Commissioner to achieve results because neither she nor the independent human rights mechanisms staffed by OHCHR have enforcement power beyond moral suasion.”⁵¹⁹ As a result, it cannot be said that the OHCHR can be seen as unduly restricting the sovereignty of states. There would seem to be considerable potential, however, for the OHCHR to influence

⁵¹⁸ Address by Mary Robinson, United Nations High Commissioner for Human Rights to the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 18th April 2001, as appearing in *Conscience for the World*, pp. 202-203.

⁵¹⁹ Genser, J., ‘The High Commissioner and Human Rights in Burma (Myanmar)’, in *Conscience for the World*, p. 367.

a state's behaviour and, therefore, indirectly affect the ways in which such a state chooses to exercise its sovereignty.

At the same time as acknowledging this influence over the sovereignty of states, it is also worth noting that the OHCHR is also capable of acting independently of such sovereignty. Whilst the OHCHR does form part of the UN system, and is therefore ultimately liable to the wishes of UN member states, this relative independence from the sovereignty of states is visible through the operation of the OHCHR field presences that were discussed above. Such independence is, however, limited. Whilst the OHCHR is capable of establishing a presence in the field without seeking specific approval from the more politicised bodies of the UN system, "[t]he legal basis for the operation of field offices is a negotiated agreement with the respective government".⁵²⁰ Consequently, the mere establishment of a field presence in a specific state cannot be seen as a direct infringement on that state's sovereignty, nor can it be taken as indicating the complete independence of the OHCHR from state decisions.

Nevertheless, these field offices do not fall under the direct control of the state concerned. Instead, they remain a part of, and remain accountable to, the broader OHCHR. As a result, they contain an inherent potential to act in ways which are contrary to the sovereignty of the state in which they are placed. This becomes particularly evident when it is noted that the Human Rights Officers who staff these field presences "are gaining greater potential for influencing how governments and non-governmental organizations respond to human rights abuses."⁵²¹ However, in a similar manner to the political influence and moral persuasion that stems from public statements, being able to influence how governments react to infringements of human rights can only be seen as, at most, an indirect inhibition on their sovereignty.

The overall impression, therefore, would seem to be that the current operation of the OHCHR does not contain an inherent and necessary restriction on the sovereignty of the states to which it relates. The limitation of the OHCHR's enforcement capacities to instances of political influence, moral persuasion and public criticism would seem to suggest that, whilst potentially affecting the operation of a state's sovereignty, this is not unduly restrictive. The primary exception to this would seem to be the OHCHR's pursuit of relationships with

⁵²⁰ Mertus, p. 19.

⁵²¹ Horowitz, J., 'OHCHR Pre-Deployment Human Rights Training: Adapting to the Evolving Roles, Responsibilities, and Influence of UN Human Rights Officers', (2010) 2(1) *Journal of Human Rights Practice* 28, p. 28.

national human rights institutions. However, whilst these relationships do contain the ability and potential to undermine a state's sovereignty, it must be remembered that such institutions are created and maintained by the state in question. Consequently, any relationship between the OHCHR and a national human rights institution must of necessity interact with, and be reliant on, the wishes of the state concerned.

There is, however, an additional theme which appears to emerge from an examination of the relationship between the OHCHR and state sovereignty. In particular, although it is possible to infer a relationship between the human rights activities of the OHCHR and wider theories of cosmopolitanism, as already discussed, it remains unclear as to how its activities might interact with the operation of the wider global constitutional process. Consequently, in order to more fully consider the level of constitutional impact exercised by the OHCHR, it becomes necessary to examine the relationships between this office and other international bodies.

7.3 Relationships with Other International Bodies

At this point, it has been established that the OHCHR adopts a markedly different approach to the international system than the HRC. Specifically, the work of the OHCHR is more cosmopolitan and more oriented towards the individual human being than the position of its primarily state-centred counterpart. At the same time, however, the limitations of the OHCHR mean that it is incapable of having an adverse impact on the nature of state sovereignty to the extent that it could reasonably be supposed to directly threaten it. Instead, the OHCHR adopts a position that attempts to complement the role of the state, working with national governments rather than against them. The particular combination of both of these factors seem to suggest that this cosmopolitan approach is more capable of preserving the liberty and equality inherent within the global constitutional process than the polycentric method that was examined earlier. However, in order to more fully assess the extent to which this is indeed the case, it first becomes necessary to consider the relationship between the OHCHR and other international bodies.

The reasons for conducting such an investigation are twofold. Firstly, there remains a potential argument that the work of the OHCHR is too restricted to be considered as having a significant impact on the overall process of the global constitution. Such a possibility is

directly affected by the extent to which the OHCHR is capable of influencing, or is influenced by, its activities relating to other aspects of the international society within which it operates and to which it relates. In addition to this, questions must also be asked as to whether or not the OHCHR is capable of actively preserving state sovereignty within the international system, as opposed to merely respecting it.

In order to more thoroughly examine these factors, then, it becomes necessary to more closely consider the relationship between the OHCHR and other international bodies. To facilitate such an investigation, the other bodies concerned can broadly be divided into three distinct categories. The first category to consider concerns the relationship between the OHCHR and other bodies within the United Nations system. If the OHCHR is restricted to a relatively limited and technical role within its own organisation, it is perhaps unlikely that its work can be seen as having broader constitutional implications across international society as a whole. A second category to be examined is the relationship between the OHCHR and state-based bodies that are external to the UN system. Of particular note in this regard is the extent to which the OHCHR integrates, or is capable of integrating, its focus on the individual into the operations of bodies that are more explicitly focused on the concerns of states themselves. A final set of relationships to be considered are those which exist between the OHCHR and various non-governmental organisations. If the OHCHR is to be considered as protecting the idea of state sovereignty, then it is arguably its relationships with organisations that most directly test such an idea that ought to be examined in greater detail.

7.3.1 The OHCHR and the United Nations

In the earlier attempt to examine the nature, or even existence, of a focus on the individual on the part of the OHCHR, the point was highlighted that the primary aims of the High Commissioner's mandate appear to concern his or her relationship with the broader UN system. In particular, upon creation of the post, the High Commissioner for Human Rights was given the responsibility "[t]o carry out the tasks assigned to him/her by the competent bodies of the United Nations system in the field of human rights".⁵²² He or she also has responsibility for coordinating both "relevant United Nations education and public information programmes"⁵²³ and "the human rights promotion and protection activities

⁵²² UNGA Res. 48/141, Art. 4(b).

⁵²³ *Ibid.*, Art. 4(e).

throughout the United Nations system”.⁵²⁴ As well as these, there is also an expectation that the person fulfilling this role shall “rationalize, adapt, strengthen and streamline the United Nations machinery in the field of human rights”.⁵²⁵

Such roles and responsibilities are perhaps to be expected given the intention “that the High Commissioner for Human Rights shall be the United Nations official with principal responsibility for United Nations human rights activities”.⁵²⁶ The initial reaction, therefore, might well be to view the OHCHR as effectively integrating a diverse array of UN machinery on issues relating to the implementation, promotion and protection of human rights. This position, however, would appear to sit uneasily with the simultaneous implication that the OHCHR is subordinate to other bodies within the UN system and exists simply to aid in the administration of their decisions. Consequently, the practical functioning and operations undertaken in respect of this mandate warrant a more detailed examination.

In particular, attention must be paid to the relationship between the OHCHR and the HRC. As the principal state-based human rights organ within the UN system, the HRC can be seen as being the most affected by, or most likely to affect, the OHCHR. It must be noted, however, that “the ambiguities in the relationship between the new [Human Rights] Council and the High Commissioner have been a source of tension between the two bodies.”⁵²⁷ The inherent relationship, however, appears to be primarily one of mutual complementarity rather than competition or hierarchy. In essence, it can be described as being a relationship in which it falls “to the High Commissioner and OHCHR to capitalize upon the opportunities for action created by ... [the Human Rights] Council.”⁵²⁸ Whilst being principally cooperative in nature, this does suggest that the OHCHR is restricted in its freedom of action unless and until a specific geographic or thematic area has been positively addressed by the HRC.

For example, throughout the initial years of its operations, the OHCHR took no overt steps to explicitly address human rights issues that directly concerned matters of sexual orientation. However, in 2011 the HRC passed a resolution which requested “the United Nations High Commissioner for Human Rights to commission a study ... documenting

⁵²⁴ *Ibid.*, Art. 4(i).

⁵²⁵ *Ibid.*, Art. 4(j).

⁵²⁶ *Ibid.*, Art. 4.

⁵²⁷ Boyle, p. 43.

⁵²⁸ Nossel, S., and Broecker, C. L., ‘The High Commissioner for Human Rights and the UN Human Rights Council’, (henceforth, Nossel and Broecker), in *Conscience for the World*, p. 227.

discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world”.⁵²⁹ Following this single, and somewhat skeletal, resolution, the OHCHR has launched a “global public education campaign for lesbian, gay, bisexual and transgender (LGBT) equality”⁵³⁰ which aims to raise “awareness of homophobic and transphobic violence and discrimination, and ... [to promote] greater respect for the rights of LGBT people everywhere.”⁵³¹ The HRC’s resolution on the subject neither authorises nor requests the OHCHR to launch such an initiative and yet the OHCHR did not take such action until after the matter was directly addressed by the HRC. The implication, therefore, is that while there do exist close links between the HRC and the OHCHR, “successive High Commissioners have also built up an independent protection role mandated by the General Assembly resolution establishing the post.”⁵³²

Connected to this more independent role, and as was examined earlier, is the establishment and operation of field presences of the OHCHR which are not subject to the approval of political bodies of the United Nations, including the HRC. Combined with the knowledge and awareness gained from these operations in the field, this independence strengthens the ability of the OHCHR to relate to the HRC as an informed equal rather than a purely subordinate administrator. In turn, this grants the person of the High Commissioner herself or himself a position from which they are able “to draw global attention to the need to halt abuses and promote accountability ... [and provide] competent support to the independent mechanisms [of] the Council.”⁵³³ In other words, the normative and standard-setting work of the HRC can be seen as providing the OHCHR with direction and opportunities for action. Simultaneously, the work of the OHCHR permits a level of practical and apolitical engagement with human rights issues that is not possible within the confines of the state-based HRC.

Whilst this relationship between the OHCHR and the HRC may indeed be seen as complementary and not confrontational, it remains unclear as to whether or not it is sufficient as to imbue the OHCHR with a genuinely constitutional role. The HRC, however, is not the only other UN body to which the OHCHR can and does relate. In particular, it must be noted

⁵²⁹ Human rights, sexual orientation and gender identity, United Nations Human Rights Council Resolution, A/HRC/17/19, (15/06/2011), Art. 1.

⁵³⁰ <https://www.unfe.org/en/about> (last accessed, 06/05/15).

⁵³¹ *Ibid.* For more information about this campaign, see generally, <https://www.unfe.org/> (last accessed, 06/05/15).

⁵³² Boyle, p. 43.

⁵³³ Nossel and Broecker, p. 244.

that, “many other UN agencies are identified or identify themselves as being concerned with human rights.”⁵³⁴ Nevertheless, the position of the OHCHR is unique in that, as a

“ranking Under-Secretary-General of the United Nations, the High Commissioner carries great authority ... [and b]ecause human rights is considered a ‘cross-cutting issue,’ the High Commissioner is a member of all four executive committees of the United Nations: Peace and Security, Economic and Social Affairs, Development Cooperation, and Humanitarian Affairs.”⁵³⁵

This level of authority combined with a multi-faceted role across the work of the UN system allows the High Commissioner for Human Rights to provide the whole framework with a coordinated and integrated approach to a wide variety of issues.

