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**Book Part — Published Version**

## On the History and Theory of Global Constitutionalism

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*Suggested Citation:* Kumm, Mattias (2018) : On the History and Theory of Global Constitutionalism, In: Suami, Takao Peters, Anne Vanoverbeke, Dimitri Kumm, Mattias (Ed.): Global Constitutionalism from European and East Asian Perspectives, ISBN 978-1-108-26487-7, Cambridge University Press, Cambridge, pp. 168-199, <https://doi.org/10.1017/9781108264877.006>

This Version is available at:

<https://hdl.handle.net/10419/237108>

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## On the History and Theory of Global Constitutionalism

MATTIAS KUMM

### 1 Contemporary challenges to global constitutionalism

Modern constitutionalism has its political origins in the eighteenth-century American and French revolutions. Even though the connection between the national and the international was a much discussed topic in eighteenth-century political thought, international jurists did not discuss international law in constitutionalist terms until the twentieth century. A first wave of constitutionalist writing took place in the interwar period until after World War II, when the emergence of the Cold War put an end to it. A second wave was initiated in the 1990s and 2000s after the end of the Cold War, this time more sustained and leading to a greater depth and breadth of writing.<sup>1</sup>

Constitutionalist narratives are very much part and parcel of the history of Western legal and political thought and have been connected to periods of Western hegemony. What reasons do we have to believe that the global constitutionalist universalist project is different from its other Western ideological predecessors with universalist pretensions, such as Christianity or ‘Western civilisation’, masking particular interests and cultural practices as universal to justify hegemony? Can global constitutionalism be sufficiently civilisationally and culturally inclusive? Can it remain relevant when Western hegemony is arguably receding and the balance of power is shifting in favour of other regions, most notably Asia?

<sup>1</sup> See Anthony F. Lang and Antje Wiener (eds.), *Handbook on Global Constitutionalism* (London: Edward Elgar, 2017); see also Anne Peters, ‘Global constitutionalism’, in Michael T. Gibbon (ed.), *The Encyclopedia of Political Thought* (Malden, MA: Wiley Blackwell, 2015), pp. 1–4. For an example of the breadth and depth of writing, see also the material published in *Global Constitutionalism*, a major Cambridge University Press journal published since 2012.

To engage some of these questions, the following will provide some basic ideas towards an affirmative genealogy of global constitutionalism. The idea of an affirmative genealogy is best explained by reference to two related but different ideas: critical genealogies and progress narratives. Critical genealogies use historical analysis to trace the emergence and use of concepts as a strategy of power, as exemplified in the work of Nietzsche or Foucault. They have a delegitimising thrust. Affirmative genealogies, on the other hand, illuminate the plausibility of the normative claims that are made in the context of the emergence and use of certain concepts.<sup>2</sup> Affirmative genealogies are distinct from progress narratives, in that they neither imply that progress over time is historically inevitable or linear nor suggest that the relevant concepts and ideas are themselves not potentially abused or hypocritically applied. Notwithstanding their affirmative character, affirmative genealogies are more attuned to the complexities, frailties and ambivalence of progress, without giving up on the idea of the progressive clarification and realisation of normative ideals across time and space.

In what follows the first section will provide some conceptual clarifications and historical contextualisation of the idea of global constitutionalism, building on but expanding and deepening the description provided in the Introduction of this book.<sup>3</sup> The second section will provide thumbnail sketches of some central historical events and issues for the history of constitutionalism as it relates to Asia. The conclusion summarises how these histories tend to strengthen the grounds for embracing the universalist claims underlying constitutionalist ideals. Global constitutionalism can be civilisationally and culturally inclusive, notwithstanding its origins. And it may well remain relevant even if Western hegemony is receding and the balance of power is shifting in favour of Asia.

## 2 Clarifying the issue: what is global constitutionalism?

### 2.1 *Global constitutionalism as a jurisprudential approach*

Global constitutionalism is not a political project to establish a world state under a global constitution. If one insists on the conceptual

<sup>2</sup> Here I only partially follow Hans Joas, *The Sacredness of the Person* (Washington, DC: Georgetown University Press, 2013), chapter 4, whose general positioning of the idea of an affirmative genealogy between Kant and Nietzsche, and, in modern forms, Habermas and Foucault, I share, without seeking to rely on the somewhat convoluted ideas of Ernst Tröeltsch.

<sup>3</sup> See Introduction, Section 2.

distinction between law and politics, as one should,<sup>4</sup> it qualifies as a distinctly legal project. As a legal project it is not an attempt to describe existing international legal structures as equivalents or analogues to domestic constitutional regimes, suggesting that the international legal domain is somehow fundamentally like the state domain. In fact, global constitutionalism is not preoccupied with the concept of the state at all, even though it recognises the central role that states play both in people's lives and in international law.

Instead, global constitutionalism is best described as a jurisprudential approach: it provides a cognitive frame,<sup>5</sup> or mindset,<sup>6</sup> for understanding and engaging the world of law. A jurisprudential approach is less than a fully worked-out theory. There is a place for competing theories of distinct legal issues or areas of the law within a jurisprudential approach.<sup>7</sup> Furthermore, whereas not every lawyer will have a full-fledged theory of the law or particular subparts of it, all lawyers have a cognitive frame or mindset with which they engage legal materials, not only global constitutionalists. Legal materials do not in and of themselves solve legal problems. Questions arise how to identify materials that are properly legal, whether they are applicable, how they are to be interpreted, how conflicts between them ought to be resolved, etc. Here a cognitive frame or mindset provides, first, the resources to construct a distinctively legal order out of inchoate materials, second, relatively concrete ideas about what types of arguments count as plausible and convincing arguments in various contexts and, third, a considerable degree of internal coherence and determinacy. Most lawyers are socialised into adopting a particular cognitive frame or mindset. That is why they often believe that they have no theory and that what they do is simply what you do when you are a lawyer. But once cognitive frames or mindsets operating in law are elevated to consciousness and become the subject matter for explicit reflection and argument, they take the form of jurisprudential accounts.

<sup>4</sup> Of course, establishing a certain kind of law is the result of a political decision, and a commitment to the rule of law can be described as a political commitment, but legal reasoning and legal decision making rightly understood follows its own logic.

<sup>5</sup> See Mattias Kumm, 'The cosmopolitan turn in constitutionalism', in Jeffrey L. Dunoff and Joel P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009), pp. 258–325.

<sup>6</sup> See Martti Koskeniemi, 'Constitutionalism as a mindset: reflections on Kantian themes about international law and globalization' (2007) 8 *Theoretical Inquiries in Law* 9–36.

<sup>7</sup> This accounts at least in part for the differences between global constitutionalists such as Anne Peters, Geir Ulfstein, Miguel Maduro, Jan Klabbers, Yoon Jin Shin, Daniel Halberstam, others and myself.

In that sense a jurisprudential account is the reflexive form of professional consciousness. Competing jurisprudential accounts typically have considerable overlaps in what they identify as a legally relevant fact and a legally relevant argument, so that in legal practice there will be many occasions where underlying jurisprudential disagreement will be of no practical relevance. But when there is disagreement among well-informed, high-level lawyers on a particular issue – think about disagreements among International Court of Justice (ICJ) or Permanent Court of International Justice (PCIJ) judges, or judges on the Inter-American Human Rights Court of the European Court of Human Rights (ECtHR) – then that disagreement will often be a function of the underlying jurisprudential approach embraced by the judge.

In international law the contemporary<sup>8</sup> mainstream<sup>9</sup> competitors of global constitutionalism as a jurisprudential approach are either *will-based* (*voluntarist*) or *conventionalist positivist* jurisprudential accounts. A will-based account is one that insists that ultimately all law binding on a state is one that the state must have consented to. If you are a voluntarist, then you believe that treaty law is the paradigmatic form of international law, customary international law reflects the idea of implicit consent and general principles of law are a relatively insignificant catch-all category dealing with trivial or otherwise uncontroversial propositions of law. A conventionalist account seeks to tie all law to conventions. A conventionalist believes that customary international law is the paradigmatic form of law, with treaties playing an important role in the formation of customary international law while retaining an independent transactional role due to the customary principle *pacta sunt servanda*, whereas general principles play a residual role largely subsumed by custom. A global constitutionalist account insists that certain

<sup>8</sup> Historically the precursor to international law – the *jus publicum Europaeum* – was conceived either within the Christian scholastic natural law tradition (from Vittoria and Suarez to Grotius) or, in the nineteenth century, in civilisational, historicist or naturalist terms; see Martti Koskiennemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001).

