

## On the Theory of the International Constitution

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Pierre-Marie Dupuy is an inspired and inspiring mind. He invites young students and academics like myself to open their minds to new and different ways of thinking, to overcome strict formalism, while remaining lawyers and academics. His enlightened positivism underscores the necessity of situating law in its sociological and political context: law is a tool for regulating social relations, not a set of rules without consequences in real life:

“Les normes juridiques ne sont pas des expressions de la seule logique formelle. Ce sont aussi des instruments empiriques destinés à la régulation sociale. Elles ont elles-mêmes une histoire ; elles sont l’expression de choix politiques et idéologiques qui ont des implications sur leur dynamique propre.”<sup>1</sup>

Professor Dupuy constantly reminds us that our theories should be mainly descriptive, and only marginally prescriptive, if we want to remain in the spheres of science. However, he also recognizes that academic discourse could and in fact should, at times, be prospective and attempt to devise new schemes more in line with present day sociological conditions<sup>2</sup>.

Among all of the issues Professor Dupuy addresses with his concern for opening minds and highlighting new perspectives, he gives particular attention to the concept of an international constitution.<sup>3</sup> This concept generally generates a lot of scepticism among international lawyers, especially French international lawyers. Pierre-Marie Dupuy has examined this concept very closely, and in particular the argument according to which the UN Charter is seen as the “Constitution of the International Community”<sup>4</sup>. While acknowledging the constitutional dimensions or the constitutional flavour of the UN Charter, Pierre-Marie Dupuy also develops a critical perspective based on the difficulties in terms of interpretation raised by this position. Difficulties arise, in particular, from the vagueness of the concept of a constitution. A constitution means different things in different legal traditions with the result that applying an indeterminate concept of a constitution to the UN Charter may not help in

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<sup>1</sup> Pierre-Marie Dupuy, “L’unité de l’ordre juridique international. Cours général de droit international public”, *R.C.A.D.I.* 2002, vol. 297, (thereafter *Cours général*), 209.

<sup>2</sup> *Cours général*, p. 211 : « Descriptive, non prescriptive, l’analyse juridique du droit international ne doit pas forcément s’effrayer d’être à l’occasion prospective, dans la mesure où elle est contrainte par l’accélération de l’histoire comme par l’affirmation ostensible d’une volonté collective de « moralisation du droit » à intégrer la composante idéologique et la variable temporelle dans l’analyse de la dynamique inhérente à la norme qu’elle a pour objet d’examiner. »

<sup>3</sup> Pierre-Marie Dupuy, “The Constitution Dimension of the Charter of the United Nations Revisited”, *Max Planck Yearbook of United Nations*, vol. 1, 1997, 1-33; *Cours général*, 215 sq.; “Ultimes remarques sur la ‘constitutionnalité’ de la Charte des Nations Unies”, in R. Chemain, A. Pellet, *La Charte des Nations Unies, Constitution mondiale?*, Paris, Pedone, 2006, 219-232.

<sup>4</sup> *Cours général*, p. 227.

clarifying its content and its meaning.<sup>5</sup> Professor Dupuy recognizes that viewing the UN Charter as a constitution may have an impact on providing a substantial unity to the international legal order. At the same time, he remains sceptical about what fundamentally appears to be an analogy with a concept generally used in relation to a state. Thus his cautiousness in handling the concept: at a certain level, it is quite certain that the UN Charter gives organic unity to the international community, as well as substantial common principles, but that does not clearly mean that it is appropriate to call it a “Constitution”.

I fully agree with this critical view on what has also been called the doctrine of the “constitutionalization” of international law. What is disturbing here is the failure to come to an agreement on the concept of a constitution. The movement described as constitutionalization is not premised on a clear understanding of what its result is supposed to be.

Another question is whether we need the concept of a constitution in the first place to describe international law? I tend to think that under certain conditions such a concept would be very useful in understanding contemporary international law. International law is not what it used to be anymore, as Pierre-Marie Dupuy has taught us. The concepts which were forged by Vattel and his successors – sovereignty, consent, *non-interference* – clearly fall short of what we need to describe the changing structure of international law. We need new types of concepts – which does not mean that we need to reinvent law altogether. This essay is based on the idea that legal theory offers a limited range of concepts to describe a limited phenomenon. Law is not everything and it is not an indeterminate phenomenon. It is a phenomenon which is immanent in any society (*ubi societas, ibi jus*) and that cannot be conflated with other types of phenomenon – for instance habits, courtesy, or certain types of moral rules the sanction of which is not socially organized. On this basis, I would like to argue that the concept of a constitution is useful in depicting the reality of any legal order. And the time may have come when the concept of a constitution should be put at the forefront again, not because there was no constitution before – in fact I will argue that there has always been a constitution in international law – but because this concept is now more useful than ever in understanding and describing international law as it is today, that is a legal order which has become more complex, fragmented, and difficult to conceptualize with such elementary concepts such as sovereignty and consent.

In this attempt to make the concept of a constitution useful, I will come back to the thinking of the author who took the concept of Constitution the more seriously: Georges Scelle. Pierre-Marie Dupuy gives credence to Georges Scelle mostly for his “*dédoublement fonctionnel*” – the role splitting theory<sup>6</sup>, but is quite reluctant when it comes to his constitutional thinking, and in particular his attempt to have recourse to the concept of social functions when reflecting upon the implementation of international law<sup>7</sup>. My belief is that there might be more to take from Georges Scelle than the *dédoublement fonctionnel*. At the same time, I also recognise the limits of his sociological position, and am particularly critical of the fact that this theory is obviously unable to explain how the facticity of power may take into account the “social fact” in order to produce rules that claim to be both valid and legitimate.

In other words, Georges Scelle’s theory reveals itself incoherent when it tries to explain how ethics meets power in order to produce law. I propose to try to remedy this defect by applying a democratic definition of law, that is a Kantian definition of law closely linked with the

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<sup>5</sup> *Cours général*, 229.

<sup>6</sup> « Humanité, Communauté et efficacité du droit », in *Humanité et droit international. Mélanges René-Jean Dupuy*, Paris, Pedone, 1991, 133-148, spec. 138 sq.

<sup>7</sup> *Cours général*, p. 79.

concept of freedom, albeit revised in light of discourse theory as developed by Jürgen Habermas.

### 1. Georges Scelle's concept of the International Constitution

It seems quite natural to try to find support in George Scelle's work when reflecting upon the theory of the international constitution. After all, George Scelle's second volume of the *Précis de droit des gens*, is simply called: "Droit constitutionnel international"<sup>8</sup>. However, it is a fact (and maybe an injustice) that not much attention has been given to his views on international constitutional law.

This may be explained by, among other reasons, the fact that Scelle is often considered with sympathy by academics today, but also viewed as "old fashioned".<sup>9</sup> His sociological perspective based on Durkheim's work on the social division of labour seems too systemic in the eyes of post-Nietzschean thinkers, who reject the very idea of a general theory as applied to law or society. Also, the way Scelle sometimes opposes "objective" and "positive" law, and tends to judge positive law in the light of objective law is too evocative of a natural law framework which may lead some authors to the paradoxical conclusion that Scelle is not even a "positivist" lawyer.

It would be a shame though, on the basis of these general ideas, not to read Scelle thoroughly, as we continue, for instance, to read Kelsen 80 years after he gave his course at the Hague Academy on the general theory of international law (1932). In particular, Scelle's writings on the concept of the international constitution deserve at least to be studied carefully, even if one may, in the end, reject them in their entirety.

