Constitutional pluralism, a recent trend in international constitutional law: European origins and the third world concerns

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Introduction

The growing body of literature dealing with the concept of constitutionalism is a reflection of a novel phenomenon observable in the rapid rise of transnational bodies, the expansion of the ambit of international law, and an increased obligation on the part of states to abide by international law and the decisions of transnational bodies. This development, which moves beyond the Westphalian model of ultimate state sovereignty in the international sphere, is exhibited in the cumulative coinage and use of transnational terminology like 'world order', 'global governance', 'global administrative law', and not least, 'globalisation'. In order to avoid chaos in terms of understanding this complex development, it is crucial to set out how the relationships and interactions operate at supranational levels. The constitutional perspective provides a cogent understanding and deep insight into the working of this development.[1] The concerns regarding the enforcement of and respect for

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[1] The debate as to whether the constitutionalisation of international law is desirable or not continues. It forms a part of the larger debate regarding the limits of the international law primarily between the two visions of international law, universal and particular. For an overview of a vision highlighting the limitations of international law in general and favouring a state centred approach towards international law, see Goldsmith and Posner *The limits of international law* (2005). There are many scholarly works based on a more favourable disposition towards the constitutional trend in international law and favouring an expansion of the ambit of international law. See, eg, Kumm 'The legitimacy of international law: A constitutional framework of analysis'(2004) 15 *European JIntL*; see, too, Paulus 'The international legal system as a constitution' in Dunoff and Tracthman (eds) *Ruling the world? Constitutionalism, international law and global government* (2009) at 69-109 for a comprehensive explanation of linkages between the notions of constitutionalism, international law and global governance, and an overview of the universalist point of view regarding constitutional law beyond the state.

human rights, non-discrimination, and the uniform application of the rule of law have taken centre stage in the wake of common concerns such as terrorism, climate change, the enforcement of mandates of international judicial bodies, and decisions of international arbitral bodies and inter-governmental organisations such as the World Trade Organization (WTO) dispute settlement body. The values and procedures subsumed by constitutionalism hold great promise in finding universal acceptability of matters dealt with or decisions made at the supranational level. The use of constitutional vocabulary at the international level has been growing rapidly. New trends in response to novel forms and the unprecedented extent of engagements and interactions at the international level are constantly developing. One such trend which has emerged within the aegis of the 'constitutional law beyond the state' vision is that of 'constitutional pluralism'. This concept, arising out of the experiences and challenges faced by the European Union (EU), is ideologically laden and has multiple dimensions including those of a normative, institutional, and legal nature. The epistemological need for devising a normative mechanism to deal with various forms of plurality in an increasingly integrated world, has catalysed scholarly debate on conceptualising the most conducive theoretical models. Similar to the elevation of numerous norms of international law which originated in Europe to deal with supranational issues arising between nations, the concept of constitutional pluralism, being intensively theorised in the European context, also stands to be transposed to the global level in the near future. This has raised justified concerns among the non-European regions – especially the third world – based on the legitimisation of the colonial past under the then prevailing international law norms, and the inadequacy of current international law effectively to lessen existing asymmetries in north/south global relations. However, the mere origin of a concept in a particular region under specific circumstances does not *prima facie* exclude its justifiable application elsewhere. Rather than favouring a blanket denunciation, I argue, rather, that an attempt should be made to shear away hegemonic biases and to introduce multicultural elements to those concepts which may well become part of the international law. With earnest inclusionary efforts, addressing concerns posed by the non-western world, and working towards filtering out any remnant of regional bias, the concept of constitutional pluralism holds promise for great mediatory value in dealing with the plurality of issues, sources, institutions, and ideologies at the global level.

The paper is structured as follows: Part I expounds upon two major theoretical conceptions in the study of constitutionalism, i.e. the statist and the eclectic, and locates the position of constitutional law beyond the state within these two paradigms. It also explains the terminological justification for using constitutional vocabulary beyond the statist paradigm and locates the

parameters of constitutional pluralism within the 'constitutionalism' paradigm. Part II traces the development of constitutional pluralism in Europe and, through a brief literature review of the theories developed by some prominent scholars, explores the European meaning of the term. Part III analyses the constitutionalisation of international law and the permeation of international law by norms having constitutional connotations. Part IV concludes the paper and addresses the possibility of applying principles of constitutional pluralism in cases of interactions at the global level. It further proposes a broadening of the normative contours of the term by including the aspirations and experiences of third world countries, so ensuring wider acceptability.

I Two trends in constitutional law: Origins and development

The legal discourse on constitutional law beyond the state can be traced to two primary paradigms: one is sceptical of the application of constitutionalism beyond the state; while the other favours taking the constitutional terminology into the transnational arena. The first advocates the sole existence of public order within the homogeneous confines of a nation state, while the second is open to the viability of a public order existing at both the regional and global levels. This dichotomy can be explained by two major trends in the context of constitutionalism, the 'statist' and the 'eclectic'.[2] The former connotes limiting the use of constitutional vocabulary to the context of the nation state, while the latter embodies the move beyond the state context to embrace developments at the supranational level. However, beyond this dichotomy there is a third voice – the voice of third world scholars who are sceptical of a universalist vision widely removed from the 'statist' vision of continued state primacy in international law.

1 Statist concept of constitutionalism

During the late eighteenth century, nationalist revolutionaries deposed the monarchy in France, heralding an era of revolution in Europe and triggering the

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[2] The 'statist' and 'eclectic' trends in constitutionalism are conceptualised on line of binaries like 'universalism and particularism', coined by Bogdandy and Dellavelle to analyse the two major opposing trends in international law. See Bogdandy and Dellavalle 'Universalism and particularism as paradigms of international law' Inst for Int'l L and Just, Hist and Theory of Int'l L Series, Working Paper No 3 (2008) available at www.iilj.org. Each trend in itself comprises of various sub-trends which together give a highly nuanced quality to each of the trends. The 'eclectic' view subscribes to the 'universalist' conception of international law, but is not identical with it as every 'universalist' perspective cannot be taken to espouse the use of constitutional vocabulary beyond the state. The debates on the two trends in international law and on constitutionalism might or might not coincide. For instance, see Krisch 'Global administrative law and constitutional ambition' LSE and Pol Sci L Dept Working Paper No 10 (2008) where Krisch's conception of global administrative law would be placed well under the 'universalist' conception of international law but as he considers the project of global constitutionalism as a tool for global governance to be too ambitious favouring a more limited approach, Krisch's view would not subscribe to the 'eclectic' view of constitutional law beyond the state.

adoption of formal constitutions. These post-revolution communities – whether 'imagined'[3] or not and whether arising from political, linguistic, cultural or industrial[4] exigency or not – shared the fundamental principles of state sovereignty: inviolable political boundaries; democracy; and a distinctly integrated social and political order. The idea of a constitution which would be the supreme inviolable law of the land came to prominence in these sovereign states. As a consequence of the primarily statist origins of the traditional concept of 'constitution' – and later constitutionalism – a part of the legal discourse on constitutionalism regards the application of the concept of constitutionalism beyond its 'statist domicile' as misconceived. The concept of constitutionalism, which developed specifically within the confines of a nation state, was believed to be inappropriate to serve circumstances transcending the nation state. The use of constitutional terminology for processes beyond the state, encompassing the regional or global levels, has been denounced on two grounds by the proponents of the statist vision. First, there is reluctance to use the constitutional metaphor outside of the state context;[5] and secondly, there are possible unjust repercussions of such a use. This attitude towards post-state constitutionalism can be classified under four major heads of criticism, *viz*, limited utility, democracy deficit,[6] procedural bias, and hegemonic bias. These, coincide with the major limitations of international law.[7] First, the limitation of the application of constitutionalism beyond a state is regarded to have arisen due to the basic structure of the traditional constitution which contains elements of democracy, the rule of law, the separation of powers, and the sovereignty (both external and internal) of a state. It is argued that if these core features are absent, a system cannot have constitutional connotations. The constitutional paradigm in a statist context is compared to a toolbox which is capable of providing a solution to problems.[8] Statist origins leave the constitutional paradigm ill-equipped to solve new issues arising beyond limits of the state. The argument continues that these new issues are seen as being so different from the domestic law issues that they

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[3]See generally Anderson *Imagined communities: References on the origin and spread of nationalism* (1991).

