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The Achievement of Constitutionalism and its Prospects in a Changed World

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I. External Culmination – Internal Erosion

Constitutionalism is a relatively recent innovation in the history of political institutions. It emerged in the last quarter of the eighteenth century from two successful revolutions against the hereditary rulers, first in the British colonies of North-America, then in France. Immediately understood as an important achievement, it appealed to many people outside the countries of origin, and attempts to introduce modern constitutions started all over Europe and soon also in other parts of the world. The nineteenth century was a period of struggle for constitutionalism in a lot of countries. But after many detours and setbacks constitutionalism had finally gained universal recognition by the end of the twentieth century. Today, only a handful of the nearly 200 states in the world is still without a constitution.

This is not to say that these constitutions are everywhere taken seriously, or that constitutional norms always prevail in cases of conflict with political intentions. But the universal recognition of constitutionalism as a model for the organisation and legitimation of political power is shown by the fact that even rulers who are not inclined to submit themselves to legal norms feel compelled at least to pretend to be exercising their power within the constitutional framework. Further, the general willingness of rulers to govern in accordance with the provisions of the constitution has recently increased considerably, as is indicated by the great number of constitutional courts or courts with constitutional

jurisdiction that were established during the last quarter of the twentieth century. After 225 years, constitutionalism seems now to have reached the peak of its development.

This external success of constitutionalism, however, should not mislead the observer. It is accompanied by an internal erosion that started almost unnoticed in the wake of a transformation of statehood, domestically as well as internationally, and eventually cost the state the monopoly of public power over its territory.[1] Today, the state shares its power with a number of non-state actors, most of them international organisations to whom sovereign rights have been transferred and whose exercise escapes the arrangements of national constitutions. This differs from the fact that constitutional norms may be violated or have little impact on political action; such a gap between norm and fact has always existed, but does not of itself undermine the potential of constitutionalism. The internal erosion, by contrast, endangers the capacity of the constitution to fulfil its claim of establishing and regulating all public power that has an impact on the territory where the constitution is in force. This is why the erosion not only affects this or that constitution, but the achievement of constitutionalism altogether.

One response to this development has been the attempt to elevate constitutionalism to the international level. The recent boom of the term 'constitutionalization' is an indicator of this tendency. Different from traditional constitution-making, it describes not an act by which a constitution takes legal force, but a process which eventually ends up in a constitution. Such processes are already seen underway, certainly in Europe where the European Convention of Human Rights and the primary law of the European Union are analysed in terms of constitutional law, but also globally. For many authors, public international law is acquiring constitutional status. The Charter of the United Nations as well as the statutes of other international organisations such as the World Trade Organisation are interpreted as constitutions. Even global public policy networks and self-organisation processes of private global actors are discussed in terms of constitutionalism – all objects not regarded as constitutions just a few years ago.[2]

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[1] For the domestic causes and effects, which are not the central concern of this Chapter, see D. Grimm, *Die Zukunft der Verfassung* (Frankfurt: Suhrkamp, 1991, 3rd edn. 2002), 399; D. Grimm, ‚Ursprung und Wandel der Verfassung' in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts* (Heidelberg: C.F. Müller, 3rd edn., 2003), vol.1, 22 et seq.

[2] The literature is increasing rapidly. See in general R. St.J. Macdonald and D.M. Johnston (eds.), *Towards World Constitutionalism* (Leiden: Brill, 2005); A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579; E. de Wet, de Wet, 'The International Legal Order' (2006) 55 *International & Comparative Law Quarterly* 51; R. Uerpmann, ‚Internationales Verfassungsrecht' (2001) *Juristenzeitung* 565; M. Knauff, ‚Konstitutionalisierung im inner- und überstaatlichen Recht' (2008) 68 *Zeitschrift für ausländisches öffentliches*

In order to realize the extent to which the development affects the constitution on the national level one needs a clear notion of what constitutionalism entails. This is not always present in discussions over the process of constitutionalization and the future of constitutionalism. Many authors tend to identify constitutionalism as involving a submission of politics to law. This is not wrong, but it is not the whole story. Legalization of politics is nothing new; it existed long before the constitution emerged. A clear notion of constitutionalism can therefore be best obtained if one tries to determine what was new about the constitution when it emerged from the two revolutions, and which conditions had to be present before it was able to emerge.[3] This, in turn, will allow a comparison of constitutionalism in the traditional sense with new developments on the international level and permit an assessment to be made of the possibility of its reconstruction at the global level.

II. THE ACHIEVEMENT AND ITS PRECONDITIONS

The emergence of the modern constitution from revolution is not accidental. The American and the French Revolutions differed from the many upheavals and revolts in history in that they did not content themselves with replacing one ruler by another. They aimed at establishing a new political *system* that differed fundamentally from the one they

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Recht und Völkerrecht 453; ‚Constitutionalism in an Era of Globalization and Privatization' (2008) 6 *International Journal of Constitutional Law* issues 3 & 4; C. Walter, 'Constitutionalizing International Governance' (2001) 44 *German Yearbook of International Law* 170; R. Kreide and A. Niederberger (eds.), *Transnationale Verrechtlichung* (Frankfurt: Campus, 2008). For public international law, see: J.A. Frowein, ‚Konstitutionalisierung des Völkerrechts' (1999) 39 *Berichte der Deutschen Gesellschaft für Völkerrecht* 427. For the UN, see B. Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law*, 529. For the WTO, see D. Cass, *The Constitutionalization of the World Trade Organisation* (Oxford: Oxford University Press, 2005); J.P. Trachtman,'The Constitution of the WTO' (2006) 17, *European Journal of International Law* 623. For the European Convention of Human Rights, see C. Walter, 'Die EMRK als Konstitutionalisierungsprozess' (1999) 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 961. For the European Union, the literature is immense: see, e.g. J. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999); I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam' (1999) 36 *Common Market Law Review* 703; A. Peters, *Elemente einer Theorie der Verfassung Europas* (Berlin: Duncker & Humblot, 2001). For societal constitutionalism, see: G. Teubner, ‚Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie' (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1; A. Fischer-Lescano and G. Teubner, *Regimekollisionen* (Frankfurt: Suhrkamp 2006); H. Schepel, *The Constitution of Private Governance* (Oxford: Hart, 2005). For some critical voices see R. Wahl, ‚Konstitutionalisierung – Leitbegriff oder Allerweltsbegriff?' in C-E Eberle (ed.), *Der Wandel des Staates vor den Herausforderung der Gegenwart. Festschrift für W. Brohm* (Munich: Beck, 2002), 191; U. Haltern, ‚Internationales Verfassungsrecht?' (2003) 128 *Archiv des öffentlichen Rechts* 511; P. Dobner, *Konstitutionalismus als Politikform* (Baden-Baden: Nomos 2002); D. Grimm, ‚The Constitution in the Process of Denationalization' (2005) 12 *Constellations* 447.

