Democracy, Constitutionalism and the Question of Authority

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1   Introduction

In his insightful and thought-provoking article, Walker argues that the relation between democracy and constitutionalism is dialectic: there is an irresolvable tension between democracy and constitutionalism, yet the two also depend on each other. By contrast to theories that hold constitutionalism to be fully compatible with democracy,[1] Walker argues that constitutionalism and democracy cannot be completely reconciled. Constitutionalism necessarily draws on non-democratic sources to make it tick. In contrast to approaches that aim to sever constitutionalism from democracy, Walker argues that democracy and constitutionalism supplement each other: constitutionalism is 'contingently necessary' for democracy, whereas democracy 'nourishes and preserves' constitutionalist discourse.

I fully agree with the argument that democracy and constitutionalism stand in an insoluble tension. However, I have some doubts (or at least questions) regarding the second strand of the argument: the claim that democracy needs constitutionalism and constitutionalism needs democracy. In this commentary, I will elaborate both points.

2   Does Democracy need Constitutionalism?

2.1 *Constitutive Acts, Constitutions and Constitutionalism*
In order to understand and discuss Walker's argument that democracy needs constitutionalism, it is necessary to make a distinction between three concepts: (a) constitutive acts, (b) constitution and (c) constitutionalism. Although the three are related in several ways, it is necessary to keep them analytically apart.

•   *Constitutive acts*
In terms of speech act theory, a constitutive act can be considered as a declarative act that, if successful, brings about a certain state of affairs. Examples of such acts are utterances such as 'I hereby open this meeting' or 'I hereby declare you man and wife'.[2] Constitutive or declarative acts, in other words, go beyond pure description or prescription as they *constitute* (or aim to constitute) a new reality.

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1   Walker discusses three positions that aim to do so. First, the ones that 'define-up' democracy as essentially a means to serve constitutionalist values, secondly the ones that 'define-down' constitutionalism as a means to democratic decision-making and thirdly the ones that hold constitutionalism and democracy to be mutually supportive ideas.
2   See, e.g., John Searle, *Speech acts*, Cambridge: Cambridge University Press 1969.

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Constitutive acts, however, take place in a particular social and political context – not all attempts to open a meeting are successful, not all attempts at marrying A and B will result in a valid marriage, etc. What counts, in other words, is not just the mere utterance of certain words, but also the relation between speaker and an audience. One could say that the speaker *presents* a certain institutional reality to her audience (the now opened meeting, the now concluded marriage, etc). The constitutive act is only successful if an audience is willing (or can be coerced or somehow seduced) to act upon the presentation of reality.[3]

The later qualification is especially important when it comes to foundational, political constitutive acts such as the establishment of a new constitution, a declaration of independence, etc. As Ruiter has explained, such constitutive acts take a specific form. Almost by definition, they do not operate within the legal system they strive to overthrow.[4] The creation of a new legal order, Ruiter argues, 'is the performance of an *assertive* speech act about the *factual recognition* of legal validity, which is true or false, and which grants no reprieve in the latter case. This is why establishing a new legal system is such a hazardous undertaking, as many a revolutionary can attest'.[5]

- *Constitution*

The second concept is the concept of the constitution. As Walker explains in his article, this concept underwent a significant transformation in Western political thought. Prior to the rise of the modern state, the term 'constitution' was used to describe '... the political way of life of a community in quasi-organic terms'.[6] During the Middle Ages, its primary focus shifted to the institutional forms of the polity, while in the 18th century it was applied mainly to the '... *legal* mode of articulation and regulation of the body politic' which was seen as '... constitutive or generative of that body politic'.[7] The constitution, in other words, also took a normative form, became a contra-factual blueprint for the organization of the polity. Moreover, the constitution was linked to a designer perspective: to the idea that the body politic is something that can and should be designed in specific ways. At the same time, however, the aim of such a design is to turn the constitution into a societal reality – a framework that is internalized, that produces a certain ethos, that guides political discourses and contestations, etc. In modern times, the term 'constitution' thus signals both that which constitutes a specific

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3   For a different reading see Searle's theory of meaning, where the effects on the thoughts, emotions and beliefs of the hearer have no bearing on the meaning of a sentence. The meaning of sentences in Searle's theory of speech acts is accounted for in terms of speakers who use the constitutive rules of language to express their intentions. See, *inter alia*, John Searle, *Intentionality*, Cambridge: Cambridge University Press 1983; John Searle, *The Foundations of Illocutionary Logic*, Cambridge: Cambridge University Press 1987.
4   Unless, of course a constitution reserves a right to declare independence to parts of the country, although even then questions of authorship will most probably arise.
5   Dick W.P. Ruiter, *Institutional Legal Facts*, Dordrecht/Boston/London: Kluwer Academic Publishers 1993, p. 225.
6   Walker, in this issue, 208.
7   Walker, in this issue, 209.