<sup>9</sup> What makes these accounts mainstream is that they all take seriously the idea of an internal point of view relating to the law. Various ‘critical’ approaches, such as Marxism, postcolonialism, feminism, etc., engage international law from an external point of view, reflecting, for example, on how law reifies pre-existing power structures along lines of geography, class or gender. An interesting third kind of approach, that is neither fully external nor internal, are poststructural theories such as those developed by David Kennedy, *International Legal Structures* (Baden-Baden: Nomos, 1987) and Martti Koskiennemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 1989).

moral principles are constitutive of international law and that the content of these principles is in part more concretely shaped by conventions that settle reasonable disagreement about its meaning. Multilateral treaties are both a way to establish custom and of normative significance because of the moral significance of the self-determination-enhancing possibility of transactional relations between states within a general public law framework. Note how all three approaches recognise treaties, customary law and general principles as a source of law. More generally in practice most legal issues are not sensitive to differences of underlying jurisprudential approaches. There is much qualified lawyers are able to agree on, simply by virtue of being qualified lawyers. But competing jurisprudential approaches are to a large extent the reason for there being different positions in debates about doctrinal details relating to the sources of law and a wide range of other basic doctrinal issues. Take the example of *jus cogens*. The idea that there is such a thing as norms enjoying *jus cogens* status is nowadays undisputed, as are certain paradigm examples of such norms, such as the prohibition of genocide. Because this concept and its core instantiations are part and parcel of what states have consented to, is conventionally accepted and justified as a matter of principle, there is basic agreement on this. But voluntarists, conventionalists and constitutionalists are likely to disagree not just about what norms qualify as *jus cogens* but also about how to identify them. To take a stylised rendition of an extreme example: when the European Court of First Instance in an obiter dictum in the first *Kadi* decision claimed that all clear and serious violations of an abstract human right, including the right to property or access to a court, qualify as a *jus cogens* violation,<sup>10</sup> neither voluntarists nor conventionalists could conceivably be persuaded, because there was very little evidence supporting such a claim from either point of view. But constitutionalists have reasons to take seriously such a claim. If human rights are constitutive general principles of the global order, then the claim that any act or agreement violating those principles in a clear and serious way is null and void appears perfectly plausible. This serves as an example not only of how different jurisprudential approaches and the mindsets they produce have a different understanding of the moral grounds of international law but of how this different understanding has implications for the interpretation of law.<sup>11</sup> Here it must suffice to

<sup>10</sup> See Case T-306/01, *Yusuf and Al-Barakaat Int'l Found. v. Council and Comm'n*, 2005 E.C.R. II-03649, paras. 343–345.

<sup>11</sup> On these issues I follow Ronald Dworkin, *A Matter of Principle* (Oxford: Clarendon, 1985).

have defined global constitutionalism as a distinctive jurisprudential approach competing with other jurisprudential approaches in international law and to have made plausible the idea that jurisprudential approaches are not only of theoretical interest but at the heart of much of what is interesting and controversial in legal practice.

The next section will attempt to provide a better understanding of global constitutionalism as a jurisprudential approach, starting with the basic ideas and constitutive principles of international law as they were established in the twentieth century. As will become clear, at the heart of a global constitutionalist account of international law are certain principles drawn from the eighteenth-century tradition of the American and French revolutions as constitutive for the constructive understanding, interpretation and progressive development of international law. Note how the various parts of the account provided may on occasion deviate from conventional emphases and understandings of international law and may in part be controversial. That should not be surprising: The particular emphasis and understanding the account puts forward interprets historical shifts in light of a constitutionalist mindset and may be in tension with voluntarist and conventionalist accounts. But as will hopefully become clear, the historical facts lend themselves to such an interpretation. Or, to put it more strongly: a constitutionalist reading presents the most plausible interpretation of the transformation of international law in the twentieth century.

## 2.2 *Global constitutionalism: basic principles*

Between the end of World War I and the end of World War II, international law went through fundamental transformations.<sup>12</sup> Between the establishment of the League of Nations and of the United Nations, resulting from the shocks of World War I and World War II, the legal and political world had been radically reconstituted as a matter of principle. Under the leadership of the United States, allies and other state representatives effectively acted as revolutionary agents of the international community to establish the foundations for a new legal and political world ultimately grounded in principles that had previously

<sup>12</sup> Of course, describing the whole period between 1918 and 1945 as one of transformation does not imply that the transformation was a twenty-seven-year gradual process. World War II and its end in particular can be characterised either as a rupture or as an acceleration and dynamisation of the transformative process.

been alien to international law: these were constitutionalist principles, genealogically connected to basic normative commitments of the eighteenth-century American and French revolutions, highly contested throughout the nineteenth and early twentieth centuries in most European states, but set to gain hegemonic status with the victory of the Allies after World War II and fully achieving that status after the end of the Cold War. The commitments of the rule of law, democracy and human rights would become central also to international law. To be sure, there were also structural continuities in international law: both before 1918 and after 1945 states remain the central actors of the international system. And the mechanisms through which the shift was brought about were treaties formally consented to by states. As in the aftermath of any other revolution many areas of the law were not directly and immediately effected. But that basic structural Westphalian continuity covers up more than it reveals. There are three basic structural features of the new world order that justify speaking of a revolutionary shift and connecting that shift to constitutionalism.

First, the introduction into international law of the idea of *self-determination as a general principle*<sup>13</sup> in 1945 ultimately brought about the end of empires and led to the *genuine universalisation of statehood* for the first time. The subjects of international law were no longer European sovereigns, who competed to divide up the world between them using rules of international law to structure the 'great game' of competitive empire building. Nor was the issue merely to gradually expand the circle of subjects to include other powers depending on the degree to which they were recognised as *civilised* by established Western powers. Instead, self-determination established as a general principle in the UN Charter gradually led to the full universalisation of statehood as the process of *decolonisation* took its course starting in the 1940s but gathering steam in the 1950s and 1960s and helped abolish the primary forms of international law-enabled domination. There were 51 original member states of the United Nations. Today, there are 193 members of the United Nations

<sup>13</sup> To cabin in its transformative potential and reflect British and French sensibilities, the principle was originally described by Western international scholars as a 'political principle', until, partly as an impatient reaction to this downgrading, it was revitalised as a 'right to self-determination' in Art. 1 of the ICCPR and ICESCR in 1966. The principle was originally introduced in the Treaty of Versailles as a more limited principle effectively governing only the dismantling of empires and the resolution of territorial conflict of those on the losing side of World War I. After World War II, such cabining in would prove to be untenable.



as formally equal sovereigns. Much of that shift is connected to the end of empires and the realisation of the principle of self-determination.

Second, the idea of statehood itself was radically reconceived. Internally it was tied to its function to respect, protect and fulfil human rights, echoing the normative commitments of the great eighteenth-century revolutions in the United States and France. States after 1945 were legally bound to comply with human rights as general principles of law referred to in the UN Charter as a general idea and worked out and concretised in the UN Declaration of Human Rights in 1948 and multilateral treaties such as the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) negotiated in the 1960s. Whereas empire-ending decolonisation concerned the external dimension of self-determination and legally delegitimised certain forms of domination by foreign powers, the internal dimension concerned the structure of government institutions and the status of the individual. Once decolonisation had been effectively achieved by the 1970s, human rights came into their own ever more powerfully as a widely embraced lingua franca for the critique and reform of state practices.