[4]Gellner *Nations and nationalism* (2006) (2 ed).

[5]Kumm 'The cosmopolitan turn in constitutionalism: On the relationship between constitutionalism in and beyond the state' in Dunoff and Trachtmann n 1 above at 258, 261. Kumm opines that the concept of constitutionalism does not demand the 'framework of a state' as a prerequisite for its application. Through this work, he surmises that the big 'C' constitution (used to connote the constitution of a state) and small 'c' constitution (used to connote constitutional developments at international level, beyond the state) are not irreconcilable.

[6]The term 'democracy deficit', first used in the context of the European Union is now frequently used in political analysis of the other parts of the world, as well as to designate the working of various international organisations. See Buchanan *Democracy in deficit: The political legacy of Lord Keynes* (1977); Levinson 'The democratic deficit in America' (2006) 1 *Harv L and Pol Rev* http://www.hlpronline.com/2006/06/levinson_01.html (last accessed 3 July 2011).

[7]See generally Goldsmith and Posner n 1 above.

[8]Walker 'Taking constitutionalism beyond the state' (2008) 56 *Pol Stud* at 241, 521.

demand a different approach. A state constitution, being the supreme law of land, could never submit a sovereign domestic power to non-national centres of power. If the contrary were allowed, the paradox of having the state relinquish its monopoly over public power in its territory would result.[9] With the global polity in flux due to the emergence of new transnational actors with enhanced powers, unforeseen possibilities surface leading to the emergence of unfamiliar challenges which call for unconventional and innovative solutions.[10]

Secondly, the 'democracy deficit' is the most common charge levelled against the functioning of any transnational centre of power. The liberal democratic state constitution is characterised by democratic legitimacy. It is said to emanate from 'we the people'[11] to which post-revolutionary regimes trace their legitimacy. In the resulting constitutions, the 'bill of rights' took centre stage.[12] This democratic origin, rooted in 'the people' is considered to provide a 'stronger' form of legitimacy.[13] The absence of the 'voice' of 'the people', especially individuals, in decisions reached by the supranational bodies calls into question the legitimacy[14] of constitutionalism on a supranational level in light of the absence of the 'exit' rights.

Thirdly, 'procedural bias' poses a major problem in choosing an appropriate procedure. There is a complex web of international bodies like the EU, ASEAN, OAS etc, working at the regional level; and UN, WTO etc working at the global level. Furthermore, there are various international institutions such as the World Bank, the International Monetary Fund (IMF); various non-governmental organisations, and inter-governmental organisations with their own decision making mechanisms and procedures. In this web of different procedures a difficult situation arises where an acceptable procedure must be selected. This procedure has to be seen as neutral and effective by all those affected. Consensus on the acceptable procedure is the bottom line and difficult to achieve. The current global legal and institutional arrangement is structured in a non-equitable manner, benefiting some over others.[15]

Fourthly, a 'hegemonic bias' in the exercise of decision making and public law regulation in the transnational realm is considered a significant rationale

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[9]Grimm 'The achievement of constitutionalism and its prospects in a changed world' in Dobner and Martin (eds) *The twilight of constitutionalism?* (2010) at 3-23.
[10]Kennedy 'The mystery of global governance' in Dunoff *et al* (eds) n 1 above at 36, 37.
[11]Kumm n 5 above at 265.
[12]United States' Bill of Rights came into effect in 1791 and Declaration of Rights of Man was adopted in France in 1789.
[13]Krisch note 2 above at 10.
[14]The legitimacy of international law has often been questioned and at best it has been regarded as possessing merely a thin form of legitimacy. See, eg, Rabkin *The case for sovereignty* (2004).
[15]Kennedy n 10 above at 63.

behind the opposition to the spread of constitutionalism beyond the state. An international constitution without democratic legitimacy is seen, not as an equalising force, but rather as a vehicle for the promotion of values and norms and is thus in the self-interest of those already in power. The lopsided power structure in international bodies is a case in point. The asymmetry in prominent international organisations in terms of the veto and other decisional rights – as in the case of the UN,[16] or the vast difference in the voting weight of the different members of the IMF and IBRD[17] – has been a major cause of concern for those excluded from the coterie of powerful nations. Owing to this asymmetry the regions which have been underrepresented in these bodies are reluctant to delegate or extend public power beyond the national realm.

However, apart from this criticism of constitutional law beyond the state emanating from the west, there is another source of criticism arising from the scepticism expressed by third world scholars towards the strengthening of any aspect of international law endorsed by the west, which stokes fears of a neo-colonial experience. A couple of centuries after the French Revolution, the mid-twentieth century saw another major era of revolution with the decolonisation and independence of most of the former colonies. The concepts of constitution and constitutionalism attained prominence in these newly independent countries, but subject to epistemological variation coloured by each country's individual experiences.[18] The support from the third world for the extension of constitutional principles beyond the state will depend largely

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[16]There are many proposals aimed at reforming various dimensions of the UN such as change in its structure and organisation; decision making mechanism; and the operation of the veto rights mechanism in the Security Council. See sources cited n 80 below.

[17]Various aspects of the working and organisation of the international developmental bodies like the IMF and IBRD have also been recognised as perpetuating the asymmetry between the global north and south. A wide array of reform proposals has been made by the scholarly community *vis-à-vis* these international bodies. One of the most recurring criticisms leveled is the 'conditionality' requirement set by the World Bank for providing aids/loans. See, eg, Santiso 'Good governance and aid effectiveness: The World Bank and the conditionality' (2001) 7 *Geo Pub Po Rev* at 467-68; Lombardi 'Report on the Civil Society (Fourth Pillar) consultations with the International Monetary Fund on Reform of IMF Governance' (2011) available at http://www.idasa.org/media/uploads /outputs/files/Report %20on%20IMF%20Consultations%20with%20Civil%20Society.pdf (last accessed 7 July 2011).