The fundamental importance of human rights across the work of the UN was reinforced by former Secretary-General Kofi Annan, who declared that “we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights.”⁵³⁶ This so-called ‘mainstreaming’ of human rights at the United Nations is highlighted by the way in which even “the [Security] Council normally includes a human rights component in the peacekeeping operations it authorizes.”⁵³⁷ This inclusion of human rights in the work of the Security Council naturally increases the connections between that Council and the OHCHR, a relationship which is reflected in “[t]he increasing frequency of the Security Council’s invitations to the High Commissioner to brief it on specific situations”.⁵³⁸ Consequently, whilst it cannot be said that the OHCHR is in any way directive or commanding in the way it relates to the wider UN system, the High Commissioner can be seen as having extensive participation in, and engagement with, the other elements of the UN. However, in order to more fully assess the constitutional role of the OHCHR, attention must also be paid to the way in which it relates to actors outside of the UN system.

⁵³⁴ Hannum, H., ‘Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding’, (2006) 28 Human Rights Quarterly 1, (henceforth, Hannum), p. 11.

⁵³⁵ Mertus, p. 13.

⁵³⁶ *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General, A/59/2005, (21/03/2005), (henceforth, *In larger freedom*), p. 6, para. 17.

⁵³⁷ Hannum, p. 13

⁵³⁸ *In larger freedom*, p. 37, para. 144.

7.3.2 The OHCHR and Other State-based Bodies

Before examining the relationships between the OHCHR and bodies that are, at least on the surface, unconnected to the UN system, there exists a particular group of actors that could be said to occupy a somewhat peculiar form of middle-ground. These are the various bodies that have been established in connection with specific international treaties and covenants. Each of these

“human rights treaty bodies (with the exception of the ECOSOC-established Committee on Economic, Social and Cultural Rights) is a *sui-generis* independent body, established by treaty and not answerable to the political organs of the UN. However, the treaties specify that secretariat services be provided by the UN Secretary-General. This secretariat function has always been provided by the UN’s human rights program”.⁵³⁹

This secretarial provision in support of the human rights treaty bodies is arguably one of their more consistent aspects as, in other respects, there can be considerable variation amongst and between them. One area of difference that ought perhaps to be expected is the precise subject matter being addressed, with each treaty body serving a particular treaty that is intended to address a specific, and most often thematic, area of concern. At the time of writing, such areas included the prevention of torture, the rights of children and the elimination of racial discrimination.⁵⁴⁰

In relation to the mechanisms and operation of these treaty bodies, however, there would appear to be a certain degree of similarity, although there remains considerable divergence relating to exact details. As a generalised view, it can be said that the responsibilities of these bodies usually relate to the fulfilment of “some, if not all, of the following functions: review of state reports; state-to-state, individual and other forms of communications; the issuance of ‘General Comments’; thematic discussions and other open fora; and establishing ‘National Plans of Action’.”⁵⁴¹ In addition to the variation of remits, there are also some inherent tensions underlying the operation of these bodies as, whilst they

⁵³⁹ O’Flaherty, M., ‘The High Commissioner and the Treaty Bodies’, (henceforth, O’Flaherty), in *Conscience for the World*, p. 101. O’Flaherty notes the exception of the Committee on the Elimination of Discrimination Against Women which, for a time, was administered to by the UN Division for the Advancement of Women.

⁵⁴⁰ For some more specific examples, as well as more detailed discussion of the operations and functioning of human rights treaty bodies, see generally Mertus, pp. 82-94. A full list of the treaty bodies currently serviced by the OHCHR is available at <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx> (last accessed, 06/05/15).

⁵⁴¹ Mertus, p. 65.

are established by and reliant on treaties concluded between states, those who serve in them predominantly “work as independent individuals, rather than representing the interests of their own home countries.”⁵⁴²

Overall, then, the work of the human rights treaty bodies can be said to be varied and diverse. The ways in which the OHCHR relates to these bodies, however, is broadly consistent in spite of such differences and variation. In general, these relationships have “come over time to embrace at least three dimensions: delivery of secretariat support, substantive partnership of human rights actors, and the High Commissioner’s facilitatory leadership in confronting the problems of the system.”⁵⁴³ In and of themselves, none of these dimensions are indicative of the constitutional nature of the work of the OHCHR. In particular, there does not seem to be any indication that the OHCHR is responsible for any incorporation of individual personhood into the activities of these treaty bodies. Any possibility of individual petitions or communications is dependent on the methods established by the treaty bodies themselves and is independent of any overt desires or actions of the OHCHR. At the same time, however, the relationships between the OHCHR and the human rights treaty bodies do seem to demonstrate a certain degree of integration of the OHCHR into various processes and activities within the wider realm of international human rights law.

Examining these broader aspects of international law, however, seems to suggest that efforts to incorporate a more individualised, or potentially cosmopolitan, perspective have developed relatively independently of any influence exerted by the OHCHR. In a general sense, it can be argued that

“the ever growing role of the individual in contemporary international law is linked to three other phenomena of general and gradual change of international law which may be so summarized: a) a widening of the scope and of the material content of international law; b) a process of progressive narrowing of the ‘private’ normative nature of international law and of widening of its ‘public’ nature; c) a process of widening of the formal addressees of international law”.⁵⁴⁴

⁵⁴² *Ibid.*

⁵⁴³ O’Flaherty, p. 118.

⁵⁴⁴ Mazzeschi, R. P., ‘Impact on the Law of Diplomatic Protection’, in Kamminga, M. T., and Scheinin, M., (eds.), *The Impact of Human Rights Law on General International Law*, (Oxford: Oxford University Press, 2009), (henceforth, *The Impact of Human Rights Law*), pp. 212-213.

The suggestion has even been made, in fact, that the individual “has *always* remained in contact, directly or indirectly, with the international legal order.”⁵⁴⁵

A clear and direct example of this within the existing systems of international law is found within the practices of the European Court of Human Rights, which “may receive applications from any person, nongovernmental organisation or group of individuals”.⁵⁴⁶ Nevertheless, it may well be possible to argue that certain systems developed through the United Nations and its predecessor, the League of Nations, “were some of the first international experiments to grant procedural capacity directly to individuals”.⁵⁴⁷ Such procedures, however, were concretely established many years before the creation of the OHCHR.

At the other end of the spectrum, individuals are not only able to claim enforcement of their rights under international law, but opportunities also now exist for their prosecution for violations of the rights of others. Whilst it remains true that a general regime “which would enable national courts to prosecute and punish foreign state officials for severe human rights violations”⁵⁴⁸ has not yet been made manifest at an international level, other opportunities for similar prosecutions do now exist. In particular, the International Criminal Court (ICC) has “the power to exercise its jurisdiction over persons for the most serious crimes of international concern”.⁵⁴⁹

In the case of the ICC, however, there are links between its own mechanisms and those of the United Nations system. Whilst it was established outwith the purview of the official UN machinery, the parties creating the ICC did agree that it would “be brought into relationship with the United Nations”.⁵⁵⁰ This relationship, however, is primarily with the Security Council of the UN.⁵⁵¹ As a result, any influence the OHCHR might exert on the proceedings is both limited and indirect. This indirect relationship is highlighted by “personnel moves [which] happen at the working level, when staffers from the Office of the Prosecutor at the International Criminal Court ... transfer to work within the Office of the

⁵⁴⁵ Trindade, A. A. C., *The Access of Individuals to International Justice*, (Oxford: Oxford University Press, 2011), (henceforth, Trindade), p. 3. Emphasis added.

⁵⁴⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), (04/11/1950), United Nations Treaty Series I-2889, Art. 34.

⁵⁴⁷ Trindade, p. 19.

⁵⁴⁸ Rensmann, T., ‘Impact on the Immunity of States and their Officials’, in *The Impact of Human Rights Law*, p. 151.

⁵⁴⁹ Rome Statute of the International Criminal Court, (17/07/1998), United Nations Treaty Series I-38544, Art. 1.

⁵⁵⁰ *Ibid.*, Art. 2.

⁵⁵¹ For more detailed discussion of the relationship between the ICC and the UN Security Council, see Arbour, L., ‘The Relationship Between the ICC and the UN Security Council’, (2014) 20 *Global Governance* 195.

High Commissioner for Human Rights.”⁵⁵² This interchange of staff, happening in both directions, lends support for “the merging of the movements of international criminal justice and international human rights”.⁵⁵³

Consequently, whilst the influence of the OHCHR beyond the UN system may be indirect at best, it is equally true that these external relationships demonstrate the broad scope of activities to which the OHCHR is connected. As regards the overall global constitutional process, however, the significance of these relationships appears somewhat limited. This is particularly the case when it is noted that the OHCHR has been completely disconnected from the development of “[t]he free and full exercise of the right of individual petition directly before international human rights tribunals (such as the European, Inter-American and, more recently, African Courts)”.⁵⁵⁴

Any evidence, therefore, of individual participation within international law cannot of itself be directly attributed to the role and influence of the OHCHR. Simultaneously, however, it is also possible to see the OHCHR as having a relatively broad impact that affects international proceedings beyond the purely administrative issues of other UN bodies. As a result, it remains the case that the OHCHR can be situated within a wider cosmopolitan perspective on the global constitutional process, despite not having a monopoly on its direction. Nevertheless, in order to more fully assess the extent of any influence that the OHCHR is capable of exerting, it is also necessary to examine the ways, if any, in which it is able to preserve and maintain the centrality of state sovereignty, as opposed to merely respecting it in its own work. In order to achieve this, it becomes necessary to consider the relationships between the OHCHR and organisations that are not composed of states or their direct representatives.

7.3.3 The OHCHR and Non-Governmental Organisations

Initially, it might be expected that there would be much mutual support between the OHCHR and non-governmental organisations (NGOs). This is especially the case when it is considered that, in submitting their opinion to the 1993 World Conference on Human Rights, various NGOs advocated for “[a]n office of a High Commissioner for Human Rights [which]

⁵⁵² Kaye, D., ‘Human Rights Prosecutors? The High Commissioner for Human Rights, International Justice, and the Example of Syria’, in *Conscience for the World*, p. 246.

⁵⁵³ *Ibid.*

⁵⁵⁴ Trindade, pp. 48-9.

should be established as a new high-level independent authority within the United Nations system”.⁵⁵⁵ In spite of this support, however, when it came time for the UN to outline the mandate and role of this new office, “the Chairman [of the working group debating the issue] reserved the right to exclude NGOs when sensitive matters were discussed.”⁵⁵⁶ This exclusion, whilst limited, does suggest a degree of suspicion and distrust between a UN system centred upon sovereign states and a privately-organised system of NGOs.

Nevertheless, it remains the case that “the role of the NGOs in promoting and conceptualizing the idea of a High Commissioner over the years is now reflected in the Office’s reliance on them for information, suggestions and support.”⁵⁵⁷ For the purposes of the present discussion, however, establishing in any great detail the extent or nature of the information and support provided to the OHCHR by NGOs would not be particularly revealing. This is a position that only increases in significance once it is noted that in NGOs possessing a “far-flung organizational formation the professional NGO staff wields tremendous discretionary power, unaccountable to either beneficiaries or supporters, to massage information to reflect the expectations of the partners rather than the reality of the mission.”⁵⁵⁸

For the time being, therefore, the relevant factor for consideration is not the information provided by NGOs to the OHCHR. What is more relevant is, rather, the extent to which the OHCHR is capable of preserving a respect for state sovereignty within the operations of its relationships with NGOs. This is particularly significant from within an environment in which “there has been a prolific attempt to build a case against NGOs suggesting that they are undermining national sovereignty and democracy”.⁵⁵⁹ Attempts by NGOs to transform the operation of the political scene have not been restricted to the level of the state itself. It has even been suggested, for instance, that “an emerging global civil

⁵⁵⁵ Note by the Secretariat, Report by the General Rapporteur, Manfred Nowak, as adopted by the Final Plenary Session of the NGO-Forum, World Conference on Human Rights, A/CONF.157/7, (14/06/1993), Annex II, I.A., para. 3.