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polity and that what is constituted. It is not surprising therefore that legal theo-
rists sometimes distinguish between different types of constitution. Allot, for
example, makes a distinction between the legal constitution ('a structure and sys-
tem of retained acts of will'), the real constitution ('the constitution as actualised
in the current social process, a structure and a system of power') and the ideal
constitution ('a constitution as it presents to society an idea of what society
might be').[8]

• *Constitutionalism*

The term 'constitutionalism' (or maybe rather: modern constitutionalism) refers
to a specific way of thinking and theorizing about the constitution. Modern con-
stitutionalism, as Walker puts it, 'came first and foremost to be defined in func-
tional opposition to absolutism, as a guarantee of *limited* (by law) government
…'.[9] Whereas constitutions may take different forms (and may, for example, also
constitute dictatorial forms of government), constitutionalism is linked up to the
idea of limited government through mechanisms such as a mixed constitution
(balancing several groups in society), separation of powers, checks and balances,
human rights, etc. Constitutionalism thus contains an inherent tension as it
simultaneously aims to constitute political power (and a political society) and
tries to limit this power through legal means.

2.2 The Incompleteness of Democracy

Walker convincingly argues that democracy is incomplete in two respects: it is
empirically incomplete as it cannot deliver its own foundation or terms of appli-
cation and normatively incomplete as it cannot function as a guide to good gov-
ernment on its own terms.[10]

When it comes to the normative incompleteness, I think the argument that
democracy needs constitutionalism is quite persuasive: it is constitutionalism
that provides guidance to democracy in terms of individual rights, limited welfare
rights, checks and balances, etc. In order to complete democracy in this way, con-
stitutionalism has to take recourse to non-democratic sources, thus creating an
unsolvable tension between democracy and constitutionalism. Making this argu-
ment, however, presupposes a specific reading of democracy. If democracy is
defined narrowly (or normatively agnostically), there is indeed an irresolvable
tension. Democracy then refers to a specific mode of political decision-making (by
majority, by 'the people', etc.), without further thick normative substance.

8   Phillip Allot, *Eunomia, New Order for a New World*, 2nd ed., Oxford: Oxford University Press
     2001, p. 135, 136.
9   Walker, in this issue, 209.
10   Walker, in this issue, 213-223.

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Although Walker deliberately leaves out a definition of democracy in his paper,[11] the most plausible reading of his approach to democracy seems to be the thinner one, which does not already contain all kinds of constitutional values and guarantees. This fits with Walker's argument that it is unhelpful to define away tensions between democracy and constitutionalism by 'defining-up' democracy, by 'defining-down' constitutionalism or by allowing for a 'speculatively serendipitous causal formula' that make the tensions between constitutionalism and democracy disappear.[12]

When it comes to the empirical incompleteness I find it harder to understand that democracy would need constitutionalism. Constitutionalism, Walker argues, has several democracy-realizing functions which remedy the empirical incompleteness of democracy. Examples are issues of authorship (the foundational question), membership, representation or basic protections. However, when it comes to issues such as the foundation of a democratic polity it seems much more plausible to argue that democracy needs some kind of constitutive or foundational act, rather than constitutionalism per se. In similar fashion, when it comes to issues of membership or representation, I would rather argue that democracy needs a foundational act and a constitutional arrangement than that it needs constitutionalism per se. The only way in which democracy can be intrinsically linked to constitutionalism, it appears to me, is by taking a thicker understanding of democracy. If this is done, however, it raises the question what is left of the normative incompleteness of democracy discussed above.