[18]For example, the concept of 'equality' under constitutional law had limited dimensions during the colonial period. However, after decolonisation, the former colonies of western states gained independence and acquired membership of international organisations, primarily the United Nations. With the inclusion of these former colonial possessions as sovereign nations with *de jure* equality in status to their former colonisers, the definition of the concept of equality changed significantly. By the end of colonialism the concept of equality had acquired new dimensions such as non-discrimination on the basis of race, colour and ethnic origin. This change is reflected in a wide array of treaties and documents, ranging from the UN Charter, to the statutes of various international organisations, to individual state constitutions around the world. See Owada n 24 below at 3.

on the form these principles take on the international level.[19] Thus, mistrust of an increasingly widening ambit of international law and the extrapolation of constitutional vocabulary beyond the state, has been voiced by both third world scholars[20] and their western counterparts who favour a statist vision.[21] But these two apprehensions are based on completely different, in fact opposite, premises and beliefs, and neither can be dismissed as being misplaced. In order to be responsive to the changes in the configuration of the world order, it is imperative to devise appropriate ideological, political, structural and economic responses aimed at achieving balance in the organisation of the world order. The eclectic concept of constitutionalism is a development which seeks to introduce the necessary ideological and normative elements to constitutional developments at the international level, and to assuage concerns about hegemony, in terms of norms, practices and ideologies prevalent in certain dominant regions of the world.

2 Eclectic concept of constitutionalism

The world order has moved beyond the traditional dominance of sovereign states. It is now characterised by transnational organisations with wide-ranging powers of oversight, especially with regard to issues of the environment and human rights.[22] This 'multi-layered reality'[23] is the hallmark of globalisation which defies national borders.[24] In defining constitutionalism, political and institutional developments demand post-Westphalian modes of understanding and control. Theories based on an eclectic concept of constitutionalism are distinguished by their accommodation of newer elements introduced by transnational legal and political developments in the definition of 'constitutionalism'. Support for a conceptual move beyond the statist boundaries is ingrained in these perspectives. Furthermore, these theories have multiple points of departure. There are primarily four models of constitutionalism beyond the state: institutional; lexical; normative and pluralist.

The 'institutional model' encompasses an institutional hierarchy in order to give coherence to the multiplicity of existing institutions and attempts to provide a means of connectivity between them. For example, certain basic concepts such as fundamental human rights and peace should be governed at the global level.

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[19] See text accompanying n 55 and 56 below.
[20] See n 62-65 and accompanying text below.
[21] See generally Goldsmith and Posner n 1 above.
[22] Kingsbury 'The Foreign Office model versus the global governance model: An introduction' available at http://iilj.org/courses/documents/GlobalGovernancePaper.pdf (last accessed 1 October 2011).
[23] Schreuer 'The waning of the sovereign state: Towards a new paradigm for international law?' (1993) 4 *Eur Int LJ* at 447,455.
[24] Owada 'Some reflections on justice in a globalizing world' (2003) 97 *Am Soc Int L Proc* at 181-182.

The values to be governed at the international level can be determined by way of a global consensus.[25] The international community has majority interests and goals which ought to be protected at the global level. However, because of its deep western underpinnings, this model is criticised for embodying remnants of imperialism which are unacceptable to global society as a whole.

The 'lexical model' understands transnational constitutionalism in a more limited sense. It gives substantive priority to *jus cogens* norms, laws against genocide, and *erga omnes* obligations which should trump competing claims, whether national or domestic. The lexical priority of these norms is derived from the notion that certain ideas are more fundamental than others. But this model is limited in its scope as it does not take into account the recent developments in international law and organisations which require a more comprehensive approach.

The 'normative model' emphasises the linkage between law and ethics. Law does not function independently of ethical and moral considerations. Constitutionalism is deeply rooted in ethical beliefs. Certain values like due process, freedom and equality, cannot be confined within state boundaries. These normative values should apply in all contexts and societies regardless of state borders. The imperfections of the state model of constitutionalism, for instance its inability to prevent events such as the world wars, are highlighted. This shows that the statist conception of constitutionalism is not necessarily perfect.[26] As a solution to these flaws, a constitutional order beyond the state holds considerable promise. However, in all but extreme cases, it is difficult to find uniform support for normative values. This notwithstanding, the EU law is undoubtedly undergoing constitutionalisation.

The 'pluralist model' offers a broader approach to transnational developments. It recognises the mutual existence and development of constitutional ideas at different levels – national, regional and global. It is a non-hierarchic or heterarchic[27] conception of constitutional law at different levels. It recognises different 'archipelagic' sites of constitutional authority. This conception recognises fluidity between different parts and not a mere coexistence. It holds promise as an ideological conception to regulate and shape the complex institutional developments in the current world order. The ideology of constitutional pluralism first emerged under the pluralist model in the context of the EU. The following section traces its origins and seeks to explain this ideologically-laden term.

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[25]Fassbender 'Rediscovering a forgotten constitution: Notes on the place of the UN Charter in the international legal order' in Loughlin and Walker (eds) *The paradox of constitutionalism: Constituent power and constitutional* (2007) at 269-290.
[26]See Kumm n 5 above at 263.
[27]See Walker n 8 above at 519.

II Constitutional pluralism in the European context: Origins and explanation

The concept of constitutional pluralism has been most vividly theorised in the context of the EU. This can be ascribed to the *sui generis* nature of the EU where decisions taken and operations conducted at Union level necessitated the formulation of an ideological framework which transcended the traditional state centred approach, in favour of inter-state cooperation. Certain powers and functions, which had hitherto been considered the sole prerogative of the sovereign states, had to be delegated to the Union. Such a unique situation necessitated the development of novel insights into the functioning of the Union and the emergence of non-traditional conceptions of new forms of interaction between the sovereign states. From the Rome Treaty onwards, a gradual constitutionalising trend began at the Union level.[28] This is apparent from the text of EU treaties, the landmark judgments passed by the Court of Justice of European Union, and the federal nature of the Union.

The Court of Justice has played a crucial role in the constitutionalisation of the European legal order through its interpretation of EU treaties and the promulgation of certain key doctrines. The doctrines of direct effect,[29] supremacy of EU legal norms,[30] human rights,[31] and fundamental rights

[28] There is a plethora of scholarly works on constitutionalisation of the European Union legal order. See Weiler *The Constitution of Europe: Do new clothes have an emperor? And other essays on European integration* (1999); Weiler 'The transformation of Europe' (1991) 100 *Yale LJ* at 2403-2483 ; Mancini 'The making of a constitution for Europe' (1989) *Common Mkt LR* 595-614; Lenaerts 'Constitutionalism and the many faces of federalism' (1990) 38 *Am J Comp L* 205-263. For an understanding of relationship between politics at EU level and the constitutionalisation trend in the EU, see Shapiro and Stone 'The new constitutional politics of Europe' (1994) 26 *Comp Pol Stud* at 397. For an overview of political theories in order to explain the European integration see Pentland 'Political theories of integration: Between science and ideology' in Lasok and Soldatos (eds) *The European Communities in action* (1981) at 545-569; Stein 'Lawyers, judges and the making of transnational constitutions' (1981) 75 *AJIL* 1 at 24.

[29] According to the doctrine of direct effect, individuals become directly subject to certain kinds of EU legislation, thus imposing an obligation on national courts of the member states to enforce the EU law *vis-à-vis* the individual(s) concerned, even if no national law to give effect to the community legislation in question has been enacted. The doctrine was first promulgated by the Court of Justice in Case 26/62 *Van Gend en Loos v Nederlandse Admistratie der Belastingen* 1963 ECR 1. The principle, though not expressly present in the EU treaty, has been expanded to EU regulations as well as to the EU directives in some cases.