[3] See D. Grimm, *Zukunft der Verfassung*, above n.1, 31; D. Grimm, *Deutsche Verfassungsgeschichte* (Frankfurt: Suhrkamp 3rd ed. 1995), 10 et seq.

had accused of being unjust and oppressive. In order to achieve this, they devised a plan of legitimate rule, with persons being called to govern on the basis and in accordance with these pre-established conditions. The historic novelty of this step is often obscured by the fact that the legalization of politics did not start with the first constitutions. Neither was the term 'constitution' new. It had been in use long before constitutionalism emerged. But the earlier legal bonds of politics were of a different kind and the term 'constitution' had a different meaning before and after the revolutionary break.[4]

In its traditional meaning, the term referred to the state of a country as determined by various factors, such as the geographical conditions, the nature of its population, the division of power. Also among these factors were the fundamental legal rules that determined the social and political structure of a country. Later in the eighteenth century the notion was used in a narrower sense, referring to the country's state as formed by the fundamental rules. But still the term 'constitution' did not designate these rules. It was an empirical rather than a normative notion. Understood in a descriptive sense, every country had a – or more precisely was in a – constitution. If used in a normative sense, constitution designated some specific laws, such as laws enacted by the Emperor in the Holy Roman Empire (*Constitutio Criminalis Carolina*). On the other hand, there existed laws regulating the exercise of public power, though these were not called 'constitutions', but forms of government, *leges fundamentales* etc.

In the medieval era, these fundamental laws were regarded as of divine origin. They were by definition higher law and the political powers could not dispose of them. The function of politics consisted in enforcing God's will. Legislation, if it occurred, was not understood as law-creation, but as concretization of eternal law, adapting it to exigencies of time and space. This understanding lost its ground with the Reformation of the early sixteenth century. The devastating civil wars that followed the schism made the restoration of social peace the ruler's primary function. This required a concentration of all powers and prerogatives, which in the medieval order had been dispersed among many independent bearers who exercised them not as a separate function but as an adjunct of a certain status, e.g. that of a landowner. In addition, this power did not extend to a territory; it referred to persons so that various authorities coexisted on the same territory, each of them exercising different prerogatives.

[4] See H. Mohnhaupt and D. Grimm, *Verfassung* (Berlin: Duncker & Humblot, 2nd ed. 2002); C.H. McIlwain, *Constitutionalism*, *Ancient and Modern* (Ithaca: Cornell University Press, 1940).

Restoration of internal peace seemed possible only if all holders of prerogatives were deprived of their power in favour of one single ruler, historically the prince, who combined them in his person and condensed them to the public power in the singular. This power was no longer limited to law enforcement. It included the right to create a legal order that was independent of the competing faiths and secular in nature. Eternal law thereby lost its legal validity and retreated to a moral obligation. In order to enforce the law against resisting groups in society the prince claimed the monopoly of legitimate use of force, which entailed on the other side a privatisation of civil society. A new notion for this completely new type of political rule soon came into use: the *state*, whose most important attribute was sovereignty, understood since Bodin's seminal work as the ruler's right to dictate law for everybody without being bound by law himself.[5] The state originated as an absolute state.

Absolutism nevertheless remained an aspiration of the rulers that was nowhere completely fulfilled before the French Revolution ended this period. Sovereignty, although defined as highest and indivisible authority over all subjects, was but relative in practice. Old bonds dating from the medieval period survived, new ones were established. But they did not form an integral whole. Most of these laws had a contractual basis. They took the form of agreements between the ruler and the privileged estates of a territory on whose support the ruler depended. They were regarded as mutually binding and could sometimes even be enforced by courts. Yet none of these legal norms questioned the ruler's right to rule. Based on transcendental or hereditary legitimation this right preceded the legal bonds. They merely limited the right in this or that respect, not comprehensively, and in favour of the parties to the agreement, not universally.

The existence of such legal bonds, first eternal and then secular, indicates that it would not be sufficient to characterize constitutionalism as a submission of politics to law. Different from the older legal bonds of political power, the new constitutions did not modify a pre-existing right to rule: they preceded the rulers right to rule. They created this right, determined the procedure in which individuals were called into office, and laid down the conditions under which they were entitled to exercise the power given to them. In contrast to the older legal bonds, the constitution regulated public power coherently and comprehensively. This is not to say that political power was again reduced to law enforcement, as with the medieval order. It means, rather, that constitutionalism neither recognized any extra-constitutional bearer of public power, nor any extra-constitutional

[5] J. Bodin, *Les six livres de la République* (Paris: Du Puys, 1576).

ways and means to exercise this power vis-à-vis citizens. Finally, the legal regulation of public power not only favoured certain privileged groups in society who possessed sufficient bargaining power, but society as a whole.

These differences had some consequences that further characterize the constitution. As an act that constituted legitimate public power in the first place, the constitution could not emanate from the ruler himself. It presupposed a different source. This source was found in the people that had decided to form a polity. The legitimating principle of the modern constitution was popular rather than monarchical sovereignty. This was by no means an original idea of the American and the French revolutionaries. It had older roots and gained widespread recognition when religion no longer served as basis of the social order after the Reformation. In the absence of a divine legitimation the philosophers of the time turned to reason as a common endowment of mankind, independent of religious creeds. In order to find out how political rule could be legitimized, they placed themselves in a fictitious state of nature where everybody was by definition equally free. The question, then, was why and under which conditions reasonable people would be willing to leave the state of nature and submit themselves to a government.

