

# Plugging the Legitimacy Gap? The Ubiquity of Human Rights and the Rhetoric of Global Constitutionalism\*

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## 1 Introduction

As has been noted by others, international, post-national or global constitutionalism is very much in fashion at present.<sup>1</sup> Amongst the wealth of works that this still growing trend has generated, Neil Walker has carved a niche as one of the most nuanced and original thinkers in the constitutional field, helping in no small part to define the terms in which we understand the post-national discussion.<sup>2</sup> In a genre in which claims are often made in absolute terms, Walker's now substantial body of work on constitutionalism beyond the state provides balanced insight into forces and interactions that frequently defy singular definition.

Indeed, Walker's position both as a moderate within the debate and as a committed pluralist means that there is often little in his work with which this commentator can disagree. However, while this very difficulty in finding elements to dispute is itself perhaps a cause for suspicion – Walker's habit of defining the debate so as to position himself on the reasonable middle ground is perhaps one reason why it is frequently impossible to disagree with his characterization of constitutionalism in the post-national sphere or spheres – I do not take up these suspicions here. Instead I shall attempt to engage with his arguments in his paper 'Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship', taking up his claim that the relationship between constitutionalism and democracy is rooted in an inextricable yet mutual tension in the context of a trend observable within contemporary international legal discourse that has been bothering me for some time: the proliferation of the language of human rights across all areas of human concern.

\* I am grateful to the participants of the 'Constitutionalism and the Framing of Democracy' seminar, and Neil Walker in particular, for their comments and feedback, as well as to Euan MacDonald and the two anonymous referees. I wish to express my thanks, too, to the organizers of the symposium for the invitation to discuss Neil's work.

- 1 E.g., recently, Samantha Besson, *Whose Constitution(s)? International Law, Constitutionalism, and Democracy*, in: Jeffrey L. Dunoff and Joel P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance*, New York: Cambridge University Press 2009, p. 381.
- 2 E.g. Walker, *The Idea of Constitutional Pluralism*, *Modern Law Review* 65 (2002): 317; Walker, *Late Sovereignty in the European Union*, in: Neil Walker (ed.), *Sovereignty in Transition*, Oxford: Hart Publishing 2003, p. 3-32; Walker, *Postnational Constitutionalism and the Problem of Translation*, in: J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State*, Cambridge: Cambridge University Press 2003, p. 27-54.

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Building on Walker's description of the relationship between constitutionalism and democracy, what I wish to suggest is that the spread of human rights discourse is in some way, at least in certain instances, connected to attempts to apply constitutional discourse beyond the state, particularly at the international or global level. I think this is so in two ways. The first is the way in which human rights is used as a neutral language to legitimize decision-making beyond the state, where a community of 'legitimizers' is neither readily apparent nor easily capable of constitutionalizing itself. In this form, human rights discourse renders obsolete a connection between the always necessarily political nature of the decision-making that takes place at the international level and a political community capable of legitimating it. There is no need for such a political community, the reasoning runs, because such values are universal. The second level is the way in which this spread of human rights (used to justify the decision-making of a deeply biased international order precisely because of their supposed universality (the first level)) is subsequently used as evidence of the universal nature of those values that are themselves evidence of the constitutional nature of the international system. Through a combination of these circular lines of reasoning, human rights become not place-holders for a political legitimacy that is yet to be imagined but *place-takers*.

My concern therefore is that human rights, in seemingly providing the political legitimacy that is lacking at the international level, enable those advocating constitutionalism beyond the state to avoid the hard questions about how to consider questions of political participation and voice beyond the state; how to achieve fairness in global decision-making. Moreover, the use of human rights discourse to provide legitimacy for global governance ignores the fact that human rights, particularly as they are defined as positive law in human rights treaties, are not uncontroversial, and arguably do not achieve the universality that their proponents either assume or claim. Walker's latest paper brings these concerns into sharper focus. Both his characterization of the relationship between constitutionalism and democracy as iterative and the description of the irreconcilable tension between them provide a useful context in which to situate the ubiquity of human rights language. I begin by considering his claims concerning the relationship between constitutionalism and democracy and the implications for our understanding of constitutionalism in the global age.