My aim is to take a closer look at this particular way of thinking and in particular to see how it develops an alternative theory to what could be considered as a more communitarian version of international constitutional theory, which supports the idea of the progressive "constitutionalization" of the international legal order.<sup>10</sup> George Scelle's thinking can be

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<sup>8</sup> Georges Scelle, *Précis de droit des gens. Principes et systématique*, vol. II, *Droit constitutionnel international*, Paris, Recueil Sirey, 1934 (thereafter *Précis de droit des gens*, vol. II).

<sup>9</sup> See Martti Koskenniemi's thorough analysis of Scelle's doctrine: *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960*, Cambridge University Press, 2002, part. p. 338: "By the onset of the Cold War such a view had lost political force. Its combination of realism and utopia seemed insufficient under both headings, too abstract to ground a realistic program for renewal and far from independent of the political struggles that it hoped to overcome. (...) That he was sidelined from the preparation of the Schuman Declaration of May 9, 1950, the century's most significant federalist move, betrays the sense in which his *Droit des gens*, must have seemed to the cultivators of the new pragmatism as old wine in yesterday's bottles." In France too, Georges Scelle is often seen as "old wine in yesterday's bottles": see Carlo Santulli's preface to the reprint edition of the first volume of the *Précis de droit des gens*, Paris, Dalloz, 2008 (thereafter *Précis de droit des gens*, vol. II). See however the contributions included in Issue vol. I, number 1 of *EJIL*, and in particular those of Hubert Thierry, René-Jean Dupuy and Antonio Cassese, who all demonstrate the actuality of Scelle's doctrine relating to a number of aspects of present international and European law.

<sup>10</sup> Almost all writings on the International Constitution or on the "constitutionalization of international law" adopt a communitarian perspective, insisting on "community interests" and on the formation of an international community which would explain the development of an international constitution. This tradition may find its origins in the work of Alfred Verdross (see *Die Verfassung der Völkerrechtsgemeinschaft*, Vienna and Berlin, Springer, 1926, quoted by B. Simma in his general course referenced below. See also the "Règles générales du droit international de la paix", *R.C.A.D.I.* 1929, vol. 30, part. 354: "En effet, le droit des gens contient des règles coutumières bien établies qui forment une véritable *constitution internationale* obligeant toutes les autorités. La primauté du droit des gens, ou mieux de la constitution internationale, n'est donc pas un postulat, mais une réalité". Professor Bruno Simma, co-authored the 1976 edition of Verdross' *Universelles Völkerrecht*, describing the UN Charter as the constitution of the international community. His general course in The Hague maintain this position: "From Bilateralism to Community Interest in International Law", *R.C.A.D.I.*, v. 250, 1994, part. 258 sq. On similar lines are, among the most important authors: Christian Tomuschat,

distinguished from this discourse on the constitutionalization of the international community in three ways: the constitution is immanent in any society and not transcendent of a given community; the constitution is a phenomenon and not an idea of reason; the constitution is a process and cannot be contained exclusively in a single written document.

### 1.1. Community and Society

Let us start with what is probably the most crucial issue, as it is the one that best reveals the differing positions of Scelle and what we could call the communitarian position. For the latter, the concept of a constitution is closely linked to the idea of community. On the contrary, for Georges Scelle, a constitution is inherent to law and law is inherent to society. Central to the communitarian conception is the distinction between community and society, originally crafted by Ferdinand Tönnies in one of the seminal pieces that gave birth to sociology as a science.<sup>11</sup>

Georges Scelle relies on another distinction, contemporary of Tönnies' and which is partly but not totally overlapping, namely Durkheim's distinction between two types of solidarities: solidarity by similarities (or "mechanical solidarity"), and solidarity arising from the division of social labour (or "organic solidarity").<sup>12</sup> To a certain extent, solidarity by similarities is consonant with Tönnies's concept of community existing in even "primitive" human groups, whereas solidarity through division of social labour only takes place in more evolved social groupings, called societies by Tönnies. Tönnies' and Durkheim's descriptions and theories of the evolution of any human groupings are more or less the same: "primitive" human groups are unified by strong beliefs in common values, as well as by traditions, which are habits turned into rules. In such communities, individuals are tied by similarities. As social and economic activities develop, a social division of labour takes place, differentiating between individuals who become more aware of their particularities and thus less inclined to unquestionably abide to the common rules as dictated by "the conscience of community". Society is primarily driven by interests, including common interests, whereas community is driven by values. The main difference between Tönnies and Durkheim is that Tönnies remains within the ambit of an idealistic view of history, inherited from Marx: he sees the evolution from community to society as a linear and inevitable movement of modern history,

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"Obligations Arising for States without or against Their Will", *R.C.A.D.I.*, vol. 241, 1993, 195; Jochen Frowein, "Reactions by not directly affected States to breaches of public international law", *R.C.A.D.I.*, vol. 248, 1994, 345; Jan Klabbers, Anne Peters, Geir Ulfstein, *The Constitutionalization of International Law*, Oxford University Press, 2009; Erika De Wet, "The International Constitutional Order", *I.C.L.Q.*, vol. 55, January 2006, 51-76. The same type of approach can be found in the analysis of European Law: see in particular Armin von Bogdandy, Jürgen Bast, *Principles of European Constitutional Law*, 2<sup>nd</sup> ed., Oxford, Hart Publ., 2009. Bardo Fassbender distinguishes three currents in the doctrine of the international constitution: Verdross and his School, the New Haven School and the Doctrine of International Community (starting with Hermann Mosler and continued by Christian Tomuschat). See "The United Nations Charter as the Constitution of the International Community", *Columbia Journal of Transnational Law*, 1988, vol. 36, 529 and "Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order", in J. L. Dunoff and Joel P. Trachtman, *Ruling the World? Constitutionalism, International Law and Global Governance*, Cambridge University Press, 2009, 133.

<sup>11</sup> Ferdinand Tönnies, *Communauté et société. Catégories fondamentales de la sociologie pure (1887)*, Paris, 2010, PUF. The distinction was also foundational in René-Jean Dupuy's reflection on the "international community". See for instance, *L'Humanité dans l'imaginaire des Nations*, Paris, Julliard, 1991, 98: " 'Communauté' et 'société internationale', ces deux expressions, couramment utilisées indifféremment comme des synonymes, recouvrent des notions distinctes. Toute société suppose une communauté de base. En revanche, la communauté n'est pas nécessairement organisée en société. (...) La vieille distinction de Toennis entre communauté et société (*Gemeinschaft und Gesellschaft*) est ici parfaitement applicable."

<sup>12</sup> Emile Durkheim, *De la division du travail social (1930)*, 7<sup>th</sup> ed., Paris, 2007.

progressively leading to fragmented and conflicting societies. By contrast, Durkheim's views tend to be much more realistic and do not rely on a teleological view of history: the evolution towards society does not preclude the survival of community values, even though their influence tends to diminish. Society remains a natural but not mechanical phenomenon.<sup>13</sup> Any evolved human grouping is characterized by a tension between the two types of solidarities. Society and community coexist at each time in different ways and at different levels and in the end it is a mixture of interests and values that keeps the society tied together.