The state itself now was understood not merely as an effective power configuration over territory and people but as an institutional framework within which those governed by it would practise self-determination, both individually and collectively. The task of public authorities was now to respect, protect and fulfil the human rights of those it was governing. Furthermore, government structures themselves had to meet requirements that reflected this commitment. To be sure, it was up to citizens to determine the concrete structure of the institutions that would govern them. But respecting human rights also implies the establishment of a government legitimised by free and fair periodic elections<sup>14</sup> and an independent judiciary, in short, the basic features of a liberal constitutional democracy.<sup>15</sup> Ultimately the

<sup>14</sup> See Art. 21, Universal Declaration of Human Rights, and Art. 25, ICCPR.

<sup>15</sup> This has been the focus of scholarly interest only after the end of the Cold War; see T. Franck, 'The emerging right to democratic governance' (1992) 86 *American Journal of International Law* 46. This position is not uncontested, although the critique is rarely based on careful legal analysis but more general policy concerns about a lacking international consensus, fostering military intervention and risking a new imperialism. For an extensive discussion see Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (Oxford: Oxford University Press, 2000).

point of the state was to serve as an instrument for persons as a basic unit of normative concern and not the other way around. Persons were now reconceived as self-determining agents endowed with human dignity.

Third, the issues central to the interpretation and progressive development of the law concern the understanding of human rights and the adequate institutionalisation of their protection. What kind of individual remedies should be available under international law? Should there be regional or even universal human rights or constitutional courts? If so, what level of deference should be granted to national political processes? Should the international community, acting through the United Nations under chapter VII, have the authority to prevent serious and persistent violations of human rights? And if a permanent member of the Security Council casts a veto, under what circumstances if any could states nonetheless intervene as part of their responsibility to protect? These are some of the questions that over time became central to international law after its constitutionalist turn.

This piercing of the veil of sovereignty and radical changing of the understanding of what is essentially within the jurisdiction of a state to determine for itself were brought about for two reasons: in part for the obvious reason that because the German Fascist regime and some of its allies had committed atrocities against its own population to such an extent that it seemed important for international law to delegitimise human rights-violating behaviour by states, instead of turning a blind eye and describing such behaviour as a sovereign act of state about the substance of which international law has nothing to say. Such agnosticism would ultimately implicate international law and undermine its legitimacy. But perhaps more important was the idea that the internal structure of the state and how it related to its citizens had implications for how it would conduct its foreign policy. Whereas Kant was the first to argue<sup>16</sup> that what he called 'republics' – essentially liberal constitutional democracies – would not go to war against one another,<sup>17</sup> Roosevelt shared the belief that 'making the world safe for democracy' and ensuring 'freedom from fear' meant that international law had to establish basic

<sup>16</sup> I. Kant, *Towards a Perpetual Peace*.

<sup>17</sup> A claim substantiated by considerable empirical evidence; see Michael Doyle, 'Kant, liberal legacies and foreign affairs' (1983) 12 *Philosophy and Public Affairs* 205–235. For a useful review of the various permutations of the 'Democratic Peace' debate, see Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (London: Penguin, 2011), pp. 278–294.

standards for legitimate government.<sup>18</sup> It was of central importance to ensure that individual persons were no longer conceived as subject citizens serving as a resource for competitive power-mongering states, which mobilise their subjects with reference to the dignity, pride and glory of the nation and its superior culture and power to build empires and raise their status. This was important to prevent nationalist ideologies, whether of a fascist or merely authoritarian bent, from continuing to serve as a basis for domination either internally or externally.

But the idea of statehood was also changed more generally in its relationship to the 'outside'. States were conceived as an integral part of a larger international community, whose authority was not derived from the authority of each individual state. Fundamentally, the international community was in authority and could restrict the freedom of states whether an individual state consented to these restrictions or not, both on the grounds of general principles of law – some of them protected as *jus cogens* – and on the grounds of customary international law. Sovereignty was no longer a right not to be subject to restrictions without first having consented to them. Sovereignty was better understood as focused on membership and participation in a larger global community of principle.<sup>19</sup> The legal structure of this shift will be described later. The question is how such a shift is connected to constitutionalism. Fundamentally there are two reasons why such a shift is required by constitutionalist commitments. The first is a commitment to non-domination. If self-determination within a framework of equal sovereign states is the principled starting point for imagining international order, then powerful states should not be able to dominate others, irrespective of whether they have consented to such a restriction or not. Here the prohibition of the use of force and the duty to settle disputes peacefully are paradigmatic. More generally the idea of the rule of law as applicable also to the relationship between states is grounded in this idea, with the concrete rules of law themselves to be interpreted in a way that reflects a commitment to non-domination and sovereign equality. Second, the limited capacity of states to secure global public goods and welfare needed to be overcome. The international community needed to develop

<sup>18</sup> See Roosevelt's State of the Union Address of 6 January 1941 discussing the foundational significance of the 'four freedoms' for the global order that the United States would work towards.

<sup>19</sup> See, for example, Abram Chayes and Antonia H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA; London: Harvard University Press, 1995).

a legal and institutional infrastructure that would enable humanity to act collectively to address these issues. Self-determination is not a practice that takes place within the territorial confines of the state. Opportunities are provided and restrictions imposed also by the wider global environment. Those too are not simply to be taken as a natural fact about the world but to be made the subject matter for collective shaping through collective action. This is the background understanding with which constitutionalists make sense of the following legal shifts of general structural significance.

First, states were no longer authorised to go to war to secure their rights under international law. Restating the commitment first entered into by most states in the Kellogg-Briand Pact in 1928,<sup>20</sup> the UN Charter in Article 2 section 4 prohibited the use of force in all cases except when a state was being subjected to an armed attack<sup>21</sup> or when the state was acting within authorisation of the UN Security Council under chapter VII. States that believed their rights to be infringed by another state were under an obligation to settle disputes peacefully. Until the issue was brought to a court or tribunal a party thinking of itself as aggrieved could take certain countermeasures, subject to procedural and substantive constraints, to force the violating side to resume compliant behaviour. But the state would not be permitted to seek legal redress by way of force. Even though the basic idea here was that *the rule of law was to replace the law of force*, and courts and tribunals had a significant role to play after 1945 and significantly proliferated after 1990, the jurisdiction of any court over any dispute is still generally believed to require the consent of states. But notwithstanding this continuous violation of the basic principle of *nemo iudex in sua causa* central to the rule of law – because asking for consent amounts to making the accused be one's own judge<sup>22</sup> – violations of the prohibition of the use of force could lead to charges of 'crimes of aggression', which in principle could be subjected to criminal sanctions.<sup>23</sup> Similarly serious and systemic violations of humanitarian law or human rights law could be subjected to criminal

<sup>20</sup> For an account that highlights the significance of that pact, see Oona A. Hathaway and Scott Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon & Schuster, 2017).

<sup>21</sup> See Art. 51, UN Charter.

<sup>22</sup> Deficiencies lamented by luminaries such as Hans Kelsen and Hersch Lauterpacht after World War II.

<sup>23</sup> I will forego the complicated issues relating to either universal jurisdiction or the jurisdictional complexities of the ICC provisions in this regard.

persecution as war crimes or crimes against humanity, even if the person responsible for these actions was a state official acting under orders or even if the person was the head of state oneself. *Respondeat superior* was no longer recognised as a valid defence, and the immunity of heads of state or ministers in office no longer provided protection. In that sense since 1945,<sup>24</sup> it is simply wrong to say that states have the monopoly of power, if we mean by that the ultimate authority to determine how and when individuals may use force against other individuals.<sup>25</sup> The core of the norms over which the International Criminal Court (ICC) now has jurisdiction is furthermore protected as *jus cogens*. The norms cannot be changed by the opposing will of a state, no matter how powerful.

Second, a preoccupation of the constitutionalist tradition of the eighteenth century was not just to constrain power but to create the preconditions for collective empowerment. Collective self-determination on the level of the state has its limits and is unable to secure a wide range of global public goods central to global welfare. In international law some degree of collective empowerment would occur through innovative re-engineering of the jurisgenerative process as well as through the creation of administrative capacities over time. The core idea here is to overcome the restrictions connected to consensus requirements characteristic of treaty making. On the more conventional side the International Law Commission, a body of highly regarded state-appointed legal experts established under the auspices of the UN, produces reports that either by themselves or by serving as a basis for multilateral treaty making play a central role to not only codify but progressively develop new international law across a wide range of fields.<sup>26</sup> More innovatively a new understanding of customary international law has evolved, which limits the amount of time needed for binding custom to form<sup>27</sup> and reinterprets

<sup>24</sup> If not already since the Nuremberg and Tokyo trials, at least since the ICC became operational in July 2002.