[30] The doctrine refers to the supremacy of EU law, in the areas falling in its competence and *vice versa* for areas falling under the competence of member states. The doctrine was first stated in Case 6/64 *Costa v ENEl* 1964 ECR 614. For an overview of development of the doctrine of supremacy of community law see Usher *European community law and national law – the irreversible transfer* (1981).

[31] With the enforcement of the Lisbon Treaty in December 2009, human rights protection has found formal mention in the EU Treaty. The EU is under an obligation to accede to the European Convention of Human Rights. Even before the enforcement of the Lisbon Treaty, the Court of Justice emphasised human rights protection.

protection[32] epitomise this constitutionalisation. This trend is not monolithic; in fact it subsumes various sub-trends, each of which visualises the legal and institutional interactions within the EU from a different perspective. Constitutional pluralism is one such sub-trend which has evolved in the last two decades as a concept for explaining the complex process of European integration.

The complex landscape of the EU legal order can be delineated into three primary legal and political orders. These are: the twenty-seven National, EU and international legal orders. These can be further sub-categorised. In the first situation, the internal systems of the Union and member states' legal orders interact. Here, for instance, is an issue requiring a solution in the wake of conflicts between the constitutions of member states and EU law which *de facto* has undergone constitutionalisation. The decisions[33] and observations of some national constitutional courts repudiating challenges to the authority of their national constitutions by decisions of the Court of Justice are a case in point. The second situation arises in the case of the EU legal order interacting with other international legal orders, for instance, an issue arising between the UN and the EU or the WTO and the EU. The normative authority of these different legal orders has often been contested. This increases the probability of friction and, consequently, the disparity between the different legal systems. It raises the question of determining the supremacy of one legal order over another.

The concept of constitutional pluralism has been developed for the resolution of issues arising from the overlapping of different legal orders. However, the term itself is ideologically loaded and means different things to different scholars. Therefore, in order to understand the intrinsic elements of the term, it is imperative to delineate the theoretical underpinnings developed by different proponents of constitutional pluralism.

In order to respond to the scenario of friction between the national and European legal orders, Mattias Kumm favours a pluralist approach which

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[32] Prior to the Lisbon Treaty, the EU Treaty contained no explicit provision for the protection of human rights. In spite of this, the Court of Justice of European Union insisted on reviewing acts of the Union/Community for violation of human rights in light of the common constitutional traditions of the member states and struck down measures violating human rights. This became clear from the case law of the Court of Justice from 1969 onwards when in the landmark judgment, Case 29/69 *Stauder v City of Ulm* 1969 ECR 419, the court ruled that it was under a duty to protect the fundamental human rights enshrined in the general principles of community law.

[33] For example, the German Constitutional Court *Lisbon Treaty Judgment* of 30/06/2009 where the democracy deficit at EU level was contrasted with the legitimacy of Bundestag. See *Bundesverwaltungsgericht [BVerfG]* [Federal Constitutional Court] 30 June 2009, *Bundezgesetz-blad [BGBl] Absatz-Nr* 1-421 2008 (Ger) available at http://www.bundesverfassungsgericht.de /entscheidungen/es20090630_2bve000208en.html (last accessed 5 July 2011).

would accommodate both national and the Union aspirations, facilitating the EU integration process.[34] He developed this approach further in the context of international law, as 'the cosmopolitan turn in constitutionalism[35]... which establishes an integrative basic conceptual framework for a general theory of public law that integrates national and international law'.[36] Constitutional pluralism is made up of certain formal, jurisdictional, procedural and substantive principles comprising a common framework, which can facilitate a smooth interaction between different legal orders.[37]

Going beyond the application of constitutional pluralism to resolve deadlock between conflicting constitutional claims, Miguel Poaires Maduro regards constitutional pluralism as inherent in the very idea of constitutionalism.[38] This vision of constitutional law is best depicted through the concept of 'counterpunctual principles'[39] which aid in an harmonious interaction of diverse legal orders. Horizontal equality and heterarchic conception, increase dialogue and responsiveness between legal orders are the defining elements of this notion. Rulings by various courts in light of fundamental values of other systems, awareness of trends evolved in other systems, and attempts to strike common ground present effective measures to contain friction between the different systems. The CILFIT[40] doctrine requiring national courts to act as community courts in issues already clarified by the Court of Justice, is an indication of a process seeking to bring two courts together in a process of 'constructive interference'.

Walker seeks to explain the change in the European political landscape in the post-Westphalian age in terms of 'meta-constitutionalism'.[41] The language of constitutionalism is believed to link the different legal orders in Europe and beyond. The plural reality should be recognised and a move towards constitutional monism at the European level should be avoided. He emphasises different dimensions of constitutional pluralism which all exist

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[34]Kumm 'Who is the final arbiter of constitutionality in Europe?: Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 *Common Mkt LR* at 351-386.
[35]Kumm n 5 above at 260.
[36]*Id* at 264.
Id at 265.
[38]Avbelj and Komarek (eds) 'Four visions of constitutional pluralism' Eur Union Inst Working Paper 21 (2008), available at http://cadmus.eui.eu/bitstream/handle/1814/9372/LAW_2008_21.pdf?sequence=1 (last accessed 5 July 2011).
[39]The notion of 'counterpunctual law' as an amenable solution to possible clash of legal orders has been elaborated by Poiares Maduro 'Counterpunctual law: Europe's constitutional pluralism in action' in Walker (ed) *Sovereignty in transition* (2003) at 501-538.
[40]Case C- 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* Reference for a preliminary ruling: Corte suprema di Cassazione, Italy 1982 ECR 3415.
[41]Walker n 8 above at 356.

simultaneously[42] (eg, legal order, institutional, constituent power, societal and political community dimensions), and depicts the complex reality of multiple constitutional sites as opposed to monism which was characteristic of the Westphalian age.[43]

Komárek, going beyond the 'traditional constitutional pluralism', underlines the importance of the institutional dimension of constitutional pluralism. The communication and dialogue between multiple institutions, the application of self-restraint by the decision-making institution in question, the reaction of the institutions other than the decision-taking institution, and the importance of approaching the appropriate institution for resolution of a dispute are emphasised.[44]

The term 'constitutional pluralism' has acquired multiple dimensions in the European context. With each scholarly work, the concept is further explored and new nuances developed. The dimensions theorised by scholars include normative, legal and institutional aspects of pluralism in Europe. It is through a process of dialogue and constructive differentiation that this plurality of legal, normative and institutional orders is channelled into providing mutually acceptable and accommodating solutions in conflict situations. In the European context there are competing claims to adjudicatory authority. Adjudicatory bodies of the member-states, the Court of Justice of European Union, the European Court of Human Rights, and decision making bodies of the international organisations, together form part of the complex court system. The pluralist discourse has found favour with scholars and practitioners of EU law in an attempt to deal with the multiplicity of institutions and stakeholders, asserting competing claims over final authority in decision making, and to deal with multiplicity of sources of constitutional law. With the constitutionalisation of international law, another plane of engagement is created. The Court of Justice of the European Union has been approached with many cases where it was required to act as arbiter between EU law and international law.[45]

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[42] Avbelj and Komarek n 38 above at 13.

[43] Walker n 8 above at 357.

[44] Komárek 'Institutional dimension of constitutional pluralism' Czech Society for Eur and Comp Law, Eric Stein Working Paper no 3 (2010).

