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Organic Global Constitutionalism

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Abstract

Global constitutionalism is becoming increasingly prevalent in international legal discourse. While the various contributions give the impression of a seemingly complex and diverse debate, the contributions in fact all share some significant omissions and biases. It is argued here that the limitations, to be found in the disregard for processes such as fragmentation, and the biases, to be found through such realities as hegemony in international law, give rise to the necessity of a reconceptualization of the global constitutional debate. It is suggested that global constitutionalism should be reconfigured in terms of what is called 'organic global constitutionalism'. Organic global constitutionalism should be understood as being defined by constitutionalism as process, constitutionalism as political, constitutionalism as a 'negative universal', and constitutionalism as a promise for the future. These features would offer an alternative way of framing the debate and a means of redeeming the idea of global constitutionalism.

Key words

bias; flexibility; global constitutionalism; liberal democratic; organic

Global constitutionalism is currently one of the most discussed areas of international law. More and more academics are contributing to the debate by writing about their respective visions of global constitutionalism. Needless to say, no one document is currently universally recognized as the constitution of the world. Many suggestions have been made as to what set of norms and principles such a constitution could and should be composed of and which process supposedly amounts to constitutionalization. It will be shown in the following that there are different but overlapping contemporary debates in international law regarding global constitutionalism. While seemingly complex, the debate as it currently is suffers from some significant omissions and biases. These omissions and biases are caused by investment in a particular kind of political practice and thought, namely the unquestioned extrapolation of liberal democratic precepts, poorly suited for global constitutional purposes. Possible shortcomings of constitutional theory are significant, since constitutional elements are believed to permeate every aspect of life. The shortcomings in constitutions are therefore shortcomings of the political, social, and economic orders that the constitutions encircle.

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This article introduces an alternative to prevailing international legal approaches to global constitutionalism in the form of what is referred to as 'organic global constitutionalism'.[1] Organic global constitutionalism endeavours to overcome the shortcomings and limitations that the other visions of global constitutionalism entail. It tries to take a step back from the dream of a global constitution of certain common legal techniques and pre-political values, and suggests a more fluid and flexible approach to constitutionalism. Importantly, it is not presented as a coherent 'new concept' of global constitutionalism, rather as a compilation of relevant and loosely connected themes. These themes, although initial and tentative, do not point to a process that will one day accumulate or amalgamate to 'a global constitution'; rather, what is involved remains constitutional*ism*.

The following will first situate the prevailing visions of global constitutionalism by categorization according to their central premises. The categorizations of the contributions to the debate highlight five key themes of global constitutionalism – all central tenets of the liberal democratic traditions. The visions will then be critiqued as regards their common assumptions and as regards the five key themes. Subsequently, organic global constitutionalism will be introduced as a means of reimagining global constitutionalism.

1. Situating prevailing visions of global constitutionalism

Current visions of global constitutionalism can broadly be categorized as falling into one of four dimensions. I call these dimensions social constitutionalism, institutional constitutionalism, normative constitutionalism, and analogical constitutionalism.[2] The following will try to explain the debate on global constitutionalism as it stands today by reference to these four dimensions and their respective sub-categories.

Social constitutionalism emphasizes that the basis for global constitutionalism lies in coexistence in an international social order. Political concerns of participation, with liberal democracy as a model framework through which participation can be achieved, shape social constitutional visions of global constitutionalism. This dimension of global constitutionalism can be split into two subcategories:

1 The term 'organic constitutionalism' was notably first introduced by G. W. F. Hegel, in Hegel, *Philosophy of Right*, trans. T. M. Knox (1952), §§ 271, 272. His meaning of the term is slightly different from the way I use it. Hegel spoke of constitutionalism for the national rather than the international sphere; 'organic' for him meant that constitutions should be in tune with the historical situatedness and culture of a given society. This type of 'organic' is only truly 'organic' when a constitution is being drafted. After the constitution has been written, it is again fixed. D. T. ButleRitchie argues for a similar type of domestic constitutionalism (explaining his use of the word 'organic' as referring to the social and political context within a state: 'constitutional formation should be homegrown') in ButleRitchie, 'Organic Constitutionalism: Rousseau, Hegel and the Constitution of Society', (2006) 6 *Journal of Law and Society* 36 (particularly at 41). 'Organic' for global constitutionalism is also sensitive to historical backgrounds, present circumstances, and cultures, but is significantly never-ending in this sensitivity and fluidity. This type of constitutionalism adapts constantly to circumstances and to the participants in the constitutional dialogue.

2 This is, of course, only one way of organizing the debate. For another method, see J. L. Dunoff and J. P. Trachtman, 'A Functional Approach to International Constitutionalization', in J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009).

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first, the category which has been dubbed 'the international community school' and, second, visions of a global civil society.[3] The international community school, propagated particularly by Bardo Fassbender and Christian Tomuschat, places particular weight on the notion of a paradigm shift that has allegedly taken place away from a sovereignty-centred system to a value-oriented or individual-oriented system of international law.[4] The idea of the international community as an integrated system and therefore as a constitutional order is found in many visions of global constitutionalism. Indeed, the idea of an international community establishing an international legal order runs through most ideas of global constitutionalism like a red line.[5]

The most eminent scholars of the vision of global constitutionalism as global civil society, as the second subcategory of social constitutionalism, are Gunther Teubner and Andreas Fischer-Lescano.[6] While some contributors to the debate on global constitutionalism emphasize the indispensability of states in the international order, others, including Teubner and Fischer-Lescano, are of the opinion that world law and global constitutionalism can be found in the idea of a civil world law. The foundation of a world law is believed to lie in civil society, which centres on popular legitimacy.

Institutional constitutionalism as the second dimension of global constitutionalism is predominantly centred on the identification of power allocation among institutions in the international sphere. A distinction can be made here between global governance ideas of constitutionalism, ideas that put forward the UN Charter as the global constitution, and ideas that suggest specialized international organizations and subject matters as hardening to become global constitutional law. Global governance advocates do not consider there to be only one locus of power, but rather identify many power hubs that require legitimacy through accountability. This notion is suggested by a number of scholars including Anne Peters, Ingolf Pernice, and Jürgen Habermas.[7] The second type of institutional constitutionalism identified here focuses on international institutions that are constituted through a multilateral treaty process. The UN Charter has been dubbed the global constitution

3 The term 'international community school' in the debate on global constitutionalism was first coined by B. Fassbender, 'The United Nations Charter as Constitution of the International Community', (1998) 36 *Columbia Journal of Transnational Law* 529, at 546 ff.

4 C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', General Course on Public International Law, (1999) 281 RCADI 195, at 237.

5 The belief that the international sphere is an international legal order, i.e. a normative system that transcends the national legal systems, is necessarily a common premise for contributors to the debate on global constitutionalism.

6 G. Teubner, 'Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie', (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1, at 6; A. Fischer-Lescano, 'Die Emergenz der Globalverfassung', (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 717, at 759.

7 A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', (2006) 19 LJIL 579, at 580; I. Pernice, 'The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalisation', in P.-M. Dupuy et al. (eds.), *Common Values in International Law: Essays in Honour of Christian Tomuschat* (2006), 991; J. Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?', in Habermas, *The Divided West*, trans. C. Cronin (2006), 116 ff. To some extent, they were all inspired by Anne-Marie Slaughter's ideas of the 'disaggregated State', in A.-M. Slaughter, *A New World Order* (2004).

almost since its inception.[8] Distinct from this view, but yet with many similarities, is the idea that other organizations and subject areas of public international law are constitutionalizing in a way that has been referred to as 'microconstitutionalism becoming macroconstitutionalism'.[9] This has been observed in regard to the World Trade Organization as a specialized international organization,[10] and for international environmental law as a specialized subject area.[11] The above views on institutional constitutionalism all place questions of accountability for actions of power at the forefront of considerations on constitutionalism. It merits clarification that notions of accountability vary strongly, most notably in the question of who should be held accountable. Macroconstitutionalism largely relates to states losing their ability to hold *institutions* to account and microconstitutionalism is conversely mostly concerned with institutions holding *states* to account for their actions.