The reason for this was the fundamental insecurity of life and limb in the state of nature. Leaving the state of nature became a dictate of reason. Given the equal freedom of all individuals, the step from the state of nature to government called for a general agreement. Legitimacy could be acquired only by a government based on the consent of the governed. It was also up to the governed to determine the conditions under which political power could be exercised. These conditions varied over time. For those philosophers who elaborated their theory against the backcloth of the religious wars of the sixteenth and seventeenth centuries, ending civil war and enabling peaceful coexistence of believers in different faiths enjoyed absolute priority. For them, this goal could be achieved only if individuals handed over all their natural rights to the ruler in exchange of the overarching good of security. Here, the theory of the social contract justified absolutism.

The better the absolute ruler fulfilled his historical function of pacifying society, the less plausible seemed the claim that peaceful coexistence in one society required a total relinquishment of all natural rights. The ruler's task was now seen to be the protection of individual freedom, which required no more from the individuals than handing over the right to self-justice. From the mid-eighteenth century, the treatises of natural law contained growing catalogues of fundamental rights that the state was obliged to respect and protect. This coincided with the economic theory that freedom of contract and property would be a

better way of achieving justice and welfare in society than feudalism and state regulation of the economy. The idea that individual freedom remained endangered vis-à-vis a concentrated governmental power also gained ground. To guarantee that the state respected individual rights, some separation of powers and certain checks and balances were regarded as indispensable.

Although these theories contained all the ingredients that later appeared in the constitutions, they were not pushed forward to the postulate of a constitution by the philosophers. For them, they functioned as a test of the legitimacy of a political system: a political system was deemed legitimate if it could be considered *as if* established by a consensus of the governed. Like the state of nature, the social contract was fictitious. With the sole exception of Emer de Vattel,[6] neither a document nor a popular decision was required. The social contract served as a regulative idea. It was not considered to be the result of a real process of consensus-building. Its authority was based on argumentation, not on enactment. No ruler before the revolution had been willing to adopt it, and most rulers had explicitly rejected it. Natural law and positive law contradicted each other.

Only after the revolutionary break with traditional rule were these ideas able to become a blue-print for the establishment of the new order needed to fill the vacuum of legitimate public power. By their very nature they worked in favour of a constitution. Popular sovereignty was the legitimating principle of the new order. But unlike the sovereign monarch, the people were incapable of ruling themselves. They needed representatives who governed in their name. Democratic government is government by mandate and as such stands in need of being organized. In addition, the mandate was not conferred upon the representatives unconditionally. In contrast to the unlimited power of the British Parliament and the French monarch, the revolutionaries wanted to establish a limited government. The limits in scope and time as well as the division of power among various branches of government also required a determination in the form of rules.

Hence, the contribution of the American and French revolutionaries was to turn the idea from philosophy into law. Only law had the capacity to dissolve the consensus as to the purpose and form of government from the historical moment and transfer it into a binding rule for the future, so that it no longer rested on the power of persuasion but on the power of a commitment. There was, however, the problem that, after the collapse of the divinely inspired medieval legal order, all law had become the product of political decision. Law was irreducibly positive law. Nothing else could be true for the law whose

function it was to regulate the establishment and exercise of political power. The question that emerged from this positivization of law was how a law that emanated from the political process could at the same time bind this process.

This problem was solved by taking up the old idea of a hierarchy of norms (divine and secular) and re-introducing it into positive law. This was done by a division of positive law into two different bodies: one that emanated from or was attributed to the people and bound the government, and one that emanated from government and bound the people. The first one regulated the production and application of the second. Law became reflexive. This presupposed, however, that the first took primacy over the second. The revolutionary theoreticians had a clear notion of this consequence of constitution-making. The Americans expressed it as 'paramount law' and deployed the distinction between master and servant or principal and agent, while Sieyes conceptualized it in the dichotomy of *pouvoir constituant* and *pouvoir constitué*.[7] Without this distinction and the ensuing distinction between constitutional law and ordinary law and of the subordination of the latter to the former, constitutionalism would have been unable to fulfil its function.

Constitutionalism is therefore not identical with legalization of public power. It is a special and particularly ambitious form of legalization. Its characteristics can now be summarized:

1. The constitution in the modern sense is a set of legal norms, not a philosophical construct. The norms emanate from a political decision rather than some pre-established truth.

2. The purpose of these norms is to regulate the establishment and exercise of public power as opposed to a mere modification of a pre-existing public power.

3. The regulation is comprehensive in the sense that no extra-constitutional bearers of public power and no extra-constitutional ways and means to exercise this power are recognized.

4. Constitutional law finds its origin with the people as the only legitimate source of power. The distinction between *pouvoir constituant* and *pouvoir constitué* is essential to the constitution.

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[6] E. de Vattel, *Le droit des gens ou principe de la loi naturelle* (Leiden:1758), I, 3 § 27.

[7] James Madison, Alexander Hamilton and John Jay, *The Federalist Papers* (1788), No. 78; E. Sieyes, *Qu'est-ce le Tiers Etat?* (Paris: 1789).

5. Constitutional law is higher law. It enjoys primacy over all other laws and legal acts emanating from government. Acts incompatible with the constitution do not acquire legal force.

These five characteristics refer to the function of the constitution. As such they differ from the many attempts to describe the modern constitution in substantive terms: democracy, rule of law, separation of powers, fundamental rights. The reason is that constitutionalism leaves room for many ways of establishing and organizing political power: monarchical or republican, unitarian or federal, parliamentarian or presidential, unicameral or bicameral, with or without a bill of rights, with or without judicial review etc. All this is left to the decision of the *pouvoir constitutant*. But this is not to say that the constitution in the modern sense is compatible with any content. The reason is supplied by the function of the constitution, namely to establish legitimate rule and to regulate its exercise by the rulers comprehensively. A system that rejects the democratic origin of public power and is not interested in limited government does not meet the standards of the modern constitution.

The two elements of constitutionalism, the democratic element and the rule of law element, cannot be separated from each other without diminishing the achievement of constitutionalism. It is widely accepted that a document which does not attempt to submit politics to law is not worth being called 'constitution'. But it is not so clear with regard to democracy as a necessary principle to legitimize public power. Yet, every principle of legitimacy other than democracy would undermine the function of the constitution. If political power is based on some absolute truth, be it religious or secular, the truth will always prevail in cases of conflict with positive law. This will also happen if an elite claims superior insight in the common good and derives from this insight the right to rule independently of popular consent. For this reason, it would be wrong to recognize two types of constitutions as equally representing the achievement of constitutionalism: a democratic type and a rule of law type.[8] In terms of achievement only a constitution that comprises both elements is capable of fulfilling the expectations of constitutionalism fully.