## 2 The Iterativity of Constitutionalism and Democracy

In his paper, Walker moves beyond his recent attempts at mapping the contours and boundaries of constitutionalism beyond the state and instead makes a far-reaching claim about the nature of the relationship between democracy and constitutionalism. Seyla Benhabib has, in a well-known paper, used the language of Derrida to describe democracy as possessing an iterative quality.<sup>3</sup> For Benhabib,

3 Seyla Benhabib, *Another Cosmopolitanism: Hospitality, Sovereignty and Democratic Iterations*, ed. Robert Post, Oxford: Oxford University Press 2006, p. 47-51.

democratic iterations are part of a juris-generative understanding of political processes whereby the *demos* engages in the reappropriation and reinterpretation of the norms and principles that bind them – a process that enables them to be both the subject and author of those principles and other laws.<sup>4</sup> Walker takes up the vocabulary of democratic iteration and uses it as an explicit analytical frame to consider in detail the nature of the relationship between democracy and constitutionalism. At the root of his claim of an iterative relationship between democracy and constitutionalism lays the contention of the radical incompleteness of democracy – a ‘double incompleteness’ – that renders democracy unable to specify the content of the constitutionalism that is required *both* to realize and limit democracy. The iterative nature of the interaction between democracy and constitutionalism is to be found both in the recurrent ways in which constitutionalism addresses and makes good democracy’s double incompleteness over time, as well as in the ways in which democracy’s incompleteness manifests itself. This iteration denotes, according to Walker, an unavoidable and irresolvable tension between democracy and constitutionalism – an ambivalence in their relationship that it is vital to understand in the context of regulation in a global age. And yet, at the same time, he attempts to blunt the criticism of post-national constitutional sceptics by suggesting a deep internal connection between constitutionalism and democracy that is rooted in a shared moral order from which both emerge: ‘they are woven out of the same moral fabric’ and are ‘inextricable even as they remain in mutual tension’.

Walker explicitly sets up his understanding of the relationship between constitutionalism and democracy as challenging the dominant poles of constitutional thinking beyond the state that claim, at one extreme, that weak democratic credentials deal a fatal blow to visions of global constitutionalism, and at the other that weak democratic credentials are easily replaced by constitutionalism’s non-democratic values. However, whilst noting that transnational constitutionalism should aspire to some kind of ‘meta-democratic imprimatur’, Walker ultimately appears to come down on the side of constitutionalism, even where a democratic pedigree is lacking. He does so for two reasons: the first is the way in which particular constitutional ‘points’ which themselves lack democratic credentials may nonetheless connect with strongly democratic settings within a constitutional constellation; for example, the way in which the European Convention on Human Rights interacts with the democratically-mandated governments of the Council of Europe’s member states. This is of course a vision of a modest, pluralist constitutionalism beyond the state with which it is difficult to take issue. The second reason relates to the idea of constitutionalism and democracy being cut from the same moral cloth. Walker appears to imply with this contention that, as a consequence of both representing the same deeper moral values that define modernity, a democratically legitimate mandate for constitutionalism becomes less important, at least than the sceptics assume, and however desirable it may be.

4 Benhabib 2006, p. 49.

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It is this part of Walker's paper – that of the apparent demoting of democratic legitimation to a position of lesser importance – that I wish to pick up on. But first I should be clear about what I am not doing: I am not suggesting that Walker's claim regarding the nature of the relationship between constitutionalism and democracy relies upon human rights either explicitly or implicitly; and certainly not that he is guilty of the reductive thinking that characterizes much of the debate in relation to the legitimizing potential of human rights. Instead I wish to challenge the implicit suggestion that a democratic mandate is less important given the deeper connection between democracy and constitutionalism. I will try to do this by reference to the ubiquity of human rights talk.