<sup>25</sup> Of course, that does not mean that state officials often get away with illegal use of force amounting to wars of aggression or war crimes or crimes against humanity, but this is no different from criminals within the national context often getting away with serious crimes. If that fact was never in and of itself sufficient to undermine the claim that the state has the monopoly of the use of force, then the same must appropriately apply to the claims of international law.

<sup>26</sup> These range from the Law of Treaties to rules relating to the Responsibility of States for Wrongful Acts.

<sup>27</sup> Think of 'pressure-cooked' or 'instant' international law; see the discussion in Federal Republic of Germany/Netherlands, *North Sea Continental Shelf* Judgments [1969] ICJ Rep 3 (20 February 1969).

what counts as state practice or how much state practice and opinion *iuris* is needed.<sup>28</sup> This has facilitated the emergence of new binding norms through strengthening the effective role of the UN General Assembly which enacts Resolutions that, although not binding in themselves, become a central part of a decentralised quasi-legislative process of generating customary international law. Finally, over time, a new plethora of international institutions grounded in multilateral treaties from the General Agreement on Tariffs and Trade (GATT, later the WTO), the World Bank and the International Monetary Fund (IMF) have created an infrastructure for administratively managing certain aspects of the global commons with a focus on the global economy. Today, international institutions have wide-ranging roles in administrative rule making.<sup>29</sup> Moreover, international organisations interact with domestic actors to produce practices described and critically analysed by the field of global administrative law.<sup>30</sup> From a global constitutionalist view these shifts are interpreted as having the general point to build the institutional and legal infrastructure to empower humanity to collectively shape the world through legal regulation, ensuring non-domination and enhancing welfare.

### 2.3 *The real and the ideal within the law: on the critical and transformative potential of constitutionalism*

If law is constituted by basic principles that together establish an ideal of constitutionalist legality, then the teleology of a legal system imagined in this way is geared towards the full realisation of these principles. But the actual positive rules and institutions might be in tension with these basic principles or realise them only in a limited, incomplete way. There may be significant tensions between the legally prescribed, principled ideal and the actual institutional and rule-bound practices in positive existence. Such a situation is one in which the concrete legal rules and institutions, although legally valid, are legally deficient. Note how this puts lawyers in a position to criticise existing positive law from the perspective of legal principle, that is, a perspective that is internal to the law. Constitutionalism,

<sup>28</sup> See Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge; New York: Cambridge University Press, 2010).

<sup>29</sup> José Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2005).

<sup>30</sup> Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The emergence of global administrative law' (2005) 68 *Law and Contemporary Problems* 15–62.

then, allows for a critical normative assessment of existing legal rules and institutions from a perspective that is internal to the law.

The international legal order that emerged after 1945 was reconstituted by the core principles described earlier. They were enshrined in legal documents such as the UN Charter. But the institutionalisation and concretisation of these principles was left to be completed over time.

To take the example of human rights, even if it would be correct to claim that after 1945 states were legally required to respect human rights, the requirement was left radically underspecified both in substantive terms and in terms of the availability of remedies in case of violation.<sup>31</sup> The legal project of a commitment to human rights began as a legally articulated promise, rather than an effectively institutionalised reality. And even though there has been a considerable evolution in the field of human rights concerning both the definition of the primary norms and the establishment of the institutions and doctrines enforcing them – primarily but not only regionally rather than universally – a great deal of deficiencies remain.

Similarly the idea of criminalising violations of the use of force that violated prohibitions of wars of aggression, war crimes, crimes against humanity or genocide was established in the Nuremberg and Tokyo trials. But these trials themselves were highly imperfect instantiations of the new principles. Only the vanquished were on trial, not the victors. Neither issues relating to the firebombing of Axis cities, from Dresden to Tokyo, nor the removal of Germans from Poland and Czechoslovakia nor the use of nuclear weapons in Hiroshima and Nagasaki were subjected to legal scrutiny by criminal courts. The courts were not constituted by way of impartial and independent procedures but by the victors. But notwithstanding these serious structural deficits, which are perfectly correctly criticised, it would be wrong to simply decry these faults as an indication that this was just a hypocritical form of dispensing victor's justice. A better way to understand these events is to think of them as part of a path to gradually institutionalise new principles under real-world conditions. It would take further steps after the end of the Cold War, first as ad hoc projects to establish UN tribunals with jurisdictions over specific conflicts in Yugoslavia and Sierra Leone by way of UN Security Council Resolutions, before a general court would be established by the

<sup>31</sup> Samuel Moyn's thesis that human rights law came in existence only in 1977 is a gross exaggeration, but he was correct to have pointed out a major shift in the wider political and cultural reception of human rights that occurred in the late 1970s; see his *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2010).

Statute of Rome in the form of the ICC. And even that Statute, in particular but not only with regard to its limited jurisdiction for crimes of aggression, is subject to plausible and continuing legal critique.

If constitutionalism thus allows for taking a critical perspective on existing legal institutions and doctrines that is internal to the law, the flip side of constitutionalism's critical potential is its potentially transformative character.<sup>32</sup> Both are a function of the possible tension between the ideal and the real within the law. A constitutional transformation occurs when through either interpretation or progressive development the significance of these basic legal principles becomes an argument to reinterpret existing rules or reform existing institutions in structurally transformative ways to make them more compliant with the underlying legal principles that legitimise them.

If an existing legal practice can be criticised in light of its grounding principles and, conversely, that practice may at times be transformed to make it more compliant with underlying principles, then the way to get from criticism to transformation is (1) by way of legal interpretation, (2) by progressive development of the law by law appliers (notably courts) or (3) by law reform by 'political' law-making actors. Once basic principles have been brought to bear to criticise an actual legal proposition as incompatible with the principles underlying it, these are the three ways to ensure that positive rules and practices are more closely aligned with their legitimising principles. In all three cases the underlying principles assume a regulative function, the point of which is to bring actual legal practice more in line with its principled foundations. When it comes to legal interpretation, principles provide objective teleological arguments in favour of interpreting the law in one way rather than another, when an issue is disputed. We speak of progressive development of the law when principled challenges to settled understandings of the law lead to new settlements that are more aligned with underlying principles. The normative limits of admissible progressive development of the law are reached whenever there are reasonable alternative ways of interpreting a principle with regard to an issue that is appropriately addressed by political actors.<sup>33</sup> When that is the

<sup>32</sup> For the debate on transformative constitutionalism, see Michaela Hailbronner, 'Transformative constitutionalism: not only in the global south' (2017) 65 *American Journal of Comparative Law* 527–565.

<sup>33</sup> Of course, this formulation covers up a can of worms. For a classical critical treatment of the related distinction between judicial and non-judicial (political) disputes, see Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon, 1933).



case, reform – requiring some kind of political endorsement – becomes necessary to legitimise a choice between reasonable alternatives and validate the particular solution the law is to embrace. Even though more would need to be said, the teleological character of the law does not imply that law, conceived in constitutionalist terms, does not have the resources to uphold the institutionally central distinction between legal interpretation and progressive development of the law on the one hand and political reform on the other.