Normative constitutionalism encompasses those visions that focus on the existence of a common normative (value) system. There are three types of normative constitutionalism. First, visions of a world law (world law is a body of law that transcends state borders; it is believed to be anchored in certain universally applicable rights);[12] second, visions pertaining to a hierarchy of norms (it is believed that in international law, states and international organizations adopt the role of the lawmaker and these 'lawmakers' are bound by a set of higher norms);[13] and, third, visions of fundamental norms (certain fundamental norms incorporate such central values of international society that they constitute a framework for the rest of international law).[14] An example of normative constitutionalism suggested by Erika de Wet is the idea that *jus cogens* norms constitute the global constitution as the core value system common to all communities.[15] This vision could be attributed to the sub-category relating to fundamental norms. Distinct from institutional constitutionalism, these visions do not necessarily have an institutional element; rather, their legitimacy is derived from their inherent (moral) value. Normative Constitutionalism thus emphasizes the protection of rights-oriented dimensions of constitutionalism.

Finally, analogical constitutionalism includes visions of global constitutionalism that are modelled on existing constitutional orders. Analogical constitutionalism can focus on meta-rules (as suggested by the early writings of Alfred Verdross

8 See particularly Fassbender, *supra* note 3; R. Macdonald, 'The International Community as a Legal Community', in R. Macdonald and D. M. Johnston (eds.), *Towards World Constitutionalism – Issues in the Legal Ordering of the World Community* (2005), 879.

9 A. Peters, 'The Merits of Global Constitutionalism', (2009) 16 *Indiana Journal of Global Legal Studies* 397, at 408.

10 E.-U. Petersmann, 'The WTO Constitution and Human Rights', (2000) 3 *Journal of International Economic Law* 19.

11 D. M. Bodansky, 'Is There an International Environmental Constitution?', (2009) 16 *Indiana Journal of Global Legal Studies* 565 ff.

12 A. Emmerich-Fritsche, *Vom Völkerrecht zum Weltrecht* (2007); J. Delbrück, 'Perspektiven für ein "Weltinnenrecht"?', in *Gedächtnisschrift für Jürgen Sonnenschein* (2003), 793.

13 B.-O. Bryde, 'Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts', (2003) 42 *Der Staat* 61.

14 E. de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order', (2006) 19 LJIL 611.

15 Ibid., at 613.

and Christian Tomuschat[16]), on domestic constitutional orders (as suggested by Robert Uerpmann[17]), or on European constitutionalism (as put forward by Matthias Kumm[18]). This vision of constitutionalization is predicated on the idea that legal processes should be standardized on the international sphere. Standard-setting is to be understood as the suggestion for prescriptive–practical norms to make up a fixed system of law, with the purpose of acting as guidance for societal development.

The key themes that have emerged from the foregoing are (a) the limitation of the single locus of power through participation (as found in social constitutionalism), (b) the key theme of governance through the institutionalization of power (as found in institutional constitutionalism), (c) the centrality of individual rights (emphasized particularly in normative constitutionalism) and (d) an idealistic vision of a social value system (as also found in normative constitutionalism), and, finally, (e) the key theme of the systematization or standardization of law (as evidenced in analogical constitutionalism). One can compress the four dimensions of global constitutionalism further, to visions centring either on ideas of democratic processes (social and institutional constitutionalism) or on ideas of liberal principles (normative and analogical constitutionalism). Although tainted by over-simplification, as is the case with all categorizations, this 'mapping' of the current debate on global constitutionalism indicates that the prevailing notions of global constitutionalism are largely lodged in the trajectories of liberal democratic thought.

2. Questioning prevailing visions of global constitutionalism

Having mapped the landscape in this way, what could be missing from it – the omissions and biases of the prevailing notions of global constitutionalism – will be highlighted briefly. The purpose of the following is to raise questions (for lack of space, an in-depth analysis is not possible) and point to possible weaknesses of the global constitutionalist debate. It is indicated here that many of the limitations are linked to the fact that the central ideas of global constitutionalism are at the same time central tenets of liberal democracy – as evidenced through the above key themes of global constitutionalism. This article does not intend to challenge liberal democracy itself (which in any event encompasses a wide diversity of political practices and arrangements), but it does point to the possible weakness of visions that depend exclusively on established traditions in liberal democratic thought and believe that they can be applied to global constitutionalism without further scrutiny.

The critique first regards certain 'universals' – assumptions about global constitutionalism that are common to all the named dimensions. Second, it regards the specific liberal democratic key themes and their applicability to the international sphere. The first common assumption discussed here is the belief that

16 A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926); C. Tomuschat, 'Obligations Arising for States without or against Their Will', (1993) 241 RCADI 216.
17 R. Uerpmann, 'Internationales Verfassungsrecht', (2001) 56 *Juristen Zeitung* 565.
18 M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', (2004) 15 EJIL 907.

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constitutions can exist beyond the domestic legal system and the nation state. This belief is linked to the view that a separate international legal order exists that allows for a normative framework.[19] Proponents of global constitutionalism commonly assert that a paradigm shift in international law has taken place, changing it from a law of coexistence to a law of co-operation.[20] This assumption could be contestable on the ground that such rationalization and idealization ignores the complexity of and political influences on the international sphere. A related concern (also regarding over-simplification and over-rationalization) is that the international sphere could be regarded as analogous to the nation state, thus glossing over particularities of the international sphere. Analogous constitutionalism is of course most exposed to this criticism.

The second common assumption maintained in prevailing international law visions of global constitutionalism is that a certain unity or homogeneity of the international sphere exists. Advocates of global constitutionalism commonly either hold that unity already exists or is developing, or that it can be created as a consequence of a global constitution. However, it can be objected that there is no unity in international law due to processes of fragmentation. A 2006 report by the International Law Commission (ILC), initiated by Martti Koskenniemi, fuelled the debate about the fragmentation of international law.[21] The group found that fragmentation has resulted in 'conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law'.[22] Some authors have brushed this aside in the context of constitutionalism, even regarding reference to fragmentation as 'somewhat panicky'.[23] However, it does give rise to the question whether in times of fragmentation a global constitution or even the process of constitutionalization is more reality or more dream.[24] Furthermore, it could be objected that the international sphere is marked by different facets of hegemony. Hegemony in international law is believed to exist in the cultural, economic, and political domination of certain states, particularly of the United States;[25] it is also believed to exist in international law in terms of a male gender domination.[26] Such accounts of hegemony mean that it is necessary to at least question the assumption of the existence of unity. The statement that unity can be *created* by means of a

19 The idea of the international sphere as incorporating a particular *order* or *system* is at variance with ideas that understand practices in the international sphere as chaotic or as purely derived from state interest. For a useful analysis regarding global constitutionalism, see A. L. Paulus, 'The International Legal System as a Constitution', in Dunoff and Trachtman, *supra* note 2, at 69.

20 E.g. Fassbender, *supra* note 3, at 551.

21 Report of the Study Group of the ILC, 58th session (2006), A/CN.4/L.682.

22 Ibid., at 11.

23 J. Klabbers, 'Setting the Scene', in J. Klabbers, A. Peters, and G. Ulfstein, *The Constitutionalization of International Law* (2009), 11.

24 Wouter Werner highlights that this disjuncture between the 'is' (the facts) and the 'ought' (the normative) does not lead advocates of global constitutionalism to question or 'water down' their ideals but rather leads them to emphasize the need to change the facts. W. Werner, 'The Never-Ending Closure: Constitutionalism and International Law', in N. Tsagourias (ed), '*Transnational Constitutionalism – International and European Perspectives* (2007), 342.

25 See, e.g., A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2008); M. Koskenniemi, 'International Law and Hegemony: A Reconfiguration', (2004) 17 *Cambridge Review of International Affairs* 197, at 199; E. W. Said, *Culture and Imperialism* (1993).

26 H. Charlesworth and C. Chinkin, *The Boundaries of International Law* (2000).

global constitution can be met with concerns about self-awarded legitimacy and the consideration that unity could also lead to uniformity at the expense of diversity.

