

Ulrich Haltern. **Was bedeutet Souveränität?** Tübingen: Mohr Siebeck, 2007. Pp. xii + 136. €34. ISBN: 9783161492037.

Toni Erskine. **Embedded Cosmopolitanism. Duties to Strangers and Enemies in a World of 'Dislocated Communities'**. Oxford: Oxford University Press/British Academy, 2008. Pp. 292. £50. ISBN: 9780197264379.

Jeffery L. Dunoff and Joel P. Trachtman (eds.). **Ruling the World? Constitutionalism, International Law, and Global Governance**. Cambridge: Cambridge University Press, 2009. Pp. xiv + 414. £19.99. ISBN: 9780521514392.

Two notions constantly re-emerge in present-day research on issues arising under the general heading of constitutionalization of international law: sovereignty and cosmopolitanism. The former is regarded as being rather an impediment to the projects of international constitutionalism, the latter as a distant future goal, but both to be reinterpreted and readapted to modern realities and aspirations of researchers engaged in the theorization of international constitutionalism.

The three books under review, which appeared during the last three years, represent an excellent illustration of the relationship and tensions existing between sovereignty, cosmopolitanism, and the project of a constitutionalization of international law. It is significant that the titles of two of these books are formulated as questions. Many uncertainties dominate the field. The first and one of the most important of these uncertainties relates to the notion of sovereignty. Ulrich Haltern in his book entitled *What does sovereignty mean? (Was bedeutet Souveränität?)* attempts to shed more light on some ways in which the notion of sovereignty continues to shape our understanding of the political and on reasons for the continuing relevance of sovereignty

in the modern world, including international law.

Haltern describes his approach as a political theology of the notion of sovereignty (*politische Theologie des Souveränitätsbegriffs*) (at 10). He provides an explanation of one of the paradoxes at the core of the project of international constitutionalism, namely that between increased sophistication of theoretical arguments developed by international lawyers to demonstrate the relevance and force of international law beyond the mere will of states and the continuing political practice of the imposition of the will of dominant state(s) on the world contrary to international rules and prescriptions. Sometimes this paradox is explained in terms of the insufficiency of international law's enforcement mechanisms. This explanation is viewed by Haltern as too simplistic (at 8). According to Haltern's analysis the notion of sovereignty which he explicitly refuses to define¹ is a product of religious experiences of European societies. In parallel with two major religious denominations of Western Europe – protestantism and catholicism – he describes two understandings of sovereignty: catholic sovereignty (Chapter IV) and protestant sovereignty (Chapter V).

In his fascinating chapter about catholic sovereignty Ulrich Haltern convincingly demonstrates how the sovereignty of God is transformed into the sovereignty of the king, and later the sovereignty of the people, to become finally the sovereignty of the human being (at 40). While separating sovereignty and God this process does not liberate sovereignty from its religious meanings and connotations. From my point of view, one of the

¹ 'Was Souveränität "ist", lässt sich nicht rein abstrakt anhand einer logischen Definition entziffern' ('What sovereignty "is" cannot be deciphered in a purely abstract way from a logical definition') (at 10). Haltern explains that his entire book is an attempt at a genealogical research of sovereignty in order better to grasp its meaning (at 12).

most important consequences of the remaining link to religion mentioned by Haltern is the maintenance of the sacred nature of sovereignty which enables the state to require sacrifice from its citizens. This in turn allows for a justification of the use of force for the purpose of protecting this sovereignty, and with it the state (at 47–48 in particular). This sacred sovereignty through the allegiance of its members makes a real movement to universality impossible (at 40).

Haltern argues that this mystical aspect of sovereignty is erased in the protestant version of sovereignty which, like Protestantism itself, turns away from magic and mysticism to conversation and dialogue (at 63) retaining the dignity of human beings as the only trace of the holy in the constitution (at 65–68). However, the only state which, according to Haltern, moved to protestant sovereignty is Germany. This turn away from mysticism to communication is determined by Germany's experience with Hitler's fascist regime. Protestant sovereignty, instead of requiring sacrifice, creates space for discussion. As protestantism is characterized by its turn towards the text of the bible, word, speech, and text become central to the political experience of protestant sovereignty (at 63, 65). The text – in the framework of a state this text is the constitution – becomes the place where the holy remains (at 65). The holy in the text is human dignity (at 65–68). However, even in Germany this protestant sovereignty is under pressure from two sides: from Catholicism and from the Enlightenment (at 68–72). Haltern concludes his chapter on protestant sovereignty with an interesting consideration of its implications for the ability to impose restrictions on the right to human dignity originally recognized as absolute and holy. Once this remnant of the holy becomes subject to restrictions, the last trace of the holy in the constitution disappears. Secularism is complete, nothing is absolute, everything becomes calculable and negotiable: we are faced with a pure market-state. However, the demystification of human dignity creates a gap, an unanswered question about the identity of the sovereign and, because of humanity's longing

for unity between the finite and the infinite, opens space for imagination of the political which goes back to the catholic vision of sovereignty (at 72–73).