### **3 Some ideas on an affirmative genealogy of global constitutionalism with particular attention to the Asian context**

The history of constitutionalism is not studied appropriately simply as part of the history of ideas or of the history of certain formal legal institutions and doctrines. It should be studied as part of an actual legal and political practice in the variety of contexts it touches. A history of global constitutionalism would focus not just on how constitutional ideas were invented, interpreted, developed and justified over time but also on how, why and by whom they were resisted. It should focus not just on the successes it helped bring about, in terms of either individual and collective emancipation from domination, economic prosperity and general welfare or cultural and civilisational flourishing, but also on its ambivalences, failures and hypocrisies. A history of global constitutionalism could not plausibly be a simple progress narrative. But the question is whether a greater familiarity with the history of constitutionalism and its contestations might lead to an understanding of it that would make more plausible its normative claims and its potential, notwithstanding all of this. The question is whether a genealogy of constitutionalism, as it has spread both horizontally across political communities and states worldwide and vertically to capture the imagination of statespersons, entrepreneurs and jurists shaping the international legal order, may affirm it, rather than discredit it. In other words, the question is whether the history of global constitutionalism might lend itself to an affirmative genealogy. To the extent that it could, it would have to address a variety of concerns, perhaps the most important of which is the concern that global constitutionalism and its commitment to human rights, democracy and the rule of law are just the latest reincarnation of the West's attempt to cover up its imperial ambitions and particular interests by dressing them up as a universalist ideology. What Christianity was from the sixteenth to the eighteenth century and what 'civilisation'

became in the nineteenth and early twentieth centuries were resurrected after World War II, this time as constitutionalist ideology.

### 3.1 *The new constitutionalist world order and 'the West'*

Perhaps the best way to make plausible the idea of an affirmative genealogy is to face head-on the most obvious series of concerns or the most serious concerns that appear to give credence to this scepticism. It is true that constitutionalism originated in the heartland of 'the West': in the American and French revolutions in the eighteenth century. It is also true that the modern global constitutionalist project is deeply connected to the Roosevelt and Truman administrations seeking to shape a new world order after World War II. The United States was the revolutionary agent in this regard, putting its considerable war-proven power and diplomatic clout to work to achieve its aim. Here it much suffices to briefly recount three examples.

The first two concern the role of the United States in establishing new constitutions for the main Axis powers. These were effectively ordered to establish some version of a liberal constitutional democracy after the Axis powers surrendered unconditionally. The genealogies of neither the German Constitution nor the Japanese Constitution reflected the commitment to 'We the People' freely deciding on how to govern themselves.

In the case of Germany the leadership was reluctant, because, they claimed, there was no people that could give itself a constitution: the eastern parts of Germany were occupied, after all, by Soviet forces, and the new constitution could be applicable only in the Western-occupied territories. They were told to get on with it nonetheless, and all the representatives from the various states could do to express their discontent was to refuse the new document the name of a constitution. They called it the Basic Law instead, and the Allied powers signed off on it after assuring themselves that the document met their requirements. Only after that was the document ratified by state parliaments.

The story of the Japanese Constitution is even more unsubtle.<sup>34</sup> After having been told to amend and modernise the Meiji Constitution by General MacArthur as the Supreme Commander of Allied Powers (SCAP), the reluctant government established a research committee to study whether an amendment of the constitution was necessary.

<sup>34</sup> The following draws on Shigenori Matsui, *The Constitution of Japan: A Contextual Analysis* (Oxford: Hart, 2011), pp. 4–20.

The committee concluded that amendments to the Meiji Constitution were indeed necessary but that they were relatively minor. When the draft amendments were published, the SCAP was frustrated by their conservative content and had his staff members draft a new constitution within eight days. While that constitution left intact the emperor as head of state, it abolished the feudal system, established the principle of popular sovereignty, required the renunciation of war and prohibited the maintenance of armed forces. The government was then pressured to adopt the draft and moved it through the ratification process.

The genealogy of the UN Charter is not entirely dissimilar. Even though the Charter was adopted by fifty nations at the San Francisco Conference in 1945, the decisions on the basic structure and principles had already been made sometime from the Atlantic Charter, in which Roosevelt arm-wrestled Churchill to sign off on common principles, over the Tehran and Yalta conferences to the Dumbarton Oaks Conference. Much of the preparatory work was done by various parts of the US Roosevelt administration. The UN would not exist in anything like its present form were it not for the leading role of the United States. Axis powers were excluded as enemy states from the negotiations and would not become members until 1956 in the case of Japan and 1973 in the case of the divided Germany. There were 51 states who were the original signatories of the UN Charter in 1945. Today, there are 193 states. The difference is to the greatest extent connected to peoples successfully claiming self-determination against their colonisers and empires disintegrating.

What is clear is that in all of these cases the spread of constitutionalism was part of a distinctly American-dominated project. What is less clear is what it teaches us about constitutionalism's universalist posture in its relationship to the West and the rest of the world. This is not only the case because of the logical gap between a genealogical critique and challenges to the validity of a claim. It is also because this genealogy itself is not without its interesting ambivalences and complexities.

The idea of 'the West' is a complicated notion in the history of constitutionalism. A closer examination quickly makes clear that the connection between constitutionalism and the West is attenuated, at best. Germany as a major European power in the first half of the twentieth century appears to share more traits with Japan, a major Asian power, than with the United States and is treated in much the same way as Japan was by the Allies: as a country in need to be re-educated and weaned off its nationalist militaristic culture. More generally, Germany,

much like Japan, both in the early twentieth century during World War I under the kaiser and under National Socialism, adopted ideologies which had nothing to do with constitutionalism. On the contrary, the German nationalist, culturally supremacist 'ideas of 1914' propagated when the war began were self-consciously embraced as a distinct alternative to what were described as the materialist, individualist and ultimately existentially shallow ideas of '1789', which were claimed to be incompatible with German culture.<sup>35</sup> Going further west in Europe to France, the German Nazis found willing collaborators in the conservative authoritarian Vichy regime. In France the ideas of the French Revolution had produced deep divisions and a series of counter-revolutions throughout the nineteenth century, as conservative authoritarians sought to connect the idea of France as a nation not to the principles of the revolution but to its Catholic faith and both the aesthetic superiority of the simple life in the French countryside (*la France profonde*) as well as the aesthetic splendour created by its nobility. Cross off the idea of the aesthetic splendour of the nobility, and you get something close to the populist vision of France that Marine Le Pen is peddling today. Even Britain's role in this context is not simple. World War II was Britain's 'finest hour', as it provided a bulwark against the Nazis. But, of course, Britain itself was a global empire structured internally by a class system in which hereditary privilege remained of central importance, with the working class invited to feel nationally elevated by imagining their miserable plight to be connected to the 'white man's burden' to help bring civilisation to the rest of the world by way of managing an empire in which the sun did not set. The recognition of the principle of self-determination by Churchill was a price he had to pay to secure the desperately needed support of the United States against Hitler. Roosevelt had made it quite clear that he was not willing to invest American blood and treasure to defend and uphold the British Empire.

In 1945 constitutionalisation of the world was an American-led project, not a Western one, because constitutionalism had not taken a deep hold among major powers in Europe before the end of World War II, notwithstanding a century-old history of political and ideological struggles. And its most intrusive actions and attempts at re-education were not aimed at hapless backward people but Germany and Japan, the highly civilised barbarians that had unleashed World War II in Europe and Asia.

<sup>35</sup> See Thomas Mann's elaborations on German culture and liberal constitutional democracy in his *Reflections of a Nonpolitical Man* (New York: F. Ungar, 1918).

The constitutional moment of 1945 brings a decisive break between the old European colonial order established before World War I and the post-World War II order. The end of World War II saw the most aggressive imperial powers of their time put into place. At the same time as the idea of self-determination, the prohibition of the use of force and human rights, a set of normative principles were established that also delegitimised the older European empires such as those of Britain and France, even though the process of decolonisation would still require time and national struggle. In that sense the constitutional moment of 1945 was also a high point of anti-imperialism.