The universality of the idea of global constitutionalism itself is the third common assumption of contributors to the debate. All writers with a vision of a global constitution assume that the concept of global constitutionalism is universally applicable. While a number of academics across the globe adhere to the idea of a global constitution, it is noteworthy that mostly European academics, particularly Germans (this author included), are fascinated by the area. The fact that there is a strong presence of German academics and an absence of academics from the non-European world in the debate begs the question whether the idea of global constitutionalism is *itself* global.[27]

The above has shown that the universals of prevailing ideas of global constitutionalism should be questioned and can raise concerns about limitations. The universals are not necessarily entrenched in a liberal democratic thought tradition; they are, however, typical assumptions of thinkers who work within the trajectories of this particular political practice. All three universals concern the idea of an abstraction of reality. Abstraction of reality is a tradition of constitutionalism which has been prevalent since theorists such as Locke and Kant. Theorists of the age of Enlightenment attempted to reduce the structures of the state to a small set of concepts. Kant's vision was that such abstraction and reduction could lead to a type of blueprint for the universal creation of the rationalized or good society.[28] Constitutionalist debates are often couched in abstractions; to paraphrase David T. ButleRitchie, this means that abstract form is often valued over the content of social and historical circumstances.[29] Visionaries of global constitutionalism employ the same methodology: they observe certain occurrences in the international sphere – such as increased communication through digitalization or the establishment of international institutions – and bring these occurrences into a language of abstract concepts or patterns suited for universalization. The language used for the global constitutional project is a language made up of terms such as 'global values', 'international legal community', 'international order', and so on. Koskenniemi suggests that such a systemic approach to international law and the (project of the) portrayal of an international order is itself to no avail, since such ideas only exist in the academic world.[30] In his assessment, such systematization is removed from reality in the sense that occurrences are rationalized and categorized that cannot in reality be rationalized or categorized.

The following briefly examines the specific key themes that were identified in the above four dimensions of global constitutionalism as to their possible limitations. It has already been observed that these five key themes are also central precepts of a liberal democratic tradition. The first key theme that was named above was the idea of the limitation of power. In the visions of global constitutionalism the limitation

27 S. Kadelbach, 'Völkerrecht als Verfassungsordnung? Zur Völkerrechtswissenschaft in Deutschland', (2007) 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 599.
28 I. Kant, *Perpetual Peace*, ed. and trans. L. W. Beck (1957).
29 See ButleRitchie, *supra* note 1, at 67.
30 M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2004), 3.

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of power is often disproportionately stressed in comparison with the granting of power. A correlative aspect of the limitation of power is of course the granting of regulatory and coercive capability. While the limitation of power sits well with ideas of democracy and accountability, it is often left unmentioned that this would mean that power is also allocated to an international decision-making organ, a force that can then itself deprive people of political and social freedom.[31] This inevitability is most obvious, yet rarely discussed, in the characterization of the UN Charter as the constitution of the world (institutional constitutionalism). While the Charter grants rights (and therefore limits power), its recognition as a global constitution would at the same time enlarge the power of the UN as an institution.[32] A further concern regards the centrality of legal equality within the idea of the limitation of power. It could be raised that the concept of legal equality – a central principle of liberalism – could serve to mask, and hence sustain, real, social inequality. Equality could be viewed as only applying to the individuals who conform to what can be termed the 'dominat*ing* culture' in a community, thus excluding the 'dominat*ed* cultures'.[33]

The institutionalization of power as the second key theme of constitutionalism (and the central preoccupation of institutional constitutionalism) should be scrutinized, in that it seems to rely inherently on the distinction between a public and a private sphere. The separation of the public and the private spheres and the location of the political within the public is an assumption that is enshrined in most views of constitutionalism of a liberal democratic tradition. A constitution either makes this distinction itself (constitutes it) or renders this distinction obligatory (requires it). The institutionalization of power is always aimed at directing the locus of power. In some cases the direction of the locus of power can be aimed at one particular body. The division between the public and the private and the possible institutionalization of a single locus of political power can give rise to concerns regarding (a) the possible manifestation of the exclusion of women's interests in the public (political) sphere; (b) a possible political domination and therewith exclusion of anyone not protected by a political community; and (c) the possible encouragement of the domination of a 'majority culture' at the expense of 'minority cultures'. Feminist voices were the first to use the slogan 'the personal is political' to highlight the problems associated with the public/private dichotomy. [34] Some feminists argued that the 'masculine' ethical orientation is for justice and rights and the 'feminine' ethical orientation is for care and responsibility.[35] While justice is allocated to the public sphere, care is allocated to the private sphere, leading to the exclusion of female assertions in the public sphere. The division public/private is in this way mapped onto the division male/female.[36] Ideas pertaining to a single locus of political power on a global scale – as suggested

31 D. Held, *Democracy and the Global Order* (1995), 9.
32 Ibid., at 269.
33 J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995), 7.
34 See C. Hanisch, 'The Personal Is Political', in S. Firestone and A. Koedt (eds.), *Notes from the Second Year: Women's Liberation in 1970* (1970). In a new introduction in 2006, Carol Hanisch clarifies that she was not the one to give the original paper its title, but rather that it was the editors, Firestone and Koedt.
35 C. Gilligan, *In a Different Voice* (1982).
36 S. Benhabib, *Situating the Self* (1992), 158.

for some UN-centred visions for global constitutionalism – raise questions of inclusion and exclusion: could, for example, the single locus of power lead to a manifestation of the disadvantages of women in international institutions?[37] Furthermore, a single locus of political power implies that the respective political power determines who can enjoy citizens' rights and who cannot. Such a form of constitutionalism carries a risk of unchecked political rule. It also underlines how rights in the abstract (such as human rights) could be empty shells without a political structure that defines citizenship. This thought goes back to the work of Hannah Arendt and her writing on the right to have rights. Reflecting on the status of the Jews in the Third Reich in Germany and the rest of Europe, Arendt argued that one needs to be part of a political community in order to make claims, even those claims that are usually associated with the 'abstract nakedness of being human', such as the claim to physical protection or life.[38] A further concern connected to a single locus of political power has to do with minority cultures. A hierarchical form of government encourages a majority culture and most likely the demand for assimilation of minorities. However, every representative of the whole would simultaneously also be a representative of some particular.[39] If one particular demands assimilation of another particular, could, then, cultural diversity be at stake?

The third key theme of constitutionalism, social idealism, also raises concerns as to its applicability to the global-constitutionalist debate. In global-constitutional visions (particularly in normative constitutionalism), the values that are protected as the common values of mankind are mostly couched in the terminology of human rights law. But what if human rights are considered the only available means of expressing social values? The possible limitations of equating human rights with civil rights as regards questions of the right to have rights need to be explored in this context.[40] Furthermore, human rights have been accused of being a tool for conceptual or ideological imperialism insofar as they can be interpreted in a way particular to a certain philosophical, historical, and ethical viewpoint.[41] Such possible limitations need to be explored before the theme of social idealism is applied to the debate on global constitutionalism.

The systematization of law as the fourth key theme of global constitutionalism concerns the notion that society can be directed according to a fixed plan or system. Constitutions are often believed to have an inherent ability to define and offer guidelines to progress. The danger in the idea of progress is that it could be employed as an instrument for ideological expansion. The liberal democratic tradition is often regarded as the most progressive standard and is thus left unquestioned.[42] A brief

37 Charlesworth and Chinkin, *supra* note 26.
38 Hannah Arendt, *The Origins of Totalitarianism* (1951), 299.
39 Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration', (2004) 17 *Cambridge Review of International Affairs* 199.
40 Arendt, *supra* note 38, at 299.
41 V. Leary, 'The Effect of Western Perspectives on International Human Rights', in A. A. An-Na'im and F. M. Deng (eds.), *Human Rights in Africa: Cross-cultural Perspectives* (1990), 15; M. Mutua, 'The Ideology of Human Rights', (1995–6) 36 *Virginia Journal of International Law* 588.
42 Some writers therefore even claim that development has gone so far that history and political evolution have come to an end. See particularly Francis Fukuyama, who claims in *The End of History and the Last Man* (1992) that the universalization of Western liberal democracy signals the end of mankind's ideological evolution.

examination of the failures of both liberal democracy and projects of democratization would be enough to illustrate that liberal democracy is everywhere a work in progress, rather than a complete set of standards that can be applied across the globe.