One implicit point of agreement between the communitarian school and Scelle, is that at the international level, the evolution takes exactly the reverse path: in other words, society precedes community.<sup>14</sup> Those human groupings that emerge as sovereign states in the beginning of the XVIth Century were precisely born on the rejection of common values, and in particular of common religion. *Cujus regio, ejus religio* was the key to peace among European nations. Tolerance, in international law, meant the right to non interference in domestic affairs. Thus the society of states that takes its rise from that moment is not and cannot be a community: its rules are based on the idea of minimum relations to regulate their coexistence in war and peace. It is only in its most recent history from the end of the XIXth Century that the idea that *values* should innervate the content of international law took a second breath. This was concretized progressively through the hardships of the two world wars and based on the experience of globalization which gave a growing sense of interdependence and of common destiny. Thus international society was first a society based on the division of social labour, and it was only at a certain stage of its evolution that a solidarity based on similarities emerged. One clear symptom of this can be seen through the evolution of the concept of a crime in international law. Durkheim's point of departure in the analysis of the two types of solidarity is to show that criminal law is the *first type of legal norm* to appear in any human grouping, as the most immediate and basic expression of a solidarity within the group based on similarities. Conversely, the weight of criminal law tends to diminish in more evolved social settings, and other branches of law, like civil law and commercial law tend to develop in order to regulate the phenomenon associated with the division of labour. As far as international law is concerned, criminal law only emerged as a legal category in positive law in recent times – starting with the trials of Nuremberg and Tokyo after World War II. This late appearance of criminal law as a branch of international law clearly demonstrates that there was an international society before an international community finally took shape.<sup>15</sup>

The fundamental divergence between Scelle and the communitarian school lies in the fact that the latter associates the concept of a Constitution with the idea of community. In other words,

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<sup>13</sup> See Emile Durkheim's note on Tönnies' book: "Communauté et société selon Tönnies", *Revue philosophique*, 27, 1889, pp. 416-422, in Emile Durkheim, *Textes I. Eléments d'une théorie sociale*, Ed. de Minuit, 1975, coll. « Le sens commun », 383-390. On this debate, see Serge Paugam, "Durkheim et le lien social", in E. Durkheim, *De la division du travail social (1930)*, Paris, Puf, coll. Quadrige "Grands textes", 1990, 8-10, also mentioning the position taken by Raymond Aron.

<sup>14</sup> See however René-Jean Dupuy's interpretation who tends to associate the concept of Society with institutionalization: *L'Humanité dans l'imaginaire des Nations*, *op. cit.*, 98-99: "La société est non plus un fait spontané, mais le fruit d'un vouloir délibéré, rationalisé et définissant un ordre légal. Elle se concrétise dans l'organisation internationale. Cette société organisée pourra, à son tour, agir sur la communauté de base et la consolider."

<sup>15</sup> Pierre-Marie Dupuy follows this line of reasoning when he shows that the "International Community" as integrated in positive international law is essentially a fiction which has a dynamic effect on the development of the International Society and of International Law. The fiction works as a Pure Idea of Reason in Kant's philosophy, *Cours général*, 268: "Qu'est-ce, en droit, que la 'communauté internationale dans son ensemble' ? C'est la fiction juridique d'une solidarité universelle affirmée a priori, pour inciter les Etats à agir comme s'il était avéré qu'elle existe vraiment : le droit, et la technique de la fiction dont il a la maîtrise, comme instrument de formalisation du projet philosophique proposé aux nations, ainsi unies."

in the perspective of Verdross and his successors, a constitution can only come into force with the formation of the international community, understood as a human grouping which is tied together not only by common interests, but also by common values. For the neo-Verdrossian authors like Simma or Tomuschat, a constitution means universal legal values and sufficiently developed institutions that are able to implement those legal values.

Conversely, Georges Scelle sees the Constitution as an inherent feature of any legal order, which itself is the natural consequence of the coming into being of a society. According to Scelle, solidarity decreases in intensity as its range expands and similarities become less obvious. But still, world solidarity does exist in international society, and like in every society social functions have to be fulfilled. Rules relating to the fulfilment of social functions form the essential part of constitutional law and, says Scelle, no society can persist without them<sup>16</sup>.

In other words, Scelle's Constitution does not come at the end of a process of evolution for international society when States tend to form an international community based on common values and institutions.<sup>17</sup> It is there right from the beginning, from the moment a minimal society is formed and exchanges take place between nationals of different countries. The Constitution is not a project, it is a reality. And this leads us to the second important distinction.

## 1.2. The Constitution as a phenomenon

Depending on the definition one gives to the concept of a constitution, the International Constitution can be understood either as a phenomenon or as an idea of reason. Its content can be very demanding, corresponding to what one might call a "thick" concept of a constitution, described as follow by Samantha Besson:

“a superior legal norm that is usually but not always laid down in written document and adopted according to a specific procedure (1) that constitutes and defines the powers of the main organs of the different branches of government (2) and that is in principle protected

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<sup>16</sup> See *Précis de droit des gens*, vol. I, 51 : « Il est aujourd'hui indiscutable que le fait juridique intersocial est mondial : que des relations sociales existent en puissance entre tous les habitants de la terre, et que les échanges de produits, de services et d'idées s'entrecroisent comme un réseau sur l'ensemble de la planète. Cette solidarité mondiale est nécessairement la plus diffuse et la plus lâche, car cette solidarité diminue d'intensité à mesure que son aire s'élargit, par l'affaiblissement des similitudes. Mais dans toutes ces sociétés interétatiques, les fonctions sociales doivent être et *sont remplies* : la règle de droit est exprimée ; les compétences conférées ; les situations juridiques réalisées ; leur régularité constatée, leur effectivité assurée... » And *Précis de droit des gens*, t. 2, p. 7 : « Toute collectivité intersociale, y compris la communauté universelle du Droit des Gens repose, comme les collectivités mieux intégrées et notamment les collectivités étatiques, sur un ensemble de règles constitutives essentielles à leur existence, à leur durée, à leur progrès. Là même où ces collectivités paraissent avoir l'organisation la plus rudimentaire, où les normes fondamentales semblent les plus indéfinies et où les institutions paraissent inexistantes, une *constitution* au sens large, mais au sens juridique, ne s'en révèle pas moins. Elle est apparente dans les systèmes super-étatiques ou fédératifs et dans les systèmes extra-étatiques. Elle l'est moins dans les systèmes interétatiques où le droit classique voyait les phénomènes internationaux typiques ; - elle ne peut pas cependant ne pas s'y rencontrer. »

<sup>17</sup> One can trace a parallel with the debate – in the context of the European Union – on the “no demos” thesis, i.e. the thesis according to which there can be no Federal Democracy at the level of the EU – and thus no Constitution – because there is nothing such as a “European People”. This thesis is brilliantly deconstructed by Robert Schütze, *European Constitutional Law*, Cambridge University Press, 2012, 71-74, who shows it is based on “three constitutional denials” which are all “false problems” created by a “wrong constitutional theory”, i.e. the “Europe's statist tradition”. See also, Louis Lourme, *Qu'est-ce que le cosmopolitisme?*, Paris Vrin, 2012, 57.

through specific revision rules against modification by ulterior legislation, over which it therefore has priority (3).”<sup>18</sup>

In other words, this concept of a constitution is one of “constitutionalism” as a political and legal doctrine, reflecting the ideal of a democratic constitution and of the rule of law, as these ideas were developed from the end of the XVIII<sup>th</sup> Century in the western world.

The International Constitution, in this regard, appears much more as a distant goal than as a reality. In this vein, the concept of a constitution fulfils two functions: heuristic, in the sense that it allows us to build a different understanding of international law from the more classical one; but also dynamic, as it identifies an aim of the evolution of the interstate society, an aim which, once declared, is to be pursued by social actors. The more recent discourse on the constitutionalization of international law follows the same logic. In his introductory chapter to a book on the *Constitutionalization of International Law*, Jan Klabbers defines the intent of the authors as follow: “... our aim is to see what a constitutional international legal order could look like”. This approach thus situates itself “somewhere in between the strictly normative (...) and the strictly descriptive.”<sup>19</sup> In this context, the concept of a constitution is often used as a benchmark to evaluate the degree of evolution of a legal order. Authors would *compare* the current state of international law with the Idea of Constitution as understood by constitutionalist thinking.

Partly normative, partly heuristic, the concept of a constitution thus appears as a regulatory idea, a project to be pursued but never reached.