In the realms beyond the state, the legitimacy that democracy provides is unlikely to take a state-based form. Nonetheless, if Walker is correct and we would be wise to view democracy and constitutionalism as sharing an iterative relationship, some post-state form of political legitimation, whatever form it may take, would appear to remain a necessary part of the political order of modernity i.e. we should not accept constitutionalism without a democratic political legitimation just as we should not view democracy as pre-eminent. However much legitimacy may stem from a variety of sources, an iterative relationship suggests that constitutionally-based sources of legitimacy, such as human rights, are no replacement. I would go even further and suggest that even if this iterative relationship is not the only political architecture fit for modernity,<sup>5</sup> we should be reluctant to accept a post-political post-modernity, for all that constitutionalism and democracy share the same moral foundations. The purpose of using human rights as an approach to Walker's own paper will hopefully become clearer in the subsequent section.

### 3 The Onward March of Human Rights

Since the end of the 1990s there has been a trend towards integrating once separate areas of human concern with human rights.<sup>6</sup> This has become particularly visible in recent years at the international level for example in the field of development, in regard to trade law and the WTO, but also in the attempted integration between humanitarian law and human rights. There are increasingly few areas of human concern that have not seen an attempt at re-interpretation in the language of human rights. This trend has not been without criticism, particularly for the way in which it blunts the emancipatory potential of human rights by co-

5 Walker, *Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship*, 45.

6 See, for example, Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2001), who welcomes the shift he sees at the normative level towards a more integrated international community.

opting them into the realm of positive law.<sup>7</sup> However, such criticism sits at the margins of international discourse. Moreover, it seems that this trend has a long way to run yet. More recent aspects of this phenomenon can be seen in the attempt to define corruption in human rights terms<sup>8</sup> and in the effort to view climate change through the lens of human rights.<sup>9</sup> The latter clearly has a great deal of potential, and it seems quite possible that climate change and human rights will become a field of study in its own right in the coming years.

One explanation of this phenomenon is the need to create legitimacy in a world in which a community capable of providing political legitimacy is not only almost impossible to identify, but where organizing a process or agreeing a language for genuinely inclusive political interaction is beyond our current institutional imagination. Klabbers has recently suggested that where a global *pouvoir constituant*, a mandate and means for global governance are all unclear, it is no coincidence that observers 'take refuge in notions of legitimacy'.<sup>10</sup> What I wish to suggest is that the rhetoric of global constitutionalism takes refuge not in legitimacy but in human rights, which it equates with legitimacy.<sup>11</sup> Elsewhere Klabbers has noted the inability of constitutionalism alone to address the legitimacy shortfall at the international level.<sup>12</sup> In their claim to universality, human rights allow an appeal to shared values common to all that can seemingly bridge the legitimacy gap that

7 See, for example, Sundhya Pahuja, Rights as Regulation: The Integration of Development and Human Rights, in: Bronwen Morgan (ed.), *The Intersection of Rights and Regulation. New Directions in Sociolegal Scholarship*, Aldershot: Ashgate 2007; also Morag Goodwin and Kate Rose-Sender, Linking Corruption and Human Rights: An Unwelcome Addition to the Development Discourse, in: Fons Coomans (ed.) et al., *Corruption and Human Rights*, Antwerp: Intersentia 2010 (forthcoming).

8 See, *inter alia*, Coomans 2010.

9 See, in this regard, Stephen Humphreys (ed.), *Human Rights and Climate Change*, Cambridge: Cambridge University Press 2010.

10 Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalism of International Law*, Oxford: Oxford University Press 2009, p. 37.