The final key theme is the importance of individual rights in visions of global constitutionalism (particularly normative constitutionalism). Individual rights are considered the best means of protecting the existence and interests of the individual in and from society. A possible problematic aspect of the incorporation of individual rights in a global constitution is the indeterminate nature of rights. It has been argued that the indeterminacy of individual rights allows for interpretations that are biased towards dominant traditions.[43] Before individual rights are branded global constitutional rights one must question who determines the content of such individual rights – in other words, whose standards are universalized to the international sphere?

While the above could only raise some questions, it has hopefully clarified that visions of global constitutionalism, despite their complexity and multidimensionality, are largely rooted in the same legal-political traditions, historically ingrained in western Europe. The divergences of the dimensions of global constitutionalism largely reflect the different visions and trajectories of liberalism. Such limited views have been found to burden prevailing approaches to global constitutionalism with possible blind spots and biases. If these key themes are applied to the international sphere without scrutiny, one could question whether global constitutionalism is in fact a manifestation of the liberal democratic ethos in international law. Richard Collins even declares that the support for a constitutional agenda is a 'call to arms' to reassert such 'old commitments' within the field of international law.[44]

It bears emphasizing that not all key themes give rise to the same gravity of concern. It seems that those dimensions which rely heavily on the centralization of power and a common set of values are subject to the more serious limitations. Institutional constitutionalism (e.g. the idea that the UN Charter is the global constitution) and normative constitutionalism (e.g. the idea that *jus cogens* norms are the global constitution), along with analogical constitutionalism (e.g. the idea that global constitutionalism mirrors national or regional constitutional models), are more susceptible to criticism in regard to these two features.

3. A REORIENTATION TOWARDS ORGANIC GLOBAL CONSTITUTIONALISM

The introduction of organic global constitutionalism as a new dimension to global constitutionalism seeks to reorient the debate away from its current trajectories towards a more flexible, participation-centred model. This suggestion is an attempt at re-engagement with the topic of global constitutionalism. It was noted above that

43 M. Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization', (2007) 8 *Theoretical Inquiries in Law* 9, at 11. Reference to H. Kelsen, *Introduction to Problems of Legal Theory*, trans. B. L. Paulson and S. L. Paulson (1992), 81.

44 R. Collins, 'Constitutionalism as Liberal-Juridical Consciousness: Echoes from International Law's Past', (2009) 22 LJIL 256.

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those dimensions which rely heavily on the centralization of power and a common set of values are subject to the more serious limitations. Both the centralization of power and the designation of certain values as *common* values include a sense of being fixed or stasis. Organic global constitutionalism tries to maintain the idea of global constitutionalism, but to dispense with those aspects of global constitutionalism that cause stasis. If liberal democratic ideas such as unity and legal equality are admitted to the international sphere, then they should be so only in a form which allows for corrections and changes and treats liberal democracy as a work-in-progress rather than as an end product.

The reconfiguration of global constitutionalism is based on four themes: (a) constitutionalism should be regarded as an ongoing process; (b) the debate on global constitutionalism should be political and discursive; (c) a vision of global constitutionalism should be predicated on the idea of the universal as a negative or, in other words, constitutionalism as an 'empty space'; and (d) global constitutionalism should be viewed as a promise for the future – a future devoid of predetermined content. These four themes will be introduced by reference to their respective intellectual origins. While the following in no way intends to suggest a new 'vision' of global constitutionalism, there is undoubtedly a link between them or a paradigm that they all share. Although the four themes distance themselves from the idea of common values in a substantive sense, there is a common factor of proceduralism or formalism. Communication, participation, and inclusion are the connecting formal mechanisms by which organic global constitutionalism functions. Many thinkers have struggled with the difficulty of separating the substantive and the procedural. Although in theory such procedural paradigms as communication, participation, and inclusion are devoid of any substantive values such as, say, 'freedom of religion is a fundamental right', one has the creeping suspicion that formal mechanisms are not immune to bias either. In respect of constitutionalism it has even been observed that 'form and substance are inseparable'.[45] Koskenniemi has identified this complexity, noting that formal mechanisms depend on equal application, which is impossible, since 'the reality to which they are applied is profoundly unequal'. Formal rules therefore 'always institute a bias in favour of some substantive preferences' and thus lose their formality.[46] This cross-fertilization is a feature of law that I do not intend to deny; indeed, it is a feature that underlines the 'organic' nature of law. However, the distinction between substantive questions and formal mechanisms is nevertheless useful. As mentioned above, all categorizations are in a way also simplifications, but they do assist us in understanding and distinguishing. In our case, the distinction between the substantive and the procedural allows us to understand different grades of bias and whether bias is to be embraced or questioned. Mechanisms that are conceptualized as being procedural – such as communication, participation, and inclusion – allow a stocktaking without necessarily having to commit to merely a different set of substantive questions.

45 Paulus, *supra* note 19, at 87.
46 M. Koskenniemi, 'What is International Law for?', in M. Evans (ed.), *International Law* (2006), 71.

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3.1. Constitutionalism as an ongoing process

The first overall theme of organic global constitutionalism that will be presented is the theme of constitutionalism as a process. It must be clarified at the outset that the word 'constitutionalism' does not, of course, refer to a given set of norms, but rather to an idea or practice. In most visions of global constitutionalism, that idea or practice is directed towards the amalgamation or composition of 'a global constitution'. The reference to constitutionalism as a process refers instead to an *ongoing* process that is not aimed at hardening to form a specific constitution. In his book *Strange Multiplicity: Constitutionalism in an Age of Diversity*, James Tully challenges the predominant ideas of constitutions in nation states.[47] The focus of the book is on demonstrating that cultural recognition is possible through constitutionalism without imperialism if the present-day language of constitutionalism is reoriented. It is suggested here that Tully's ideas on constitutionalism, which he developed for the national sphere, can also be applied to the international sphere.

Tully begins his book by asking, 'Can a modern constitution recognize and accommodate cultural diversity?'[48] He approaches the debate from the perspective of cultural diversity, in particular from the perspective of the struggles of aboriginal peoples for constitutional recognition. The strange multiplicity of cultural identities is illustrated through an account of a sculpture by Bill Reid named *The Spirit of* Haida Gwaii. The sculpture depicts a canoe containing 13 passengers, each a different character from the aboriginal Haida mythology. During the time of European imperialism, the Haida, like many other aboriginal governments, were deprived of their land and were forced to assimilate to the imperial European culture.[49] Tully encourages his readers to imagine the canoe and its passengers and to approach it with a willingness to listen to its culturally diverse spirits. He then explains that such willingness could enable one to imagine the sculpture as a constitutional dialogue of mutual recognition.[50] The constitutional dialogue is facilitated through the language of constitutionalism. Tully stresses that the appeal of the constitutional language lies in the fact that it is open to change, that it accommodates anti-imperial undertakings through its flexibility.[51] The *contemporary* language of constitutionalism is a composite of the flexible, open, and anti-imperial language of constitutionalism, as well as the dominant, inflexible, and imperial language of constitutionalism.[52]

According to Tully, current constitutional discourses largely foreground the dominant and inflexible variant. Historically, however, both aspects were employed. Constitutional struggles have mostly taken place due to the demand for independence and recognition. The first wave of constitutional nation-state-building took place when European nation states arose in opposition to the papacy and the Holy Roman

47 Tully, *supra* note 33.
48 Ibid., at 1.
49 Ibid., at 17–24.
50 Ibid., at 23, 24.
51 Ibid., at 38; see also Klabbers, *supra* note 23, at 9.
52 Tully, *supra* note 33, at 31.