Constitutionalism in this sense deserves to be called an achievement,[9] because it rules out any absolute or arbitrary power of men over men. By submitting all government action to rules, it makes the use of public power predictable and enables the governed to

[8] For this attempt see C. Möllers, ‚Verfassunggebende Gewalt – Verfassung – Konstitutionalisierung' in A.von Bogdandy (ed.), *Europäisches Verfassungsrecht* (Baden-Baden: Nomos, 2003), 1.

[9] See N. Luhmann, ‚Die Verfassung als evolutionäre Errungenschaft' (1990) 9 *Rechtshistorisches Journal* 176.

anticipate governmental behaviour vis-à-vis themselves and to face public agents without fear. It provides a consensual basis for persons and groups with different ideas and interests to resolve their disputes in a civilized manner. And it enables a peaceful transition of power to be made. Under favourable conditions it can even contribute to the integration of a society.[10] Although there is no achievement without shortcomings, constitutionalism as characterized by the five features is not an ideal type in the Weberian sense that allows only an approximation, but can never be completely reached. It is a historical reality that was in principle already fully developed by the first constitutions in North America and France and fulfilled its promise in a number of countries that had adopted constitutions in this sense.

Yet, the five characteristics do *not* describe everything that in constitutional history or in present times presents itself under the name 'constitution'. There are many more legal documents labelled 'constitution' or considered as constitutions than constitutions in the full sense of the achievement. The reason is that once the constitution was invented and inspired many hopes, it became possible to use the form without adopting all of the features that characterize the achievement. There were constitutions that left a pre-constitutional right to rule untouched. There were constitutions without a serious intention to limit the ruler's power. There were constitutions whose rules did not enjoy full primacy over the acts of government, but could legally be superseded by political decisions. But to the extent that these constitutions lacked some of the essential features of constitutionalism they failed to meet the achievement and were regarded as deficient.

The fact that the achievement was reached rather late in history nourishes the presumption that additional preconditions had to exist before a constitution in the sense described here, i.e. different from a mere legalization of public power, could arrive. Although the first constitutions were a product of revolutions, a revolutionary break is not an indispensable precondition of the constitution. For the invention of the constitution the break with the traditional rule, combined with a new imagination of legitimate government, may have been necessary. But once invented the constitution no longer depends on a revolutionary origin. It can be adopted in an evolutionary way. It is sufficient that questions of legitimacy and organisation of political power are open to political decision. If the political order is pre-determined independently of a consensus of the people, there is no

[10] See D. Grimm, 'Integration by Constitution' (2005) 3 *International Journal of Constitutional Law* 193; H. Vorländer (ed.), *Integration durch Verfassung* (Wiesbaden: Westdeutscher Verlag, 2002).

room for a constitution. A document that bears this name is unlikely to enjoy primacy, but will be subordinated to an ultimate truth.

However, understood as a coherent and comprehensive regulation of the establishment and exercise of public power, the constitution could not emerge unless two further preconditions were in place. First, there has to be an object capable of being regulated in the specific form of a constitution. Such an object did not exist before the emergence of the modern state in the sixteenth and seventeenth centuries. Different from the medieval order, the state was characterized by a concentration of all prerogatives on a certain territory in one hand. Only after public power had become identical with state power could it be comprehensively regulated in one specific law. The medieval world did not have a constitution, and it could not have had one.[11] All talk about the constitution of the ancient Roman Empire, or of medieval kingdoms, or of the British constitution refers to a different object.

Although being a necessary condition for the realization of the constitution, the state was not a sufficient condition. For historical reasons, the state emerged on the European continent as the absolute state. This meant that it did not depend on the consent of its citizens; it claimed unlimited power over them. Different from political power that is exercised in form of a mandate, power that a ruler claims of his own right requires no regulation of the relationship between principal and agent. Omnipotence is then the only rule of constitutional rank. But even if the ruler has a mandate but it is unconditional, no regulation is necessary. Unlimited government stands opposed to constitutional government. Only when the idea had taken roots that the power of the state should be limited in the interest of individual freedom and autonomy of various social functions was a constitution needed.

The concentration of all public power in the hands of the state has a corollary: the privatization of society. The constitution did not change this. It only changed the order between the two. Individual freedom takes primacy while the state's task is to protect it against aggressors and criminals. In order to fulfil this limited function the state continued to claim the entire public power and the monopoly of legitimate force. Only the purpose for which and the conditions under which it might be used were limited. The border

[11] See H. Quaritsch, *Staat und Souveränität* (Frankfurt: Athenäum, 1970), 184; E.W. Böckenförde, ‚Geschichtliche Entwicklung und Bedeutungswandel der Verfassung' in *Festschrift für R. Gmür* (Bielefeld: Gieseking, 1983), 9; D. Grimm, *Zukunft der Verfassung*, above n.1, 37 et seq.

between public and private is thus constitutive for the constitution.[12] A system where the state enjoys the freedom of private persons would have as little a constitution as a system in which private persons may exercise public power. If private persons gain a share in public power, the constitution can no longer fulfil its claim to regulate the establishment and exercise of public power comprehensively unless the private actors submit to constitutional rules whereby they would lose their status as free members of society.

The fact that an object capable of being constitutionalized emerged in the form of the territorial state had the consequence that a plurality of states existed side by side. A second precondition for the constitution's claim to comprehensive validity was therefore that the public power of the state was without an external competitor within the territory. Consequently its legal force ended at the border of the territory. No constitution submitted domestic power to a foreign power or granted acts of a foreign power binding force within the domestic sphere. Just as the boundary between public and private is of constitutive importance for the constitution, so too is the boundary between external and internal.[13] A state that was unable to shield its borders from acts of a foreign public power could not secure the comprehensive functioning of its constitution.