⁵⁵⁶ Clapham, p. 562.

⁵⁵⁷ *Ibid.*, p. 567.

⁵⁵⁸ DeMars, W. E., *NGOs and Transnational Networks: Wild Cards in World Politics*, (London: Pluto Press, 2005), p. 7.

⁵⁵⁹ Jordan, L., and van Tuijl, P., ‘Rights and Responsibilities in the Political Landscape of NGO Accountability: Introduction and Overview’, in Jordan, L., and van Tuijl, P., (eds.), *NGO Accountability: Politics, Principles and Innovations*, (London: Earthscan, 2006), (henceforth, *NGO Accountability*), p. 3.

society may hold the potential for forging new forms of democracy and social mediation on a global scale.”⁵⁶⁰

This transformational potential, however, is yet to be realised. Nevertheless, it does suggest that the natural tendency of NGOs is to undermine, or at least influence, the existing ability of states to act as they choose, even if this influence is only indirect. To a certain degree, this is perhaps to be expected, given that NGOs are specifically *non-governmental* organisations. Consequently, it is the very nature of NGOs themselves which leads to a position that “one should not expect NGOs to be accountable to governments.”⁵⁶¹ This independence of NGOs as regards sovereign states is equally applicable to the relationship between NGOs and the OHCHR. Whilst these organisations are permitted to provide information and support, the OHCHR has no specific control over the actions of any NGOs to whom it relates, nor does it even possess a remit that would grant the possibility of such control. As a result, it cannot be said that the OHCHR is capable of enforcing a respect for state sovereignty upon any NGOs that would otherwise be willing to ignore it.

At the same time, however, it remains possible to suggest that these NGOs “are necessarily implicated in the reproduction of the inter-state system and to that extent must still formulate their demands with reference to the sovereign state”.⁵⁶² Nevertheless, acknowledging state sovereignty is not coterminous with respecting it and it cannot be said that the OHCHR has the capacity to impose such respect on either NGOs or the even more nebulous concept of a ‘global civil society’. Indeed, it can even be suggested that any influence that does exist between the UN system and NGOs is actually flowing in the opposite direction, with the United Nations demonstrating an increasing willingness to receive advice and suggestions from a wide variety of such organisations.⁵⁶³

From a particularly benign perspective, this apparent willingness to more openly consider the opinions of NGOs can be attributed to a belief that such organisations represent “the rise of civil society [which] is one of the landmark events of our times, and that the growing participation and influence of non-state actors is enhancing democracy and

⁵⁶⁰ Turner, S., ‘Global Civil Society, Anarchy and Governance: Assessing an Emerging Paradigm’, in Frost, M., (ed.), *International Ethics*, (Vol. II), (London: Sage, 2011), p. 60.

⁵⁶¹ Charnovitz, S., ‘Accountability of Non-Governmental Organizations in Global Governance’ in *NGO Accountability*, p. 21.

⁵⁶² Colás, A., *International Civil Society: Social Movements in World Politics*, (Cambridge: Polity Press, 2002), (henceforth, Colás), p. 139.

⁵⁶³ For just one example, see generally, Report of the Panel of Eminent Persons on United Nations-Civil Society Relations, *We the peoples: civil society, the United Nations and global governance*, A/58/817, (11/06/2004).

reshaping multilateralism”.⁵⁶⁴ Simultaneously, however, it must also be borne in mind that “undermining state sovereignty can be as detrimental to the objective of accountable, democratic politics as it is in some instances beneficial”.⁵⁶⁵ Some critics have even presented the argument that “[w]hile the project of building a global civil society sounds benign and entirely progressive, in reality ... it offers a human face to the ugly practices of global corporate capital.”⁵⁶⁶

It is not the place of the present discussion, however, to assess the relative merits or intentions of a global civil society. For the time being, it shall suffice to conclude that the OHCHR appears inherently unable, and potentially even unwilling, to integrate the foundations of a liberal global constitutional process with its relations to non-governmental organisations. Whether or not such a conclusion can be extended to describe the entire relationship between the OHCHR and the global constitutional process is an assessment that must be undertaken within the overall context of the various factors discussed above.

7.4 Contribution of the OHCHR to the Global Constitutional Process

The fundamental question that led to an examination of the OHCHR was whether or not a cosmopolitan perspective on the global constitutional process may be able to preserve the liberty and equality of states through the development and maintenance of an intra-constitutional view of rights at the global level. As examined in the course of this chapter, the OHCHR can indeed be seen as an institution which provides for some degree of incorporation of the individual human being into the global constitutional process. Simultaneously, however, there is a maintenance of respect for state sovereignty which, whilst occasionally subject to challenge, retains a privileged position within the work of the OHCHR.

Nevertheless, despite initial appearances to the contrary, examining the relationship between the OHCHR and other international bodies appears to reveal the inherent inability of the office to maintain a liberal global constitutional process. Although it may possess a certain degree of constitutional status and integration as regards such relationships, it is

⁵⁶⁴ Lindblom, A.-K., *Non-Governmental Organisations in International Law*, (Cambridge: Cambridge University Press, 2005), p. 410.

⁵⁶⁵ Colás, p. 138.

⁵⁶⁶ Gamble, A., and Kenny, M., ‘Ideological contestation, transnational civil society and global politics’, in Germain, R. D., and Kenny, M., (eds.), *The Idea of Global Civil Society: Politics and ethics in a globalizing era*, (London: Routledge, 2005), p. 21.

completely lacking in any ability to enforce constitutional precepts on those who would otherwise ignore them. This is compounded by an incorporation of the individual which, whilst present, is primarily as passive beneficiary rather than active participant.

It is arguably this attitude towards the individual that is the principal cause of the OHCHR's inability to support a liberal global constitutional process. By failing to truly engage the individual as a participant in the process, the OHCHR fails to adopt a truly cosmopolitan perspective on constitutional issues. Ultimately, whilst the office may not be directly controlled by states themselves, this position leaves the OHCHR as a passive addressee of a state-operated and state-directed constitutional process. Such an arrangement is then simply highlighted by the absence of any direct ability to participate in the enforcement phase of the process, which results in an incomplete, and therefore ineffective, engagement with constitutional mechanisms. The implications of such a conclusion for the broader concepts of liberal global constitutionalism shall be discussed in the following chapter.

Chapter 8

Conclusion

Over the course of the present discussion, it has been established that it is possible to view a constitution as an ongoing, multiphase process, as opposed to a singularly static and monolithic entity.⁵⁶⁷ By focusing on the conceptually dominant form of liberal constitutionalism, it was also possible to establish the existence of a global constitutional process operating on the basis of the sovereign equality of the autarchic communities known as states.⁵⁶⁸ Nevertheless, the capacity of an international society of states to maintain a liberal global constitutional process has been called into question.

The United Nations Human Rights Council (HRC) was shown to be lacking the capacity for normative integration that would be necessary to support a polycentric approach to maintaining the sovereign equality of liberal global constitutionalism.⁵⁶⁹ Similarly, the Office of the United Nations High Commissioner for Human Rights (OHCHR) was considered to be lacking the necessary integration of individual participation to maintain a cosmopolitan approach to the same issue.⁵⁷⁰ According to the earlier analysis, therefore, it would appear as though reliance on the beneficence of great powers, as unsustainable as it may be, remains the only way to ensure the maintenance of a liberal global constitutional process.⁵⁷¹

Before unreservedly supporting such a conclusion, however, greater attention must be paid as to why the alternatives have seemingly failed. In particular, it must be noted that neither the polycentric nor cosmopolitan approaches were shown to be lacking in and of themselves. Rather, there was a failure of the human rights institutions of the United Nations (UN) to fully embody the prerequisites necessary for the respective theoretical approaches to take hold. Consequently, there proceeds from this analytical framework the opportunity for more normative arguments as to the reforms that would be necessary within international society if reliance on the unreliable great power approach is to be avoided.

⁵⁶⁷ See *supra*, Chapters 2 and 3.

⁵⁶⁸ See *supra*, Chapter 4.

⁵⁶⁹ See *supra*, Chapter 6.

⁵⁷⁰ See *supra*, Chapter 7.

⁵⁷¹ See *supra*, Chapter 5.

The present chapter, then, proceeds to examine such arguments in greater detail. This analysis, however, is not intended to be exhaustive. Instead, the aim is to more closely examine such claims in order to reveal possible directions for future research and investigation. Underlying this discussion are the particular contributions made by the adoption of an understanding of a constitution as a process composed of the distinct, though interrelated, phases of identification, enumeration, implementation and enforcement.

8.1 Reforming the United Nations

As stated above, the earlier discussions surrounding the primary human rights institutions of the UN have shown both of them to be lacking the ability to develop and support a constitutional framework that is both liberal and global. In the case of the HRC, it can be argued that a greater focus on integrating competing normative views across and between international society would strengthen its ability to act as a normative centrepiece around which a polycentric society could cohere. As for the OHCHR, it could be suggested that a greater focus on enabling and encouraging public participation in its activities, and potentially even in its direction, would strengthen the role of the individual within international affairs and thereby help provide the groundwork for a cosmopolitan approach to a liberal global constitutional process. It cannot be suggested that these reforms would be either easy or likely. Indeed, it must be conceded that in previous years “[t]he widely endorsed project of UN reform disappointed even before it failed.”⁵⁷² Nevertheless, it remains equally true that there may be “concealed opportunities for transformative politics [to] exist in relation to the future of the United Nations.”⁵⁷³ Consequently, the possibilities just outlined do merit a more detailed examination. It is, therefore, this examination that shall now be conducted.

8.1.1 Reforming the HRC

It was considered earlier that the HRC as it currently stands presents very little threat to the maintenance of an international polycentric system. Instead, the problem that was

⁵⁷² Falk, R., ‘The Outlook for UN Reform: Necessary, but Impossible’, in Paolini, A. J., *et al.*, (eds.), *Between Sovereignty and Global Governance: The United Nations, the State and Civil Society*, (Basingstoke: Macmillan, 1998), p. 296.

⁵⁷³ *Ibid.*, p. 310.

presented was an apparent inability to convincingly integrate a wide variety of normative values and concerns.⁵⁷⁴ At this point, then, the logical question to consider would be whether or not there exist ways in which such normative integration might become possible. Whilst, as already suggested, reforms to the UN system remain both rare and difficult, it must also be noted that the HRC was itself born out of reform and it can be argued that “[i]f it is doing its work properly, the council should have its eyes on developments that will shape the world of the future.”⁵⁷⁵ Consequently, there may yet be insights to be gleaned from considering ways in which the HRC could develop.

In particular, it ought to be recalled that one of the principle reasons behind the lack of normative integration at the HRC was found to be its reliance on a purely geographic system of representation. As a result, a natural solution might be to suggest a reconfiguration of the selection procedures for membership of the HRC in order to diminish the significance of geographic location. There are, however, a number of significant obstacles to such a suggestion.

Firstly, there is the consideration that a “serious concern surrounding the [former] Commission was its composition”,⁵⁷⁶ which resulted in membership of the HRC forming one of the most contentious issues surrounding its creation.⁵⁷⁷ Consequently, any attempt at altering its composition could expect to encounter similar resistance and objections. This complication is compounded further by the fact that “these [geographical] groupings have been used throughout the United Nations system for the purpose of election to seats including in the Security Council, General Assembly, [and] ECOSOC”.⁵⁷⁸ This has the result that any change in this area within the HRC would likely require broader reforms, or at least would have broader implications, than altering the membership of the HRC alone.

Furthermore, consideration must also be given to the fact that there is “only mixed evidence that blocs are relevant in this new UN institution.”⁵⁷⁹ This observation can be

⁵⁷⁴ See *supra*, Chapter 6.

⁵⁷⁵ Ramcharan, B. G., *The UN Human Rights Council*, (London: Routledge, 2011), p. 2.