As we have already seen, Scelle’s position is totally different: he does not conceive of the constitution as an idea, but as a reality, as a phenomenon that can be known through the analysis of positive law – and thus present since international law came into existence<sup>20</sup>. In other words, the concept of a constitution is inherent in the phenomenon of law - it is immanent and not transcendent. If a constitution exists as soon as legal norms emerge in a society, it can only be the “thin” concept of a constitution. Again, following Samantha Besson:

“The thin constitution is an ensemble of secondary rules that organize the law-making institutions and processes in a given legal order. Any autonomous legal order entail a thin constitution”.<sup>21</sup>

This perfectly matches Georges Scelle’s definition of the constitution as a legal instrument that contain rules and principles having primacy over other rules, regulating the devolution and the exercise of power and organizing the implementation of social functions in a given society. There is no mention of such sophisticated ideas, such as the separation of powers or the rule of law. In other words, Scelle’s constitution is not constitutionalist. It gives up all the complex apparatus developed to make the constitution a tool for the preservation and the development of human freedom. Does this mean that Scelle’s conception totally omits the

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<sup>18</sup> Samantha Besson, “Whose Constitution(s)? International Law, Constitutionalism, and Democracy”, in J. L. Dunoff and Joel P. Trachtman, *Ruling the World? Constitutionalism, International Law and Global Governance*, Cambridge University Press, 2009, 386.

<sup>19</sup> Jan Klabbers, « Setting the scene », in *Jan Klabbers, Anne Peters, Geir Ulfstein, op. cit.* ft n°10, 4.

<sup>20</sup> It should be noticed that Verdross, while closely linking the notion of an International Constitution to the idea of an international community, also asserts that the constitution is a *reality* (in 1929). See the quotation in the footnote n°10 above.

<sup>21</sup> Samantha Besson, *op. cit.* ft n°18, 385. See also, in the same volume, the contribution by Bardo Fassbender, *op. cit.* ft n°10, 139, describing his ideal type of the constitution: “A constitution is a set of fundamental norms about the organization and performance of governmental functions in a community, and the relationship between the government and those who are governed. It shall, in principle, for an indefinite period of time, provide a legal frame, as well as guiding principles for the political life of a community.”

question of freedom? Certainly not. But freedom is not central to Scelle's construction, something that we will discuss later on, as it is, in my opinion, the main difficulty of Scelle's conception.

### 1.3. The International Constitution as a process

A third issue is to know whether the Constitution can be localized in a written document, or whether it is mainly composed of unwritten rules which may, or may not, be codified in a written document. Most of the constitutionalist authors would follow Verdross' proposal that the UN Charter has become the constitution of the international community. They would tend to perceive it as a "constitutional moment" in the history of humanity. This is not to deny that there has ever been any "constitutional principles" before the UN Charter. But broadly speaking, the relationship between international constitutional principles and the International Constitution is thought of in the same way the French revolutionnaire thought of the relationship between the Kingdom Laws (*Lois du Royaume*) and the 1791 Constitution. The *Ancien Régime* certainly had constitutional laws, but not a constitution, because those laws were conceived as having their source in nature, or God's command rather than in History. Those laws were a legacy, not a novation.

According to this position, a constitution is the result of an act of will, and not of a spontaneous and continuous process. The legal constitution is the expression of the values of a community, but it also represents a particular moment in history: there is a *before* and an *after*. The constitution also has an institutional dimension. It is not merely normative. The constitution means new international organs and a reasoned and voluntary distribution of competences between them, in order to try to manage a certain balance of powers.

One comes back to the idea of a constitution as an idea of reason and the *thick* concept of the constitution, but also a constitution as a political technology, rather than as a legal technique.

The second position sees the constitution essentially as an unwritten body of rules. This does not exclude that certain constitutional rules are established by treaty. But the core constitution is of a customary nature. Two elements should be underscored.

First, the constitution is the result of a process and not of a decision. There may be a text, adopted at a certain moment in time, that would integrate a number of constitutional rules in a single document. But such a text does not prevent the constitution from evolving. Philip Allott's theory of the "three constitutions of society" is consonant to this approach. According to Allott, "the constitution is three constitutions in one – the legal, the real, the ideal.":

"The *legal constitution* is the constitution as law, a structure and a system of retained acts of will. Retained acts of will which are concerned with the distribution and use of social power are carried in the legal constitution (...) The *real constitution* is the constitution as it is actualized in the current social progress, a structure and a system of power. It is the constitution as it takes effect in the present-here-and-now, as actual persons exercise the social power made available by the legal constitution to realize the possibilities of the ideal constitution (...) The *ideal constitution* is the constitution as it presents to society an idea of what society might be. (...) In the ideal constitution, society conceives of its other selves, possible selves which conform to the idea of itself as society. In willing, society chooses to make an actual self out of one of its possible selves. Its possible selves are possibilities inherent in the legal constitution and the real constitution."<sup>22</sup>

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<sup>22</sup> Philip Allott, *Eunomia, New Order for a New World*, Oxford University Press, 1990, 134-136.

A second important dimension of this position is that the constitution does not necessarily include an institutional dimension: there may be a constitution without any specific bodies to implement it. The constitution may simply distribute the competences between individuals or pre-existing collective bodies. There is no need for separation of powers or even a balance of powers so that “power stops power”. Once again, this conception brings with it a *thin* definition of a constitution.

Of course, the solution to that problem is the best known part of Georges Scelle’s work: the *dédoublement fonctionnel*. Scelle shows that a legal order may prosper without any specific organs of its own. The social functions are nonetheless implemented because the “inorganic society” “borrows” its governing personnel from the “organic societies” – that is, in the case of international law, from national societies.<sup>23</sup> The legislative, judicial and executive functions are *effectively* implemented, but this does not mean that one can identify any specific legislative, judicial or executive organs.

#### 1.4. A critique of George Scelle’s theory

Georges Scelle leads us to an alternative concept of the international constitution which is, in my view, potentially very fruitful. It allows us to conceive of a constitution not as the expression of a community – as opposed to a society – but as a mere legal technique. From this point of view, the constitution needs not be seen as an idea of reason – a kind of sophisticated ideal when applied to international law – but as a phenomenon inherent in any society. Any society, as elementary and loose as it may be, generates legal norms; and any legal order includes a Constitution. And finally, Scelles’ concept of the Constitution allows us to better situate the phenomenon of a constitution in time, as it shows that a constitution is not a single written document adopted at a certain moment in time (Philip Allott’s *legal constitution*), but a constant process which is being actualized at every moment (the *real constitution*) as a result of the evolution of society and the evolution of how society sees itself (the *ideal constitution*).

However, Georges Scelle’s conception of the constitution is also, in other aspects, problematic. This is what I would like to focus on here with a view to finding ways to cure these problems so as to be able to reconstruct the concept of the international constitution starting from Scelle’s theory. The main problem with the theory is that it fails to explain properly the link between freedom and constraint.

According to Scelle, positive law is the product of the encounter between social fact and power. In other words, power does not create law, it only “takes note” of a rule which is already established at the level of society – what Scelle calls “objective law”.

Such a conception meets two obstacles. The first is that Scelle admits that power has a will of its own and may at times, far from “taking note” of objective law, deviate from it. He comes to the conclusion that in these cases, positive law reveals itself to be “anti-legal” (*anti-juridique*). This is often perceived as one of the main weaknesses of Scelle’s theory: a new dualism at the very heart of monist theory, between “positive law” and “objective law”, with the latter being used as a benchmark to judge the former.