### 3.2 *Anti-imperialism as imperialism? The battle of Tsushima as a constitutional moment*

Of course, anti-imperialism can itself turn into imperialism very quickly. When the Japanese navy defeated the Russian navy in the battle of Tsushima in 1905, this was widely celebrated by subjugated people of the world as proof that the Western imperial powers could be defeated. For many non-white peoples this seemed to mock Western racial hierarchies and the presumption to 'civilise' the supposedly 'backward' countries in Asia.<sup>36</sup> It made a deep impression on future leaders of liberation struggles and projects of national modernisation, from Mohandas Gandhi, then an unknown lawyer in South Africa, to Mustafa Kemal, later known as Atatürk, then a young Ottoman soldier in Damascus, to Jawaharlal Nehru, later the first Indian prime minister, to Sun Yat-sen, later the first president and founder of the Chinese Republic.<sup>37</sup> But even though it is correct to understand this as a moment in which established Western imperial powers and their racial presumptions were undermined in a way that gave hope to and wakened from their lethargy a wide range of subjugated peoples across Asia, it was not an anti-imperialist moment. Ultimately the battle of Tsushima was a battle in a war between two competing imperial powers over who would control Manchuria and Korea: Russia, as an established European power, or Japan, a regional upstart seeking its own place in the sun after having gone through a process of radical modernisation following the Meiji Restoration. What that battle and Japan's subsequent further rise

<sup>36</sup> Pankraj Mishra, *From the Ruins of Empire: The Revolt against the West and the Remaking of Asia* (London: Penguin, 2012), p. 3.

<sup>37</sup> *Ibid.*, pp. 1–6.

illustrated was merely that empire and racially and culturally presumptuous domination were not something that Europeans or the West could effectively maintain a monopoly over. If the battle of Tsushima was the beginning of an Asian awakening and the 'opening chords of the recession of the West',<sup>38</sup> then it left open the possibility that an awoken Asia would simply replicate the worst of what the West had to offer. Imperialism based on presumption of racial or cultural superiority, too, this suggested, is a Western ideology with potentially global appeal.

To be sure, it was widely believed that Japan's success had something to do with its constitution.<sup>39</sup> Conversely Russia's weakness was associated with its ossified autocratic structure. In that sense the battle of Tsushima was also a constitutional moment. The possibilities to gain self-respect and constitutional government, so it seemed, go together. It helped fuel a series of popular constitutional revolutions against autocracies not only in Asia but also in Russia. Students from all over Asia flocked to Japan to study its constitution. But the 1889 Meiji Constitution, like its Prussian nineteenth-century counterpart, which it was developed from, was constitutional only in form and remained deeply wedded to autocratic government and hereditary legitimacy. The emperor was the sovereign, his power derived from religious authority, and he had the status of a living god; the Diet was weak, and individual rights were benevolent grants of the emperor. Unlike the case with the post-war constitutional transformations, the Meiji Constitution shared little more than formalities with constitutionalism.

### 3.3 *An Asian embrace of and contributions to global constitutionalism?*

The failure of the battle of Tsushima as an anti-imperialist global constitutional moment teaches something important: defeating imperial powers alone is insufficient to guarantee the victors anti-imperial bona fides. If that is so, does the United States qualify as an imperial power in the morally relevant sense after World War II, given its forceful role to establish and maintain the post-war order? There may have been a significant shift between the European variations of empire and the new global constitutionalist order the United States was instrumental in bringing about. But the fact that the new legal order has a different normative structure does not in and of itself ensure that this new normative structure is not just a new manifestation of imperialism.

<sup>38</sup> Ibid., p. 6.

<sup>39</sup> Ibid.

Of course, it is also not enough to simply claim that the establishment of constitutionalism can never be imperial because it simply is the correct legal and political ideology. This was the kind of argument with which all imperial projects were justified and is thus insufficient. But what exactly is required to be able to reject the argument that global constitutionalism is just the latest false universalism foisted upon the world, this time by the United States as the dominant imperial power emerging from World War II?

If constitutionalism is effectively imposed on a particular nation or the world, as it was on Germany and Japan after World War II and as it arguably was on the whole of the world by way of the UN Charter, then it becomes decisive whether those subjected to the order generally embrace its basic principles over time, make it their own, engage with it, participate within it and, if they deem necessary, modify aspects of it as they deem fit. One of the decisive features of constitutionalism is that it legally authorises and highlights such participatory engagement and rejects the lethargic attitude of mere subjects as unworthy of the office of citizenship.

### 3.3.1 The German Basic Law

The German Basic Law has over the decades not only become a central point of reference in the everyday political and legal debates, with the Constitutional Court recognised as a highly influential and respected institution. Over time the constitution has also become a central factor for German national identity and pride, even though that does not mean that Germans feel constrained to amend it as they deem appropriate.<sup>40</sup> In Germany the idea of constitutional patriotism has real resonance and widespread, even if not universal, support. The claim that the constitution should be understood as an imperial imposition has no contemporary resonance whatsoever.

### 3.3.2 The Japanese Constitution

In Japan the constitution appears to also be widely regarded as successful and enjoys widespread support. Yet there are two striking features that a scholar of comparative constitutional law cannot help but notice and that are of interest here. On the one hand courts have refused to play the active role that they play in most established liberal constitutional democracies, even though they have the formal powers

<sup>40</sup> The German Constitution has been amended by fifty-four amendment laws amending 109 articles in its first sixty years until 2009.

to do so.<sup>41</sup> Furthermore, the constitution has not been amended once, even though there are obvious reasons for doing so. In its famous Art. 9 the constitution renounces not only the right to wage war but also the right to maintain armed forces. Assuming that Japan maintains the right to defend itself as guaranteed under Art. 51 of the UN Charter, as appears to be the dominant view among Japanese scholars, that provision would imply that Japan is denied the right to maintain the military means to do so. Of course, in practice Japan maintains one of the most sophisticated militaries in the world in the form of its Self Defense Forces. This status quo is problematic not only because it undermines the authority of the constitution opening it up to charges of hypocrisy. It also undermines the potentially strong role that Japan appears to in principle be willing to play as a militarily active contributor to missions authorised under chapter VII of the UN Charter. The reasons for both the resistance to more engaged judicial review and to amending the constitution are surely complex, and this is not the place to discuss them in depth. But could it be at least in part because there is a degree of cultural recalcitrance against the legalist spirit that comes with constitutionalism, once the constitution is taken seriously as containing operative norms which guide and constrain political actors? Is it simply because the discrepancy between what the constitution requires and what is done in practice does not matter, because fundamentally, the constitution should not be taken too seriously as a legally operative constraining text but more as a symbol for the new post-war Japan? Could it, perhaps more audaciously, be because if previously the person of the emperor was sacred, it must now be the constitutional text whose role is primarily imagined to be symbolic? Is it because Japanese citizens and politicians don't trust themselves to change anything in the constitution, because they imagine this to be a slippery slope leading inevitably into a new authoritarian, perhaps even militaristic, regime? The new constitution may stand for the new post-World War II Japan, pacifist and prosperous, that as such is a success and enjoys widespread support. It is less obvious that, given these features, constitutionalism as a legal and political practice has developed deep roots in Japan, even though, of course, more would have to be said. What that suggests is that acceptance of constitutions and of liberal constitutional democracy can, in practice, mean a variety of things and does not imply that all core

<sup>41</sup> Matsui (n. 34), pp. 140–151.



normative commitments will in fact be effectively institutionalised. Acceptance of something originally foreign will always involve cultural adaptation, but it may also mean partial subversion and the subtle rejection of some facets of what is claimed to be accepted. But even if an account along these lines were to do justice to the Japanese experience with constitutionalism, it suggests that claims that the constitution is not legitimate and that it symbolises the ongoing domination of Japan by the United States are implausible.

### 3.3.3 Global constitutionalism and its many authors

The global order, as it emerged after World War II, was not simply a product of Western minds, shaped by Western traditions and imposed by powerful Western statespersons. It was the result of a process which included the successful struggle of subjugated colonised nations against imperial oppression. And once the basic post-World War II order was established political struggles and contestation over the meaning of its core principles involved a wide variety of actors. The following can provide only some very cursory glimpses to illustrate that point.