Above the states there was no lawless zone. Rather the rules of public international law applied. But public international law rested on the basic assumption of the sovereignty and integrity of the states. It regulated their relationship based on the prohibition of intervention in the internal affairs of states. Legal bonds among states were therefore recognized only if they emanated from a voluntary agreement that was limited to the external relations of states. Only the precondition of this order, the rule *pacta sunt servanda,* was valid independently of consent. But the international order lacked the means to enforce contractual obligations. This is why war could not be ruled out. But there were no legal means for states or the international community to interfere with the internal affairs of a state. The two bodies of law - constitutional law as internal law and international law as external law - could thus exist independently of one another.

III. Prospects Under Changed Conditions

[12] See Grimm, 'Ursprung und Wandel', above n.1, 18 et seq.; S. Sassen, *Territory, Authority, Rights* (Princeton: Princeton University Press, 2008).

[13] Grimm, Ursprung und Wandel, above n.1, 18; R. Walker, *Inside/Outside* (Cambridge: Cambridge University Press, 1993).

If the modern constitution could only came into existence because of the prior development of certain conditions, it cannot be denied that these conditions may disappear, just as they once arrived. This does not necessarily mean that the constitution will cease to exist. The disappearance of such conditions is unlikely to be a sudden event. If it occurred it would most probably be a long process with remote rather than immediate consequences. But should the constitution survive, it is almost certain that it would acquire a new meaning and produce different effects. It is therefore of crucial importance for the future of constitutionalism to inquire whether, or to what extent, the situation that brought forth the constitution has changed, and to gauge how this affects the achievement of constitutionalism. The question of the prospects of the constitution is a question concerning the continued existence of its preconditions.

For two of these preconditions the answer seems straightforward. They do not pose a problem, at least in most parts of the world. Questions of political order continue to be open to political decision. They are not regarded as pre-determined by some transcendental will and removed from political influence. Furthermore, the idea of limited government is still the leading concept in countries in the Western tradition. The problem rather arises in relation to the state and its two constitutive borders: the boundary between internal and external and between public and private. It is generally observed that we are living in a period of erosion of statehood,[14] although it is not always precisely determined in what that consists. If the feature that distinguished the state from previous political entities was the concentration of public power in a given territory and the fact that this power was not submitted to any external will, it seems likely that here the source of the erosion has to be sought.

In fact, both boundaries become blurred. The boundary between public and private has become porous as a consequence of the expansion of state tasks. No longer only a guardian of individual freedom and market economy the state regulates the economy, engages in social development and welfare politics, and tries to protect society against all sorts of potential risks. Many of these tasks cannot be carried out with the traditional instruments of order and enforcement. In a growing number of cases the state relies on negotiations with private actors rather than legal orders addressed to them. Agreements replace laws. This means that private actors gain a share in public power, yet

[14] See, e.g., S. Leibfried and M. Zürn (eds.), *Transformationen des Staates?* (Frankfurt: Suhrkamp, 2006); M. Beisheim et al., *Im Zeitalter der Globalisierung? Thesen und Daten zur gesellschaftlichen und politischen Denationalisierung* (Baden-Baden: Nomos, 1999); D. Held et al., *Global Transformations* (Stanford: Stanford

without being integrated into the framework of legitimation and accountability that the constitution establishes for public actors. In addition, there are modes of decision-making that are not submitted to the requirements prescribed by the constitution for acts of public authority. Since there are structural reasons for this development, it can neither be simply prohibited nor fully constitutionalized.[15]

The same is true for the boundary between inside and outside. After having been unchallenged for almost 300 years, the border became permeable when, in order to enhance their problem-solving capacity, the states began to establish international organisations to whom they transferred sovereign rights which these organisations exercise within the states and unimpeded by their right to self-determination. The first step in this direction was the foundation of the United Nations in 1945 whose task it was not only to coordinate state activities but also to fulfil a peace-keeping mission of its own. To reach this end, member states not only gave up the right to solve their conflicts by means of violence, except in cases of self-defence. As a self-limitation this would have remained within the framework of traditional international law and left their sovereignty intact. They also empowered the UN to enforce the prohibition, if necessary by military intervention. As a consequence, the right to self-determination is limited to the relationship among states, but cannot be invoked against the public power exercised by the international organisation.

This development has meanwhile progressed further. It is no longer doubtful that, if a state completely disregards the human rights of its population or of minorities within the population, the UN has in principle the power of humanitarian intervention. Moreover, international courts have been established that can prosecute war crimes and crimes against humanity. Some of these courts, the criminal courts for the former Yugoslavia and for Rwanda were established not by way of treaties, but by a decision of the Security Council and may act on the territory of the states independently of their permission. Beyond that, under the umbrella of the UN, a *jus cogens* has developed that claims validity independently of the state's consent, but which, in turn, limits them in their treaty-making power. Similar effects went along with the foundation of the World Trade Organisation, basically a forum for negotiations and agreements of states, but independent from these states through its court-like treaty enforcement mechanism.

University Press, 1999); S. Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996); Sassen, above n.12.

[15] See D. Grimm, ‚Lässt sich die Verhandlungsdemokratie konstitutionalisieren?' in C. Offe (ed.), *Demokratisierung der Demokratie* (Frankfurt: Campus, 2003), 193.

As a consequence, no state remains sovereign to the extent states used to be before 1945.[16] But nowhere has this development progressed as far as in Europe. It is true that UN interventions, if they occur, can be much more massive than acts of European institutions. But they do not occur frequently, in part because the great majority of member states provide no reason for an intervention, in part because some states are permanent members of the Security Council and thereby enjoy a veto-right that they can use to prevent interventions. Unlike the sovereign power of states, the UN power actualises itself very rarely and only vis-à-vis states that disregard their treaty obligations and provoke UN actions. The majority of states have never been subjected to measures of the UN. For them, the change that occurred with the founding of the UN is less visible, the loss of sovereignty not obvious.

This is different on the European level. Although no European organisation has yet acquired the power to use physical force vis-à-vis its members, the states are constantly subject to European legal acts which they have to observe. Only the degree varies. So far as the Council of Europe is concerned, these are judicial acts. The Council of Europe exercises public power solely through the European Court of Human Rights. Its judgments are binding for the 46 member states, but they do not take direct effect within them. The ECtHR is not an appellate court with the power to reverse judgments of national courts. It can only state a violation of the European Convention, but has to leave the redress to the states themselves. Still, the effects on member states' legal systems are far-reaching. They may even include an obligation to change the national constitution.