11 The notion of legitimacy is of course notoriously nebulous and answers different needs in different contexts (see Jan Klabbers, Chapter 1 in Klabbers et al., *The Constitutionalism of International Law*, p. 37-43 for a brief but helpful overview). What I mean by political legitimacy here is the kind of legitimacy that can only come from the decision of a 'community', however temporarily determined or limited the substantive remit at hand, to form itself to answer certain shared needs or problems. The idea of legitimacy, it seems to me, necessarily presupposes inclusiveness in the process of decision-making (where legitimacy is the extent to which the claim of legitimacy resonates across a group) although it need not be formally democratic or answer to the demands of theories of good governance. This form of legitimacy is known in its thickest form as self-determination; such a thick concept, involving notions of sacrifice for the sake of the polity, is arguably neither necessary nor desirable in legitimating politics beyond the nation. It is, however, arguably necessary for concepts of citizenship to be meaningful in a political sense. See Goodwin, Learning Lessons from Romani National Claims: Taking European Citizenship from an Imaginary Community to an Imagined One?, in: Andrea Ott and Ellen Vos (eds.), *Fifty Years of European Integration: Foundations and Perspectives*, The Hague: TMC Asser Press 2009.

12 See, e.g., Jan Klabbers, Constitutionalism Lite, *International Organizations Law Review* (2004) 1: 31, at 48; also Anne Peters, Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures, *Leiden Journal of International Law* (2006) 19: 579-610.

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constitutionalism alone cannot. The appeal to human rights – the use of human rights as a descriptive tool for an increasing array of areas of human concern – can thus be read as an attempt to plug the legitimacy gap that constitutionalism cannot fill. To illustrate how I think this works, I will briefly consider the reasoning of two of the leading proponents of international constitutionalism.<sup>13</sup>

### 3.1 Erika de Wet

Erika de Wet has emerged as one of the most high profile proponents of constitutionalism beyond the state.<sup>14</sup> In her 2006 *ICLQ* article, De Wet made a case for the existence of an emerging constitutional order comprising of an international community, an international value system and rudimentary enforcement structures. By focusing on De Wet, I wish to show how her argument relies heavily upon human rights both to constitute and legitimize the international community that is to act as a version of the *demos* at the international level.

De Wet makes the argument for the existence of an international community by reference to the presence of community-orientated obligations,<sup>15</sup> in place of the more straightforward suggestion of the UN Charter as the constitution for (and constitutionalizing document of) the international community. These *erga omnes* obligations take the form, as De Wet highlights, almost entirely of human rights-related obligations, such as the prohibition on genocide, torture, and ‘disappearances’. These norms, however, also form the basis of the international value system that is the second element of De Wet’s international constitutional order. According to De Wet, the emerging hierarchy of norms at the international level is made manifest through human rights, which the UN Charter has elevated to ‘core elements’ of the international value system. The emerging value system is also visible in the creation in recent years of De Wet’s rudimentary enforcement structures in the *ad hoc* criminal tribunals and the ICC; although these tribunals are ostensibly an outgrowth of international humanitarian law, human rights form a central element of the growth of international criminal law, according to De Wet, as ‘violations of humanitarian law simultaneously constitute grave human rights violations’.<sup>16</sup>

By relying upon the presence of community obligations that take the form of the human rights that also constitute the international value system, the existence of an international community can be presented as emergent by the presence of an alleged international value system. In place of the fragmentation seen by others, De Wet sees the plurality of normative orders at the regional and global level as merging to form a single global order of unity underpinned by this universal value

13 The work of other leading scholars in this field, such as Bardo Fassbender, could, I think, equally be used to demonstrate the point.

14 See notably, Erika de Wet, *The International Constitutional Order*, *ICLQ* (2006) 55: 51-76; and very similarly, Erika de Wet, *The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, *Leiden Journal of International Law* (2006) 19: 611-632.