Empire. The second wave of constitutionalism can be attributed to the struggles for independence of former colonies vis-à-vis the European imperial powers. For Tully, the politics of cultural recognition constitutes a third movement of anti-imperialism and constitutionalism, with the difference that cultural recognition means recognition in a constitutional order without the claim to becoming a nation state.[53] Not only have the anti-imperial struggles inside and outside Europe taken place in the constitutional language, the struggles of women and other suppressed groups have also been waged and justified in these terms.[54]

Judith Squires explains how even the most radical feminists who had completely detached themselves from constitutionalism, condemning the constitutional language as masculine, European, and imperial, returned to it. Throughout the 1960s and 1970s many feminists in the Women's Movement advocated direct participation in women's autonomous organizations, arguing that women's energies should not be devoted to existing political institutions and electoral policies.[55] The theory of abstract individualism, the rights-based ethic of justice, the practice of institutionalized politics, and the clear demarcation of public and private spheres were all rejected, thus displaying a critique of the foundations and operation of liberal constitutionalism. Formal structures were abandoned in favour of mechanisms of rotating responsibilities and validating personal experience as a mode of political expression.[56] However, these mechanisms ran up against two problems: the problem of insularity and the problem of accountability. In regard to the former, it was commented that the radical cohesiveness that was propagated among feminists led to denying and suppressing differences within political groups or movements.[57] The issue of accountability arose through the process of rotation and could not be resolved. This suggests two things: first, that the language of constitutionalism is a language that all may be content with as a language of struggles for recognition in the public sphere; and second, that some form of democratic structure, possibly in the form of representation, is necessary. The latter point will be addressed in the following section on politicization. The former point is that constitutional language has proved *adjustable*. When minorities make a claim to constitutional recognition, they are arguing that the prevailing terms and conditions of constitutionalism are exclusionary to their interests and that those terms and conditions should be adjusted to include them. Tully emphasizes that contemporary constitutionalism can therefore be understood as a game in which the participants alter the conventions as they go along.[58] Significantly, therefore, not only imperialists use the language of constitutionalism, but also anti-imperial movements and minorities. He therefore contends that

53 Ibid., at 16.
54 Ibid., at 37.
55 J. Squires, 'Liberal Constitutionalism, Identity and Difference', in R. Bellamy and D. Castiglione (eds.), *Constitutionalism in Transformation: European and Theoretical Perspectives* (1996), 212.
56 Ibid.
57 I. M. Young, *Justice and the Politics of Difference* (1990), 312.
58 Tully, *supra* note 33, at 40.

> [the] composite, contemporary language of constitutional thought and practice need not be either blindly defended against any claim to cultural recognition or blindly rejected for its male, imperial and Eurocentric bias. Rather, it can be amended and reconceived to do justice to demands for cultural recognition.[59]

In sum, Tully has demonstrated that the constitutional language is one of flexibility and adaptability, but also one of stability. While the features of flexibility and adaptability allow for participation and change, the feature of stability can facilitate imperialism and exclusion. On the basis of his findings, he encourages a reconfiguration of domestic constitutionalism.

The above thoughts can be applied to the discourse on *global* constitutionalism. First and foremost, and possibly banally, global constitutionalism must be a language available to all who would be both subject to it and possible participants in it. It has been demonstrated that constitutional language is an apt language for participation, since it is a language that is available to majorities as well as minorities, and not only to imperial but also to anti-imperial struggles. Current visions of global constitutionalism make use of the imperial aspects while giving insufficient weight to the anti-imperial aspects. Just as Tully criticizes contemporary constitutionalism from a comparative law perspective, so, too, is it possible to criticize current approaches to global constitutionalism from an international law perspective. As mentioned above, one of the primary limitations of the prevailing visions of global constitutionalism is that the models involved may not deserve the title 'global'. They may have a tendency to marginalize minority cultures. What is more, the inflexible nature of the visions of global constitutionalism would *manifest* such marginalization in the international sphere. Thus current participants in the debate on global constitutionalism make use of the flexibility of the language of constitutionalism to fill it with their respective liberal democratic interpretations. Their specific interpretation of global constitutionalism is subsequently stabilized. Organic global constitutionalism, however, embraces the fluidity of the constitutional language. Stabilization leads to exclusions; in contrast, flexibility leaves room for the recognition of diversity and plurality. In order to argue that the idea of global constitutionalism can be recast in this way, global constitutionalism must therefore be viewed in as abstract a sense as possible (without being a victim to positivistic abstractions mentioned above). Crucially, the visions of global constitutionalism that were discussed above must be seen as only some of the possible interpretations of the concept of global constitutionalism. Abstraction requires the idea of a global constitution to be clearly distinguished from individual constitutional laws and even from the sum of them.

The need for constitutionalism to be viewed as a process and open to change is additionally stressed in the model of global constitutionalism presented here through the prefix 'organic'. While the first point highlighted that constitutional language is open to change, the word 'organic' suggests that it must *remain* open

59 Ibid., at 31.

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to change. The flexibility of the language of constitutionalism should therefore be promoted rather than obstructed.

It should be stressed at this point that the discourse on global constitutionalism is of course complex and that some contributors to the discourse have indeed given thought to the need for flexibility. Stefan Kadelbach and Thomas Kleinlein, for example, argue in their vision of global constitutionalism that principles should replace rules, which they consider to be too rigid. They regard principles as having the advantage of being dynamic rather than final.[60] Similarly, Anne-Marie Slaughter suggests an informal set of principles as an alternative to formal codification of a global constitution. In her view, formal global constitutionalism would inevitably lead to a global government, and thus flexible principles should be favoured.[61] The flexibility and fluidity of organic global constitutionalism should not be regarded in a negative sense, as exclusively an anti-imperial tool; it should also be seen as something positive. Viewing constitutionalism as an ongoing process ensures that a far greater amount of the richness in diversity, communication, and texture can be taken into account.[62]

3.2. Politicizing the discourse of global constitutionalism

Another theme that is crucial to organic global constitutionalism is that it is regarded as inescapably political. No matter to what extent one tries to rationalize constitutionalism, it is not a neutral or non-political ground. Rather, the political should be included in constitutionalism, indeed should be provided with a priority status. This entails the recognition that constitutionalism is not predicated on pre-political convictions, but rather that normativity is determined discursively or politically. It is suggested that such 'politicizing' of the debate involves democratization of the debate. By this is meant a participatory and discursive methodology of specifying which issues are viewed as 'constitutional'. Notably, political determination is used synonymously with participatory determination and does not refer to any particular political model.

In contrast to the other notions of organic global constitutionalism, this one begins with an observation by an international lawyer – David Kennedy. Kennedy has written extensively on the politics of international law. The following will primarily rely on his seminal essays under the title 'The Disciplines of International Law and Policy' to represent his thoughts.[63] Kennedy points to the pluralism of the international law profession. He claims that not only are international lawyers diverse, but so are their views on what international law is. As he puts it, international lawyers have certain projects (personal, professional, or political) that they pursue using the argumentative, doctrinal, and institutional materials which the discipline

60 S. Kadelbach and T. Kleinlein, 'International Law – a Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles', (2007) 50 *German Yearbook of International Law* 303, at 345.

61 Slaughter, *supra* note 7, at 245.

62 David T. ButleRitchie argues in favour of 'organic constitutionalism' on a domestic scale on this basis. ButleRitchie, *supra* note 1, at 69.