The power of the European Union is broader in scope and deeper in effect on the member states' sovereignty. It includes legislative, administrative, and judicial acts. It is true that the EU has only those powers that the member states have transferred to it. As far as the transfer of sovereign rights is concerned they retain their power of self-determination. They remain the 'masters of the treaties'. Once transferred, however, the powers are exercised by organs of the EU and claim not only direct effect within the member states but also primacy over domestic law, including national constitutions. Although this lacks an explicit basis in the Treaties, it has been accepted in principle as a necessary precondition of the functioning of the EU. Only the outer limits remain controversial, as both the

16 Dieter Grimm, Souveränität (Berlin: Berlin University Press, 2009).

European Court of Justice and some constitutional courts of the member states each claim the last word concerning *ultra vires* acts of the EU.[17]

Hence, the state is no longer the exclusive source of law within its territory. Laws and acts of law enforcement claim validity within the state that emanate from external sources and prevail over domestic law. The identity of public power and state power that was implied in the notion of sovereignty and had been the basis of the national as well as the international order is thus dissolving. This development cannot leave the constitution unaffected.[18] Since the constitution presupposed the state and referred to its power, the fragmentation of public power inevitably entails a diminution of the constitution's impact. Of course, the loss did not occur contrary to the will of the states. Sovereign rights were given up voluntarily because they expected something in return: an increase in problem-solving capacity in matters that could no longer be effectively handled on the national level. In addition, the states usually retain a share in the decision-making processes of the international institutions that now exercises these rights. But this cannot compensate for the decrease in constitutional legitimation and limitation of public power.

With respect to the five criteria that were found to be constitutive for the modern constitution consequences are the following:

1. The constitution remains a set of legal norms which owe their validity to a political decision.

2. Their object continues to be the establishment and exercise of the public power, but only insofar as it is state power.

3. Since public power and state power are no longer congruent, the constitution ceases to regulate public power coherently and comprehensively.

4. Consequently, the primacy of constitutional law is no longer exclusive. It prevails over ordinary domestic law and acts applying domestic law, not in general.

5. The constitution still emanates from or is attributed to the people. But it can no longer secure that any public power taking effect within the state finds its source with the people and is democratically legitimised by the people.

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[17] See F.C. Mayer, *Kompetenzüberschreitung und Letztentscheidung* (München: Beck 2000); Monica Claes, *The National Courts' Mandate in the European Constitution* (Oxford: Oxford University Press, 2006); A.M. Slaughter et al. (eds.), *The European Court and National Courts* (Oxford: Oxford University Press, 1998).

[18] See D. Grimm, ‚Zur Bedeutung nationaler Verfassungen in einem vereinten Europa' in D. Merten and H.J. Papier (eds.), *Handbuch der Grundrechte* (Heidelberg: Müller, 2009), vol. 6, 1; M. Ruffert, *Die Globalisierung*

In sum, the emergence of an international public power does not render the constitution obsolete or ineffective. But to the extent that statehood is eroding, the constitution is in decline. It shrinks in importance since it can no longer fulfil its claim to legitimise and regulate all public authority that is effective within its realm. Acts of public authority that do not emanate from the state are not submitted to the requirements of the state's constitution, and their validity on the state's territory does not depend on their being in harmony with the domestic constitution. The constitution shrinks to a partial order. Only when national constitutional law and international law are seen together is one able to obtain a complete picture of the legal conditions for political rule in a country. The fact that many constitutions permit the transfer of sovereign rights prevents the situation from being unconstitutional. But it does not close the gap between the range of public power on the one hand and that of constitutional norms on the other.

This gives rise to the question of whether the loss of importance that the constitution suffers at the national level can be compensated for at the international level. Public power stands in need of legitimation and limitation regardless of the power-holder. The constitution has successfully solved this problem vis-à-vis the state. It therefore comes as no surprise that the question is posed whether the achievement of constitutionalism can be elevated to the international level.[19] This, in fact, is the reason why the new term 'constitutionalization' has acquired its current popularity in academic writing and public discourse. 'Constitutionalisation' means a constitution-building process beyond the state.[20] It applies to international political entities and international legal documents and is even extended to rule-making of public-private partnerships on the international level and of globally active private actors.

In view of the preconditions that had to be fulfilled before national constitutions became possible, the question is whether an object capable of being constitutionalized exists at the international level. The answer cannot be the same for all international organisations, the differences between them being too big. This is even more true if societal institutions are included into the consideration. The easiest case seems to be the EU. The EU is certainly not a state, but neither is it an international organisation within the usual meaning. It differs from other international organisations first in its range of competencies which are not limited to a single issue but cover an increasing variety of

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als Herausforderung des Öffentlichen Rechts (Stuttgart: Boorberg, 2004); R. Wahl, *Herausforderungen und Antworten. Das Öffentliche Recht der letzten fünf Jahrzehnte* (Berlin: De Gruyter, 2006).

[19] See the indications suggested in n. 2 above.

[20] Cf. Loughlin, Ch.3 of this volume.

objects. It differs secondly in the density of its organisational structure, comprising all the branches of government possessed by a state. And it differs finally in the intensity of the effects that its operations have on the member states and their citizens. Given all these features, the EU comes quite close to comparison with the central unit of a federal state.

The power of the EU is by no means unregulated. It is, on the contrary, embedded in a closely-meshed net of legal norms. Although these legal norms are not contained in a constitution but in international treaties concluded by the member states, the treaties fulfil within the EU most of the functions that constitutions fulfil in states. The European treaties established what is today the EU. They created the organs of the EU, determine their powers and procedures, regulate the relationship between the EU and the member states as well as the citizens – all rules that in the state one would find in the constitution. The Treaties are also higher law: all legal acts of the EU must comply with the provisions of the Treaties. This is why many authors do not hesitate to call the Treaties the constitution of the EU, and neither does the European Court of Justice.

However, this mode of speaking neglects one of the elements that characterize a constitution in the full sense of the notion.[21] Different from constitutions, the Treaties are not an expression of the self-determination of a people or a society about the form and substance of their political union. The EU does not decide upon its own legal foundation. It receives this foundation from the member states which create it by an agreement concluded according to international law. Consequently, the Treaties lack a democratic origin. This does not make them illegitimate. But they do not enjoy the democratic legitimacy that characterises a constitution. The citizens of the EU have no share in making the basic document. They do not give a mandate to a constitutional assembly. They do not adopt the text. Ratification within the member states, even if it happens by a referendum, is not a European but a national act deciding whether a state approves of the treaty. The document is not even attributed to the citizens as the source of all public power.