15 As codified in Arts. 42 and 48 of the Articles on State Responsibility. See De Wet, *ICLQ* 2006, 54.

16 *Ibid.*, 58.

system. Moreover, human rights not only constitute De Wet's vision of an international community, thereby de-politicizing the concept of community, but also legitimize it. The hierarchy of norms that she identifies as peremptory are almost entirely composed of human rights norms.<sup>17</sup> It is these norms that provide a 'superior legal status and ethical force' for decision-making beyond the state.<sup>18</sup> Indeed, in her hierarchy of norms, although democracy may be included as a value, it is not an integral part of the system. Instead, human rights in this post-political vision are deemed capable of carrying the burden of legitimization alone.

### 3.2 Ernst-Ulrich Petersmann

Where De Wet sees the international order as constitutionalizing, Ernst-Ulrich Petersmann takes the fact of a constitutionalized order as a given. Extrapolating from his thesis concerning the WTO and EU as well-constitutionalized orders, Petersmann has extended his understanding of constitutionalism to the broader question of reforming the international system.<sup>19</sup> The central concern of constitutionalism is not for Petersmann the political question of who should govern but rather the design of laws and institutions of a higher order that protect the interests of all citizens from the harm that can be done by their leaders.<sup>20</sup> This notion of constitutionalism hinges less upon the existence of a consensus of shared values in which human rights play a central role (as it does for De Wet); but in the application of values that are identified, as MacDonald puts it, by the proper application of right reason. The need for consensus, and thus for a community capable of reaching it, is replaced by viewing certain values – those that are the product of Western constitutionalism – as the only correct possible outcome of human reasoning. Politics in Petersmann's vision, more explicitly than for De Wet, is replaced by the institutionalization of human rights, market freedoms and democracy; the only question that remains is the means of institutionalization. Democracy, in this vision, is a thin manifestation, bounded and determined by human rights and the market rights of the individual.

In an earlier article considering calls for the WTO to pay more attention to human rights, Petersmann is more explicit about the subordinate role of democracy.<sup>21</sup> In this article, he sees the call for the WTO to take human rights seriously as operating at two levels: the first is the legal and concerns the need to find a method for dealing with likely clashes between the rules governing global trade and human rights norms. The second he labels 'political' and is important in ensuring the WTO's legitimacy; in his own words, '[p]romoting the consistency of

17 *Ibid.*, 58.

18 De Wet, *Leiden Journal of International Law* 2006, 614.

19 Ernst-Ulrich Petersmann, How to Reform the UN System? Constitutionalism, International Law, and International Organizations, *Leiden Journal of International Law* (1997) 10: 421.

20 *Ibid.*, 422. The point is Euan MacDonald's. Euan Macdonald, Constitutionalising the Globe? The Rhetorical Construction of Community in International Legal Scholarship (unpublished paper on file with the author).

21 Ernst-Ulrich Petersmann, Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society, *Leiden Journal of International Law* (2006) 19: 633-667.

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WTO rules and policies with human rights is ... an important political task for enhancing the *democratic legitimacy* of the WTO'.<sup>22</sup>

While De Wet appears to suggest that the reality of a consensus on human rights is evidence for the existence of a universal value system that itself is evidence of an international community; Petersmann takes the fact of the correctness of Western values, with human rights at their core, explicitly as obviating the need for a political community. Both imply that political legitimacy can be ensured simply by taking human rights seriously, and in doing so elevate human rights above politics.

#### 4 Legitimizing Constitutional Discourse Beyond the State

We return here to Walker's paper, his account of the iterative relationship of democracy and constitutionalism and my attempt to challenge the assertion that we should not be overtly worried about the lack of a democratic mandate. The iterative nature of the relationship between constitutionalism and democracy seems to me to entail that constitutionalism cannot provide the basis for its own legitimacy or, at the very least, it is capable only of offering a poor substitute for democratic legitimacy. If this is the case, human rights will not be able to plug that gap at the post-national level.