63 D. Kennedy, 'The Disciplines of International Law and Policy', (1999) 12 LJIL 9, at 18.

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offers.[64] His starting point is therefore the specificity of international law in the United States. Kennedy argues that international law is distanced from the US foreign policy establishment because it has become technical and apolitical. This has led to the (self-)marginalization of international lawyers, particularly since 1945.[65] Public international lawyers can therefore be distinguished from scholars of international economic law or from comparative law in their legalistic and technical leaning: 'Broadly speaking, legal internationalists have fallen on the "rule" rather than on the "policy" end of the spectrum in the United States.'[66] In the areas of both foreign policy and the international economy, international law has, according to Kennedy, become too legalistic. Public international law institutions are too focused on the state and too formal in their approach to law to be able to be at the centre of the debate on the construction of a modern market regulatory regime.[67] International institutions are too dependent on outdated concepts such as 'sovereignty' to be effective or taken seriously in this field. For him, moreover, the construction of the European Union is an example of how *not* to proceed in the international sphere: 'The European Union seems to track one's worst fears about the internationalization of public life. The political has become technocratic. The government exists only to serve the market.'[68]

Thus *political* engagement in the international sphere, in international law, is crucial. This implies a necessary focus on participation, rather than on ascertaining a unity as a common basis.[69] Kennedy goes on to introduce the international legal theory that positions itself outside this liberal mainstream (referred to, *inter alia*, as New Approaches to International Law and Critical Legal Studies). He explains that methodologically this shares with the US mainstream an image of law as both rules and policies.[70] It observes the stability of rules, on the one hand, and the flexibility of policies, on the other. In contrast to the mainstream, its critique is directed against the liberal policy conclusions and legalist sympathies of the mainstream discipline itself.[71] Politicization responds to a concern that any form of global constitutionalism which distances itself from liberalism may be taken as undemocratic.[72] The idea of politicizing the legal debate is in fact an attempt to make the discourse *more* democratic.

Kennedy's thoughts on the need to politicize international law from the perspective of US international lawyers can be applied to the debate on global constitutionalism. In order for this debate to be more relevant to reality, it must be a political debate. As Wouter Werner asserts, global constitutionalism 'should take the political seriously'.[73] Crucially, politicization means participation. The proposal

64 Ibid., at 14, 83.
65 Ibid., at 21.
66 Ibid., at 27.
67 Ibid., at 53.
68 Ibid., at 58.
69 S. Marks, *The Riddle of All Constitutions* (2003).
70 Kennedy, *supra* note 63, at 34.
71 Ibid., at 35.
72 Squires, *supra* note 55, at 209.
73 Werner, *supra* note 24, at 348.

for an organic form of constitutionalism pays heed to the fact that the identities of participants and therewith the respective interests represented on the international level are fluid. Those wanting to be heard in the international sphere – and making use of a space of global constitutionalism – may come there in a variety of ways. Cultural identity, determined through cultural affiliations, is itself fluid and open to change. Identities cannot be defined through looking at national borders, or sexes, or even languages. Individuals adopt an ever more disparate set of personal identities, meaning that they have affiliations with a number of groupings. Personal identities can be evidenced by ethnic affiliation, religious allegiances, views of personal morality, ideas about what is valuable in life, tastes in music and art, and so on.[74] Participants may identify themselves as citizens of a particular country; they may identify themselves as belonging to a certain sex; they may identify themselves as belonging to a cultural group; or they may identify themselves as part of a profession. Identities are as fluid as the plurality in the world. If constitutionalism is to be global, then this fluidity of identities must be accommodated.

A further central reason for politicizing the debate is the necessary rejection of specific entrenched pre-political values in the international sphere. Rather than declaring particular values as given and unalterable, an open debate would determine which questions are constitutionally pertinent. The issue was raised above that prevailing visions of global constitutionalism possibly manifest exclusions in the international sphere by designating certain norms as global constitutional norms. For example, the designation of the UN Charter as the global constitution could manifest certain hegemonic structures already existing in the international sphere (those structures that are in place through the internal constitution of the UN, such as the designation of the permanent members in the Security Council). Furthermore, the designation of certain norms as *jus cogens* norms could not only exclude other norms, but would indeed exclude any form of discourse on the excluded norms. It was noted above that the designation of certain universal values (such as human rights norms) begs the question of the convictions behind such norms. For example, are these supposed fundamental and universal norms based on a religious conviction, such as the Christian belief in the personal salvation of individuals, or on a philosophical conviction, such as the Kantian notion that every person has certain rights merely by virtue of being human? Furthermore, are these supposed fundamental and universal norms based on a Western tradition? And are such norms not limited by their indeterminacy in any case? The above examples clarify the fact that the idea of entrenched pre-political norms offers much room for dispute. If the focus is shifted to a discursive determination of norms, participation is moved to the forefront.

It must be noted here that, while rejecting entrenched pre-political norms, we cannot envision discourse as proceeding from a 'clean slate'. It must be accepted that participants come with pre-political values firmly entrenched in their identities. Participants are likely to have specific cultural, religious, ethical, or other beliefs that

74 D. Miller, 'Citizenship and Pluralism', (1995) 43 *Political Studies* 432.

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they will wish to see represented. The challenge is to allow a hearing of these beliefs. The discourse must thus be lodged in the respective cultural, societal, or religious context. It cannot be free-floating discourse; all discourses are in some way predetermined through the participants to it. The rejection of entrenched pre-political norms simply means that no *specific* pre-political value is prioritized over another.

The rejection of a common pre-existing ethical basis for constitutional matters seemingly raises questions of legitimacy. Yet legitimacy should in fact be easier to achieve through a political process. Richard Bellamy summarizes this phenomenon aptly: 'Once societies are no longer viewed as naturally constituted according to some moral order, then the norms that animate and regulate human affairs have to be politically constructed and legitimated by those who are to submit to them.'[75]

Now that it has been determined that global constitutionalism is best conceived as a political process, the issue of *how* the debate may be politicized must be addressed. The inherent difficulty facing any suggestion of a political constitutionalism is to overcome the tension between the need for flexibility and fluidity on the one hand and the need for formal procedures and the stability of norms on the other. It is possible that organic global constitutionalism could thus run into self-contradiction. The idea was raised above that a central limitation of the prevailing visions of global constitutionalism is that they not only suffer from weaknesses in terms of exclusions, but also manifest these weaknesses in the international sphere. Such manifestations occur through the need for certain procedures and forms. The problem in employing procedures and forms lies in the fact that the plurality of identities is no longer fluid and contextual; rather, identities are 'frozen'. [76]

One approach to addressing the dilemma is to view constitutionalism as discursive. Jürgen Habermas first introduced the concept of normativity through discourse in his famous discourse theory.[77] He suggested that rules could be deliberated through communication. The purpose of discourse is to determine which norms meet with the approval of all affected in their capacity as participants in a practical discourse.[78] He thus alters Kant's notion of the categorical imperative, turning it into a collective imperative, an imperative that reflects a general will. Habermas identifies such a norm as a truly universal norm with full legitimacy.[79] The discursive nature of law-making is directed towards participation, as was deemed necessary for a political process above. In application of the discourse theory, all those potentially affected by the norm would then stand in a participatory dialogue. A norm achieves validity when a general will as to its validity is recognizable. Such a form of discursive and political constitutionalism differs from liberal constitutionalism in that the constitutional provisions have no pre-political justification.[80] A discursive political

75 R. Bellamy 'The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy', in Bellamy and Castiglione, *supra* note 55, at 43.
76 Squires, *supra* note 55, at 216.
77 J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. W. Rehg (1998), 4.
78 J. Habermas, *Moral Consciousness and Communicative Action*, trans. C. Lenhardt and S. W. Nicholsen (1990), 197.
79 Ibid., at 67.
80 Squires, *supra* note 55, at 218.

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designation allows for a flexibility and fluidity that a pre-political concept cannot provide.