⁵⁷⁶ Besant, A., and Malo, S., ‘Dim Prospects for the United Nations Human Rights Council’, (2009) 4 Yale Journal of International Affairs 144, p. 145.

⁵⁷⁷ See generally, Lauren, P. G., “‘To Preserve and Build on its Achievements and to Redress its Shortcomings’: The Journey from the Commission on Human Rights to the Human Rights Council”, (2007) 29 Human Rights Quarterly 307, (henceforth, Lauren).

⁵⁷⁸ Boyle, K., ‘The United Nations Human Rights Council: Origins, Antecedents, and Prospects’, (henceforth, Boyle), in Boyle, K., (ed.), *New Institutions for Human Rights Protection*, (Oxford: Oxford University Press, 2009), p. 18.

⁵⁷⁹ Hug, S., and Lukács, R., ‘Preferences or blocs? Voting in the United Nations Human Rights Council’, (2014) 9 Review of International Organizations 83, (henceforth, Hug and Lukács), p. 103.

combined with an argument that “[s]tates are linked by political and other interests and affinities which in some cases, such as Africa, coincide with geography but in others, such as Eastern Europe, equally reflect geo-political realities”.⁵⁸⁰ Working together, these factors give rise to a recognition that, for the most part, controversy at the HRC is not simply due to geographic representation but “is largely introduced by countries with blemished human rights records.”⁵⁸¹ Consequently, it becomes difficult to sustain an argument that simply altering the geographic balance of the council will produce the desired level of normative integration.

Instead, it can be argued that the above observations highlight an alternative possibility. As opposed to focusing on the exact nature of any geographic balance, and to the extent that instability in the HRC is introduced through states with a poor human rights record, greater consideration could be given to the provisions that voting members of the HRC ought to respect human rights themselves. Provided that election was still undertaken through the General Assembly of the UN, strengthening these conditions could arguably maintain the necessary level of representation of the broader UN membership whilst simultaneously improving the ability of the HRC to provide cohesive and coherent normative integration.

At this point, making the normative argument for such an eventuality may not appear particularly innovative or surprising. After all, the HRC was created with the hope that states “would regard membership as a reward for their demonstrated support for human rights.”⁵⁸² Despite these hopes, however, “[i]n the final design, a state’s human rights record was not a major impediment to membership on the HRC”.⁵⁸³ Consequently, it can be argued that many of the original debates surrounding such criteria remain applicable. Nevertheless, what the constitutional analysis of polycentricity has shown is that strengthening the criteria for membership of the HRC does not automatically have to proceed from a desire to strengthen human rights protection.⁵⁸⁴ Instead, this perspective highlights the fact that these developments would actually be beneficial to states wishing to protect their sovereignty in the

⁵⁸⁰ Boyle, p. 19.

⁵⁸¹ Hug and Lukács, p. 103.

⁵⁸² Lauren, p. 332.

⁵⁸³ Cox, E., ‘State Interests and the Creation and Functioning of the United Nations Human Rights Council’, (2010-11) 6 *Journal of International Law and International Relations* 87, (henceforth, Cox), p. 117.

⁵⁸⁴ Whilst it is not strictly relevant to the present discussion, whether or not stronger membership criteria would actually benefit human rights themselves has been the subject of some debate. See, for instance, Ghanea, N., ‘From UN Commission on Human Rights to UN Human Rights Council: One Step Forwards or Two Steps Sideways?’, (2006) 55(3) *The International and Comparative Law Quarterly* 695, particularly at pp. 699-700.

international sphere, understood in an analogous manner to individual liberty at the national level. Principally, this would be through an improved degree of normative integration which would enable a variety of political and legal centres to overlap and compete without threatening the overall viability and coherence of the international society itself.

In developing this integration, however, it must be noted that the HRC would still need to maintain a degree of representation of the broader UN membership. Consequently, tighter controls would need to be balanced with maintaining a variety of opinions and perspectives. Additionally, a degree of restriction would need to remain regarding the HRC's ability to act as a significant political and legal centre in its own right. This is particularly emphasised by an acknowledgement of the distinct constitutional phases of identification, enumeration, implementation and enforcement. For instance, it has been suggested that, in creating the HRC, states succeeded in "designing an institution that reflected the overwhelming desire of many states not to have an overly strong human rights enforcement body."⁵⁸⁵ Such a position is precisely what is supported by the present argument. Excessive centralisation of power in the hands of the HRC would increase the threat to polycentricity by encouraging a tendency towards hierarchical domination of international society. As a result, there remains reason to support and encourage a situation in which "power and persuasion sit side by ... [side] as part of the same intellectual schema."⁵⁸⁶

As a consequence of these positions, it can be argued that a reformed HRC must be better able to build consensus regarding international human rights norms whilst simultaneously continuing to be broadly representative of the wider UN system and without requiring stronger enforcement capabilities. In essence, this would require a degree of political acumen that would rely on somewhat nebulous factors such as trust, respect and integrity. Uncovering the exact mechanisms by which such achievements might be developed and maintained, however, is an investigation that must await another day. For the time being, it shall suffice to conclude that the HRC remains a viable contender for grounding a global separation of powers, as expressed through a polycentric society. This would only be possible, however, were it to strengthen its ability to build consensus around key human rights concerns.

⁵⁸⁵ Cox, p. 117.

⁵⁸⁶ Davies, M., 'Rhetorical Inaction? Compliance and the Human Rights Council of the United Nations', (2010) 35(4) *Alternatives: Global, Local, Political* 449, p. 464.

8.1.2 Reforming the OHCHR

In contrast to the HRC, reforming the OHCHR would initially appear somewhat simpler and easier to achieve. As was evident through its establishment of field presences and the UN Free and Equal campaign, the secretariat- rather than state-based nature of the OHCHR provides it with more flexibility to vary its operations than appears possible in the state-centred HRC. The extent of reforms that would be necessary to make the OHCHR a viable supporter of a liberal global constitutional process, however, puts even this increased flexibility to the test.

As previously identified, the primary area in which support is lacking regards the OHCHR's apparent inability to incorporate a particular view of individuality into the global constitutional process. The cosmopolitan reasoning underpinning the need for such a development could potentially be seen as being substantially similar to a constitutionalism-as-governance view of rights, seeing them as a form of fundamental morality. However, the universalist, and potentially imperialist, implications of such a position can make it difficult to sustain and certain trends within cosmopolitan thought seek instead "to overcome this problem by calling for an order wherein all will be subject to a law of which all are the authors".⁵⁸⁷ One of the reasons that led to an examination of the OHCHR, however, was a desire to focus on existing institutions as they are now and so avoid an approach which "leaves us suspended between our present unsatisfactory condition and this utopian horizon."⁵⁸⁸

In order to escape this destiny, it is possible to argue that, through emphasising individuals as rights-holders and rights-claimers, a cosmopolitan approach leads to an increased focus on the need to incorporate a greater degree of democratic practices within the operation of the OHCHR. Whilst it could potentially be suggested that simply "[s]tating that the international community is a *constitutional* community evokes the constitutionalist principle of democracy",⁵⁸⁹ it has already been established that contemporary notions of democracy are more properly linked with liberal values of equality and liberty than with constitutionalism *per se*.⁵⁹⁰ Having also established, however, that the contemporary global

⁵⁸⁷ Ingram, J. D., *Radical Cosmopolitics: The Ethics and Politics of Democratic Universalism*, (New York, USA: Columbia University Press, 2013), (henceforth, Ingram), p. 246.

⁵⁸⁸ *Ibid.*

⁵⁸⁹ Peters, A., 'Membership in the Global Constitutional Community' in Klabbers, J., *et al.*, (eds.), *The Constitutionalization of International Law*, (Oxford: Oxford University Press, 2009), (henceforth, *The Constitutionalization of International Law*), p. 154. Emphasis in original.

⁵⁹⁰ See *supra*, Chapter 3.

constitution can be described as a system of liberal constitutionalism,⁵⁹¹ there does remain the possibility that encouraging the development of a cosmopolitan democracy may well assist in the preservation of these liberal principles at the global level.

Such a suggestion, however, immediately gives rise to a vast array of challenges and difficulties, both theoretical and practical. At the theoretical level, this approach “requires a rethinking of some of the basic principles of democratic practice and organization”.⁵⁹² One such reconceptualisation of democracy that is particularly relevant is the argument that

“[w]hile democracy is typically associated with familiar representative and electoral institutions, these institutions are commonly conflated with the values or principles that animate them ... Representative and electoral institutions can be (better) understood as requirements that follow from democratic principles in particular settings.”⁵⁹³

Through establishing this focus on principles rather than institutions, it becomes possible to argue that if “we understand democracy as a form of political action rather than a regime, we can understand practices of claiming rights as themselves democratic, and democracy as arising wherever and to the extent that such practices come into being.”⁵⁹⁴ Through such a conceptualisation of democracy, it becomes possible to suggest that, to the extent that it encourages and enables the practice of claiming rights, the OHCHR is already democratic, or at least supportive of democracy.

From the present perspective, however, an argument that the OHCHR already supports democracy because it encourages the widening of participation in rights-based practices is neither particularly helpful nor informative. At best, this approach merely recasts the original arguments that justified the earlier examination of the UN's non-state-based human rights work. As already argued, however, the OHCHR's relationship to individuals is primarily as passive recipients rather than active participants in rights practices. If nothing else, then, the case of the OHCHR can simply be taken as evidence that support for supposedly democratic values and principles does not automatically translate into the implementation of traditional democratic practices.

⁵⁹¹ See *supra*, Chapter 4.

⁵⁹² Archibugi, D., ‘Cosmopolitan democracy: a restatement’, (2012) 42(1) Cambridge Journal of Education 9, p. 10.

⁵⁹³ Goodhart, M., and Taninchev, S. B., ‘The New Sovereignist Challenge for Global Governance: Democracy without Sovereignty’, (2011) 55 International Studies Quarterly 1047, p. 1061.

⁵⁹⁴ Ingram, p. 258.

This more practical angle, however, does highlight certain opportunities for reform, as well as more criticisms. Notably, the point must be emphasised that, whilst the OHCHR is not itself composed of representatives of states, it remains inextricably connected with the state-based system of the United Nations itself. As a result, it is perhaps only to be expected that the OHCHR would fail to establish a satisfactory incorporation of the individual into the global constitutional process. At this point, however, it must be left to future research to more fully examine the extent to which the OHCHR's failure is a result of this lingering and tangential presence of states within its operation and direction. For the time being, there do exist opportunities for reform that might achieve the goals outlined above even if this seemingly minor involvement of states were to remain.

In particular, these opportunities concern the relationship between the OHCHR and the various non-governmental organisations (NGOs) to which it relates. Specifically, the argument can be made that such "global civil society institutions constitute a kind of democratic infrastructure."⁵⁹⁵ Seen in this way, NGOs can "become a necessary part of the formal accountability mechanisms of global governance institutions"⁵⁹⁶ such as the OHCHR. In other words, by viewing NGOs as a global demos, the argument can be put forward that through developing closer integration of NGOs into the life of the OHCHR then this office could be seen as becoming more democratic.

Inevitably, however, adopting such a position is not without difficulties of its own. Not least among these difficulties is the observation that greater involvement of NGOs in the work of the OHCHR does not equate to an increase in the participatory role of individuals. Indeed, it would be difficult to argue "that all civil society activities inherently and automatically enhance democratic accountability in global regimes."⁵⁹⁷ This objection becomes particularly strong once it is noted that "NGOs do not enjoy any democratic mandate by (global) citizens, but are self-appointed."⁵⁹⁸ As a result, there is an apparently strong argument that "such an approach cannot solve the problem of the democratic deficit."⁵⁹⁹ Additionally, it is possible to suggest that "increasingly institutionalized

⁵⁹⁵ Peters, A., 'Dual Democracy', (henceforth, Dual Democracy), in *The Constitutionalization of International Law*, p. 315.