[45] For instance, see the landmark decision by the Court of Justice for European Union in the joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* 2008 ECR II-3533. The court ruled that 'the obligations imposed by an international agreement [in the given case, the UN SC res 1455 (2003) providing measures for freezing funds of terror suspects in order to counter the menace of terrorism] cannot have the effect of prejudicing the constitutional principles of EC Treaty' (para 285); In the case C-122/95 *Germany v Council* 1998 ECR I-973, the Court of Justice annulled a Council decision approving a WTO agreement

Beyond Europe, in highly heterogeneous regions like the United States of America, in order amicable to resolve standoffs between competing bodies claiming final authority to interpret the constitution, the plurality within the legal order and beyond is viewed through the prism of constitutionalism and pluralism. The predominance of constitutional pluralism in Europe has been equated with that of institutional pluralism in the USA, with the common link being the democratic credentials, expertise in the area under contestation, and rights which help balance the competing claims to adjudicatory authority.[46] The interactions between the constitutions of the sovereign states and other sources of constitutionalism can be characterised as 'constitutional dialogue',[47] which is illustrative of the increasing porosity of state constitutions and acceptance of multiple claims to constitutional interpretation.

III Constitutionalisation of international law

Beyond intra-state contestations on constitutional interpretation, the constitutional dialogue between sovereign states, and the constitutional trend in regional inter-state organisations, the process of constitutionalisation has subsumed international law as well. The serious academic works which envision the use of constitutional terminology at international level portend to make sense of, develop novel theoretical models, and give a conscious direction to the *sui generis* developments taking place at the international level. They make highly nuanced proposals of considerable practical value and which cannot be glossed over as Utopian attempts at providing highly simplistic views towards global governance like establishing a world federal state, or having a centralised world government.

The issue of global governance has been explicitly explored by scholars. The latest trend is dominated by various constitutional approaches to international law. These approaches are multifarious and range from discussing universal norms included under the concept of constitutionalism, to global cosmopolitanism, to bestowing constitutional qualities on international

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(Framework Agreement on Bananas) on the ground of violation of a general principle of community law, ie, non-discrimination.

[46] Halberstam 'Constitutionalism in the *Marbury* and *Van Gend* cases' U Mich Law Sch Public Law and Legal Theory Working Paper Series, Working Paper no 104 (2008).

[47] For an overview of the theoretical underpinnings of the process of constitutional dialogue, see Bateup 'The dialogic promise: Assessing the normative potential of theories of constitutional dialogue' NYU Pub Law Working Paper no 05-24 (2006). For a Canadian example, see Palmer 'The languages of constitutional dialogue: Bargaining in the shadow of the law' Bora Laskin Lecture, Osgoode Hall Law School York University Toronto Canada (2007). In order to facilitate the constitution making process in Nepal, the UNDP project on Support to Participatory Constitution Building in Nepal, has taken an initiative in the form of 'Centre of Constitutional Dialogue' see http://www.kiratisaathi.com/org.php?id=16 (last accessed 5 July 2011).

instruments like the UN Charter.[48] An example of the first approach is to explore the normative qualities of constitutionalism. These would include its primary function of limiting the arbitrary use of power by public authorities regardless of their affiliation – ie whether they are domestic, regional or international.[49] The scholarly conceptions theorising the cosmopolitic approach are diverse, and include those which explicitly deal with the linkages between cosmopolitanism and the constitutionalisation of international law.[50] An instance of the latter is the view that the UN Charter is an instrument capable of prescribing constitutional functions for the global legal order.[51] The vast political mandate illustrated from article 1 of the Charter which delineates the purposes of the UN, including the duty to maintain international peace and security, to develop friendly relations among the nations, and to achieve international cooperation in solving international problems, forms the starting point of the constitutional function of the Charter. A constitutional quality has been attributed to the Charter for a variety of reasons: the applicability of the Charter to all sovereign states, regardless of their membership of UN; its law making and adjudicating functions; the position of primacy it holds under international law; the naming of the treaty as a 'Charter', which holds a high position among the genre of legal instruments; and the UN being the central forum for deliberation over issues of human rights, decolonisation, and the struggle against racial discrimination.[52]

However, beyond the UN Charter there have been recent developments at the transnational level such as the development of international human rights,[53]

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[48] See text accompanying nn 51and 52 below.

[49] Poiares Maduro 'From constitutions to constitutionalism: A constitutional approach to global governance*'* in Lewis (ed) '*Global governance and the quest for justice – International and regional organizations* (2006).

[50] Kumm n 5 above; Habermas 'Does the constitutionalization of international law still have a chance?' in Ciaran Cronin (ed) *The divided west* (2006) 115-179. See also the analysis of the linkages between cosmopolitanism and constitutionalisation of international law as explained by Neil Walker in 'Making a world of difference? Habermas, cosmopolitanism and the constitutionalization of international law' in Shabaini *et* al (eds) *Multiculturalism and law: A critical debate* (2007) 219-234.

[51] Fassbender n 25 above at 134.

[52] *Ibid*.

[53] Apart from the nine major UN human rights treaties (The International Covenant on Civil and Political Rights; The International Covenant on Economic, Social and Cultural Rights; The Convention on Elimination of all forms of Racial Discrimination; The Convention on the Elimination of All Forms of Discrimination Against Women; The Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment; The Convention on The Rights of the Child; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; The Convention on the Rights of Persons with Disabilities and International Convention for the Protection of All Persons from Enforced Disappearance) there are other treaties, institutions and efforts like EU human rights regime, and international NGOs which constitute the international human rights regime. See generally Nickel

rights relating to the environment,[54] dispute settlement,[55] and world trade regimes.[56] All of these have a unique set of priorities, which need to be balanced in any conception of constitutionalism at the universal level. Following an unprecedented scale of activity conducted at inter-state level, the separate development of these various regimes has led to concerns about the 'fragmentation of international law'.[57]

The new international legal order is in flux as a consequence of the emergence of international organisations such as the UN; specialised transnational organisations such as the WTO; regional organisations such as ASEAN and NATO; common markets such as the EU, Mercosur, Unasur and NAFTA; and regimes at the global level such as the world human rights and world environmental regimes. Due to the vast expansion in the influence and functioning of these organisations and regimes, individuals have come to be directly affected by their activities. As an individual trader, a merchant, or a resident of a region, reeling under unrest and patrolled by foreign peacekeepers, experiences a direct effect of decisions made at the international level. In order to safeguard the rights and aspirations of individuals from unjust treatment meted out by these powerful international actors, application of constitutional principles to the working of these organisations in particular, and international law in general, is justified.

In response to the growing number of interactions at international, supranational, regional and international levels, and the resultant complexity,

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'Is today's international human rights system a global governance regime?' (2002) 6 *Journal of Ethics* (353-371).

[54]Supplementing environmental programs endorsed by the UN, are numerous multilateral environmental agreements and efforts undertaken by numerous NGOs which together work for environmental issues at the global, regional and national levels. See Vijge 'Towards a World Environment Organization: Identifying the Barriers to International Environmental Governance Reform' (2010) *Global Governance Project* Working Paper no 40 available at http://www .glogov.org/images/doc/WP40.pdf (last accessed 3 August 2011).