Nevertheless, there are examples in history in which a constitution in the full sense originates in form of a treaty concluded by states which unite into a greater state. But in these cases the founding treaty is only the mode to establish a constitution. As soon as the treaty is adopted as the legal foundation of the new political entity, the founding states give

[21] See D. Grimm, *Braucht Europa eine Verfassung?* (München: Siemens 1995); Eng. trans. (1995) 1 *European Law Journal* 278; D. Grimm, ‚Entwicklung und Funktion des Verfassungsbegriffs' in T. Cottier and W. Kälin (eds.), *Die Öffnung des Verfassungsstaats, Recht-Sonderheft* 2005; D. Grimm, Verfassung – Verfassungsvertrag – Vertrag über eine Verfassung, in O. Beaud et al. (eds.), *L'Europe en voie de constitution* (Bruxelles: Bruylant 2004), 279.

up the power to determine the future fate of the text and hand this power over to the new entity which thereby gains the full authority to maintain, change or abolish it. It is a treaty by origin, but a constitution by legal nature. The test is the provision for amendments. If the amendment power remains in the hands of the member states and is exercised by way of treaties, the transition from treaty to constitution has not taken place. If the newly-created state has gained the power of self-determination (even if the member states retain a share in the decision of the new entity) the legal foundation has turned into a constitution.

Such a transfer has not taken place in the EU. It was not even provided for by the failed Constitutional Treaty. Even if ratified in all member states, it would not have acquired the quality of a constitution. However, this does not deprive the EU of its capacity to be a potential object of constitutionalization. Its status as an entity comparable to the central unit of a federation qualifies the EU to a legal foundation in form of a constitution. The member states would simply have to give up their power to determine themselves the legal foundation of the EU. The question is not one of possibility but of desirability. However, by doing so they would inevitably transform the EU into a federal state. It is here that doubts arise. Would the formal democratization of the EU be accompanied by a gain in substantive democracy, or does it serve the democratic principle better if the decision about the legal foundation of the EU remains in the hands of the states where the democratic mechanisms work better than in the EU? Would it deprive the EU of its innovative character as a genuine entity between an international organisation and a federal state?

The issue is different at the global level. Here, no organisation exists whose range of powers and organisational density is comparable to that of the EU. There are some isolated institutions with limited tasks, most of them single-issue organisations, and with correspondingly limited powers. They are not only unconnected, but sometimes even pursue goals that are not in harmony with each other, such as economic interests on the one hand and humanitarian interests on the other. Rather than forming a global system of international public power they are islands within an ocean of traditional international relations. In this respect, the international order currently resembles the pre-state medieval order with its many independent bearers of dispersed powers.[22] Like medieval ordering, the international level is not susceptible to the type of coherent and comprehensive regulation that characterises the constitution.

[22] See Sassen, above n.12.

The UN is no exception. It stands out among international organisations because of its all-encompassing nature, its peacekeeping purpose, and its corresponding powers. But it is far from aggregating all public power exercised on the global level and even farther from the concentrated and all embracing public power of the state. Its charter therefore does not come close to a world constitution. It marks an important step in legalizing international relations but does not go beyond. This is doubly so with respect to institutions like the World Trade Organisation, the International Monetary Fund, the International Labour Organisation and such like. Their statutes regulate the powers of these institutions and guide them in the exercise of their functions. But their limited competencies and their non-democratic structure do not qualify them for the specific form of regulation that is characteristic of the constitution.

It has nonetheless become quite common to see constitutionalizing processes at work also on this level and to call the statutes or charters of international organisations or the *jus cogens* within public international law a constitution. The term is, of course, not reserved to one single meaning. As could be seen, the notion 'constitution' has covered a number of phenomena in the past.[23] But if it is applied to international institutions and their legal foundation one should not forget that it does not have much in common with the *achievement* of constitutionalism. Without doubt, international law is undergoing important changes, covering new ground and becoming more effective.[24] But calling it a constitution empties the notion and reflects a very thin idea of constitutionalism. Basically, it identifies constitutionalization with legalization of public power, a phenomenon that existed long before the constitution emerged and from which the constitution differed considerably. This difference is levelled by the new use of the term which does not contribute to a clarification of the current state of affairs.

This argument applies with even greater force to so-called societal constitutionalism.[25] This type of constitutionalism is not only disconnected from the state but also from international organisations created by states. The proponents of societal constitutionalism realize on the one hand that the state is unable to regulate the

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[23] See Mohnhaupt and Grimm, above n.4.

[24] See B. Zangl and M. Zürn (eds.), *Verrechtlichung – Bausteine für Global Governance?* (Bonn: Dietz 2004); B. Zangl, *Die Internationalisierung der Rechtstaatlichkeit* (Frankfurt: Campus, 2006).

[25] See D. Sciulli, *Theory of Societal Constitutionalism* (Cambridge: Cambridge University Press, 2005); G. Teubner, 'Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors?' in K.H. Ladeur (ed.), *Public Governance in the Age of Globalization* (Aldershot: Ashgate, 2004), 71; see also Teubner and Fischer-Lescano, and Teubner, above n.2. For a comment D. Grimm, ‚Gesellschaftlicher

transactions of global actors. On the other hand they do not believe either that international organisations have sufficient regulatory power to provide a legal framework for the operations of global actors that would prevent them from pursuing their own interests in an unihibited way. At best, international organisations could 'constitutionalize' themselves, i.e. submit their actions to self-created standards. The gap between international rule-making and transnational operations of private actors could only be closed if the idea of constitutionalism is disconnected from its traditional link with politics and adapted to the societal sphere. In this case a body of transnational law would emerge alongside national and international law.