⁵⁹⁶ Volk, C., 'Why Global Constitutionalism Does not Live up to its Promises', (2012) 4(2) *Goettingen Journal of International Law* 551, (henceforth, Volk), p. 564.

⁵⁹⁷ Scholte, J. A., 'Civil Society and Democratically Accountable Global Governance', (2004) 39 *Government and Opposition* 211, p. 213.

⁵⁹⁸ Dual Democracy, p. 316.

⁵⁹⁹ Falk, R., and Strauss, A., 'On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty', (2000) 36(2) *Stanford Journal of International Law* 191, p. 214.

participation in global governance risks modifying and distorting what NGOs are able to achieve in terms of substantive policy outcomes.”⁶⁰⁰

Despite this opposition, an argument can be presented “that civil organisations are not functional or institutional equivalents of political parties, thus any assessment of the political representation of the former based on parameters suited to the latter leads to predictable and sometimes trivial conclusions.”⁶⁰¹ As a result, it becomes possible to conclude that “[t]he democratic function of NGOs is not to be representatives in a parliamentary sense.”⁶⁰² Nevertheless, it is precisely such a representative role that is needed in relation to the OHCHR if its ability to support a liberal global constitutional process is to be strengthened through a greater focus on the individual.

The broader relationships between NGOs, ‘civil society’ more broadly, and the wider United Nations has already been examined elsewhere.⁶⁰³ Unfortunately, however, the precise details of exactly how the OHCHR itself might strengthen the representative nature of the NGOs to which it relates, as well as increase the participation of such representative NGOs within its own operations, are matters that must await a more detailed consideration than is possible at the present time. For present purposes, it shall suffice to note that, in order for the OHCHR to achieve a more cosmopolitan approach to liberal global constitutionalism, increasing both the role and the representative nature of NGOs could well prove beneficial.

8.2 The Great Power Approach

Despite the possibilities for reforming the UN system that are outlined above, it must be recognised that these normative arguments were prefaced with an acknowledgement of the difficulties involved in implementing such reformative proposals. Provided that such obstacles continue, it would seem as though there is little choice but to conclude that the only option for maintaining an integration of liberal values within the global constitutional process is through the ongoing support of great powers.⁶⁰⁴ In other words, given the preceding analysis, any desire to preserve the contemporary liberal global constitutional process must

⁶⁰⁰ Dany, C., ‘Janus-faced NGO Participation in Global Governance: Structural Constraints for NGO Influence’, (2014) 20 *Global Governance* 419, p. 419.

⁶⁰¹ Lavalle, A. G., ‘NGOs, Human Rights and Representation’, (2014) 20 *SUR: International Journal on Human Rights* 293, p. 294.

⁶⁰² *Dual Democracy*, p. 316.

⁶⁰³ See, for instance, Weiss, T. G., *et al*, ‘The “Third” United Nations’, (2009) 15 *Global Governance* 123.

⁶⁰⁴ See *supra*, Chapter 5.

rest on the hope that the states with the power and ability to dictate the operation of this process continue to do so in a liberal manner.

It must be noted, however, that this suggestion should not be seen as imbuing the concept of ‘great powers’, or even that of power more generally, with any form of explanatory ability, predictive utility or moral justification. On the one hand, this position does imply a general degree of support for the claim that “[n]orms and values certainly do not operate divorced from power.”⁶⁰⁵ Nevertheless, it is not necessarily the case that acknowledging the role of great powers in shaping the operation of the current global constitutional process involves an equal recognition that “[t]he sphere of power is independent of the sphere of justice, rendering the state an autonomous actor, able to pursue its own interests, limited only by its own capabilities.”⁶⁰⁶ At most, the current position could potentially be seen as concurring with “the old truth that though law cannot exist without power, still law and power, right and might, are not the same.”⁶⁰⁷ Such conclusions and debates about the role, nature and significance of power itself, however, do not inherently and directly affect the concept of a global constitutional process. Instead, they can simply be seen as having the potential to help elucidate exactly who operates the process and how they might, can or should go about it.

In developing such arguments, however, there must necessarily be a recognition that a great power approach to the global constitutional process is not in and of itself inherently sustainable. As power waxes and wanes, so too are there fluctuations in a global constitutional process that is dependent on such power. As has already been indicated, there are no principles automatically contained in this approach that would guarantee the maintenance of a liberal constitutional order at the global level independently of the relative power held by those wishing to support it. There is, perhaps, an argument that certain liberal values, particularly sovereignty, can be maintained through “states balancing each other in order to protect their interests ... [and this] balance of power ... can also function in a constitutional way”.⁶⁰⁸ Whilst the constitutional possibilities presented by theories regarding

⁶⁰⁵ Donnelly, J., ‘Human Rights, Globalizing Flows, and State Power’, (henceforth, Donnelly), in Brysk, A., (ed.), *Globalization and Human Rights*, (London: University of California Press, 2002), p. 235.

⁶⁰⁶ Braumoeller, B. F., *The Great Powers and the International System: Systemic Theory in Empirical Perspective*, (Cambridge: Cambridge University Press, 2013), p. 1.

⁶⁰⁷ Kelsen, H., (trans., Wedberg, A.), *General Theory of Law and State*, (Cambridge, USA: Harvard University Press, 1946), p. 121

⁶⁰⁸ Lang Jr., A., ‘Global Constitutionalism as a Middle-Ground Ethic’, (henceforth, Lang), in Navari, C., (ed.), *Ethical Reasoning in International Affairs: Arguments from the Middle Ground*, (Basingstoke: Palgrave Macmillan, 2013), (henceforth, *Ethical Reasoning*), p. 108.

the balance of power should certainly not be ignored, it must equally be recognised that “much of the conventional wisdom about the balance of power does not survive contact with non-European evidence.”⁶⁰⁹

Consequently, there may well be scope to advance an argument that it will frequently and naturally be in the interests of great powers to preserve a global constitutional process founded upon the liberty and equality of states. This position is lent further support by a recognition that “the progress of those norms cannot be reduced to the power of their leading sponsors.”⁶¹⁰ As noted, however, the desire of any great powers to advance such values cannot be relied upon. It has been observed, for instance, that

“great powers, like small powers, frequently behave in such a way as to promote disorder rather than order; they seek to upset the general balance, rather than to preserve it, to foment crises rather than to control them, to win wars rather than to limit them, and so on.”⁶¹¹

An argument that the support of great powers is necessary for the maintenance of a liberal and global constitutional order is, therefore, somewhat less than ideal. This is particularly the case once it is recalled that there is no inherent reason why great powers might choose to preserve such an order, beyond any moral, ethical or interest-based justifications that might be presented to them.

Simultaneously, however, it must also be noted that the potential alternatives to a great power approach that have already been explored do not appear to be inherently unique. Whilst the human rights mechanisms of the United Nations may indeed present the most appropriate embodiment of both the polycentric and cosmopolitan approaches at the time of writing, this is not to say that such a scenario precludes the future development of these same approaches using different bodies. Indeed, in the earlier discussion that led to an examination of the HRC, it was noted that the existing regime of international environmental governance, whilst not yet capable of supporting a polycentric approach, may present such a possibility in the future.⁶¹² Once such a possibility is acknowledged, there must inevitably be a similar acknowledgement that other comparable opportunities may yet arise. Nevertheless, it is

⁶⁰⁹ Wohlforth, W. C., *et al.*, ‘Introduction: Balance and Hierarchy in International Systems’, in Kaufman, S. J., *et al.*, (eds.), *The Balance of Power in World History*, (Basingstoke: Palgrave Macmillan, 2007), p. 1.

⁶¹⁰ Donnelly, p. 235.

⁶¹¹ Bull, H., *The Anarchical Society: A Study of Order in World Politics*, (4th edn.), (Basingstoke: Palgrave Macmillan, 2012), (henceforth, Bull), p. 201.

⁶¹² See *supra*, Chapter 5.

almost tautological to point out that “[i]t is not possible, by definition, to foresee political forms that are not foreseeable”.⁶¹³ For the time being, therefore, it would seem as though the great power approach is the most appropriate, albeit flawed, option available.

8.3 Human Rights and the Global Constitutional Process

At this point, it may appear as though the discussion regarding alternatives to the great power approach has begun to fragment into an examination of the HRC on the one hand and a consideration of the OHCHR on the other. As stated above, however, no suggestion has been made that would preclude the appearance of some other body that would be better suited to the task. Additionally, it must also be noted that nothing has yet been raised that would appear to suggest that the two apparently divergent approaches outlined thus far are, in fact, mutually exclusive. In order to avoid this conclusion, or to more thoroughly assess its possible accuracy, it becomes necessary to consider some of the broader themes and ideas that can be seen as uniting these investigations, or at least as being held in common by them. As both approaches can be said to be attempts to maintain a form of liberal constitutionalism at the global level, these shared themes can equally be divided into the two areas of liberal values and constitutional theory.

As regards the possible maintenance of liberal values, the conclusion cannot be escaped that nothing in the present discussion has advocated the desirability of such a position. Whilst the focus thus far has been on the interconnected, though potentially incommensurable, ideas of liberty and equality, the point was explicitly made earlier that there is nothing inherent to a constitutional approach that automatically requires the incorporation of these ideas.⁶¹⁴ The argument was presented, however, that it is this liberal vision of the world that currently prevails at the global level and, therefore, it is only reasonable to consider these values and not others in relation to the operation of a global constitutional process.⁶¹⁵

In spite of this position, the objection must be noted that “[g]lobal constitutionalism and its purveyors are too strongly biased in favor of the status quo.”⁶¹⁶ Additionally, it has been suggested that contemporary discussions of global constitutionalism suffer from a

⁶¹³ Bull, p. 247.

⁶¹⁴ See *supra*, Chapter 3.

⁶¹⁵ See *supra*, Chapter 4.

⁶¹⁶ Volk, p. 562.

variety of “omissions and biases [which] are caused by investment in a particular kind of political practice and thought, namely the unquestioned extrapolation of liberal democratic precepts”.⁶¹⁷ Nevertheless, it must be reiterated that the approach to, and understanding of, global constitutionalism that has been presented in the current discussion has not been *in favour* of the status quo in and of itself, nor has it unquestioningly adopted liberal thought. Instead, the preceding arguments have been advanced through a *separation* of liberalism and constitutionalism that must acknowledge the viability of alternative mechanisms by which the constitutional process may be operated.

Despite the seemingly fragmentary nature of the discussion, then, it is this distinctive approach to constitutional theory that can be seen as the primary strand of thought which gives cohesion to the various and diverse elements presented thus far. By considering a constitution as a process composed of distinct, though related, phases, an approach to international society was revealed which presented opportunities for analysis and reform that had previously remained unexamined. In particular, the connections between cosmopolitan thought and the OHCHR have been conspicuously unexplored by much contemporary literature. Whilst acknowledging this distinctiveness, however, recognition must also be given to the argument that an

“involvement with ethical theory is not something we do *after* having come to grips in some direct ‘empirical’ and norm free way with the key features of how things stand in the practices of world politics, but is part of the very process required in order to understand our contemporary world.”⁶¹⁸

Consequently, it cannot be said that recognising the plasticity and utility of the constitutional process is coterminous with a suggestion that the process is entirely neutral and value-free.

Indeed, it could be argued that the desirability of the constitutional process itself depends upon an assumption that “order has its positive dimensions, for it provides the basis for stability”.⁶¹⁹ This connection between constitutionalism and order was particularly highlighted in the earlier discussion on global constitutionalism, where it was found that

⁶¹⁷ Schwöbel, C. E. J., ‘Organic Global Constitutionalism’, (2010) 23 *Leiden Journal of International Law* 529, p. 529.

⁶¹⁸ Frost, M., *Constituting Human Rights: Global civil society and the society of democratic states*, (London: Routledge, 2002), p. 1.