When US President Wilson insisted on establishing the legal principle of self-determination in the Treaty of Versailles that ended World War I, it was applied merely as a principle governing territorial claims relating to defeated powers. It was not applied to territorial claims that the defeated European powers had against the victors, and it was certainly not to apply to territories belonging to the British and French empires outside of Europe. Yet it was as the Treaty of Versailles was negotiated and as later on state delegates were to be seated at the newly established League of Nations that non-European actors made their claims in the name of self-determination and called out the hypocrisy of the European powers, after the atrocities of World War I claims of a superior European civilisation seemed spurious at best. When Gandhi was asked what he thought of Western civilisation he quipped that he thought it would be a good idea, a sentiment that had considerable resonance after World War I. More generally representatives of Egypt, India and other countries claimed they were *civilisations*, thereby implicitly rejecting the presumptions of the existing powers to have the authority to determine which of the relevant actors met relevant 'civilisational' requirements. Pressure mounted to give up the requirement of 'civilisation' in order to be recognised as a state. Thus, the universalisation of statehood, without a civilisational adage, is an achievement that is a result of a political

struggle in which those colonised and subjugated appeared as central actors and ultimately overcame their merely passive status.<sup>42</sup>

Another example of an Asian country playing an active, constitutionally progressive role pushing for the development of international law, even if in that specific context not immediately successfully, was India in the context of its intervention in East Pakistan in 1971.<sup>43</sup> It brought humanitarian intervention onto the agenda of the UN Security Council as a subject for discussion and as a potential ground to authorise the use of force, when it wanted to intervene in East Pakistan. The Pakistani government was effectively engaged in a genocide against Bengalis there, which ultimately left at least 500,000 Bengalis dead. Besides addressing the humanitarian concerns, India sought to stop the considerable flow of Bengali refugees across its borders. Since this was in the middle of the Cold War and Pakistan was an ally of the West and India was not, the substantive position that India put forward had no chance of being accepted in the UN Security Council. But its position would find support much later, after the Cold War was over. It is today generally accepted that the mandate to secure international peace and security under chapter VII of the UN Charter also includes the possibility to authorise all necessary measures to secure the rights of individuals against serious and systematic human rights violations, irrespective of whether those violations have little or no tangible physical effect outside of a state's borders.

Furthermore, the role of successive Japanese and other Asian governments and civil society actors to help bring about an elimination of nuclear weapons deserves to be mentioned. For the past twenty-four years Japan has introduced a resolution to bring about the elimination of nuclear weapons before the General Assembly, which generally passes with very widespread support. The issue is also of legal constitutional rather than just political relevance, because any use or threat of use of weapons is arguably in violation of basic principles of humanitarian law.<sup>44</sup> Nuclear weapons may well be described as the original sin of the

<sup>42</sup> For a description of this evolution, see Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History of 1842–1933* (Cambridge: Cambridge University Press, 2014).

<sup>43</sup> For a book-length treatment of the issues focusing on the roles of Nixon and Kissinger seeking to preclude Indian intervention, see Gary Bass, *Blood Telegrams: Nixon, Kissinger, and a Forgotten Genocide* (New York: Alfred A. Knopf, 2013); see also his 'The Indian way of humanitarian intervention' (2015) 40 *Yale Law Review* 227–294.

<sup>44</sup> When the ICJ had an opportunity to adjudicate the issue it effectively avoided it by way of a highly unusual *non licet* decision, thus leaving the issue open (ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226; see also ICJ,

post-World War II constitutionalist order, the way that slavery was the original sin of the eighteenth-century US constitutional project: a core feature of the newly established constitutionalist order, which is fundamentally incompatible with commitments underlying it. In July of 2017 122 countries, excluding the United States and practically all European Union countries but including Bangladesh, Malaysia, Indonesia, Thailand and Vietnam, adopted the Treaty on the Prohibition of Nuclear Weapons. It remains to be seen whether the treaty will prove to be an effective step towards the elimination of nuclear weapons by building pressure on nuclear powers.<sup>45</sup> But what this issue too makes clear is that the divide between the different sides has little to do with regional geography or culture. It has a great deal to do with geostrategic considerations, ambitions of hegemony, insecurities and the old drama of principle seeking to constrain and guide power. And in this drama Asian and Western actors find themselves on both sides of the divide.

### 3.3.4 Global Constitutionalism and the challenge posed by China

China today appears to be a country unwilling to embrace a constitutionalism domestically that has very little to do with intrinsic features of its culture, traditions and history and a great deal to do with highly path-contingent options and preferences taken by the existing party elite and, more recently, by Xi Jinping more specifically. These are decisions that have a great deal to do with real failures of liberal constitutional democracy elsewhere, suggesting that China might do better to explore other options. What that means for China's relationship to global constitutionalism in international law, however, remains ambivalent.

Much like Japan, China embraced radical reform and modern constitutional government as a result of its humiliations when confronted with other powers: first in the Opium Wars in the middle of the nineteenth century, which, beyond the unequal treaties imposed on it, led to the loss of Hong Kong to the British, then – in the eyes of the Chinese perhaps even more humiliatingly – in the defeat in the first Sino-Japanese war of

*Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Judgment of 5 October 2016, relating to duty of nuclear powers to make a good-faith effort to work towards the elimination of nuclear weapons under the Non-Proliferation Treaty).

<sup>45</sup> Four of the eight current nuclear powers are Asian: China, India, Pakistan and North Korea.

1894–1895.<sup>46</sup> Note how that humiliation was not simply the result of China being disrespected as an equal by others effectively establishing themselves as superior. The pain was sharpened by imperial China imagining itself as the centre of the world, with other nations and peoples relating to the centre through complicated rituals of submission and trading privileges.<sup>47</sup> When the British first established unequal treaties with China, it was not even clear to the Chinese government that it was unequal in any sense relevant to its moral universe. Sure, British citizens would be subject to consular jurisdiction and not imperial jurisdiction, but in ancient China jurisdiction was generally personal and not territorial. And if the Chinese were not granted consular jurisdiction over their citizens in Britain on a reciprocal basis, then that made perfect sense: Chinese subjects were generally not allowed to and had no reasons to travel elsewhere anyway, whereas, of course, there were good reasons for others to come to China to show reverence and learn from the superior Chinese culture and hope to gain from trade with it. But the losses against Japan hurt: after all how could a tiny island long dependent on the Chinese language and culture defeat an empire many times its size? The military defeat against Japan prepared the ground for the end of the Qing Dynasty and the birth of China as a constitutional republic in 1911, with Sun Yat-sen as its first president. Even though the specifics of the constitution needed, of course, to be adapted to special Chinese circumstances, unlike the Meiji Constitution of 1889, the Chinese Constitution reflected a genuine commitment to constitutionalist principles. Because of foreign occupations, the remaining powerful role of warlords and the divisions between nationalists and Communists the country was in permanent turmoil, until in 1949 Mao Tse Tung was able to unify mainland China under Communist rule and establish the People's Republic of China with his nationalist rival Chian Kai-shek holding on to Taiwan. Even though Chian Kai-shek's Kuo-Ming Tang governed in Taiwan by way of martial law for the first decades, by the late 1980s Taiwan not only was enjoying considerable economic success but gradually developed into a modern liberal constitutional democracy. In mainland China, too, after the death of Mao Tse Tung, who had to

<sup>46</sup> For a history of China's encounter with and embrace of international law, see Rune Svarverud, *International Law as World Order in Late Imperial China: Translation, Reception and Discourse 1847–1911* (Leiden; Boston: Brill, 2007); see also Chi-Hua Tang, 'China-Europe', in Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012), pp. 701–723.