[55]For an overview and discussion of the proliferation of dispute settlement mechanisms at the global level see Teitel and Howse 'Cross judging: Tribunalization in a fragmented but interconnected global order' (2009) *NYU Public Law and Legal Theory* Working Paper no 112.

[56]As a result of the Uruguay Round, the ambit of the World Trade Organisation has spread from trade in goods to include trade in services and intellectual property. Due to an unprecedented increase in volume of inter-state trade and after the strengthening of the dispute settlement mechanism under the WTO in 1994, the WTO has acquired great influence in the international sphere, going beyond mere trade issues and extending to issues concerning the environment and human rights. Contributing to this complexity is a proliferation of bilateral and multilateral regional trade organisations.

[57]For an overview of different aspects of fragmentation of international law studied and discussed by international scholars, see Koskenniemi and Leino 'Fragmentation of international law? Postmodern anxieties' (2002) 15 *Leiden J Int Law* 553-579; Martineau 'The rhetoric of fragmentation: Fear and faith in international law' (2009) 22 *Leiden J Int Law* 1-28; Lindroos and Mehling 'Dispelling the chimera of "self-contained regimes": International law and the WTO' (2006) 16/5 *European J Int Law* 857-877.

theoretical models beyond the classical constitutionalism are being developed. Constitutional pluralism which has been well theorised especially in context of Europe, is illustrative of such a development. However, where this concept is extrapolated to the global sphere, modifications need to be undertaken in order for it to be regarded as just and universally acceptable.

IV Response to the Third World concerns- towards an inclusive definition

In order to deal with the complexity at the international level as described above, the pluralist approach suggests an active communication between different legal orders and a mutual awareness of the practice and new trends prevalent amongst the diverse legal orders. The inevitable interaction between different legal orders and constitutional approaches can be facilitated through a pluralist approach. The criticism levelled against the Eurocentric character[58] or western origins of international law,[59] would also hold true in the application of constitutional pluralism owing to its primarily European origins. Asymmetries between the north and the south are evident and each faces different issues requiring immediate attention Thus, the contours of constitutional pluralism at the international level need to be defined in an inclusive and unbiased way by undertaking appropriate modifications in response to the concerns raised by the third world.

There are two major aspects to constitutional pluralism in the international sphere: institutional and normative. The institutional aspect mainly deals with balancing the plurality of both public and private institutions with overlapping jurisdictions at the international level. This aspect of international law has been dealt with in detail by academic literature on the existence, functioning

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[58] Voices of resistance to western bias in international law have emerged from all third world regions. In bringing to the fore western bias enmeshed in classical international law, the pioneering scholarship of Ram Prakash Anand, primarily from the Afro-Asian perspective, deserves special mention. See Anand *International law and the developing countries, confrontation or cooperation?* (1987); and *Asian states and the development of universal international law* (1972). His scholarship was complemented by the subsequent generation of third world scholars. See, eg, Chimni 'Outline of a Marxist course on public international law'(2007) 17 *Leiden J Int L* 1; Gathii 'International law and Eurocentricity' (1998) 9 *Eur J Int Law*1848;; Sornarajah 'Power and justice, third world resistance in international law' (2006) *Singapore Yb Int L* 19-57; Rajagopal *International law from below: Development, social movement and the third world resistance* (2004).

[59] The recent intervention in Libya, Iraq, Afghanistan and many other parts of the third world by western states led by US forces, has been seen as a major cause of concern. The dominance of international law by US and the formulation of norms such as 'humanitarian intervention' have been criticised both by western and non-western scholars. See Habermas *The structural transformation of the public sphere – an inquiry under the category of bourgeois society* (1991) (Thomas Burger trans); Gray *International law and the use of force* (2004).

and interaction between numerous dispute resolution forums[60] which have been created at transnational levels. Some scholars see this as an instance of the 'fragmentation of international law',[61] while others regard it as an instance of 'pluralism'.[62] The following section deals primarily with the normative aspects of constitutional pluralism which are envisaged as a set of values dissociated from any regional bias and which comprise the plurality in norms resulting from varied historical and ideological experiences of different regions and societies.

1 Normative contours of constitutional pluralism envisaged beyond Europe

The concepts of 'constitutionalism' and 'pluralism' form an integral part of the normative contours of constitutional pluralism. Constitutionalism contributes towards the maintenance of order and stability in a society by performing three principal functions. First, by delineating the range of functions and the extent of power exercisable by public authorities[63] constitutionalism provides an effective check on their arbitrary exercise of power. A mandatory adherence to the 'rule of law' indicates the *de jure* supremacy of law over individual discretion and the equality amongst individuals regardless of their place in the economic, social or political hierarchy. Secondly, being a living concept, constitutionalism helps both in the dynamic development of the definition of the existing values, and in the inclusion of new values within its confines. A spurt in works expounding the nuances of principles like subsidiarity and proportionality is an example which shows attempts at widening the scope of constitutionalism to incorporate and address concerns arising out of the changing dynamics in the world today. Thirdly, due to its living nature, constitutionalism provides an interactive space for deliberation between voices and values emanating from multiple sources.

Therefore, the traits of pluralism are inherent in the concept of constitutionalism itself. In the ideological realm, values espoused by this concept claim universal acceptability due to respect for ideals, norms and the aspirations of diverse cultures and regions. It holds the potential for mainstreaming marginal voices and representing the voices of dissent. The concept is a repository of certain non-derogable norms purporting to possess widespread acceptability. Respect for the rule of law, concern for human rights, equality with special emphasis on the protection of minorities, and justice are some such norms. These are living norms, evolving with time and

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[60]Teitel and Howse n 55 above at 1-10.
[61]Koskenniemi and Leino n 57 above at 553.
[62]Halberstam n 46 above at 2.
[63]Maduro n 39 above at 501.

circumstances which cannot be definitively defined.[64] The divergence evident from these different meanings[65] can also be attributed to the idiosyncratic evolution of these norms in different regions, which is, in turn, largely attributable to varied historical experience.[66] These norms have been defined variously in languages of both the dominant and the peripheral players. The imposition of a definition emerging from a particular region and context upon others would naturally stoke discontent.[67]

An inclusive effort to heed the voices from the periphery is crucial for the acceptance by the 'periphery'. There are many instances of difference in emphasis and priority of goals between the discourse over rights and development taking places in different parts of the world. Constitutional pluralism should provide the deliberative space necessary for interaction between these discourses and facilitate the development of need- and region-specific solutions. Reaching beyond the limits of constitutional pluralism as defined in the European context, constitutional pluralism at the global level, in consideration of the vast majority of the populace residing in the less developed parts of the world, should incorporate larger humanitarian goals and be directed towards providing concrete solutions for their effective realisation.

1.1 Human rights

An instance of the difference between the western and non-western discourses is the prevalence of two different views regarding the current human rights regime. The concept of constitutional pluralism is of considerable practical relevance to this regime owing to increasingly widespread human rights awareness the world over.[68] The ideal of respect for human rights and its universality is valued and cherished in its own right. The respect and protection of human rights of all human beings appears to be an elevated ideal,

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[64]See generally Slaughter *A new world order* (2004).

[65]Note 18 above and accompanying text.

[66]Experiences like colonialism have indelibly marred the future development of the former colonisers and colonies. That these historical experiences have come to shape the confines of certain values cannot be ignored in creating an equitable and non-prejudicial arena for interaction of this plurality of norms.