⁶¹⁹ Bleiker, R., ‘Order and Disorder in World Politics’, in Bellamy, A. J., *International Society and its Critics*, (Oxford: Oxford University Press, 2004), p. 179.

neither anarchy nor hierarchy could be taken as a pre-determined starting point.⁶²⁰ Instead, a constitutional approach was presented as supporting a position that incorporated both without presuming either. It is in such a way that this understanding of constitutional theory can be seen as supporting a form of ‘middle-ground’, where the aim is “to achieve reconciliation between the two positions, generally by respecting elements in each.”⁶²¹ These connections between the constitutional process and the attempted seizure of the middle ground are also highlighted by the development of the constitutional process itself, as a response to the distinction between governance- and government-based approaches to constitutional thought.⁶²²

From this position, therefore, it might appear possible to argue that there are significant “links between global constitutionalism as defined through the political theory of constitutionalism and the middle-ground ethics of the English School as understood primarily through Martin Wight’s conception of rationalism.”⁶²³ This connection is only strengthened through a recognition that “[t]he central concern of the English School is with the problem of order”.⁶²⁴ Despite these close similarities, however, there is a particularly marked and distinguishing feature between an English School understanding and the constitutional approach outlined in the present discussion. In particular, it must be noted that the underlying question behind an English School approach to many of these issues concerns the extent to which “the inherited political framework provided by the international society of states continue[s] to provide an adequate basis for world order”.⁶²⁵ In contrast, the constitutional approach outlined thus far has adopted a perspective which asks to what extent world order, as understood through the operation of a global constitutional process, can continue to provide an adequate basis for a political framework based upon an international society of states.

It is in attempting to address issues from this point of view that the current discussion led to an examination of the polycentric capabilities of the HRC and the cosmopolitan possibilities presented through the OHCHR.⁶²⁶ In examining the commonalities behind these assessments, however, there remains no clear evidence of their inherent mutual exclusivity.

⁶²⁰ See *supra*, Chapter 4.

⁶²¹ Navari, C., ‘The Terrain of the Middle Ground’, in *Ethical Reasoning*, p. 1.

⁶²² See *supra*, Chapters 2 and 3.

⁶²³ Lang, p. 109.

⁶²⁴ Hurrell, A., ‘Order and Justice’, in Navari, C., and Green, D. M., (eds.), *Guide to the English School in International Studies*, (Chichester: John Wiley & Sons, 2014), p. 143.

⁶²⁵ *Ibid.*

⁶²⁶ See *supra*, Chapter 5. See also, *supra*, Chapter 6 (on the HRC) and Chapter 7 (on the OHCHR).

Instead, the possibility remains open that both a polycentric *and* a cosmopolitan approach to the global constitutional process could be adopted if the desirability of maintaining the liberal status quo was to be established. Unless and until the necessary reforms occur, however, the requirement of maintaining such a position falls to the responsibility of those states with the power to direct the operation of the global constitutional process. The extent to which the human rights machinery of the UN currently contributes to such a process is, therefore, minimal.

Bibliography

Articles

- Alexander, L., 'What are constitutions, and what should (and can) they do?', (2011) 28(1) *Social Philosophy and Policy* 1.
- Alizadeh, H., 'A Proposal for How to Realize Human Rights at the National and Regional Level: A Three-Pillar Strategy', (2011) 33 *Human Rights Quarterly* 826.
- Alston, P., 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council', (2006) 7 *Melbourne Journal of International Law* 185.
- Aoláin, F. N., 'Symposium on the United Nations High Commissioner for Human Rights: The First Ten Years of the Office, and the Next: Remarks', (2003-4) 35 *Columbia Human Rights Law Review* 523.
- Arbour, L., 'The Relationship Between the ICC and the UN Security Council', (2014) 20 *Global Governance* 195.
- Archibugi, D., 'Cosmopolitan democracy: a restatement', (2012) 42(1) *Cambridge Journal of Education* 9.
- Backer, L. C., 'Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering', (2009) 16 *Indiana Journal of Global Legal Studies* 85.
- Baer, S., 'Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism', (2009) 59 *University of Toronto Law Journal* 417.
- Besant, A., and Malo, S., 'Dim Prospects for the United Nations Human Rights Council', (2009) 4 *Yale Journal of International Affairs* 144.
- Boast, R. P., 'The "Spanish" Origins of International Law: A Historiographical Review', (2010) 41 *Victoria University of Wellington Law Review* 235.
- Bodansky, D., 'Is There an International Environmental Constitution?', (2009) 16(2) *Indiana Journal of Global Legal Studies* 565.
- Brown, G. W., 'Kantian Cosmopolitan Law and the Idea of a Cosmopolitan Constitution', (2006) 27(4) *History of Political Thought* 661.
- Brown, G. W., 'The constitutionalization of what?', (2012) 1(2) *Global Constitutionalism* 201.
- Capps, P., and Rivers, J., 'Kant's Concept of International Law', (2010) 16(4) *Legal Theory* 229.
- Cavallar, G., 'Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?', (2008) 10 *Journal of the History of International Law* 181.
- Cerny, P. G., 'Neomedievalism, Civil War and the New Security Dilemma: Globalisation as Durable Disorder', (1998) 1(1) *Civil Wars* 36.
- Chang, D., 'Structuring Constitutional Doctrine: Principles, Proof, and the Functions of Judicial Review', 58 *Rutgers Law Review* 777.
- Chesterman, S., *et al*, 'The Security Council and the Rule of Law', (2009) 103 *American Society of International Law Proceedings* 245.

- Christov, T., 'Liberal Internationalism Revisited: Grotius, Vattel, and the International Order of States', (2005) 10(6) *The European Legacy* 561.
- Chwaszcza, C., 'Beyond cosmopolitanism: towards a non-ideal account of transnational justice', (2008) 1(3) *Ethics & Global Politics* 115.
- Clapham, A., 'Creating the High Commissioner for Human Rights: The Outside Story', (1994) 5 *European Journal of International Law* 556.
- Clark, I., 'How Hierarchical Can International Society Be?', (2009) 23 *International Relations* 464.
- Claude, Jr., I. L., 'Peace and Security: Prospective Roles for the Two United Nations', (1996) 2 *Global Governance* 289.
- Cox, E., 'State Interests and the Creation and Functioning of the United Nations Human Rights Council', (2010) 6(1) *Journal of International Law and International Relations* 87.
- Cox, R. H. J., 'The Liability of European States for Climate Change', (2014) 30(78) *Utrecht Journal of International and European Law* 125.
- Craig, P., 'EU Accession to the ECHR: Competence, Procedure and Substance', (2013) 36 *Fordham International Law Journal* 1114.
- Cruft, R., 'Rights: Beyond Interest Theory and Will Theory?', (2004) 23(4) *Law and Philosophy* 347.
- Curran, E., 'Hobbes's Theory of Rights - A Modern Interest Theory', (2002) 6(1) *Journal of Ethics* 63.
- Dany, C., 'Janus-faced NGO Participation in Global Governance: Structural Constraints for NGO Influence', (2014) 20 *Global Governance* 419.
- Darrow, M., and Arbour, L., 'The Pillar of Glass: Human Rights in the Development Operations of the United Nations', (2009) 103 *American Journal of International Law* 446.
- Davies, M., 'Rhetorical Inaction? Compliance and the Human Rights Council of the United Nations', (2010) 35(4) *Alternatives: Global, Local, Political* 449.
- de Mello, S. V., 'Symposium on the United Nations High Commissioner for Human Rights: The First Ten Years of the Office, and the Next: Remarks', (2003-4) 35 *Columbia Human Rights Law Review* 509.
- Donnelly, J., 'Sovereign Inequalities and Hierarchy in Anarchy: American Power and International Society', (2006) 12(2) *European Journal of International Relations* 139.
- Downing, B. M., 'Medieval Origins of Constitutional Government in the West', (1989) 18(2) *Theory and Society* 213.
- Eckes, C., 'EU Accession to the ECHR: Between Autonomy and Adaptation', (2013) 76(2) *Modern Law Review* 254.
- Edwards, M. S., *et al.*, 'Sins of Commission? Understanding Membership Patterns on the United Nations Human Rights Commission', (2008) 61(3) *Political Research Quarterly* 390.
- Eskelinen, T., 'Global basic structure and institutions: The WTO as a practical example', (2011) 7(1) *Journal of Global Ethics* 47.
- Falk, R., and Strauss, A., 'On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty', (2000) 36(2) *Stanford Journal of International Law* 191.

- Fine, R., 'Cosmopolitanism and Human Rights: Radicalism in a Global Age', (2009) 40(1) *Metaphilosophy* 8.
- Ghanea, N., 'From UN Commission on Human Rights to UN Human Rights Council: One Step Forwards or Two Steps Sideways?', (2006) 55(3) *International and Comparative Law Quarterly* 695.
- Glanville, L., 'Intervention in Libya: From Sovereign Consent to Regional Consent', (2013) 14 *International Studies Perspectives* 325.
- Glanville, L., 'The Myth of "Traditional" Sovereignty', (2013) 57 *International Studies Quarterly* 79.
- Goodhart, M., and Taninchev, S. B., 'The New Sovereigntist Challenge for Global Governance: Democracy without Sovereignty', (2011) 55 *International Studies Quarterly* 1047.
- Graham, P., 'The Will Theory of Rights: A Defence', (1996) 15 *Law and Philosophy* 257.
- Grimm, D., 'The Constitution in the Process of Denationalization', (2005) 12(4) *Constellations* 447.
- Gross, L., 'The Peace of Westphalia, 1648-1948', (1948) 42(1) *American Journal of International Law* 20.
- Hannum, H., 'Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding', (2006) 28 *Human Rights Quarterly* 1.
- Hansen, M. H., 'The Mixed Constitution versus the Separation of Powers: Monarchical and aristocratic aspects of modern democracy', (2010) 31(3) *History of Political Thought* 509.
- Hamza, G., 'The classification (*divisio*) into "Branches" of Modern Legal Systems (Orders) and Roman Law Traditions', (2006) 8 *European Journal of Law Reform* 361.
- Harris-Short, S., 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child', (2003) 25(1) *Human Rights Quarterly* 130.
- Heinze, E., 'Principles for a Meta-Discourse of Liberal Rights: The Example of the European Convention on Human Rights', (1998-9) 9 *Indiana International and Comparative Law Review* 319.
- Hobson, J. M., and Sharman, J. C., 'The Enduring Place of Hierarchy in World Politics: Tracing the Social Logics of Hierarchy and Political Change', (2005) 11(1) *European Journal of International Relations* 63.
- Horowitz, J., 'OHCHR Pre-Deployment Human Rights Training: Adapting to the Evolving Roles, Responsibilities, and Influence of UN Human Rights Officers', (2010) 2(1) *Journal of Human Rights Practice* 28.
- Howland, T., 'Mirage, Magic, or Mixed Bag? The United Nations High Commissioner for Human Rights' Field Operation in Rwanda', (1999) 21 *Human Rights Quarterly* 1.
- Hug, S., and Lukács, R., 'Preferences or Blocs? Voting in the United Nations Human Rights Council', (2014) 9 *Review of International Organizations* 83.
- Jacobson, G. J., 'An Unconstitutional Constitution? A comparative perspective', (2006) 4 *International Journal of Constitutional Law* 460.
- Jackson, V. C., 'Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence', (2003) 35 *George Washington International Law Review* 521.