In the following chapter Haltern discusses the implications of this understanding of sovereignty for international law. He identifies two strategies developed in modern international law in order to go beyond the simple regulation of relations between states: the relativization of sovereignty and an attempt to locate the sovereign at the transnational level (at 75–77). Both strategies are only partly successful because states can appeal to their sacred, holy substance which is lacking in international law (at 77–80). The best illustration of this all-encompassing and superior nature of the state despite all theories and developments of international law is, according to Haltern, the right to self-defence. This right remains in sharp contrast to other principles of international law such as the prohibition of the use of force, the protection of human rights, humanitarian law. It has no ground or justification other than the survival and well-being of the sacred state (at 80–81). Thus, the well-being of the state with its holy nature appears superior to the respect for international law, including human rights (at 79). In his conclusion on sovereignty in international law Haltern demonstrates that due to the superior and sacred nature of state sovereignty, even human rights remain of uncertain ever-changing value, unable to override this superior claim of the state (at 91–97).

Before coming to his conclusions Haltern formulates one final question: Is this picture of sovereignty not too static and essentializing; is some kind of development reaching beyond the sacred possible? The answer to this question is provided in Chapter VII where European integration – like Germany after World War II, born out of a catastrophe – serves as an example of a step away from sovereignty and its religious symbolism towards the market and its liberty and secularism. Haltern is, however, careful enough not to overlook the difficulties which this project is facing as well as not to position the European model as one which is universally applicable and acceptable (at 104–109).

In his concluding remarks, Ulrich Haltern remains sceptical about the possibility of the disappearance of the constant longing for the sacred and sovereignty inherent in the Western tradition. Nevertheless, he reminds us that only if we remain fully conscious of the genealogy and meanings of our understanding of the political generally and sovereignty more particularly can we hope to comprehend the political as well as legal processes. He stresses once again that the success of liberalism can be explained by the unwitting maintenance of links between reason and mysticism. These links are possible because ideas of political theology from the Middle Ages are transposed into modern times through the continued use of the notion of sovereignty (at 116–117).

The book contains many valuable and inspiring insights and ideas. I wish to offer two points for critical observation and further reflection. First, one gets an impression that the value of the market as a model is overestimated and the author's position is less critical with regard to the market economy than it could be.² Secondly, the book does not justify the limitation of its analysis to only two – catholic and protestant – visions of sovereignty. There are some remarks about the Jewish vision of sovereignty (at 47, 64 notes 107 and 112), but what about other religious traditions or atheistic visions? If this limitation is explained by the fact that only catholic and protestant traditions are at the origin of sovereignty, the current international system organized around sovereign states must appear very discriminatory and strange to communities which have other religious traditions. Is it possible to imagine a social and political organization beyond sovereignty which apparently is foreign to so many parts of the world? Haltern does not give a clear

answer to this question, but his stance can be interpreted as rather sceptical in this regard.

The book by Toni Erskine provides us with one of the possible responses to this question. Erskine's enquiry is a contribution to normative International Relations theory (at 3). The central question around which the study revolves is the following: 'how we get from where we are presently situated, steeped in our own immediate circumstances, with our own local ties and loyalties, to consideration for distant strangers' (at 10). The traditional predominant response to this question which Erskine defines as 'impartialist' requires one to achieve a level of abstraction, impartiality, in order to give equal consideration to everyone. This impartialist position has been criticized by many as being too abstract, and thus illusionary. Taking these critiques into account she explores the possibility of a cosmopolitan position which would eschew impartiality in moral reasoning while remaining 'inclusive and self-critical enough to take seriously the equal moral standing of compatriots, comrades, foreigners, and foes alike' (at 3–4). She convincingly argues that such a position entitled 'embedded cosmopolitanism' is possible. This position acknowledges the impossibility of detaching ourselves completely from our personal experiences, allegiances, ties. The facts that these experiences and ties are fluid and changing and that everybody does not belong to just one but to many communities make establishing connections even with distant strangers and enemies possible. In order to come to this conclusion, Toni Erskine deals in depth with the arguments developed by various thinkers.