[67]In addition to the works mentioned in n 58 above, for pertinent issues concerning the global order by third world scholarship, see Chimni 'International institutions today: An imperial global state in the making' (2004) *Europ J Int L* 1; Rajagopal 'Locating the third world cultural geography'(1999) 1 *Third World Legal Studies* 1-20; Mickelson 'Rhetoric and rage: Third world voices in international legal discourse' (1997) 16 *Wis Int LJ* 353-419.

[68]Regions which have been languishing under various forms of non-democratic rule for decades are also experiencing popular revolts. The recent 'Arab spring' is a case in point. Starting from Tunisia, the revolutionary wave has taken Egypt, Algeria, Libya, Bahrain, Syria and Yemen by storm. It is the broad-based popular nature of these revolts which stands out. Rising human rights awareness can be seen as being of one the primary causes for these unprecedented wave of upheavals.

beyond all contestation. But, as to what constitutes human rights, the order of priority of these rights and the means of enforcing them can be contested. Concerns for the dominance of western discourse in drawing the confines of human rights and the measures[69] taken to propagate the 'classical and contemporary' notion of human rights in primarily less developed and developing regions of the world, has come under fire.

In the context of the third world, the point of initiation of the human rights rhetoric should be the right to be human. In order to be able to enjoy human rights, one need to have at the preliminary level, a right to be a human, i.e., the fulfilment of those basic human needs which are absolutely essential for the existence of a person. An individual can be in a position to enjoy the classic human rights only if certain basic human needs and conditions of life are first made available to that individual.[70] The guarantee of rights like liberty, speech, religion, the right to vote and to privacy, is of little use to a person reeling under extreme deprivation.[71] These rights are, for all practical purposes, meaningless for more than a quarter of the population of the earth who live under harsh conditions of multidimensional poverty.[72] Ideally, if every human life is seen as equally important, then the condition of a large portion of the global population struggling for mere survival, cannot be ignored in the conceptualisation and definition of human rights.

Within the third world, there is a considerable level of heterogeneity in terms of different hallmarks of development. For instance, the human rights related progress made by the Constitutional Court in South Africa exhibits exemplary constitutional jurisprudence. The judicial activism of the courts in promoting ideals like the rule of law, social justice, etc in India is also notable. However,

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[69]The measures taken under Responsibility to Protect (R2P), a norm of international law, justifying action by the international community in case of inaction by state governments in preventing severe human rights violations within their territory, have been heavily criticised for their selective application against certain states while ignoring similar or even worse states of affairs in other states. See Bannon 'Responsibility to protect: The UN World Summit and the question of unilateralism' (2006) 115 *Yale LJ* 1157-1164; Levitt 'The responsibility to protect: A beaver without a dam' (2003) 25 *Mich J Int L* 153-177 reviewing Weiss and Hubert *The responsibility to protect: Research, bibliography, background* (supp vol to *The responsibility to protect* (2001)).

[70]Baxi 'From human rights to the right to be human: Some heresies' in Kothari and Sethi (eds) *Rethinking human rights* (1989) at 185-186.

[71]*Ibid*.

[72]Multidimensional Poverty Index introduced in 2010 by the UNDP, supplanted the Human Poverty Index. It acknowledges that poverty is multi-dimensional and mere money-based measures are not enough to gauge the extent of poverty. It comprises of a survey of three dimensions namely health, education and living standards which are further divided into the following ten indicators – nutrition, child mortality, years of schooling, children enrolled and availability of cooking fuel, toilet, water, electricity, floor and assets.

problems like poverty, undemocratic rule, social unrest and human right violations abound in most parts of the third world. Differing reasons, ranging from corruption, undemocratic rule, etc, to the colonial experience can be seen as the causal forces behind these problems. The existing international human rights system, in the form of various treaties and customs, is a commendable effort at the protection of human rights and seeks to promote human rights awareness and compliance in these parts of the world. Socio-economic rights, too, have been incorporated in this system. However, for it to be more responsive to the challenges facing large parts of the non-western world, the international human rights regime needs to be amended. Efforts towards the fulfilment of social and economic rights should precede or accompany civil and political rights. For instance, a complaint and redress mechanism under the ICESCR[73] should be established in order to maximise its enforcement.

The development of human rights regimes at both international and regional levels,[74] necessitates a mechanism for interaction between these overlapping levels. In such a scenario, the concept of pluralism, with its essential quality of providing an interactive space, is highly relevant. The existence of differences in the circumstances and the consequent complexity faced by different regions of the world negates the utility of imposing one set of values on all the regions. Different regions have different needs calling for a focused implementation of different kinds of human rights. For instance, in some regions urgent directed efforts are needed to prevent war related crimes or racism; provide education and employment opportunities; respect privacy etc, depending upon what the most pressing issue is. Pluralism makes it possible for these different notions to coexist and interact.

1.2 Poverty alleviation

Poverty indicators like malnutrition, child mortality, life expectancy, and per capita income for a large proportion of inhabitants of the forty-nine least-developed countries and the fifty-five developing countries as indicated by the UNDP reports, reveal abysmal living conditions. The concerns relating to poverty eradication and building up a satisfactory standard of life for the huge mass of humanity entrapped in chronic poverty,[75] need to be addressed as a

[73]The International Covenant on Economic, Social and Cultural Rights (1976) along with the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights together form the bedrock of international human rights system.

[74]Regional level developments in the area of human rights are taking place rapidly. These developments have been most pronounced in Europe and Africa. With the recent appointment of ASEAN intergovernmental Commission on Human Rights, Asia, too, has joined other regions in the human rights cause.

[75]According to the UN Human Development Report 2010, about 1,75 billion people in the 104 countries covered by the Multidimensional Poverty Index are reeling under poverty, living on less than $1,25 a day. More than 30 percent of the indicators reflect acute deprivation in health,

matter of urgency. This groundwork is absolutely essential if we are to build a world order capable of wide acceptance. Three procedural essentials for strengthening this groundwork are increased participation, transparency, and accountability in the functioning of global networks.[76] The effectiveness of using constitutional pluralism as a worldview would depend upon its ability to address the glaring human development problems like poverty and gender /racial/regional inequality. Thus, the ideals and norms propagated by it and deliberative processes performed under its aegis, should be directed towards attaining the concrete goals of poverty alleviation and equality.

1.3 Affirmative action

The ambit of constitutional pluralism should be expanded by the inclusion of effective modes of affirmative action directed towards the inclusion of the less developed regions in the global development process. Well thought out special provisions under affirmative action plans need to be implemented in most areas of global governance ranging from international economic law to international political institutions. International bodies, primarily those concerned with supranational economic activities, should be compelled to amend their statutes to give immediate effect to affirmative action plans.[77] For instance, Part IV of the WTO Treaty, which contains provisions for special treatment to be accorded to the less developed countries, should be the order of the day in addressing the concerns of less developed economies. Apart from the existing development efforts, novel proposals aimed at overall development of the less developed parts of the world are being formulated. One such proposal is the recent conceptualisation of an 'international microtrade regime.' This regime is conceptualised largely outside the existing WTO framework as it is being developed with the sole purpose of assisting the less developed parts of the world to overcome the challenge of severe poverty. The primary feature of this regime is envisaged to confer most favoured nation status to labour-intensive and locally-produced products (LPPs) of the LDCs through various facilitative strategies including affirmative action. It is envisaged that in case of conflict of this new trade regime with WTO provisions, in wake of the objectives underlying the former, it should be given precedence over the latter.[78]

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education and standard of living. See United Nations Development Programme 'Human Development Report 2010' at 86.