By presenting democracy as both normatively and empirically incomplete, Walker thus raises questions regarding his own conception of democracy. If democracy is understood narrowly, constitutionalism does indeed function as a normative remedy. At the same time, it leaves open why democracy's empirical incompleteness needs to be addressed by constitutionalism and not by some other form of constitutive act and/or constitutional framework. If, on the other hand, democracy is understood in a normatively richer way, it raises the question whether there is indeed an irresolvable tension between constitutionalism and democracy.

3   Does Constitutionalism need Democracy?

The second part of Walker´s article deals with the incompleteness of constitutionalism. Here Walker makes the argument that constitutionalism cannot function in isolation from democracy. According to Walker, constitutionalism needs democracy for two main reasons: (1) constitutionalism has always been embedded in particular concrete polities – a situated discourse, not an abstract univer-

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11   During the discussion on his paper at the conference in Leiden at 18 June 2010, Walker was asked for a more precise definition of democracy. He thought that giving such a definition was undesirable, however, as democracy is an essentially contested concept and it is part of democratic deliberation and decision-making to constantly find out what democracy means for a group of people at a given time and place.
12   Walker, in this issue, 213.

salism, and (2) abstract readings of constitutionalism lack a 'meta-democratic founding' – a concrete constitutive act that sings into existence a political community.[13]

Walker's arguments are particularly relevant for contemporary debates about the evolution of an international or global constitutional framework. As I will set out below, Walker's article helps understanding the relation between contemporary constitutionalism in international law and early modern, elitist understandings of constitutionalism (section 3.1). Moreover, his argument raises questions regarding the desirability of linking international constitutionalism to democracy: what are the benefits, downsides and possible counter-effects of democratizing international relations? (section 3.2).

3.1 International Constitutionalism as Early-Modern Thinking

The past two decades or so, the vocabulary of constitutionalism has been invoked in international legal discourse for a variety of reasons, varying from in-depth critiques of existing international law[14] to attempts to explain the rise of international tribunals,[15] the revitalizations of international organizations,[16] the self-understanding of European organizations in terms of constitutionalism[17] or the development of a core of fundamental values in international law.[18] Others have argued that the international order as a whole is grounded in a basic constitutional framework that goes beyond the will and interests of individual states. For some, this framework consists in basic values scattered around human rights treaties, the practice of courts, customary law, *jus cogens*, etc.[19] For others, the constitutional framework is laid down in the UN Charter, that is believed to func-

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13   Walker, in this issue, 229.
14   See especially Phillip Allot, *Eunomia: New Order for a New World Order*; Phillip Allot, *The Health of Nations, Society and Law Beyond the State*, Cambridge: Cambridge University Press 2002. For a critique of the UN system from a constitutionalist perspective see U. Petersmann, Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of World Wide Organizations: Lessons from European Integration, *European Journal of International Law* 13 (2002): 621-650.
15   See, e.g., the positive evaluation of the phenomenon of 'judicial globalization' by Slaughter, in A Global Community of Courts, *Harvard International Law Journal* (2003): 191-219 and: Judicial Globalization, *Virginia Journal of International Law* (2000): 1103-1124.
16   Mattias Kumm, The Legitimacy of International Law: A Constitutionalist framework of Analysis, *European Journal of International Law* (2004): 907-931.
17   See, e.g., the debates on the 'European Constitution' and the characterisation of the founding treaties as a 'constitutional charter' by the ECJ in *Le Verts* (Case 294/83, Les Verts v. Parliament, 1986 E.C.R. 1357).
18   Erika de Wet, *The International Constitutional Order*, Amsterdam: Vossiuspers 2005.
19   *Ibid.*

tion as a (quasi) constitution of the international community.[20] The reason for the invocation of constitutional language in international law is twofold. In the first place, constitutional vocabulary is used in order to explain developments that cannot, or only with great difficulty, be explained in terms of state consent and sovereign equality (e.g. the objective personality of the UN or the power of the Security Council to bind non-state actors). In the second place, constitutionalism is used to further a normative agenda of internationalism, integration and legal control of politics – an agenda not very different from the programme of the Victorian lawyers that founded the institute of international law in 1873.[21]