In Chapter 2 she first provides a detailed account of the impartial cosmopolitan position and its weaknesses, with a particular emphasis on Rawls's work. In the next chapter she discusses the limits incompatible with a truly cosmopolitan position inherent in an attempt to situate the moral agent within a state's borders: by linking identity to citizenship this attempt 'creates a determined group of outsiders' (at 116) and 'results in a tacit acceptance of the borders themselves' (at 117). In Chapter 4 Erskine moves to a contextualized normative approach to international relations

² See, for instance, his affirmation that where money reigns, either fanatical ideology or bloody violence does not reign ('dort, wo Geld regiert, weder fanatische Ideologie noch blutige Gewalt regiert') (at 102) and compare it with the critical analysis of liberalism and market economy developed, e.g., by Amartya Sen.

which is able to detach itself from the state by distinguishing state from community in which our identities are embedded. She criticizes the fact that communitarian political thought, developed particularly in the works of Michael Walzer, relies on strictly bounded communities situated 'within certain boundaries that are fixed' (at 149), and thus still maintains a distinction between 'within' and 'without'.

The theoretical account of embedded cosmopolitanism is completed with the introduction in Chapter 5 of feminist critiques of communitarian political thought, more specifically of the notion of community. They demonstrate, first, that we do not have just one, but multiple identities and, secondly, that the notion of community is not fixed, limited, and exclusionary but changing, moving, and overlapping. Thus, Toni Erskine is able to affirm that 'the combination of this idea of multiple identities . . . with overlapping and non-territorial affiliations creates' a possibility of an embedded cosmopolitan position (at 175).

The most interesting part of Erskine's book, Chapter 6, is conceived as a test of the theoretically constructed embedded cosmopolitan position in the particularly demanding and complex situation of war. For this purpose Erskine analyses the perception of the enemy from different points of view theoretically presented in Chapters 2 to 5. This analysis is done in the context of two examples of norms of restraint in war: non-combatant immunity and the prohibition against torture. Erskine analyses arguments and justifications given in support of these norms by representatives of different ethical standpoints presented before and explains to what extreme logical consequences they can lead. She also extends her analysis to statements made in relation to a particular situation of the 'War on terror' (at 235–243). Observing results to which embedded cosmopolitanism as compared to other positions can lead in such difficult moral situations allows Erskine not only to demonstrate the advantages of this position, but also its weaknesses and traps. However, she also concludes that drawing on embedded cosmopolitan assumptions allows one to be aware of these weaknesses and traps and to take steps to avoid them.

The question which remains open and which Erskine did not intend to answer is about our current standing. What is the situation with regard to 'embedded cosmopolitanism' in international law? How do efforts at constitutionalization of international law integrate the valuable insights of both Haltern and Erskine? Some answers to these questions are provided through the reading of the third book, a recent collection of articles which address various aspects of the current state of international constitutionalism.

The book is divided into three parts. The first part includes articles addressing definitional issues of constitutionalization beyond the state. The second part contains contributions studying the constitutional dimensions of specific international regimes: the United Nations (with particular attention to the Charter of the United Nations as a Constitution of the international community by Michael W. Doyle and Bardo Fassbender), the European Union, and the World Trade Organization. The last part deals with crosscutting issues: relationships between international and domestic constitutions, constitutional pluralism, and democratic legitimacy.

The most interesting way to read this collection of essays in my view is to start with the contribution by David Kennedy which is to a certain extent less doctrinal than others but has the merit of putting the remaining contributions into a broader framework of our limited knowledge of international governance. Through this prism, David Kennedy with his sceptical and insightful approach reveals to the reader paradoxes and contradictions of the current mainstream constitutionalists thought. Highly symbolic is the appearance in the very title of his contribution of the word 'mystery' which bears many connotations with Haltern's book. Consider, for example, the following statement by David Kennedy: 'current constitutionalist discussions . . . end up sounding far more like proposals to remake the world's political order by sacralizing the institutional forms with which they are more familiar' (at 60–61). The passage dealing with the 'purposive bias' in thinking about constitutions is also revealing: '[s]uch a bias may well predispose us against mystery, against the aesthetic, the ritualistic, . . . the neurotic or simply

unknown in our governmental forms' (at 62). Other contributions contained in the volume respond only partly to these thoughts expressed by David Kennedy. Some valuable insights are provided, for example, by Samantha Besson, who focuses on 'the legitimacy deficit, and more specifically on the democratic deficit in current global law-making' (at 384). In order to palliate this deficit she builds on a vision of the international community as 'a complex multilayered or *demoi*-cratic constituent power' (at 398).