<sup>47</sup> Svarverud (n. 46), pp. 8–15.

be prodded by Stalin to believe that having a formal constitution was a good idea because it might help legitimise the regime and stabilise it,<sup>48</sup> with a turn towards markets under Deng Xiaoping there would be a new Chinese Constitution enacted in 1982. That constitution generally shared the core hallmarks of a modern constitution, guaranteeing democracy, human rights and the rule of law. But it did insist on the political monopoly of the Communist Party. And as in all Communist countries, its role remained negligible in political life. Instead, important shifts in power and political orientation would at best be reflected in the Communist Party's statutes, not the constitution. Similarly, what mattered were not parliamentary bodies or court decisions but decisions by the party Congresses. If the situation in China today is different from the situation in other countries that had embraced Communism but then went on to establish liberal constitutional democracies, it is because of the way the Chinese leadership handled the potentially transformative moments in 1989, when major student demonstrations in Beijing threatened the stability of the regime. Unlike the East German Communist Party elite facing the same issues that year, the Chinese government decided to clamp down. Nonetheless, even among those who favoured the clampdown there were those who embraced the idea that China would eventually develop into a liberal constitutional democracy. They just did not think that China was quite ready to take that step yet. Not surprisingly throughout the 1990s and 2000s, Chinese scholars at universities openly discussed the possibilities and implications of when and how China would eventually join the constitutionalist world.<sup>49</sup> Whereas academic debates and publications were tolerated, it was not, however, possible to publish open political calls to establish a liberal constitutional democracy, as 303 intellectuals did in 2008, when they published Charter 08 on the occasion of the 60th anniversary of the UN Declaration of Human Rights and the 100th anniversary of the Chinese Constitution as well as the 10th anniversary of China signing the International Covenant on Civil and Political Rights. But short of public political advocacy for liberal constitutional democracy putting the Communist Party and its political monopoly on power under

<sup>48</sup> Qianfan Zhang, *The Constitution of China: A Contextual Analysis* (Oxford: Hart, 2012), p. 43.

<sup>49</sup> See, for example, Li Buyun, 'Constitutionalism and China', originally published in 1993 and republished in Yu Keping (ed.), *Democracy and the Rule of Law in China* (Leiden; Boston: Brill, 2010), pp. 197–230.

immediate threat, much was permitted.<sup>50</sup> That only changed after Xi Jinping took power in 2012. These debates within the universities have effectively been put to rest by more severe party guidelines on what should and should not be discussed in political and legal seminars and by the threat of sanctions. What is clear looking at Chinese recent history, as well as the experience in Taiwan and current events in Hong Kong, is that claims that somehow China's culture and tradition make it uniquely unsuitable for embracing liberal constitutional democracy are difficult to sustain.

Leadership's decision to choose an anti-constitutionalist course after 2012 and to instead emphasise, consolidate and expand party control is likely to have many reasons. But among those reasons is no doubt the perceived failure of liberal constitutional democracies to deliver what they promise and to reflect a plausible model for best civilisational practice in the contemporary world. On the one hand the example of Russia taught China that it did well not to engage in regime change itself, when it was confronted with a serious challenge in 1989. After all Russia not only lost its position as a superpower in the international system, its economy also suffered a severe downturn, and the standard of living declined significantly for a large part of the population in the decade after the introduction of Western reforms. Furthermore, India, the world's largest democracy since its independence, has been developing at a much slower pace than China. For a traveller comparing life in the city of Mumbai with life in the city of Shanghai by the second decade of the twenty-first century, the superiority of liberal constitutional democracy as a developmental economic model is less than obvious. Finally was it not the case that the European Union and the United States – those supposed models of constitutionalist commitments – were engaging in strangely irrational actions to respond to the challenges posed by terrorism, getting bogged down in useless and illegal wars, struggling with a serious financial crisis, and, after providing lacklustre economic growth for a decade, now suffering from capture by political movements, parties and individuals which seemed to accelerate self-destructive tendencies? Was it really plausible that the Chinese Communist Party could not do better than that? Could it not reinvent itself as a quasi-meritocratic

<sup>50</sup> Perhaps typical for expressing moderately progressive sensibilities of this time was Yu Keping, *Democracy Is a Good Thing: Essays on Politics, Society and Culture in Contemporary China* (Washington, DC: Brookings, 2009), advocating an incremental building-block approach to democratic evolution in China, focused first on civil society, local government, intra-party democracy and strengthening the rule of law.

organisation recruiting talent to technocratically govern the country, merging the idea of a Leninist avant-garde party with Confucian ideas of bureaucratic merit, thus ensuring further growth and stability and perhaps, in the long term, global pre-eminence?<sup>51</sup>

It was no doubt also the thirty years of successful growth that made the Communist Party leadership confident about what it might be able to do, just at a moment when liberal constitutional democracy seemed weak. Note that this may well turn out to be a judgment to regret. Liberal constitutional democracies also seemed weak and decadent when a wide variety of Fascist and Communist forces appeared to have all the vitality necessary to conquer the future in the 1930s. And the achievement of the Communist Party to date is more ambivalent than the official narrative suggests. Even after nearly forty years of growth the standard of living of the average Chinese on the mainland is still not as high as that of the average Chinese in Taiwan or Hong Kong, let alone the average South Korean or Japanese. Instead of standing in awe one might just as well ask: Why so little so late? Why did it take China so long for it to regain a position that it had lost in the eighteenth and nineteenth centuries? Not implausibly the historical role of the Chinese Communist Party, which includes responsibility for the disastrous Maoist policies and human suffering connected to 'the Great Leap Forward' and the 'Cultural Revolution', has not just been to cure China from its century of humiliation. Even though it is difficult to know whether and how China's economic developmental situation would have improved earlier under a different, more genuinely democratic and liberal constitutional regime, it would be wrong to exclude the possibility that the monopoly of power enjoyed by the Communist Party may have been a contributory cause for its comparatively late recovery.

#### 4 Conclusion

The series of historical sketches in this chapter have exemplified some basic ideas towards an affirmative genealogy of global constitutionalism and yielded a number of insights. Historically, the link between 'the West' and global constitutionalism is significantly more attenuated than it is often portrayed to be. On the one hand constitutionalist ideas have been

<sup>51</sup> For an understanding along those lines see Daniel A. Bell, *The China Model: Political Meritocracy and the Limits of Democracy* (Princeton, NJ: Princeton University Press, 2015).

and continue to be, at various times, in various jurisdictions, subject to rejection and contestation in the West, both fundamentally and with regard to specific manifestations. The West is no more closely associated with constitutionalism than with competing ideas. Various forms of authoritarian nationalist ideologies, celebrating national culture, ethnicity, religion and tradition, fascist or communist ideologies, or empire, are no less Western than constitutionalism and have been as influential globally as, if not more influential than, constitutionalism. On the other hand, constitutionalist ideas have been embraced by Asian actors against European states (embraced by the colonised and brought to bear against colonisers, unmasking their hypocrisy) to liberate themselves and throw off the yoke of imperial domination. With the appropriation of these ideas by non-Western actors, their meaning could sometimes be altered and progressively reformed. Universal categories and their meaning have often been shaped by encounters and conflict and not simply dictated by one side. Furthermore, constitutionalist ideas have been used by those dominated within Asian states against their respective oppressors. They have been and continue to be embraced and invoked against local and national elites in non-Western contexts who defend their privileges and established practices of domination with reference to sovereignty, culture and tradition. Those elites, in turn, replicating well-established patterns practised in the West, rely on concepts of sovereignty, nationalism and culture to declare those who invoke rights and constitutionalist ideas as inauthentic, corrupt and the fifth column of the – foreign – enemy. Anti-constitutionalist actors have often served, in their respective contexts, as apologists for the ideology of self-serving regional or national elites in the name of national culture and tradition, providing them with intellectual cover against challenges made by those they govern, challenges often made in the name of human rights, democracy and the rule of law. These are phenomena that critical postcolonial sensibilities tend to obfuscate rather than illuminate, furthering the reification and essentialisation of the idea of civilisational or cultural difference, rather than focusing on ongoing relationships of domination within cultures and civilisations and on coalitions of domination and resistance across cultures and civilisations.

There is no guarantee that constitutionalism will remain relevant in the future, not globally, not in Asia and not even in the West. But constitutionalism may well remain relevant even if Western hegemony is receding and the balance of power is shifting in favour of Asia. What matters is that a sufficiently powerful coalition of actors embrace it, in



Asia, in South America, in Africa and in the West. Whether that will be the case in the midterm appears to be an open question. And if constitutionalism won't remain relevant, because various anti-constitutionalist powers become hegemonic forces successfully shaping the world in their image, then it would be wrong to assume that the reason for its demise is its insufficient civilisational and cultural inclusiveness. The reason for its demise might just be the complacency or ignorance of those who did not defend it appropriately and the ambition and ruthlessness of those who stand to profit from it.