- Kang, D. C., 'Hierarchy, Balancing and Empirical Puzzles in Asian International Relations', (2003/4) 28(3) *International Security* 165.
- Kobrin, S. J., 'Back to the Future: Neomedievalism and the Postmodern Digital World Economy', (1998) 51(2) *Journal of International Affairs* 361.
- Kramer, M. H., 'Refining the Interest Theory of Rights', (2010) 55 *American Journal of Jurisprudence* 31.
- Kumar, R. A., 'Customary Law and Human Rights in Botswana: Accredited Survival of Conflicts', (2010) 2 *City University of Hong Kong Law Review* 277.
- Kumm, M., 'Constitutional rights as principles: On the structure and domain of constitutional justice', (2004) 2 *International Journal of Constitutional Law* 574.
- Lauren, P. G., "'To Preserve and Build on its Achievements and to Redress its Shortcomings": The Journey from the Commission on Human Rights to the Human Rights Council', (2007) 29 *Human Rights Quarterly* 307.
- Lavalle, A. G., 'NGOs, Human Rights and Representation', (2014) 20 *SUR: International Journal on Human Rights* 293.
- Law, D. S., and Versteeg, M., 'The Evolution and Ideology of Global Constitutionalism', (2011) 99 *California Law Review* 1163.
- Le Grange, L., '*Ubuntu, Ukama*, and the Healing of Nature, Self and Society', (2012) 44 (S2) *Educational Philosophy and Theory* 56.
- Little, R., 'The English School's Contribution to the Study of International Relations', (2000) 6(3) *European Journal of International Relations* 395.
- Martire, J., 'Habermas Contra Foucault: Law, Power and the Forgotten Subject', (2012) 23 *Law and Critique* 123.
- Marquez, X., 'Cicero and the Stability of States', (2011) 32(3) *History of Political Thought* 397.
- Maus, I., 'From Nation-State to Global State, or the Decline of Democracy', (2006) 13(4) *Constellations* 465.
- McCorkindale, C., and McKerrell, N., 'Assessing the Relationship between Legislative and Judicial Supremacy in the UK: Parliament and the Rule of Law after *Jackson*', (2012) 101(4) *The Round Table* 341.
- McGinnis, J. O., 'The World Trade Organization As A Structure of Liberty', (2004) 1(28) *Harvard Journal of Law & Public Policy* 81.
- Milewicz, K., 'Emerging Patterns of Global Constitutionalization: Toward a Conceptual Framework', (2009) 16(2) *Indiana Journal of Global Legal Studies* 413.
- Mitoma, G. T., 'Civil Society and International Human Rights: The Commission to Study the Organization of Peace and the Origins of the UN Human Rights Regime', (2008) 30 *Human Rights Quarterly* 607.
- Moss, L. C., 'Opportunities for Nongovernmental Organization Advocacy in the Universal Periodic Review Process at the UN Human Rights Council', (2010) 2(1) *Journal of Human Rights Practice* 122.
- Nader, L., 'The Role of NGOs in the UN Human Rights Council', (2007) 7(4) *International Journal on Human Rights* 7.

- Narine, S., 'Humanitarian Intervention and the Question of Sovereignty: The Case of ASEAN', (2005) 4(3/4) *Perspectives on Global Development and Technology* 465.
- Nedelsky, J., 'Reconceiving Rights and Constitutionalism', (2008) 7(2) *Journal of Human Rights* 139.
- Ostrom, V., 'Hobbes, Covenant, and Constitution', (1980) 10(4) *Publius* 83.
- Panizza, D., 'The "Freedom of the Sea" and the "Modern Cosmopolis" in Alberico Gentili's *De Iure Belli*', (2009) 30 *Grotiana* 88.
- Patomäki, H., 'Cosmological sources of critical cosmopolitanism', (2010) 36 (S1) *Review of International Studies* 181.
- Peters, A., and Armingeon, K., 'Global Constitutionalism from an Interdisciplinary Perspective', (2009) 16(2) *Indiana Journal of Global Legal Studies* 385.
- Piccone, T., 'The contribution of the UN's special procedures to national level implementation of human rights norms', (2011) 15(2) *The International Journal of Human Rights* 206.
- Pogge, T., 'Cosmopolitanism and Sovereignty', (1992) 103 *Ethics* 48.
- Pollack, L. H., '*Marbury v. Madison*: What did John Marshall decide and why?', (2004) 148(1) *Proceedings of the American Philosophical Society* 1.
- Quane, H., 'Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?', (2013) 33(4) *Oxford Journal of Legal Studies* 675.
- Rajagopal, B., 'Lipstick on a Caterpillar? Assessing the New U.N. Human Rights Council through Historical Reflection', (2007) 13 *Buffalo Human Rights Law Review* 7.
- Remer, G., 'Ciceronian *Ius Gentium* and World Legislation', (2011) 8 *International Organizations Law Review* 225.
- Ryu, Y., and Ortuoste, M., 'Democratization, regional integration, and human rights: the case of the ASEAN intergovernmental commission on human rights', (2014) 27(3) *The Pacific Review* 357.
- Salas, V. M., 'Francisco de Vitoria on the *Ius Gentium* and the American *Indios*', (2011-12) 10(2) *Ave Maria Law Review* 331.
- Scholte, J. A., 'Civil Society and Democratically Accountable Global Governance', (2004) 39 *Government and Opposition* 211.
- Schwöbel, C. E. J., 'Organic Global Constitutionalism', (2010) 23 *Leiden Journal of International Law* 529.
- Schwöbel, C. E. J., 'Situating the Debate', (2010) 8(3) *International Journal of Constitutional Law* 611.
- Scott, D., 'Norms of Self-Determination: Thinking Sovereignty Through', (2012) 4 *Middle East Law and Governance* 195.
- Seligman, S., 'Politics and principle at the UN Human Rights Commission and Council (1992-2008)', (2011) 17(4) *Israel Affairs* 520.
- Slaughter, A.-M., and Burke-White, W., 'An International Constitutional Moment', (2002) 43 *Harvard International Law Journal* 1.

- Smith, R., “‘To see Themselves as Others see Them’: The Five Permanent Members of the Security Council and the Human Rights Council’s Universal Periodic Review”, (2013) 35 *Human Rights Quarterly* 1.
- Steiger, H., ‘From the International Law of Christianity to the International Law of the World Citizen’, (2001) 3 *Journal of the History of International Law* 180.
- Stirk, P. M. R., ‘The Westphalian model and sovereign equality’, (2012) 38 *Review of International Studies* 641.
- Stone, A., ‘What is a supranational constitution? An essay in international relations theory’, (1994) 56(3) *Review of Politics* 441.
- Stone-Sweet, A., ‘Constitutionalism, Legal Pluralism and International Regimes’, (2009) 16(2) *Indiana Journal of Global Legal Studies* 621.
- Straumann, B., ‘Is Modern Liberty Ancient? Roman Remedies and Natural Rights in Hugo Grotius’ Early Works on Natural Law’, (2009) 27 *Law & History Review* 55.
- Straumann, B., ‘Constitutional Thought in the Late Roman Republic’, (2011) 32(2) *History of Political Thought* 281.
- Upton, H., ‘Right-Based Morality and Hohfeld’s Relations’, (2000) 4(3) *The Journal of Ethics* 237.
- van Duffel, S., ‘In Defence of the Will Theory of Rights’, (2012) 18 *Res Publica* 321.
- van Duffel, S., ‘The Nature of Rights Debate Rests on a Mistake’, (2012) 93 *Pacific Philosophical Quarterly* 104.
- van Mulligen, J. G., ‘Global Constitutionalism and the Objective Purport of the International Legal Order’, (2011) 24 *Leiden Journal of International Law* 277.
- Vlcek, W., ‘Crafting human rights in a constitution: Gay rights in the Cayman Islands and the limits to global norm diffusion’, (2013) 2(3) *Global Constitutionalism* 345.
- Vijke, M. J., ‘The promise of new institutionalism: explaining the absence of a World or United Nations Environment Organisation’, (2013) 13 *International Environmental Agreements* 153.
- Volk, C., ‘Why Global Constitutionalism Does not Live up to its Promises’, (2012) 4 *Goettingen Journal of International Law* 551.
- Volkman, C. S., ‘Evaluating the Impact of Human Rights Work: The Office of the United Nations High Commissioner for Human Rights and the Reduction of Extrajudicial Executions in Colombia’, (2012) 4(3) *Journal of Human Rights Practice* 396.
- Waldron, J., ‘The Role of Rights in Practical Reasoning: “Rights” versus “Needs”’, (2000) 4(1/2) *Journal of Ethics* 115.
- Walker, N., ‘Taking Constitutionalism Beyond the State’, (2008) 56(3) *Political Studies* 519.
- Watson, A., ‘Systems of States’, (1990) 16(2) *Review of International Studies* 99.
- Watson, J. S., ‘Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law’, [1979] (3) *University of Illinois Law Forum* 609.
- Waugh, Fr. R. O'Brien, ‘Natural Law’, (1966) 16 *University of New Brunswick Law Journal* 34.
- Weiss, T. G., *et al*, ‘The “Third” United Nations’, (2009) 15 *Global Governance* 123.

- Wendt, A., 'Anarchy is What States Make of It: the social construction of power and politics', (1992) 46(2) *International Organization* 391.
- Wendt, A., 'Why a World State is Inevitable', (2003) 9(4) *European Journal of International Relations* 491.
- Wiener, A., *et al*, 'Global constitutionalism: Human rights, democracy and the rule of law', (2012) 1(1) *Global Constitutionalism* 1.
- Wilkins, B., 'International Human Rights and National Discretion', (2002) 6(4) *Journal of Ethics* 373.
- Wouters, J., and Odermatt, J., 'Comparing the "Four Pillars" of Global Economic Governance: A Critical Analysis of the Institutional Design of the FSB, IMF, World Bank, and WTO', (2014) 17 *Journal of International Economic Law* 49.
- Yasuaki, O., 'When was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective', (2000) 2 *Journal of the History of International Law* 1.
- Zolo, D., 'A Cosmopolitan Philosophy of International Law? A Realist Approach', (1999) 12(4) *Ratio Juris* 429.

Books

- Alexander, L., (ed.), *Constitutionalism: philosophical foundations*, (Cambridge: Cambridge University Press, 1998).
- Alexy, R., *A Theory of Constitutional Rights*, (Oxford: Oxford University Press, 2002).
- Allott, P., *The Health of Nations: Society and Law beyond the State*, (Cambridge: Cambridge University Press, 2002).
- Bates, E., *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, (Oxford: Oxford University Press, 2010).
- Bellamy, A. J., (ed.), *International Society and its Critics*, (Oxford: Oxford University Press, 2005).
- Bellamy, R., *Political Constitutionalism*, (Cambridge: Cambridge University Press, 2007).
- Blythe, J. M., *Ideal Government and the Mixed Constitution in the Middle Ages*, (Oxford: Princeton University Press, 1992).
- Boyle, K., (ed.), *New Institutions for Human Rights Protection*, (Oxford: Oxford University Press, 2009).
- Braumoeller, B. F., *The Great Powers and the International System: Systemic Theory in Empirical Perspective*, (Cambridge: Cambridge University Press, 2013).
- Brown, N. J., *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government*, (New York, USA: State University of New York Press, 2002).
- Brownlie, I., *Principles of Public International Law*, (6th edn.), (Oxford: Oxford University Press, 2003).
- Brysk, A., (ed.), *Globalization and Human Rights*, (London: University of California Press, 2002).

