

The transplantation of a legal governance form from one order to another is always fraught with difficulty. Perju's Reply asks critical questions regarding the characterisation of future global governance and most particularly the use of constitutionalism beyond the state presented in my article. Perju argues that an *a priori* matter, whether constitutionalism is suitable beyond the state, is of critical import. My original article centred upon a "what if" question, what would the impact of an international constitutionalization process be upon the state and whether this would be an advantageous process, what Perju portrays as the 'very option' of constitutionalism. The sense of urgency which Perju finds apparent in my article is also perceptible in other recent attempts to offer options for the future of the global legal order. Alongside constitutionalisation, other narratives ranging from global legal pluralism to global administrative law form part of a much broader narrative of "what if" questions within international governance debates seeking to consider what exists beyond the classical state consent tropes discussed in the article. This rejoinder focuses upon several questions raised by Perju; transplantation, multiple constitutional orders and the link between normative and structural constitutionalism.¹

First, transplantation and the applicability of constitutionalism, as part of a process of constitutionalisation, beyond the state. Walker considers that the opposition to constitutionalism beyond the state relies upon four interrelated categories; inappropriateness, inconceivability, improbability and illegitimacy.² Inappropriateness is linked to what Perju states as taking 'for granted the existence of an international legal order.' Indeed, the constitutionalisation debate and my article assume that a legal order exists beyond the state. Whilst not embracing Peters' claim that constitutionalisation acts as a bulwark against assertions of international law's limitations as a legitimate legal order nor wishing to dismiss outright those that do question international law's legitimacy, this article rejects the need to begin every argument about the future of international law by justifying its existence as law.³ Such a requirement hampers any attempts to tackle the operation of the legal and governance order that exists beyond the state. Questioning the underlying rationales of international law is important but this is not a discussion which every international legal academic must confront in every article written about global governance's future.

For the state to exist there must be international law. International law characterises the state and enables, at the most basic level, one state to recognise other states and treaty with them, go to war with them and pacifically settle disputes amongst them. While constitutionalism has its origins in the state, the latter does not have exclusive rights regarding the normative content of its governance that, at the very least, has the potential to operate in another order seeking to regulate the operation of politics by law. While there are obvious differences between actors, forms of politics and the structure of law, constitutionalism's concern with law and politics makes it appropriate to legal orders that pertain to the same concerns. Though this does not necessarily make it an inevitable or the most suitable option, it certainly does not make it, *ab initio*, inappropriate.

¹ Several of these issues are dealt with in detail in my forthcoming monograph *Constitutionalism in the Global Constitutionalisation Debate* CUP 2014

² N. Walker, 'Taking Constitutionalism beyond the State' (2008) 56 *Political Studies* 519

³ A. Peters, 'The Merits of Global Constitutionalism' (2009) 16 *Indiana Journal of Global Legal Studies* 397, 405

The second of Walker's list, inconceivability, is manifested in Perju's discussion of the difficulties associated with constituting a system where to assert democratic legitimacy remains difficult. Indeed, democratic legitimacy is a stark problem for international constitutionalisation and law as a legitimate governance order. Habermas argues that even the EU has failed to establish itself as a demos (while accepting Perju's critique of the limitations of the EU as a model, its competences and singular nature are instructive of the difficulties to be surmounted for constitutionalism beyond the state).⁴ The need for democratic legitimacy within a governance order is without exception. The democratic deficits and disconnect between constituent bodies and governance remain critical issues for international law. The constitutionalisation debate's normative character, at the very least, highlights this issue and enables some strategising of resolutions to this problem. At present, however, outside of the global legal pluralist debate, democracy remains under-theorised within international governance proposals. Without democratic legitimacy, global governance order can never be actually characterised as completing a constitutionalisation process. My article concedes the difficulties associated with this but also recognises that the state, due to its own internal constitutionality, can never supply the legitimacy necessary to tackle global interests without the other constituent actors in international law also being recognised as participants.

Perju's considers that the institutional arrangements within current global governance fail to, and seemingly will never be able to, grapple with the political character of law beyond the state. This fits within improbability in Walker's taxonomy of critiques. While classical international law operated upon the assumption of the naked politics of consent-based law, as the second section of my article articulates, arguably a conception of the state expressed by commentators such as Raustiala or Sarooshi, conceives of a governance order restrained by law, (though not necessarily constitutional law). This leaves a space for constitutionalism as a possible solution to understanding the relationship between constituent and constituted power. It also recognises the potential for multiple constitutional orders which, as Perju argues, is a potential outcome of current governance trajectories. Indeed, the sectoral constitutionalisation debates, which focus, for example, on the UN or WTO, are entirely based on such an assumption, as would an articulation of a pluralist constitutional order which writers such as Teubner consider as potentially in existence.⁵

Walker's final category, legitimacy, brings together the other three critiques on the basis that, if they are correct, constitutionalism cannot be legitimate beyond the state. Perhaps Perju's claim that the article mistakes the international for the domestic stems from the assertion that the structures necessary for both are currently absent and, in any case, are reliant on the state. Indeed, they are not present and the international legal order does rely on the state. My article claims that states will continue to play a role in governance though critically aspects of constituted power will shift to other points of operation as alternate constituent and constituted actors assert the

⁴ J. Habermas, (C. Cronin trans) *The Divided West* (Cambridge: Polity Press, 2006), p. 55

⁵ G. Teubner, *Constitutional Fragments. Societal Constitutionalism in the Globalization* (Oxford: Oxford University Press, 2012), D. Z. Cass, *The Constitutionalization of the World Trade Organization* (Oxford: Oxford University Press, 2005), B. Fassbender, 'The United Nations Charter as Constitution of The International Community' (1998) 36 *Columbia Journal of Transnational Law* 529

exploitation of their warrant. However, my article does not seek to herald an existing constitutional order but rather to ask what a global governance order may look like should constitutionalism become entrenched beyond the state. My article makes a claim for normative constitutionalism and thus the necessity of both a separation of powers model and democratic legitimacy in any system claiming that to be constitutionalised. In doing so the article assumes the presence of the state in an international constitutional order as a point of governance in a wider structure which builds in divisions of power and systems of review amongst the constituted power holders. The article also requires democratic legitimacy within states to enable them to act as points of legitimate governance while also necessitating that the separate global interests of other constituent power holders are taken into account and their warrant exercised within a democratic process.

The arguments against taking a constitutional analysis beyond the state limit the nature and reality of both governance and law within and beyond the domestic sphere in seeking to monopolise forms of governance within one order. A domestic constitutional structure will remain necessary for its international counterpart to be legitimate. The international order requires a structural constitutional order based upon normative values, but such an order does not have to mirror or 'de-constitutionalise' the state. Normative values have been established and developed within the domestic arena which is, the only type of governance order in which they fully operate, though not in identical forms. Democratic legitimacy and separations of power can exist outside of constitutionalism, though they are hallmarks of its presence. Their normative value remains the same no matter the governance order. They will be 'different' but their normative content and their definitional value if transposed elsewhere remains constant. Otherwise they are not democratic legitimacy or separation of powers but something else. The "what if" of the constitutionalisation debate asks how these normative values may be transplanted and Perju raises some important queries regarding the starting points of that debate. Where our positions depart is that while my article considers democratic legitimacy and separations of power to have an objective value whose definition does not change within different governance orders, be it constitutional or otherwise, Perju regards definitions put forward in the domestic arena, no matter their normative content, unsuited to the international order even if doing so identifies the stark current lack of legitimacy within global governance. But I think we both agree that before any transplantation of normative governance from one order to other can occur, the value of doing so needs to be challenged.