This law is seen as being capable of fulfilling the function of constitutions vis-à-vis private global actors. However, this requires an adaptation of the notion 'constitutionalism' to its object, the global private actors. In contrast to state constitutions, societal constitutions do not take legal force by an authoritative act of a constitution-maker. They emerge from a long-lasting evolutionary process, even though this process may be stimulated by political incentives or supported by formal legal requirements. Societal constitutions are neither mere legal texts, nor simply reflections of the factual situation. And, more importantly, they do not encompass the internationally-exercised private power in its totality. In contrast to traditional state constitutions that cover public power comprehensively but are territorially limited, societal constitutions claim global validity but are limited to certain sectors of society. The territorial differentiation of national law is relativized by the sectoral limitation of global law.

In order to deserve the name 'constitution', societal law must show in addition some of the structural elements of state constitutions. First, societal constitutions must function as higher law that regulates the making of ordinary law. Secondly, this higher law must contain provisions that regulate the organisation and the procedures of the global actors. Thirdly, it must limit the scope of action of the private global actors, just as fundamental rights limit the scope of action of state actors in domestic law. Finally, it must provide control mechanisms similar to constitutional adjudication that guarantee an effective review of the acts of global organisations with respect to their compliance with higher law. The proponents of this idea concede that up to now societal constitutionalism exists only in rudimentary form. But they believe in its potential for institutionalizing within these global sectors respect for the autonomy of other social sectors and their needs as well

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Konstitutionalismus – Eine Kompensation für den Bedeutungsschwund der Staatsverfassung?' in *Festschrift für R. Herzog* (München: Beck, 2009), 67.

as recognition of areas where the behaviour of global actors can be observed independently and criticized freely.

However, this potential, if it exists, depends on some preconditions which cannot be taken for granted. In the absence of a global legislator, the limitation by societal constitutions will always be self-limitation guided by the actor's interest, not the common interest. Both interests may partly coincide, but not completely. Hence, self-limitation capable of harmonizing actors' own interests with the interests of those affected by their actions and the communal interests is unlikely if not imposed by a public authority whose task it is to keep the self-interest of the various sectors of society within the limits of the common best. On the national level, government fulfils this function. But how can the same result be reached on the international level in the absence of an equivalent of the state or of other institutions with sufficiently broad regulatory power? And even if existing international institutions possessed this power, how effectively would they use it without the democratic and representative element that guarantees participation of those affected by the decisions and thus enables a perception of problems beyond the institutional interests of the actors? No so-called constitution on the international and transnational level is yet able of fulfilling only minimal democratic demands

IV. WHICH CONCLUSION?

This analysis suggests that the gap between public power and its constitutional legitimation and limitation, which is opening up as a result of the erosion of statehood and transfer of public power to the international level cannot for the time being be closed . On the one hand, it seems neither possible nor desirable to return to the Westphalian system. On the other, the achievement of constitutionalism cannot be reconstructed on the international or transnational level. National constitutions will not regain their capacity to legitimize and regulate comprehensively the public power that takes effect within the territory of the state. The regulation of internationally-exercised public power is expanding, but remains a legalization unable to live up to the standard of constitutionalism. Whoever invokes constitutionalism in this connection uses a thin notion of constitutionalism with its democratic element almost always left out.

If a full preservation of constitutionalism is not available, the second best solution would be to preserve as much of the achievement as possible under given conditions. In

principle, this can occur in two directions: by striving for a greater accumulation of public power on the international level,[26] or by limiting the erosion of statehood on the national level. Strengthening the international level would be a solution only if the international order could develop into an object capable of being constitutionalized in the sense of the achievement, i.e. as different from mere legalization. This is neither likely in a medium-term perspective, nor are there convincing models for democratic governance on the global level.[27] A democracy that is not deprived of its participatory element but maintains a substantive rather than a purely formal outlook including the societal preconditions of democratic government such as a lively public discourse is already difficult to realize within the European Union. On the global level even a democracy reduced to the formal element of free elections seems unlikely.

The consequence would be to put the emphasis on states where constitutionalism still finds more favourable conditions and where the potential for democratic legitimization and accountability of public power remains greater than on the international level. This should not be misunderstood as a call to restore the traditional nation state. To the contrary, the international turn of politics is in need of further development. An approximation of the scope of politics to the scope of action of private global actors seems an urgent postulate. But it is likewise important that democratic states remain the most important source of legitimation, including the legitimation of international organisations. They must be prevented from becoming self-supporting entities distant from the citizenry and largely uncontrollable in their activities and unaccountable for the results.

In fact, states are by no means out of the international and transnational game. Up to now the process of internationalization has not touched the monopoly of the legitimate use of force. No international organisation possesses its own means of physical force, let alone a monopoly. The fragmented global society has no enforcement mechanisms *per se*. International courts and even more so private arbitration bodies depend on states when it comes to enforcing judgements against reluctant parties. In addition the states retain a share in the direction and control over the international organisations they have formed. This is as important in the European Union as it is on the global level. In all these matters

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[26] See M. Lutz-Bachmann and J. Bohman (eds.), *Weltstaat oder Staatenwelt?* (Frankfurt: Suhrkamp, 2002); M. Albert and R. Stichweh (eds.), *Weltstaat und Weltstaatlichkeit* (Wiesbaden: Westdeutscher Verlag, 2007).

[27] See A. Kuper, *Democracy Beyond Borders* (Oxford: Oxford University Press, 2004); J. Anderson (ed.), *Transnational Democracy: Political Spaces and Border Crossings* (London: Routledge, 2002); A. Niederberger, 'Wie demokratisch ist die transnationale Demokratie?' in Albert and Stichweh, above n.26, 109; G. de Burca, 'Developing Democracy Beyond the State' (2008) 46 *Columbia Journal of Transnational Law* 221.

they are subservient to the requirements of their national constitutions. These bonds should neither be prematurely relinquished, nor severely weakened.

Regarding the supranational level, it seems preferable to leave the constitutional path and drop the notions of constitutionalism and constitutionalization altogether. They are misleading insofar as they nourish the hope that the loss national constitutions suffer from internationalization and globalization could be compensated for on the supranational level. This would, however, be an illusion. The submission of internationally exercised public power to law will always lag behind the achievement of constitutionalism on the national level. The conditions that would allow a reconstruction of the achievement beyond the nation state are not given. The internationalization of public power is a new phenomenon that poses new challenges. The illusion that these challenges could be met by using a model that was invented for a different object tends to obstruct the search for solutions that are oriented towards the new situation and will suit it better.