As Walker points out, international constitutionalism in its various forms has no strong link to democracy. Its main aim so far has not been so much to articulate popular will or to represent citizens, but much more to civilize politics, to redirect it from an exclusive orientation on national interests to the interests of the international community as a whole and towards the protection of individual rights. In this sense, it is much closer to what Walker describes as the early variants of modern constitutionalism – forms of constitutionalism aimed at government limited by law, not grounded on democracy. On the contrary: democracy is yet another phenomenon that needs to be civilized by law (and lawyers), 'something lurking at the margins to be tamed and constrained'.[22]

3.2 Does International Constitutionalism need Democracy?

The preoccupation with civilizing politics through legal restraints makes international constitutionalism vulnerable to Walker's critique that it lacks grounding in concrete polities as well as in situated discourses. One of the main problems facing international constitutionalism is the age-old issue of authorship and authority: who decides in whose name when constitutional norms have emerged and what do constitutional norms mean in concrete situations? Who decides upon their application? Take for example the concept of *jus cogens*. Until now, there has been little agreement how exactly peremptory norms of international law emerge (through state consent, through the consent of a majority of states, through the recognition of some pre-given natural right?)[23] and which norms exactly have attained the status of *jus cogens*. Moreover, even if there is agreement about some core norms (e.g. the prohibition of aggression or torture), there is often strong disagreement about the meaning of such terms in concrete situations.

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20 The strongest articulation can be found in Bardo Fassbender, *The U.N. Charter As Constitution of The International Community*, Leiden/Boston: Martinus Nijhoff Publishers 2009. For a somewhat more cautious approach see Thomas Franck, *Recourse to Force, State Action Against Threats and Armed Attacks*, Cambridge: Cambridge University Press 2002 en Ronald MacDonald, The Charter of the United Nations in Constitutional Perspective, *Australian Yearbook of International Law* (1999): 205-231. For a critique see W.G. Werner, The Never-Ending Closure: Constitutionalism and International Law, in: N. Tsagourias, *Transnational Constitutionalism, International and European Perspectives*, Cambridge: Cambridge University Press 2006, p. 329-368.

21 For an analysis see Martti Koskenniemi, *The Gentle Civilizer of Nations, The Rise and Fall of International Law 1870-1960*, Cambridge: Cambridge University Press 2002, p. 322-325.

22 Walker, in this issue, 210, characterizing early modern constitutionalism.

23 For an analysis see Koskenniemi 2002.

Of course, questions of authorship and authority appear in every legal order and are thus as such not specific for international constitutionalism. However, given the lack of a thick political community at the international level, they do get specific meaning and force in relation to international constitutionalism. International constitutionalism, as Walker rightly points out, does not rest on a clearly identifiable polity in which it is applied and reinvented. Rather, international constitutionalism grows out of a multitude of sources, including rulings of domestic courts, rulings and advisory opinions of international tribunals across different functional fields, customary law, scholarly writing, non-compliance proceedings, decisions of international organizations in different specialized fields, etc. Moreover, it is invoked and applied by different actors that they often have very different views on the meaning of constitutional provisions in concrete circumstances. In that sense, international constitutionalism is as much an attempt to create unity in international law as it is a reinforcement of the fragmentation of the international order.[24] In the same fashion, it is as much an attempt to contain international politics as it is the source of more intensified political struggles.[25]

Is democracy the answer to the incompleteness, shortcomings and paradoxical effects of international constitutionalism? Not necessarily. Much will depend on the form that 'democracy' in the international realm will take. In this context it is useful to recall Walker's argument that democracy is incomplete in several respects.[26] While the problem of incompleteness already poses problems for democracy at the domestic level, it appears even more pronounced at the international level.

Take for example the question of membership or, as Walker puts it, the issue of *stakeholding*: 'Whose interests and preferences should be taken into account in the operation of the democratic system (the *who* question)'?[27] The question who counts already raises fundamental questions for democracy at the national level, as Walker has aptly demonstrated in his paper. At the fragmented international level, however, those challenges tend to get multiplied. Here, the question of membership is not linked to a unified and territorially bounded polity, but to a dispersed series of specialized regimes, such as the economic regime, the environmental regime, the human rights regime, the international criminal law regime, etc. Who should count as the relevant members of such regimes? Is it the contracting States, the citizens of the contracting States, those affected by the functioning (or malfunctioning) of the regime? What is the relation between democracy at the international level and already existing democratic institutions at the

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24 For this argument see also Jan Klabbers, who has pointed out that attempts to fight fragmentation through constitutionalization 'will … only result in deeper fragmentation, as the various competing regimes and organizations will be locked firmly in constitutional place- and in battle with each other'. Jan Klabbers, Constitutionalism Lite, *International Organizations Law Review* (2004): 31-58, at 53.