The second obstacle lies in the fact that Scelle does not explain practically how power is supposed to take note of social fact and even why power should take note of social fact in the first place. Power is itself a product of the division of labour: the individuals who fulfil

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<sup>23</sup> *Précis de droit des gens*, vol. II, 12.

governmental functions are the most powerful.<sup>24</sup> It is thus difficult to understand why the most powerful individuals, being in office, could be incited or even forced to take into account the social fact. According to Scelle, this is precisely the function of the constitution to organize this coincidence.<sup>25</sup> But at the same time he demonstrates the priority of facticity against both legitimacy and validity: a legitimate power, Scelle argues, ceases to be a legal power, from the moment that it is not a factual power anymore.<sup>26</sup> Finally, Scelle's construction lies on an unstable foundation: the rulers' morals.<sup>27</sup> The rulers have to be wise enough not to use their power in contravention of objective law. It is easy to see that there is no guarantee at all that they would do so. To the contrary, following Montesquieu's wise remark – "*tout homme qui a du pouvoir est porté à en abuser*" – it seems quite obvious that the rulers, once in place, will tend to try to find ways to stay in power and to impose their own will, even if at some point it runs counter to the solidarity needs of society. There is a strong chance that the government will enact "anti-legal" laws. And what then is the remedy against such a situation? Scelle admits that there is only one: Revolution.<sup>28</sup>

The difficulties of Scelle's doctrine can be traced to the dual systematic link that he establishes between *validity and legitimacy* on the one hand, and *facticity and validity* on the other hand. Scelle insists on their convergence, on the necessary "*concordance*" between force, law and legitimacy. But he does not explain how exactly this *concordance* can happen. On the contrary, by recognizing the priority of power over law and social fact, he seems to admit that divergence will be the rule, rather than the exception. Divergence between validity and legitimacy: this is what Scelle calls "anti-legal law" – a piece of legislation that is formally law, but which is in fact the product of an arbitrary exercise of power. Divergence between facticity and validity: that happens when the rulers use illegal means (contrary to positive, valid law) to govern in the name of solidarity needs which provide a source of legitimacy for power against law.

It is thus clear that the problem that needs to be solved lies in the relationship between these three components of power: facticity, legitimacy and validity. A model must be found that keeps their relative autonomy, instead of insisting on their necessary convergence and of denouncing as contrary to "objective law" situations where this convergence does not happen – a position which in fact brings us back to a natural law type of reasoning. A concept of the constitution should be found that allows us to cover all the types of relations between those three components without excluding any in an aprioristic manner, while making it possible to figure out how convergence can be achieved. My submission is that a democratic theory of international law allows us to find the solution.

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<sup>24</sup> *Précis*, vol. I, at 23 : « Les gouvernants qui exercent ou contrôlent l'exercice des fonctions publiques sont en fait les individus qui détiennent les forces matérielles : les armes, la richesse ou le nombre. »

<sup>25</sup> *Ibid*: "Les constitutions ont pour but, qu'elles soient écrites ou coutumières, de constater et d'organiser cette concordance."

<sup>26</sup> *Ibid*, 23-24: "... le pouvoir dit *légitime* ne le demeure, ne reste un gouvernement de *droit*, que tant qu'il dispose de la force nécessaire à accomplir les fonctions sociales. *Lorsque son efficacité disparaît, il ne possède plus de titres juridiques. Il cesse d'être gouvernement de droit dès l'instant qu'il n'est plus gouvernement de fait.* Il est alors du devoir de ceux qui détiennent la force de prendre en main l'exercice des fonctions publiques. *Leurs titres juridiques sont dans l'efficacité de leur action, dans sa conformité avec la solidarité sociale.*"

<sup>27</sup> *Ibid*, 24 : « Arrivés à ce point limite, il faut bien constater que dans une société déterminée la soumission du pouvoir à la règle de droit est une question d'équilibre de forces et de moralité gouvernementale. »

<sup>28</sup> *Ibid*, 5: "La discordance entre le droit objectif ou naturel et le droit positif peut alors engendrer des ruptures de solidarité qui se traduisent par des révolutions."

## 2. A theory of the International Constitution based on a Democratic Theory of International Law

The missing element in Scelle's theory is freedom. This is not to say that Scelle ignores *freedoms*, as part of the International Constitution. He dedicates a whole chapter to the question of freedoms and clearly makes them an integral part of international constitutional law. But he doesn't see *freedom* as a founding principle of the Constitution, only as an object of the Constitution. The clear reason for this, of course, is that he does not believe that an abstract freedom exists as such. Scelle's sociological conception generally rejects all abstract ideas and transcendental concepts. Freedom, like sovereignty, is one of those transcendental concepts. My intention is not to bring back freedom as an idea of pure reason to the foundation of law. I totally adhere to Scelle's belief that scientific knowledge should be rooted in social fact. To this regard, I have argued in an earlier article that Jürgen Habermas' theory of communicative action has made it possible to reconstruct Kant's theory of morals and law while taking into account the objectivist turn of the social sciences<sup>29</sup>. Kant's central concept of freedom as autonomy is kept, but autonomy is no longer understood as a legislative activity of the self through practical reason, but as the product of the social practice of communication.<sup>30</sup>

Autonomy does not mean that each subject should consent to the rules so that they acquire legal validity and become enforceable including through the use of force, but instead that each one should be able to think of herself *as if she was* the author of the rule and not only the subject of the rule<sup>31</sup>. Such a conception brings us very near to Georges Scelle, except on one crucial point: it puts itself in the position of reconciling normativist and objectivist theories, by finding a correct balance between facticity, validity and legitimacy.<sup>32</sup> The practice of discussion becomes the social medium through which constraint and social fact can be reconciled. In other words, a proper use of discussion in society leads to the enactment of legal rules enforceable by public constraint which, at the same time, may claim to be legitimate because they reflect social fact.

Following that path, I have identified a "democratic conception of international law" which is normative in its content, in the sense that it prescribes a certain type of evolution of the international legal order, from the international law of the society of sovereign states to the

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<sup>29</sup> "Une conception démocratique du droit international", *Revue européenne de Sciences Sociales (Cahiers Vilfredo Pareto)*, t. XXXIX, 2001, n°120, 101-104, available at <http://ress.revues.org/659>

<sup>30</sup> Thus, from now on, when I use Freedom, I mean by this word not the transcendental Idea of Pure Reason, but autonomy as realized *through the social practice of discussion*.

<sup>31</sup> This principle of autonomy as self-legislation was originally crafted by Rousseau. Kelsen acutely summarizes the idea as follows: "The problem of political freedom is: How is it possible to be subject to a social order and still be free? Thus, Rousseau has formulated the question to which democracy is the answer. A subject is politically free insofar as his individual will is in harmony with the "collective" (or "general") will expressed in the social order. Such harmony of the "collective" and the individual will is guaranteed only if the social order is created by the individuals whose behaviour it regulates. Social order means determination of the will of the individual. Political freedom, that is, freedom under social order, is self-determination of the individual by participating in the creation of the social order. Political freedom is Freedom, and Freedom is autonomy." Hans Kelsen, *General Theory of Law and State*, Cambridge Mass. Harvard University Press, reprinted by The Lawbook Exchange, Ltd, 2007, 285.

<sup>32</sup> See Jürgen Habermas, *Between Facts and Norms*, Cambridge, Polity Press, 1996, 6-7: "Tossed to and fro between facticity and validity, political theory and legal theory today are disintegrating into camps that hardly have anything more to say to one another. The tension between normative approaches, which are constantly in danger of losing contact with social reality, and objectivistic approaches, which screen out all normative aspects, can be taken as a caveat against fixating on one disciplinary point of view. (...) Here my concern is to work out a reconstructive approach that encompasses two perspectives: the sociology of law and the philosophy of justice."

cosmopolitan law of the universal human society.<sup>33</sup> In contrast, I have tried to build a democratic theory of international law which is non-normative in nature. Its goal is not to *prescribe* a particular evolution of the international legal order, but rather to *describe* that evolution. It does so through a lens which is not the one still widely used today, namely the Westphalian theory of international law. It does so on the assumption that law cannot be separated in its very essence from freedom. Central to the theory is Kant's argument that law is based on autonomy and aims at the preservation and reconciliation of the freedom of each individual with the freedom of all. It does not mean that law *should* or *must* preserve freedom, but that freedom is a necessary concept to understanding law as a phenomenon.