The contribution by Matthias Kumm in which he proposes 'a jurisprudential account claiming to describe the deep structure of public law as it is' (at 262) labelled 'cosmopolitan constitutionalism' is also interesting. Like Samantha Besson, he favours constitutional pluralism leaving behind the traditional monism/dualism dichotomy (at 273–288). The cosmopolitan cognitive frame developed by Kumm is based on the notion of public reason which is defined as 'reasons that are appropriate for the justification of law in liberal democracies' (at 268, note 16), a conception of public reason which 'shares many of the features described by John Rawls' (*ibid.*). As Matthias Kumm acknowledges, in his proposed cosmopolitan paradigm '[u]ltimate authority is vested not in "We the People" either nationally or globally, but in the principles of constitutionalism that inform legal and political practice nationally and internationally' (at 272). Seen through the prism of ideas developed by Haltern and Erskine, the effort to separate constitutionalism from 'We the People' is laudable as such, but Kumm replaces this concept with another sacred figure, namely liberal democratic public reason. Despite all his efforts and best intentions Kumm does not escape the very same traps from which he intends to save us.

It is regrettable that Andreas L. Paulus in his otherwise valuable and rich contribution evaluates 'the progress and potential of constitutionalization in general international law . . . using established principles of domestic constitutions' (at 90) without paying any attention to David Kennedy's critical remarks. As David Kennedy points out when he discusses the value of bringing to international constitutionalism the baggage from national constitutions, it is not at all clear 'whether these constitutionalist ideas

are useful at the global level' (at 61). Instead of explaining his choice of national constitutional practice as a frame of reference and thus engaging in a fruitful reflection, Paulus simply states, 'I do not think that we can have an international constitutionalism worthy of that name that would not even remotely take up the insights of several centuries or so of domestic development of constitutional principles' (at 91). He does not justify this statement except when mentioning that these domestic constitutional principles worked well in national settings. However, David Kennedy in his contribution correctly pointed out that 'international society is altogether different' (at 61).

Taking into account the important place usually attributed to human rights in any constitutional system, the article which addresses the relationship between human rights and international constitutionalism written by Stephen Gardbaum is essential to the completeness of the volume. The issue is approached again from a perspective comparing rights protection in national constitutional systems with international human rights law. The most interesting question addressed by Gardbaum relates to the distinct constitutional functions of international human rights, which he sees among others in the distinct normative basis for the protection of fundamental rights in international law as rights of human beings and not just citizens (at 255–256). However, the assessment of human rights could have benefited from a more critical vision of the human rights system itself which is still unable to erase disparities in the protection of fundamental rights remaining highly dependent on citizenship and place of residence.

This volume is a valuable and interesting collection of essays reflecting quite well the state of current debates on international constitutionalism. On the one hand, many authors adopt a rather traditional approach centred on liberal democratic practices, Rawls, and Rawlsianism which itself is highly contested, as Toni Erskine demonstrated in her book. On the other hand, there are some attempts to question this traditional frame of reference and to approach the issue from a different perspective. The volume demonstrates how limited interactions and dialogue between authors adopting a rather

traditional approach and those attempting to find a new frame of reference and analysis are. The volume and, more generally, the work on international constitutionalism would greatly benefit from the participation of specialists in fields other than law.³ David Kennedy invites us to '[i]magine every citizen holding three votes to cast in any election in the world' (at 67). And a few lines before, '[i]magine sovereignty as an open-ended promise of inclusion' (*ibid.*). I would like to add, '[i]magine a philosopher, an international relations specialist, a historian, a professor in religious studies and many others discussing these issues with international and national constitutional lawyers, all of them coming from different parts of the world and not only from Western (mostly American) universities'.

My greatest hope is that some scholars will take up the questions raised by Kennedy, consider already existing less traditional research such as Haltern's and Erskine's, and attempt to go further towards what could be humanity's common future imagined beyond and without states, borders, and sovereignty.

Individual Contributions to Ruling the World? Constitutionalism, International Law, and Global Governance

Thomas M. Franck, Preface: International Institutions: Why Constitutionalize?;

Jeffrey L. Dunoff and Joel P. Trachtman, A Functional Approach to International Constitutionalization;

David Kennedy, The Mystery of Global Governance;

Andreas L. Paulus, The International Legal System as a Constitution;

Michael W. Doyle, The UN Charter – A Global Constitution?;

Bardo Fassbender, Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order;

Neil Walker, Reframing EU Constitutionalism;

Jeffrey L. Dunoff, The Politics of International Constitutions: The Curious Case of the World Trade Organization;

Joel P. Trachtman, Constitutional Economics of the World Trade Organization;

Stephen Gardbaum, Human Rights and International Constitutionalism;

Mattias Kumm, The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State;

Daniel Halberstam, Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States;

Miguel Poiars Maduro, Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism;

Samantha Besson, Whose Constitution(s)? International Law, Constitutionalism, and Democracy

Ekaterina Yahyaoui Krivenko

Lecturer, Faculty of Law, University of Montreal
Email: ekaterina.yahyaoui@graduateinstitute.ch

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³ All contributors to the volume "Ruling the World?" without any exception are lawyers.