Much of the confusion surrounding the legitimating potential of human rights stems from the sense in which human rights appear to transcend the limitations of the constitutionalism from which they sprung as constitutional rights. This is, I think, due to the two aspects of human rights: the legal and the emancipatory. In an essay entitled 'Rights as Regulation', Sundhya Pahuja has argued that the attempted integration of development and human rights 'should be understood as the creeping transformation of a promised sphere of "rights" into a domain which may aptly be called "regulatory"'.<sup>23</sup> In place of human rights as a site for political contestation and claims,<sup>24</sup> human rights as regulation denotes a focus on human rights as defined in positive law. For Pahuja, the political aspect or emancipatory potential of human rights – what she terms the symbolic valence – exists in the gap between human rights norms as laid down in international law – the regulatory aspect of human rights – and the imaginative appeal that human rights hold. These two aspects of human rights – human rights as they are laid down in positive law and human rights as they are claimed – co-exist but are not co-extensive. It is the conflict between these two aspects that opens up a space of contestation and allows for the emancipatory potential of human rights. It is this emancipatory potential that gives human rights the appearance of being able to transcend constitutionalism and act as a source of political legitimation.

22 *Ibid.*, 634; emphasis mine.

23 Pahuja 2007, 168.

24 For the claim that human rights have in the past acted as sites of contestation of the dominant development orthodoxy, see Rajagopal Balakrishnan, *International Law from Below: Development, Social Movements and Third World Resistance*, Cambridge: Cambridge University Press 2003.

But it is only an appearance of transcendence. There is little that is emancipatory in the collection and cataloguing of human rights within post-national constitutional orders; or in the way that human rights are used by contested international institutions to elevate their particular discourse above dispute.<sup>25</sup> Instead such manifestations represent a top-down imposition of human rights, in which human rights are readily identifiable as an element of modern constitutionalism i.e. the rule of law. They are, in Pahuja's phrase, rights as regulation. However, even where human rights unleash their emancipatory potential through being imagined and claimed at the local level, they become a vehicle in which claims of political legitimacy can be voiced; they remain a means and not a political end in themselves. As Walker's description of the iterativity of the fundamental political relationship of modernity so helpfully reminds us, human rights are an important part of realizing self-rule, but they do not replace it, even where assertions of constituent power come dressed up in the language of human rights.

Human rights ultimately remain an element of modern constitutionalism, designed, in their guise as constitutional rights, to facilitate and above all to limit the power of modern democracies. They represent in Constant's language the freedom of the moderns.<sup>26</sup> Just as we would not accept a full list of constitutional rights in place of self-determination (freedom of the ancients), human rights beyond the state cannot replace the legitimacy that stems from the decision of communities to come together to determine solutions to shared problems, and all that that normatively implies. As such, human rights do not and certainly not in the 'regulatory' mode in which they are being used in the examples above, provide or replace the legitimacy that stems from the claims and actions of a constituent power. If human rights cannot perform this role, then the legitimacy that constitutional discussion beyond the state is intended to create will necessarily remain soulless.<sup>27</sup> Democracy may be incomplete but the legitimacy that it expresses is not replaceable, not even where human rights are formed from the same moral cloth as individual and collective self-determination.

I do not wish to suggest, however, that the kind of legitimacy expressed by democracy in the modern era is necessarily sufficient of itself to legitimize constitutionalism beyond the state i.e. that there are not other forms of legitimacy that

25 See, e.g., Goodwin/Rose-Sender, *supra* n. 7 for how this works in relation to development, corruption and human rights.

26 Benjamin Constant, The liberty of the ancients compared with that of the moderns, in: B. Constant (trans. B. Fontana), *Political Writings*, Cambridge: Cambridge University Press 1988. Also, James Tully, The Unfreedom of the Moderns in comparison to their ideals of Constitutional Democracy, *Modern Law Review* (2002) 65: 204.

27 See also Alexandra Kemmerer, *The Pouvoir Constituant* in Times of Transition, in: Hauke Bronkhorst (ed.), *Demokratie in der Weltgesellschaft*, Baden-Baden: Nomos 1999.