[76]Chimni 'A just world under law: A view from the South' (2007) *Melb J Int LJ* 27.

[77]Post decolonisation, measures aimed at correcting the skewed economic imbalance and attaining distributive justice have been envisaged and taken at the international level. Under the aegis of United Nations Conference on Trade and Development (UNCTAD), primarily the third world countries made proposals for ushering in a New International Economic Order (NIEO). See eg, Bhagwati (ed) *The new international economic order: The north-south debate* (1977).

[78]Lee 'Theoretical basis and regulatory framework for microtrade: Combining volunteerism with international trade towards poverty elimination' (2009) 2 *Law and Dev Rev* 367-399. See also Gupta, 'International microtrade regime: Structure and financing' (2012) 5(1) *Law and Dev Rev*

Another prerequisite for effective implementation of affirmative action measures is to provide norms to limit the influence of activities carried out by powerful international actors. This controlling mechanism is needed to balance the current lopsided world order. In order to progress towards effecting substantial change, institutions and organisations in areas like business, investment, trade, common defence, etc should be brought under the purview of these limiting principles. A particular instance would be the operations of multinational corporations, specifically in less developed countries.[79] There is a need for institutional mechanisms to implement restrictions relating to vital areas such as environmental protection and conservation by enforcing high technical standards of operation; the prevention of corruption by checking malpractices such as getting work done through or obtaining preferential treatment by bribing officials and other people in power; and the maintenance of high labour standards by preventing corporations from taking advantage of the absence of proper labour laws in the areas of their operation.

This brings to the fore the dual dimensions of constitutional pluralism envisaged at the global level: first, the normative aspect, and second, the practical aspect. The normative contours need to be given expression through practical steps taken to bring about a just global order. The above mentioned normative contours of the more inclusive notion of constitutional pluralism constitute a mere fragment of the plethora of issues subsumed under the broad heading of 'constitutionalism and the third world,' which need to be addressed through carrying on a comprehensive research agenda. Taking questions like: in light of various regional notions of constitutionalism like South Asian, East Asian, African, Latin American etc., what form would constitutional pluralism take in these regions?; is it possible to constitutionalise pluralism beyond Europe where, unlike Europe, African and Asian states include democratic systems neighbouring authoritarian dictatorships, and theocratic regimes neighbouring secular ones?; should we not be suspicious of the applicability of the concept of constitutionalism to the third world, when historical analogues such as public international law have been seen to be imposed as

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3-28. These new proposals for development which are characterised by local participation and a non-universalistic understanding of development loosely fall under the 'New Law and Development Paradigm.' See generally Trubek and Santos (eds) *The new law and economic development: A critical appraisal* (2006).

[79]For example, mineral rich countries like Nigeria, Chad, Sudan etc have, paradoxically been reeling under the phenomenon of 'resource curse'. In case of mineral oil sector, the international oil corporations cannot be completely absolved from their role in perpetuation of 'resource curse', especially with regard to environmental casualties. See Ross 'The political economy of the resource curse' (1999) 51 *World Politics* 297; Maugeri 'Not in oil's name' (2003) 82/Jul-Aug *Foreign Aff* 165-174; Vidal 'Nigeria's agony dwarfs the Gulf oil Spill' *The Observer* 30 May 2010 available at http://www.guardian.co.uk/world/2010/may/30/oil-spills-nigeria-niger-delta-shell (last accessed, 3 August 2011).

setting up hegemonic standards of civilization on the third world?; as the nodal points, further research needs to be undertaken for obtaining a holistic understanding of the relevance of constitutional pluralism project for the third world.

The plurality of these constitutional values and their evolving definitions would be a step towards greater normative inclusion at the global level. A dialogic interaction between values emanating from different cultural contexts is a prerequisite for a just order. This also calls for long overdue changes to the structural setup of various international organisations and minimising the polarity in the exercise of power and influence in the transnational arena. These changes must flow from the bottom up rather than from the top down[80] This would inevitably compromise certain vested interests, but is imperative if we are to facilitate the conscious attempt to mould the global order in an equitable way.

Conclusion

The widening scope of international law; strengthening existing aspects of international law; inclusion of novel areas in its ambit; nuanced theoretical development of its principles; and an unprecedented deepening of its impact reaching beyond the state and international bodies to the include the individual, has led to a new consciousness amongst the international law scholarship, eliciting intellectual attempts to envision international law in an equitable manner and to help move the trajectory of international law in a highly responsible manner. Adherence to the constitutional principles commanding universal acceptability is a step towards a responsible shaping of the international order. Given the vastness and complexity in the operation of international law in today's world, a philosophy more nuanced than the mere application of constitutional principles to the international sphere needs to be theorised. This vision subsumes a two pronged approach. First, purging international law of the biases which have given it the characteristic of an instrument enlisted to establish and maintain western hegemony over other parts of the world. Second, an eclectic enrichment of international law by including those norms which have hitherto been ignored and introducing well thought out norms concomitant with the aim of ensuring genuine universal acceptability of and legitimacy to international law. The concept of

[80] This would definitely entail reform in the organisation of certain prominent international bodies like the UN, IMF and World Bank. In the case of UN, various structural and organisational reforms have been proposed, the most prominent of which being reform of the UN Security Council. See Fitzgerald 'Security Council reform: Creating a more representative body of the entire UN membership' (2000) 12 *Pace Int LR* 319; Krasno 'Security Council reform' (2006) 1/Spring *Yale J Int Aff* 93-102; Hurd 'Myths of membership: The politics of legitimation in UN Security Council reform (2008) 14/April-June *Global Governance* 199.

constitutional pluralism, primarily developed to deal with the pluralist challenges in Europe, can be elevated to the global level to deal with plurality of institutions, sources of norms and values, and thus contribute towards a positive enrichment of international law. But, the plurality at global level is far more profound than at the EU level, and will require a considerable widening of the scope of constitutional pluralism beyond the traits attributed to it in the European context by inculcating objectives like poverty alleviation, the bane of immense proportion afflicting humanity and requiring prompt large scale action; and principles such as affirmative action as an innate requirement for the existence of a healthy plurality of voices at the international level. There should be an inclusion of dynamics, goals, experiences and principles espoused by subaltern voices, voices emanating from the third world, which hitherto could not be heard or were overshadowed by dominant discourses, influencing the transnational decision making processes. For constitutional pluralism to truly make a difference, as envisioned at the global level, it needs to address all nations, societies and cultures equally and allow space to accommodate their voices. For this to happen, an interaction between the different regional voices represented by organisations such as the African Union, ASEAN, the European Union, and the Organization of American States, etc is strongly encouraged. Unity in these regional voices is crucial to stem the extension of undue influence by one region over another, and would foster a move towards a more equal distribution of power in the unprecedentedly globalised world today.

Such a development holds the potential to facilitate efficient negotiation and dialogue and the capacity to bridge the increasing fragmentation of international law. It should be an ever- evolving and accommodating process, representing the *zeitgeist* and heterogeneity of values. These reforms together would lead to a novel turn in international law, making it more just, symmetrical and legitimate.