Starting from this conception, a constitution, like any legal phenomenon, must be understood as being closely related to freedom. A constitution is, as we have said above, fundamentally a group of norms organising the attribution and exercise of power within society, in particular by setting rules on how basic social functions are fulfilled. Seen from the other side, a constitution aims at determining how and how far individuals in a given society can exercise their freedoms. In other words, every constitution is a constitution of freedom, not in the sense that it *institutes freedom*, but in the sense that all constitutional rules fundamentally aim at regulating freedoms in a society. Freedom, understood as a social practice, is the key to understanding how a constitution balances facticity, validity and legitimacy. Freedom refers us to two sets of concepts which, when combined together, reflect the entire diversity of constitutional experiences. Those two sets of concepts are autocracy and democracy at the level of constitutional theory; and anarchy and the federal state at the level of international legal theory. Kant's cosmopolitanism will give us the key to relate the two sets of concept and thus establish the concept of an International Constitution under a democratic theory of international law.

### 2.1. Between Autocracy and Democracy

The first set of concepts relate to constitutional theory. Hans Kelsen is certainly the author who best characterized the concept of the constitution in relation to the idea of freedom. Kelsen rightly saw that “[t]he central problem of a political theory is the classification of governments. From a juristic point of view, it is the distinction between different archetypes of constitutions.”<sup>34</sup> The classification of forms of state has indeed been one of the main tasks of political philosophy since Plato. Kelsen recalled that “the political theory of Antiquity distinguished three forms of State: monarchy, aristocracy, and democracy”. To this trichotomy, Kelsen substitutes a dichotomy differentiating between “two types of constitutions: democracy and autocracy.” And he adds that “[t]his distinction is based on the idea of political freedom.”<sup>35</sup> Kelsen's theory of the constitution based on political freedom constitutes the missing part of Scelle's doctrine:

“Politically free is he who is subject to a legal order in the creation of which he participates. An individual is free if what he “ought to” do according to the social order coincides with what he “wills to” do. Democracy means that the “will” which is represented in the legal order of the State is identical with the wills of the subjects. Its opposite is the bondage of autocracy. There the subjects are excluded from the creation of the legal order, and harmony between the order and their wills is in no way guaranteed.”<sup>36</sup>

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<sup>33</sup> Olivier de Frouville (2001), *op. cit.* ft n°29 above.

<sup>34</sup> Hans Kelsen, *General Theory of Law and State*, *op. cit.*, ft n°31, 283.

<sup>35</sup> *Id.*, 284.

<sup>36</sup> *Id.*

Here the relationship between facticity, validity and legitimacy is well explained. In a democracy, the three components are perfectly in line, in the sense that the legal (valid) rule is legitimate (because in harmony with the will of the subjects), and not only binding but enforceable (facticity). By contrast, in an autocracy facticity prevails over validity (the government can act in an illegal manner) and the link between validity and legitimacy is broken (valid laws are not legitimate, because they are not in harmony with the wills of the subjects). Translated into more Habermasian terms it means that the democratic constitution guarantees and permits the full exercise of communicative freedoms, so that subjects can also think of themselves as if they were the authors of the rules, thus making legal constraint legitimate. The autocratic constitution is characterized by the limitation or the suppression of communicative freedoms, reducing as far as possible the public space for discussion, and thus preventing the process of the legitimization of legal rules and transforming constraint into an arbitrary use of violence by those possessing force.

Autocracy and democracy are schemata under the pure idea of the constitution or, as Kelsen puts it in a more Weberian fashion, ideal types:

“In political reality, there is no State conforming completely with one or the other ideal type. Every State represents a mixture of elements of both types, so that some communities are closer to the one, some closer to the other pole. Between the two extremes, there is a multitude of intermediate stages, most of which have no specific designation. According to the usual terminology, a State is called a democracy if the democratic principle prevails in its organization; and a State is called an autocracy if the autocratic principle prevails.”<sup>37</sup>

All constitutions that exist can be characterised using this set of concepts – autocracy and democracy.<sup>38</sup> The International Constitution is no exception to that rule. When we look at the International Constitution and try to understand its nature we can refer to these concepts and try to determine whether it is rather an autocratic constitution or a democratic constitution.

But this alone is not enough because the international Constitution is not only a constitution; it is also an *international* constitution. This is where the second set of concepts comes in.

## 2.2. Between Anarchy and the Federal State

The second set of concepts comes from international legal theory and more specifically from the Kantian/cosmopolitan theory of international law. Freedom, at the level of states, is not only about the freedoms of individuals but also the freedom of States as collective entities. And it is clear – from the very beginnings of modern international law – that the former is closely linked to the latter, that is: the freedom of states has always been understood as being the condition for the freedom of individuals. In other words, there can be no freedom of individuals subject to foreign domination. Thus, for the state as considered in the society of sovereign states, the road from absolute freedom to the deprivation of freedom is not the one that goes from democracy to autocracy, but instead the one that goes from anarchy to the federal state. The state of anarchy in the society of sovereign states is a state of absolute freedom for states: there is no superior authority and states are perfectly autonomous. In the

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<sup>37</sup> *Ibid.*

<sup>38</sup> I would tend however to follow Hannah Arendt by saying that the only exception would be the constitution of the totalitarian state. Arendt shows that the constitutions of totalitarian states cannot be assimilated into what we understand as autocracy. In *The origins of Totalitarianism*, Part III, she highlights that if autocracy means the limitation of freedom, it never goes as far as totally abolishing freedoms. The principle of autocracy is *arbitrary power*, the principle of totalitarian power is *terror*.

federal state, by contrast, states lose their “sovereignty”, that is their autonomy, and submit themselves to a bond.

In Kant’s philosophy, the road from anarchy to the federal state is considered from a normative perspective: it is a duty imposed by reason that states should leave the state of nature so as to put an end to *all wars* and establish peace. As is well known, Kant contemplates the possibility of a world federal state<sup>39</sup>, but ultimately resists the idea, apparently convinced by a realist argument. Of course the world federal state remains an idea of pure reason and one should work tirelessly to achieve it *as if* it were possible, although it may not be. The only thing that can be achieved for certain is not anarchy or the world federal state, but, submits Kant, a “federation of free states”.<sup>40</sup> This expression takes the form of an antinomy: there can be no institution that is at the same time both a federal state (abolishing the sovereignties of the states to the benefit of the federal state) and what is usually called a *confederation* (in which states keep their sovereignty but transfer a number of competences to common organs). It must be one or the other. What Kant must mean by that is that the institution to be created is something in between the federal state and the confederation. It is, in fact, a *process* rather than a fixed institution. It is a process that starts from the society of sovereign states (a state of anarchy) and tends to the model of the world federal state without ever reaching it. The European Union is, of course, the example which is most commonly cited to illustrate this Kantian idea of the “federation of free states” – being neither a classic “international organization” nor a federal state, but which combines characteristics of the two types to form an original and constantly evolving institution.<sup>41</sup> Theories of the Federation have been elaborated on this basis following two distinct traditions: the objectivist tradition on the one hand, with Hans Kelsen and Georges Scelle<sup>42</sup>; and the organicist schmittian

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<sup>39</sup> Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Purpose*, in H.S. Reiss, E. Kant. *Political Writings*, Cambridge, Cambridge University Press, 1970, Seventh Proposition, 47.