- Bull, H., *et al.* (eds.), *Hugo Grotius and International Relations*, (Oxford: Oxford University Press, 1992).
- Bull, H., *The Anarchical Society: A Study of Order in World Politics*, (4th edn.), (Basingstoke: Palgrave Macmillan, 2012).
- Bull, H., and Watson, A., (eds.), *The Expansion of International Society*, (Oxford: Clarendon Press, 1994).
- Carlyle, R. W., and Carlyle, A. J., *A History of Mediaeval Political Theory in the West*, (Vol. I), (London: William Blackwood and Sons, 1903).
- Cassese, A., (ed.), *Realizing Utopia: The Future of International Law*, (Oxford: Oxford University Press, 2012).
- Cohen, J. L., *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*, (Cambridge: Cambridge University Press, 2012).
- Colás, A., *International Civil Society: Social Movements in World Politics*, (Cambridge: Polity Press, 2002).
- Costa, P., and Zolo, D., (eds.), *The Rule of Law: History, Theory, Criticism*, (Dordrecht: Springer, 2007).
- Darian-Smith, E., and Fitzpatrick, P., (eds.), *Laws of the Postcolonial*, (Ann Arbor, USA: University of Michigan Press, 1999).
- DeMars, W. E., *NGOs and Transnational Networks: Wild Cards in World Politics*, (London: Pluto Press, 2005).
- Deudney, D. H., *Bounding Power: Republican Security Theory from the Polis to the Global Village*, (Woodstock: Princeton University Press, 2007).
- Deng, F. M., *Identity, Diversity, and Constitutionalism in Africa*, (Washington, USA: United States Institute of Peace Press, 2008).
- de Vattel, E., (trans. Fenwick, C. G.), *The Law of Nations or The Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, (Washington, USA: Carnegie Institution of Washington, 1916).
- Dicey, A. V., *Law of the Constitution*, (9th edn.), (London: Macmillan, 1939).
- Dobner, P., and Loughlin, M., (eds.), *The Twilight of Constitutionalism*, (Oxford: Oxford University Press, 2010).
- Donnelly, J., *Universal Human Rights in Theory and Practice*, (3rd edn.), (London: Cornell University Press, 2013).
- Dunoff, J. L., and Trachtman, J. P., (eds.), *Ruling the World?: Constitutionalism, International Law, and Global Governance*, (Cambridge: Cambridge University Press, 2009).
- Dworkin, R., *Taking Rights Seriously*, (London: Duckworth, 2009).
- Edmundson, W. A., *An Introduction to Rights*, (Cambridge: Cambridge University Press, 2004).
- Ewing, A. C., *The Individual, The State and World Government*, (New York, USA: Macmillan, 1947).
- Fassbender, B., *The United Nations Charter as the Constitution of the International Community*, (Leiden: Martinus Nijhoff, 2009).

- Frost, M., *Constituting Human Rights: Global civil society and the society of democratic states*, (London: Routledge, 2002).
- Frost, M., *Global Ethics: Anarchy, Freedom and International Relations*, (London: Routledge, 2009).
- Frost, M., (ed.), *International Ethics*, (London: Sage, 2011).
- Gaer, F. D., and Broecker, C. L., (eds.), *The United Nations High Commissioner for Human Rights: Conscience for the World*, (Leiden: Martinus Nijhoff, 2014).
- Germain, R., and Kenny, M., *The Idea of Global Civil Society: Politics and ethics in a globalizing era*, (London: Routledge, 2005).
- Ghai, Y., and Cottrell, J., *The Millennium Declaration, Rights, and Constitutions*, (Oxford: Oxford University Press, 2011).
- Gilson, E., (ed.), *St. Thomas Aquinas 1274-1974 Commemorative Studies*, (Toronto, Canada: Pontifical Institute of Medieval Studies, 1974).
- Glanville, L., *Sovereignty and the Responsibility to Protect: A New History*, (London: University of Chicago Press, 2014).
- Gray, J., *Two Faces of Liberalism*, (Cambridge: Polity Press, 2000).
- Guyer, P., *Kant*, (London: Routledge, 2006).
- Habermas, J., *The Past as Future*, (Cambridge: Polity Press, 1994).
- Habermas, J., (trans., Pensky, M.), *The Postnational Constellation*, (Cambridge: Polity Press, 2001).
- Hall, J. W., *The Cambridge History of Japan Volume 4: Early Modern Japan*, (Cambridge: Cambridge University Press, 1991).
- Harrison, R., *Hobbes, Locke and Confucius's Masterpiece*, (Cambridge: Cambridge University Press, 2003).
- Hart, H. L. A., *The Concept of Law*, (3rd edn.), (Oxford: Oxford University Press, 2012).
- Heater, D., *World Citizenship and Government*, (London: Macmillan Press, 1996).
- Hobsbawm, E. J., *Nations and Nationalism Since 1780: programme, myth, reality*, (2nd edn.), (Cambridge: Cambridge University Press, 1992).
- Hockett, H. C., *The Constitutional History of the United States 1776-1826*, (New York, USA: Macmillan, 1939).
- Hohfeld, W. N., *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, (Westport, USA: Greenwood Press, 1919), (Reprinted, 1978).
- Ingram, J. D., *Radical Cosmopolitics: The Ethics and Politics of Democratic Universalism*, (New York, USA: Columbia University Press, 2013).
- Jackson, R. H., *Quasi-states: Sovereignty, International Relations and the Third World*, (Cambridge: Cambridge University Press, 1990).
- Jordan, L., and van Tuijl, P., (eds.), *NGO Accountability: Politics, Principles and Innovations*, (London: Earthscan, 2006).
- Kamminga, M. T., and Scheinin, M., (eds.), *The Impact of Human Rights Law on General International Law*, (Oxford: Oxford University Press, 2009).

- Kaufman, S. J., *et al*, (eds.), *The Balance of Power in World History*, (Basingstoke: Palgrave Macmillan, 2007).
- Kelsen, H., (trans., Wedberg, A.), *General Theory of Law and State*, (Cambridge, USA: Harvard University Press, 1946).
- Kelsen, H., *Principles of International Law*, (New York, USA: Rinehart and Company, Inc., 1952).
- Klabbers, J., *et al*, (eds.), *The Constitutionalization of International Law*, (Oxford: Oxford University Press, 2009).
- Koskenniemi, M., *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, (Cambridge: Cambridge University Press, 2002).
- Krasner, S. D., *Sovereignty: Organized Hypocrisy*, (Princeton, New Jersey: Princeton University Press, 1999).
- Lake, D., *Hierarchy in International Relations*, (London: Cornell University Press, 2009).
- Larkins, J., *From Hierarchy to Anarchy*, (New York, USA: Palgrave Macmillan, 2009).
- Laslett, P., (ed.), *John Locke: Two Treatises of Government*, (Cambridge: Cambridge University Press, 1988).
- Lauterpacht, H., *An International Bill of the Rights of Man*, (Oxford: Oxford University Press, 1945), (Reprinted 2013).
- Lindblom, A.-K., *Non-Governmental Organisations in International Law*, (Cambridge: Cambridge University Press, 2005).
- Little, R., *The Balance of Power in International Relations*, (Cambridge: Cambridge University Press, 2007).
- Masterman, R., *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom*, (Cambridge: Cambridge University Press, 2010).
- May, L., *Limiting Leviathan: Hobbes on Law and International Affairs*, (Oxford: Oxford University Press, 2013).
- McDowell, G. L., *The Language of Law and the Foundations of American Constitutionalism*, (Cambridge: Cambridge University Press, 2010).
- McIlwain, C. H., *Constitutionalism: Ancient and Modern*, (Revised edn.), (New York, USA: Cornell University Press, 1947).
- Mertus, J. A., *The United Nations and Human Rights: A guide for a new era*, (2nd edn.), (New York, USA: Routledge, 2009).
- Miller, J. D. B., and Vincent, R. J., *Order and Violence: Hedley Bull and International Relations*, (Oxford: Clarendon Press, 1990).
- Mills, K., *Human Rights in the Emerging Global Order: A New Sovereignty?*, (Basingstoke: Macmillan Press, 1998).
- Morgan, M. L., (ed.), *Classics of Moral and Political Theory*, (2nd edn.), (Cambridge: Hackett, 1996).
- Morgenthau, H. J., *Politics Among Nations: The struggle for power and peace*, (7th edn.), (Boston, USA: McGraw-Hill Higher Education, 2006).

- Navari, C., (ed.), *Ethical Reasoning in International Affairs: Arguments from the Middle Ground*, (Basingstoke: Palgrave Macmillan, 2013).
- Navari, C., and Green, D. M., (eds.), *Guide to the English School in International Studies*, (Chichester: John Wiley and Sons, 2014).
- Paolini, A. J., et al, (eds.), *Between Sovereignty and Global Governance: The United Nations, the State and Civil Society*, (Basingstoke: Macmillan, 1998).
- Parson, E. A., *Protecting the Ozone Layer: Science and Strategy*, (Oxford: Oxford University Press, 2003).
- Patrick, D., *Old Testament Law*, (London: SCM Press, 1985).
- Pemberton, J., *Sovereignty: Interpretations*, (Basingstoke: Palgrave Macmillan, 2009).
- Pogge, T., *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, (2nd edn.), (Cambridge: Polity Press, 2008).
- Polin, R., *Plato and Aristotle on Constitutionalism*, (Aldershot: Ashgate, 1998).
- Poznanski, C., *The Rights of Nations*, (London: Routledge, 1942).
- Ramcharan, B. G., *The UN Human Rights Council*, (London: Routledge, 2011).
- Rawls, J., *The Law of Peoples*, (London: Harvard University Press, 1999).
- Sadurski, W., *Moral Pluralism and Legal Neutrality*, (London: Kluwer Academic Publishers, 1990).
- Schmitt, C., *Legality and Legitimacy*, (London: Duke University Press, 2004).
- Strong, C. F., *Modern Political Constitutions*, (London: Sidgwick and Jackson, 1930).
- Teitel, R., *Humanity's Law*, (Oxford: Oxford University Press, 2011).
- Teschke, B., *The Myth of 1648: Class, Geopolitics, and the Making of Modern International Relations*, (London: Verso, 2009).
- Thornhill, C., *A Sociology of Constitutions*, (Cambridge: Cambridge University Press, 2011).
- Tierney, B., *Church Law and Constitutional Thought in the Middle Ages*, (London: Variorum Reprints, 1979).
- Trachtman, J. P., *The Future of International Law*, (Cambridge: Cambridge University Press, 2013).
- Trindade, A. A. C., *The Access of Individuals to International Justice*, (Oxford: Oxford University Press, 2011).
- Tuck, R., *Philosophy and Government 1572 - 1651*, (Cambridge: Cambridge University Press, 1993).
- Tuck, R., (ed.), *Thomas Hobbes: Leviathan*, (Cambridge: Cambridge University Press, 1996).
- Tuck, R., (ed.), *Hugo Grotius: The Rights of War and Peace*, (Indianapolis, USA: Liberty Fund, 2005).
- Tucker, R., *The Inequality of Nations*, (London: Martin Robertson, 1977).
- Vinogradoff, P., *Outlines of Historical Jurisprudence*, (Vol. II), (London: Oxford University Press, 1922).
- Waldron, J., (ed.), *Theories of Rights*, (Oxford: Oxford University Press, 1984).

Wall, I. R., *Human Rights and Constituent Power: Without Model or Warranty*, (Oxon: Routledge, 2012).

Waltz, K. N., *Theory of International Politics*, (London: McGraw-Hill, 1979).

Weiss, T. G., *et al*, *Ahead of the Curve? UN Ideas and Global Challenges*, (Bloomington, USA: Indiana University Press, 2001).

Weiss, T. G., *et al*, *The United Nations and Changing World Politics*, (7th edn.), (Boulder, USA: Westview Press, 2014).

Wells, H. G., *The Time Machine*, (London: Pan Books Ltd., 1953).

Wight, M., *Four Seminal Thinkers in International Theory: Machiavelli, Grotius, Kant, and Mazzini*, (Oxford: Oxford University Press, 2004).

Yunker, J. A., *The Idea of World Government*, (Oxon: Routledge, 2011).

Zurn, M., *et al*, *Rule of Law Dynamics in an Era of International and Transnational Governance*, (Cambridge: Cambridge University Press, 2012).

Websites

<http://aichr.org> (last accessed, 06/05/15).

<http://www.ohchr.org> (last accessed, 06/05/15).

<http://www.un.org> (last accessed, 06/05/15).

<http://www.unfe.org> (last accessed, 06/05/15).