Habermas's discourse theory must, however, be modified for the purposes of organic global constitutionalism. There are two factors that seem to be at odds with the idea of an organic global constitutionalism. First, discourse theory attempts to identify a universal norm. While this is not directed to a pre-political norm, the identification of a universal norm could challenge the need for flexibility. Second, how is the normative outcome of the discourse theory to be understood in respect of the indeterminacy of norms? It was stated above that norms are open to interpretation. Such indeterminacy could be counter to what discourse theory is in fact trying to achieve. It is noteworthy that Habermas himself is in favour of applying discourse theory in the international sphere in order to determine a common set of norms.[81]

This criticism brings us back to Tully's work. Tully claims that 'the presupposition of shared, implicit norms is manifestly false' in the predominant forms of discourse theory. He explains that a constitutional dialogue should take place, not to determine sameness through agreements on universal principles and institutions, but to bring negotiators to recognize their differences and similarities.[82] Crucially, therefore, the global constitutional dialogue would not have the *aim* of ascertaining unity or sameness on the basis of a common moral order or common values. This criticism upholds the discursive methodology, but rejects the aim of ascertaining universal norms. While Tully criticized the predominant discourse theory for domestic constitutionalism, his argument seems even more fitting on a global scale. The world is, after all, by far more diverse than individual nation states. The discourse methodology itself is therefore not at odds with the need for flexibility and fluidity of organic global constitutionalism. On the contrary, it *encourages* flexibility. Tully suggests that by asking, explaining, and rephrasing, participants will gradually be able to see things from the points of view of each other. This would enable an acceptable intercultural language capable of accommodating the truth in each of their limited and complementary views.[83] The use of the discourse methodology aimed at highlighting particularities rather than sameness alters the image of constitutionalism: 'Instead of grand theory, constitutional knowledge appears to be a humble and practical dialogue in which interlocutors from near and far exchange limited descriptions of actual cases, learning as they go along.'[84]

The second issue to be examined is whether discourse theory is compatible with what has been termed the indeterminacy of norms. Despite its modification towards particularities, discourse theory is nevertheless to be regarded as a discourse theory of *law*. The norms that emerge through an employment of discourse theory could be contradictory to the observations on the indeterminacy of norms above. However, it is submitted here that such indeterminacy is in fact correspondent to the flexibility of constitutional language. Recognition of the indeterminacy of norms

81 Habermas, *Divided West*, *supra* note 7.
82 Tully, *supra* note 33, at 131.
83 Ibid., at 134.
84 Ibid., at 185.

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is indeed useful for maintaining an 'organic' constitutionalism. Ulrich Fastenrath observes that the indeterminacy of norms, indeed of words, avoids the futile attempt to provide an exhaustive and finite meaning to the content of legal texts.[85] This indicates that a certain indeterminacy of language is necessary for flexibility in the constitutional language. What laws 'mean' and the aims they may appear to have will therefore depend on the judgement of application, which is a political act.[86] This is compatible with discourse theory. Indeterminacy is consistent with the approach that constitutionalism should be determined by means of political and social processes, rather than pre-political legal norms.

While the possibility of participation of all is at the core of this point, it must nevertheless be considered whether there are some legitimate limits to such wide participation. For example, what of radical groupings such as nationalists that promote racism or xenophobia, groups that might be referred to as 'undesirable'? Considerations such as these lead to further questions. Does the identification of certain groups as 'undesirable' in a discourse of global constitutionalism lead back to a majoritarian form of discourse that – as has been mentioned above – could raise concerns of hegemonic structures? Or, even broader, is the concept of participation 'free for all' simply too utopian? One might suspect that such an 'open' idea of discourse and participation places too much trust in humans. Does the example of radical groupings demonstrate the unfeasibility of organic global constitutionalism itself?

It is submitted here that this is not the case. Organic global constitutionalism looks the fallibility of humans straight in the eye – it is realistic, not utopian. Organic global constitutionalism recognizes the need for law to be placed in its particular social context, and recognizes that social contexts change depending on various factors of time and space. Thus what is considered acceptable here and now may be considered unacceptable elsewhere or in the future. The discursive nature of constitutionalism may be able to accommodate these changes, whether they are self-corrective from a moral point of view or merely reflective of a change dissociated from morals. What the above example means to demonstrate is that constitutionalism should not adopt a presupposed ethical high ground, since the adoption of such a position would automatically mean the exclusion of another possible ethical ground.

It has been shown that politicization of global constitutionalism is valuable in order to ensure the relevance of constitutional issues, and in order to place the emphasis on participation. An adjusted discourse theory that is not aimed towards a universal norm but that is directed towards an ongoing discursive process has been identified as a means of achieving this. Politicizing the debate in this context means recognizing the disunity of the world. Organic global constitutionalism is thus not oriented to finding a lowest common denominator of values; rather, its purpose is to offer different individuals and groups a space for representing their interests discursively.

85 U. Fastenrath, 'Relative Normativity in International Law', (1993) 4 EJIL 305, at 310.
86 Koskenniemi, *supra* note 43, at 11. Reference to Kelsen, *supra* note 43, at 81.

3.3. Global constitutionalism as a 'negative universal'

The third theme of organic global constitutionalism is that it is devoid of fixed content. This theme is closely linked to the idea of constitutionalism as process and specifically as political process. It merits being considered a distinct theme, since it highlights a balancing act that has been an underlying theme of global constitutionalism in general: that of universalism on the one hand and particularism on the other hand. The work of Ernesto Laclau will be referred to here, specifically his book entitled *Emancipation(s)*.[87] Laclau argues that the universal should be regarded as an 'empty space' in the sense that it has a purely indicative character. Conceived in this 'negative' sense, the universal indicates the existence of something, but has no positive content of its own. It is suggested here that global constitutionalism should similarly be regarded as an empty space. It should indicate universality, but not on the basis of common values. The following will try to explain this.

Laclau begins his argument by questioning the independence of particularity from universality. It could be stated that the particular is inherently dependent on the universal.[88] The particular identifies itself merely in relation to the universal, meaning that there is a common ground in the sense of a common social reality. The emergence of the universal and the particular from a common ground would mean that the death of the universal would thus lead to the death of the particular.[89] Laclau explains that this outcome is unsatisfying for his purposes: there can be no true emancipation if there is a common ground between the element that the emancipation is sought from (the universal) and the element that is emancipating (the particular). The particular is and remains part of the universal in that case. For the purpose of organic global constitutionalism, such an outcome is also undesirable. If the particular is inherently linked to the universal, it cannot itself determine the nature of a constitutional discourse. The eternal chasm between the universal and the particular would signify an eternal hegemonic struggle; there can be no moment in which the particular finds an independent ground for discourse. In order to break this chain, Laclau suggests perceiving universality as a negative – that is to say, the lack of any particular content. Each new 'particular' or social antagonism would redefine this negative universal.[90]

To illustrate this, Laclau presents his reader with an example of a particular social antagonism: a national minority which is oppressed by an authoritarian state. He then invites the reader to imagine the intervention of other antagonistic forces such as a foreign invasion or the action of hostile economic forces. The national minority will view all the antagonistic forces as equivalent threats to its identity. This equivalence demonstrates that there is a commonality, albeit a *negative* commonality:

> This common element, however, cannot be something positive because, from the point of view of their concrete positive features, each of these forces differs from the other.

87 E. Laclau, *Emancipation(s)* (2007).
88 Ibid., at 4–6.
89 Ibid., at 13.
90 Ibid., at 14.

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> So it has to be something purely negative: The threat that each of them poses to the national identity. The conclusion is that in a relation of equivalence, each of the equivalent elements functions as a symbol of negativity as such, of a certain universal impossibility which penetrates the identity in question.[91]

The negative commonality that is defined through the particular leads one to conclude that the universal can emerge from the particular. This negative universal is forever changing, organic, since the relation between the universal and the particular is defined through the relevant social antagonism; and the respective social antagonisms are always *particular*. Laclau characterizes this negative universality as an 'empty signifier': it is an absent presence, a signifier not of universality itself but of the idea or possibility of universality.[92] The particular therefore incorporates universality as that which it is lacking.

Applying this to global constitutionalism, one could thus view global constitutionalism as such an empty space. Global constitutionalism has no content of its own; it has no predetermined values on which it is based and it has no common principles. Only the discourse of particularities, the above-mentioned 'language of global constitutionalism', identifies the empty shell of global constitutionalism, and highlights that which is lacking in the respective particularities. Diverse interests may be represented on a global sphere that does not presuppose a common ground. The discourse itself is what makes the empty shell visible. Global constitutionalism as a negative universal can thus emerge from the particular. Such an idea of the foregrounding of the particular over the universal is in stark contrast to traditional liberal ideas of overlapping consensus, as suggested, for example, by Rawls.[93]

It is key that the discourse of the particular from which the universal can emerge is not something that happens by chance. In Laclau's example, the interventions did happen – from the perspective of the particular – by chance. The negative universal therefore also emerged by chance. Global constitutionalism, however, is necessarily to be viewed as an *available* space. It is a space that is designated to be used for discourse. Not only is the space designated, the language is designated too. The availability of the space should not be viewed as another means of attaining a positive universal for the present, but should be viewed as a space for discourse in which the negative universal will involuntarily show itself. Global constitutionalism is therefore a distinct concept that has a character of its own. Going back to Bill Reid's sculpture of the *Haida Gwaii*, the various mythical creatures depicted there are, after all, *in the same boat*. Their variety points to the element of diversity, but the diversity is nevertheless situated in a common space. Furthermore, they are steering the boat together. Although the direction may not be predetermined, they have a shared course. The idea of global constitutionalism as an empty space reinforces the emphasis above on the discursive and political character of organic global constitutionalism.