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should play a role.<sup>28</sup> However, even at risk of fetishizing what I have termed political legitimacy, it is necessarily prior to, in the sense of superior to, other forms of legitimacy. While efficiency or out-put constitute a form of legitimacy, they are important only in achieving human ends that are defined by political means. Moreover, I do not claim to know what political or democratic legitimacy beyond the state should look like – what forms it could take or how it would interact and overlap with these other forms of legitimacy – although it seems to me that it should necessarily begin with republican conceptions of the political as participation, or ‘voice’.<sup>29</sup> But simply because we have not yet been able to imagine what expressions of constituent power may look like at the international level it does not follow that the activity that it represents can be replaced by human rights.<sup>30</sup> Yet Walker’s apparent assertion that a post-modern political architecture can do without a democratic mandate, albeit that it is not ideal, leaves me wondering: how would one achieve this without relying on human rights in a similar way to the authors considered above? Human rights language is conspicuous by its absence from Walker’s work. It seems to me that human rights, human rights processes and institutions, necessarily take the place of legitimacy in the space between democracy and constitutionalism in the rhetoric of global constitutionalism. The question I wish to ask of Walker is do they need do? Can the claims he makes about global constitutionalism hold without resort to the rhetoric of human rights?

## 5 In Sum

With the hugely normative punch they pack, the reliance on human rights as a refuge from the difficulties political legitimacy poses blunts criticism of the legitimacy gap at the heart of international law and of the numerous post-national constitutional orders that have been proclaimed. More unfortunate yet, the language of constitutionalism essentially works to remove question definition, discourses, and decision-making from the realm of the ordinarily political and elevate them to a special status beyond the possibility of contestation. The rhetoric of constitutionalism beyond the state is not only dependent upon human rights for the nascency of its subject but simultaneously acts to enthrone them. Before a genuinely shared debate at the global level about values we might share can take place, the discourse of international constitutionalism is enshrining human rights as positive universal law, and de-politicizing them in the process. Yet, as most

28 Such as Halberstam’s recent characterization of legitimacy as composed of voice, expertise and rights; Daniel Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, in: Jeffrey L. Dunoff and Joel P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance*, New York: Cambridge University Press 2009.

29 By participation I do not mean the participation of international civil society, whose actors lack the same legitimacy as the organizations in which they clamour to participate.

30 See Walker (eds.), *Post-Constituent Constitutionalism? The Case of the European Union*, in: Martin Loughlin and Neil Walker, *The Paradox of Constitutionalism*, Oxford: Oxford University Press 2007, for the different registers of constituent power, 252, 264.

international lawyers will admit, human rights are by no means so straightforwardly universal as is so frequently claimed. Moreover, even where a shared value system is viewed through a constructivist lens as a means towards the development of an international political community, the contested nature of human rights and their use as trumps to silence contestation make them the wrong constitutional 'cues'.<sup>31</sup>

The suggestion here therefore is that rather than seeking to interpret every problem through the lens of human rights in the hope of legitimizing the international entities and discourses that we have at present, we should instead work harder at imagining the means and modes, the voices, tones and registers, by which processes of political participation may offer legitimacy for global decision-making, for we cannot escape the legitimacy gap with recourse to human rights. The iterative relationship between democracy and constitutionalism, it seems to me, tells us so. My second, more tentative suggestion is that, just as the emancipatory potential of human rights stems from the conflict between rights as positive law and rights as they are imagined and claimed, a legitimacy capable of encompassing both a democratically-based political legitimacy and the democracy-restraining elements of constitutionalism may be locatable in the irresolvable tension that Walker identifies between democracy and constitutionalism. I hope Walker can be persuaded to make the further articulation of this tension and its possible relationship to the legitimacy question the subject of future work.

31 '... it is only possible to use constructionist techniques to develop the idea of political community to the extent that these textual reference points provide the appropriate cues.' Walker 2007, 266.