25 Sarah Nouwen and Wouter Werner, Doing Justice to the Political: The International Criminal Court in Uganda and Sudan, *European Journal of International Law* 21/4 (2010) (in print).

26 Walker, in this issue, 213-223.

27 *Ibid.*, 214.

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national level? And what if international institutions (e.g. the WTO, the United Nations or the nuclear non-proliferation regime) include members that do not fulfil what Walker called the 'minimal conditions of political freedom on the part of its stakeholders and office-holders'?[28] Should such members be excluded, with potentially detrimental consequences for the effectiveness of the regimes concerned?

Even if those problems could be handled in some way or another, the fragmented structure of contemporary international relations gives rise to further complications. What if the members and stakeholders of the different regimes partly overlap and there is a need for a balancing of interests? Here, issues of membership get mixed up with issues of boundary setting. At the domestic level, as Walker explained, issues of boundary setting are about the territorial delimitation of the polity and the question what is outside the scope of democracy.[29] At the international level, however, boundary setting is (also) about the functional delimitation of the legal and political regime as such: what are the boundaries of the economic regime, what falls within the sphere of the environmental regime, the human rights regime, the security regime, etc. More often than not, concrete societal problems will not fall neatly within one regime or another but contain several aspects – economic, diplomatic, environmental, human rights, security, etc.[30]

Instead, decision-making takes place in functionally differentiated regimes that are biased by design and that translate societal problems into specific expert vocabularies. What happens if such specialized regimes get more democratized and thus gain stronger legitimacy? In the unlikely case that all functional regimes increase their democratic credentials equally, one of the side effects would most probably be that the fragmentation of international law is deepened. To paraphrase Klabbers, the various democratically legitimized regimes will then be locked firmly in their democratic place – and in battle with each other.[31] Another possible scenario is that some regimes are more successful than others in upgrading their democratic legitimacy.[32]

This all is not meant to argue that we should give up our attempts to make international regimes more accountable and more open to diverging perspectives on the existence and concrete application of constitutional values. As Walker rightly

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28 *Ibid.*, 219.
29 *Ibid.*, 223.
30 See also Koskenniemi, who argued that nowadays the 'politics of international law' also consists in the choice for a particular technical idiom and the expertise and structural biases that come with it. Martti Koskenniemi, The Politics of International Law – 20 Years Later, *European Journal of International Law* 20, no. 1 (2009): 7-19. Koskenniemi's argument underlines the political importance of the fragmentation of international law into several functionally differentiated regimes.
31 See Klabbers 2004, for the original quote.
32 An example of what may be called a 'functionally hegemonic take-over' can be found in U. Petersmann, The WTO Constitution and Human Rights, *Journal of International Economic Law* 3, no. 1 (2000): 19-25, *inter alia* arguing that 'the WTO can and should become an advocate not only of economic freedom, but of human freedom more generally' (at p. 19).

argues, international constitutionalism is incomplete and cannot function in isolation from discourses that are situated in real existing polities. The incompleteness of international constitutionalism, however, is quite a complicated problem that cannot be solved by transplanting traditional notions of democracy to the international realm. Rather, it requires a search for alternative forms of accountability and representation that do justice to the decentralized, multi-level and functionally fragmented nature of international society. Moreover, it requires a frank recognition that the incompleteness of democracy and constitutionalism can never be fully remedied – and that attempts to do so may even be counterproductive.

4 Conclusion

Walker's article offers a good starting point for those who search for alternative models of democracy in the age of globalization. It shows that the gap between democracy and constitutionalism can never be fully closed since there is an insoluble tension between the two. This opens up space to rethink the relation between democracy and constitutionalism in contexts that are quite different from that of the nation-state. At the same time it makes us aware that such endeavours have their limits. At the end of the day, the content of constitutionalism is not determined by constitutional or democratic considerations only, as it 'remains contingent upon other normative and practical considerations'.[33] This means that attempts to constitutionalize or democratize international relations should be carried out prudentially, with due regard for possible counterproductive effects.

33   Walker, in this issue, 206.