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91 Ibid., at 14.
92 Ibid., at 15.
93 J. Rawls, *The Law of Peoples* (2002).

3.4. Organic global constitutionalism as a promise for the future

The final theme that will be applied to global constitutionalism is the theme of a promise for the future. The work of Jacques Derrida will be introduced in this context. The preceding sections have argued for a notion of constitutionalism as process, as discourse, and as an 'empty space'. So far, then, the flexibility and organic nature of global constitutionalism have been stressed. Among all this change and movement, an aspect of stability must nevertheless be present in order for this form of constitutionalism to be regarded as *normative*. It is suggested here that normativity as a positive aspect should be regarded as a feature belonging to the future. Normativity, stability, and possibly 'a constitution' are thus not features of the present, but are features of the promise of constitutionalism *to come*. This takes into account that the future of constitutionalism must remain open, on the one hand – the necessity of openness to change – and must nevertheless include a prospect of being filled with content from time to time, on the other.[94] The above-mentioned discourse is therefore directed to the future, more specifically to a *better* future. Due to the organic nature of the discourse, global constitutionalism will never build up to 'a global constitution'. The discourse will remain one of constitutional*ism* – an ongoing process. If the social reality of today is therefore seen as marked by limitations, global constitutionalism offers a tool with which current social reality can be amended and reconceived to do justice. While current social reality can be reconceived, it can only be reconceived as a future good, not for the present. This underlines the appeal of a shared project of global constitutionalism; it speaks to a desire for future justice and democracy. Derrida studied the idea of a better future as an abstract notion, a *promise*. He speaks of a promise that is empty of any meaning save for expectation: 'an *event* which cannot be mastered by an aprioristic discourse'.[95] Derrida believes this promise is so strong as to describe it as 'messianic':

> A messianism without religion, even a messianic without messianism, an idea of justice – which we distinguish from law or right and even from human rights – and an idea of democracy – which we distinguish from its current concept and from its determined predicates today.[96]

Derrida is demonstrating a chasm between law and justice, which makes a better future necessary. Laclau rightly notes that we should not understand Derrida's idea of the 'messianic' as anything *directly* related to actual messianic movements of the past or the present. Indeed, it is distinct in that there is no eschatology, there is no 'promised land'. Derrida develops a concept of *democratie à venir* – the democracy to come.[97] Such ideas can be applied to organic global constitutionalism. Organic global constitutionalism in the *present* is devoid of fixed content; it is an open

94 Nico Krisch also comes across the problem of normativity as regards his vision of global administrative law. In his view, global administrative law causes the 'disappearance of a clearly competent authority'. This implies, similarly to what is suggested for organic global constitutionalism, 'fluidity'. In his view, fluidity leads to the limitation of a 'lack of certainty'. N. Krisch, 'The Pluralism of Global Administrative Law', (2006) 17 EJIL 247, at 275. The characteristic of organic global constitutionalism as a promise for the future could possibly be a means to overcome the chasm between fluidity, on the one hand, and normativity, on the other.

95 Laclau, *supra* note 87, at 73.

96 J. Derrida, *Specters of Marx* (2006), 74.

97 Ibid., at 81.

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space. However, the concept promises justice for the *future*. This future cannot be concretized to a specific set of norms; rather, the future remains to be realized. The tool that is employed to make the future promise *realistic* is the (adjusted) discourse theory. Organic global constitutionalism can therefore provide a means of expression to plurality and diversity – there is no positive universal that could assume a hegemonic power – and at the same time can provide a means of expression to the idea of a *shared* project for the future.

3.5. The limitations of organic global constitutionalism

The above features are not without limitations of their own. There are two major limitations associated with the suggested themes of organic global constitutionalism. First, the political mechanisms in which participation has to function risk exhibiting the inflexibility that must be avoided. Second, while organic constitutional language hopes to provide a forum of equal participation, not everyone comes to the discourse as equals. The vision of organic global constitutionalism cannot rid international law of these important limitations.

Constituting political procedures inevitably posits some stability of identity and requires exclusion of certain differences, and therefore compromises the fluidity of heterogeneous differences.[98] Participation cannot take place outside formal structures. In order to ensure the representation of interests, some formal structures are essential. As discussed earlier, the feminist movement – the forerunner in many forms of participatory politics – adjusted its views with respect to participatory politics after experiencing the difficulties of an absence of formal mechanisms.[99] The critique of existing societal and political structures led early feminists to a rejection of the universalizing framework as androcentric rather than neutral. Consequently, groups were established that strictly avoided all hierarchies. Mechanisms of rotating responsibilities were introduced and all form of representation was abandoned.[100] Such avoidance of hierarchies finally led to an insularity, which proved to lack accountability. It also proved to lack representation of all women's interests, despite its rhetoric. Learning from these imperfections, many feminists began to promote a 'politics of difference', which seeks recognition of multiple and contingent differences, and does so through procedures and organizational structures.[101] Some form of institutionalization of power must therefore be maintained for organic global constitutionalism.

A second possible limitation of organic global constitutionalism is that the participants to the discourse would be determined by current political and social structures, most notably by current international law.[102] It follows that the consideration of *who* can participate in a discourse of global constitutionalism could be subject

98 Squires, *supra* note 55, at 215.
99 Ibid., at 212 ff.
100 Ibid., at 212.
101 Ibid., at 215.
102 Nico Krisch has voiced a similar concern regarding flexible and fluid global administrative law. He considers that the reliance on a free interplay through a pluralist approach could 'merely favour the powerful at the expense of the weak'. Krisch, *supra* note 94, at 275.

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to the inequalities that are already present in current international law. There may therefore be an initial bias towards male, white, and Western participants. Despite this, the flexible nature of organic global constitutionalism would allow for its revisability in the future. The suggested themes of organic global constitutionalism may therefore also be subject to limitations, but – uniquely – incorporate the possibility of self-correction.

4. Conclusion

The above has tried to argue that the idea of *a* global constitution should be abandoned; the idea of global constitutional*ism*, however, can be retained, provided that the concept is reconfigured. Rather than trying to be an exhaustive account, this suggestion is one that attempts to initiate a new debate on global constitutionalism, one with a wider perspective than before. Needless to say, it is necessarily speculative, and does not address the many practical issues that would attend the implementation of organic global constitutionalism. Organic global constitutionalism is different from the prevailing visions of global constitutionalism in that it

1. rejects stability in favour of flexibility;
2. rejects any pre-political common values in favour of a discursive political determination of constitutionalism;
3. rejects viewing global constitutionalism as a 'positive universal', conceived along the lines of liberal democracy, in favour of viewing it as something that only emerges through contending particulars in the sense of a 'negative universal'; and
4. suggests viewing the normative aspect of constitutionalism as a promise for the future, a *constitutionalism to come*.

It must finally be noted that, while the discussion of organic global constitutionalism has proceeded in a mostly theoretical rather than practical register, global constitutionalism always also includes a *project* of constitutionalism. That is to say, concrete measures are needed to realize the abstract ideas. This aspect of organic global constitutionalism would require an in-depth analysis of institutional and other arrangements, and therefore goes beyond the scope of this article. The purpose here has been to explore the threshold question of whether an alternative to prevailing ideas of global constitutionalism is possible, and, if so, how it might be conceived. Such an undertaking could be the first step in a debate on rethinking global constitutionalism.