<sup>40</sup> See *On the Common Saying: ‘This May be True in Theory, but it does not Apply in Practice’*, in H.S. Reiss, *op. cit.*, 90, 92; and the Second Definitive Article of a Perpetual Peace: “The Rights of Nations shall be based on a Federation of Free States”, *Perpetual Peace. A Philosophical Sketch*, in H.S. Reiss (ed.), *op. cit.*, 102-105 *passim*.

<sup>41</sup> See for instance the thorough analysis by Stefan Oeter, “Federalism and Democracy”, in Armin von Bogdandy, Jürgen Bast, *Principles of European Constitutional Law*, Cambridge, Hart, 2009, 55, part. 80: “The united Europe of the European Union will not be a federal state in the classical sense for quite some time, but will remain a treaty-based hybrid – a mixed system that will gradually develop more federal characteristics and at the same time keep some traits of an arrangement of international co-operation.” See also, on the classification of the European Union as a Federal Union: Robert Schütze, *European Constitutional Law*, *op. cit.*, 47 sq.

<sup>42</sup> Hans Kelsen, *General Theory of Law and State*, *op. cit.*, 316: “Only the degree of decentralization distinguishes a unitary State divided into autonomous provinces from a federal State. And as the federal State is distinguished from a unitary State, so is an international confederacy of States distinguished from a federal State by a higher degree of decentralization only. On the scale of decentralization, the federal State stands between the unitary State and an international union of States.” Georges Scelle, *Précis de droit des gens*, vol. I, see Chapter III, in part. p. 200: “Il n’y a pas une, mais plusieurs formes d’Etat fédéral : aucune ne peut être considérée comme la forme type exclusive. L’Etat fédéral n’est lui-même que l’intégration la plus poussée du fédéralisme, mais en étudiant le droit positif, on s’aperçoit que ce n’est pas toujours dans l’Etat fédéral que le génie du fédéralisme est le mieux respecté, ni l’indépendance des collectivités fédéralisées la mieux assurée. » See also Section IV about the « League of Nations as a federal organization ». On similar lines is Hersch Lauterpacht in his brilliant conference on “Sovereignty and Federation in International Law”, in E. Lauterpacht, *International Law. Being the Collected Papers of Hersch Lauterpacht*, vol. III, Cambridge University Press, 1977, 5-25, part. the conclusions at 25: “The ultimate rational solution of the problem of international organization will be hastened – and this may be submitted as a summary of the conclusions of this lecture – by the acceptance of the view that the differences between the typical forms of unions of States are to a large extent a matter of degree (...)”

tradition.<sup>43</sup> Despite their radical differences, both comes to the conclusion that the traditional dichotomy between the federal state and the confederation is not satisfactory, as the reality of constitutional experiences offer no examples of such types. What separates the federal state from the confederation is only a difference of degree, not of nature. And most of the constitutional arrangements which aims at conciliating the freedom of component states with a strong centralized power can be subsumed under the unique concept of *federation*, a concept which corresponds to Kant's "federation of free states".

### 2.3. Synthesis: the definition of the Constitution

Kant's cosmopolitan perspective not only allows us to understand the nature of the constitution as perceived from the point of view of the society of sovereign states, it is also the key to joining the states perspective with that of the individuals. Kant's Second Definitive Article of a Perpetual Peace – which prescribes a federation of free states – is inseparable from the First Definitive Article – according to which "the Civil Constitution of Every State shall be Republican"<sup>44</sup>. The state of peace inside the states is conditioned by those states having a republican constitution (that is what we would call today a "democratic" constitution). But this state of peace is unstable and uncertain whilst the society of states is still in a state of anarchy. Only by submitting themselves to a republican constitution can states establish a lasting state of peace<sup>45</sup>. There can be no democracy without peace, and no peace without democracy. In other words, the harmony between facticity, validity and legitimacy inside a state is precarious until this harmony is also established between the states.

Kant's doctrine is, as we said, normative in the sense that the establishment of a democratic federation of free states is a requirement of reason. But we can still use this model in a non-normative, purely descriptive way. Under anarchy, states maintain their full autonomy. The society of sovereign states is a "democratic" society of states – in that they are all equally sovereign. Conversely, in the federal state, the states lose their freedom: it is a state of heteronomy/autocracy, as the law of each state is subject to federal law. The only autonomy that states retain is by virtue of federal law which determines the competencies left to the components. But at the domestic level, this heteronomy (from the States' point of view) can lead the individuals to be submitted either to a state of autonomy/democracy or to state of heteronomy/autocracy, depending on the nature of the federal constitution. If the constitution of the federal state is democratic, then the individuals will find themselves in a state of autonomy; if it is autocratic, they will find themselves in a state of heteronomy. In other words, there is no synchrony between the two sets of concepts. The democracy of states (the society of sovereign states) may go with either an autocratic or a democratic rule on individuals. Similarly, a federal state does not automatically means that individuals will live in democracy, as the Federal Constitution may be of an autocratic type.

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<sup>43</sup> Schmitt's theory of the Federation can be found in his *Constitutional Theory*, Paris, coll. Leviathan, PUF, 1993. This aspect of Schmitt's theory is the subject of Olivier Beaud thorough analysis, *Théorie de la Fédération*, Paris, coll. Leviathan, PUF, 2007.

<sup>44</sup> See *Perpetual Peace*, 99.

<sup>45</sup> See *The Metaphysics of Morals. Metaphysical Elements of the Theory of Right*, in H.S. Reiss (ed.), *op. cit.*, *The Theory of Right*, Part. II, § 61: "Since the state of nature among nations (as among individual human beings) is a state which one ought to abandon in order to enter a state governed by law, all international rights, as well as all the external property of states such as can be acquired or preserved by war, are purely provisional until the state of nature has been abandoned. Only within the universal *union of states* (analogous to the union through which a nation becomes a state) can such rights and property acquire *peremptory* validity and a *true state of peace* be attained."

George Scelle does not say anything else, when he notes that the evolution of international law will inevitably lead to a growing institutionalization of the international order and will finally result either in a universal empire, or a world federation.<sup>46</sup>

### 3. An overview of the evolution of the International Constitution

We now have a concept of the international constitution that we can apply to positive international law. The aim of this theory – like any theory – is to create a system made up of concepts that helps us to understand reality. I think that the concept of the international constitution and the argument that there is and has always been an international constitution are useful when trying to understand international law. Of course, it is not possible in the limited framework of this article to examine thoroughly the present state of international law in the light of the theory of the international constitution. But we can at least try to draw some very broad conclusions on the evolution of international law.<sup>47</sup>

Clearly, the “Westphalian” or classical constitution of international law was the constitution of an anarchic and democratic society of sovereign states. The main constitutional principle from which all others derived was equal sovereignty. Among the major corollaries were the constitutional principles of exclusive territorial jurisdiction and of non intervention. The aim was to preserve the states sovereign autonomy within their frontiers. The ultimate goal was the promotion of peoples’ freedom through the medium of sovereignty. This Constitution was simple and remarkably stable. It remained almost untouched for nearly two centuries (between the middle of the 18<sup>th</sup> century and 1919). Today’s International Constitution, by contrast, is complex and unstable. The Charter of the United Nations has certainly become the main building block of the Constitution. It brings a number of important innovations, sometimes in continuity with the Covenant of the League of Nations, sometimes in rupture.<sup>48</sup> All of these should be studied thoroughly, but let me here present a very brief overview of these innovations:

- The shift from a concept of negative peace to a concept of positive peace: international law and international organizations are now entrusted with the task of creating the necessary conditions for a lasting peace, thus provoking a tremendous extension of the field of international law which rapidly overcomes the domain of the relations between states and progressively extends to all types of human activities.
- New rules conditioning the formation of States and government: whereas this field was left totally unregulated under the “Westphalian” Constitution, the principles of self-determination and respect for human rights tend to bring new conditions to the creation of a State and to the establishment of an effective government.
- Prohibition of the use of force for the settlement of disputes and creation of the Security Council invested with the right to use legitimate violence in order to maintain

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<sup>46</sup> Georges Scelle, “Quelques reflexions sur l’abolition de la compétence de guerre”, *R.G.D.I.P.*, t. LVIII, 1954, 5, 22: “Dans une époque d’anarchie comme celle que nous vivons, le pouvoir n’est pas encore parvenu à s’intégrer au sein du féodalisme inter-étatique. Il est à la recherche d’un centre unique et faute de son établissement les règles éthiques les plus indispensables à la réalisation de l’ordre juridique international demeurent inefficaces. On sait qu’il n’est que deux remèdes possibles à cet état de choses dont nous n’avons effleuré qu’un aspect : l’Empire universel ou le Fédéralisme œcuménique. Nous assistons à la gestation de l’un ou de l’autre. Les époques révolutionnaires ne comportent aucune sécurité, même si les principes qu’elles dégagent sont une préfiguration de l’ordre juridique à venir.”

<sup>47</sup> For a complementary – awaiting a more complete – account: Olivier de Frouville, “Le paradigme de la constitutionnalisation vu du droit international”, in S. Henneville-Vauchez, J.-M. Sorel, *Les droits de l’homme ont-ils constitutionnalisés le monde ?*, Bruxelles, Bruylant, 2011, 193-215, in part. 201-211.

<sup>48</sup> See James Crawford, “The Charter of the United Nations as a Constitution”, in J. Crawford, *International Law as an Open System*, Cameron May, 2002, 123.

peace and security. This is of course a major shift in the allocation of power at the international level: the use of legitimate violence becomes a residual competence of states and is partly institutionalized.

- Proclamation of universal human rights, meaning first the guarantee of fundamental rights for individuals at the level of the federation and second the recognition of a democratic principle at all levels, including at the level of international organizations (the first Kantian Definitive Article: the Constitution of every State shall be Republican).
- Growing centralization of the fulfilment of social functions, whereas decentralization was the rule under the Westphalian Constitution.
- Establishment of a hierarchy of norms, with the Charter prevailing over all obligations of states under any other treaty (article 103).
- Constitutional regulation of the relations with regional organizations (articles 53-54).

This attempt to establish a global constitutional order through a written constitution is however facing major obstacles because no effective mechanism has been put in place to enforce the hierarchic principle set forth in the Charter. In fact, the International Constitution is fragmented. There is a *geographic fragmentation* due to the fact that regional constitutional orders maintain a certain degree of autonomy. Each of the supposedly lower levels in the hierarchy have their own dynamic and no specific mechanism is provided for to ensure that the law and practices produced are in conformity with the constitutional and legislative principles at the universal level. It is clear that there is an effort made by judges to ensure complementarity and harmony, rather than multiply cases of duplication and conflict. However, in some extreme cases, the regional level may affirm its own principles in contradiction with the obligations set at the superior level – like in the *Kadi* case, where the Court of the European Union reproduced the “Solange” type of argumentation, putting the federal level in check.

*Sectorial fragmentation* is also apparent as sites of production of constitutional norms multiply outside the effective reach of the United Nations. Even within the UN System, there are a range of international organizations each with their own “constitution” (their constitutive treaty) and each developing constitutional principles in a more or less autonomous manner. It is true that coherence here is more or less maintained through self-regulatory mechanisms – a general sense of the communities of lawyers, diplomats and civil servants working with or in relation to those organizations that there should be a certain degree of coherence at the level of principles and rules and that the UN Charter is the ultimate reference when devising new rules or interpreting existing rules. Lack of coherence is more visible outside the UN system, particularly within organizations that developed separately or parallel to the UN like the economic organizations. The constitutions of those organizations do not even formally take into account the principles of the United Nations and may develop their own principles in isolation. Again, judges would try to minimise this “clinical isolation”, but with obvious limits as long as they continue to consider themselves organs the constitution of their partial legal order rather than organs of the federation.

The contemporary Constitution thus appears relatively stable as far as its fundamental principles are concerned, but at the same time subject to a degree of instability because of its relative fragmentation. These difficulties are not exclusive to the International Constitution. Specific procedures aimed at ensuring the conformity of enacted rules to the constitution are a recent innovation in many countries. It is difficult to systematically ensure that principles and rules developed by all institutions within a state are in strict conformity with the constitution and it is even more so at the decentralized level or at the level of the states in a federal system. To those who would argue that there can be no international constitution because of these

difficulties, we would answer by recalling that until very recently in France it was not possible to effectively sanction the non conformity of an already adopted legislation with the Constitution. The only available remedy was the invocation of international legal principles having the same content as constitutional norms... Since the system of the *question prioritaire de constitutionnalité* (*Priority Preliminary Rulings on the issue of constitutionality*), best known as the ‘QPC’) has been set up in 2010, its growing success has shown at least the uncertain state of conformity of many laws with the Constitution.<sup>49</sup>

It is also a fact that some geographic fragmentation may be permitted in certain cases to accommodate local peculiarities. Acting on a QPC, the Conseil constitutionnel has recently recognized the conformity to the French Constitution of the specific regime applied in Alsace-Moselle providing for the payment by the State of pastors, in clear contradiction with the general principle of secularism, provided by the first article of the Constitution. The Conseil has admitted that in declaring the principle of secularism, the authors of the Constitution had no intention of bringing into question this regime which dated back to the period of the French Revolution.<sup>50</sup>

The final question is where to situate the International Constitution in the light of the two sets of concepts we identified earlier? The principle of self-determination and the principle of respect for human rights, clearly confer on the International Constitution a federal and a democratic character. The system of collective security and the ability of the Security Council to decide on the use of force against a state also have a clear federal dimension. But at least two other elements tend to moderate this characterization.

a) First, the principle according to which all states must obey and implement the decisions of the Security Council gives an autocratic flavour to the Constitution. The Security Council appears to be an oligarchic type of organ. By reason of its discretionary power and in absence of any judicial control of its decisions, it may also intervene in fields and fulfil functions which do not fall in the purview of its initial attribution. Being initially entrusted with the exercise of certain executive powers within the field of the maintenance of international peace and security, the Security Council may overstep its mandate at will and act as a legislative or judicial body in all fields which are more or less loosely connected with the issue of peace and security. The Constitution does not realize democracy, but records the social fact of domination by a limited number of states. At the same time, this autocracy is not a tyranny and it may not even be a dictatorship. The Council is based on the idea of creating a balance between the most powerful states, in this sense it generally prevents unilateral power automatically prevailing and integrates ten additional states on a rotating basis to the deliberation. The main problem remains the veto power, which compromise the Council’s efficiency and relative legitimacy. As long as the veto power is seen by the P5 as a necessary condition for the balance of power, the influence of the Council will remain limited. Another factor which reduces the autocratic nature of the Council’s power is that it does not intervene in all fields of social life, but mainly in fields which have, as we said, a more or less loose link with issues of security. In other words, the Council will never play the role of a world dictator who would monopolize the three functions of government. The Council is comparable to a Minister of Interior who would have superior powers compared to the other ministers of the Government and who would be able to derogate at times to statutes in order to deal with

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<sup>49</sup> See the figures dated March 2013 on the Conseil Constitutionnel’s website; since the entry into force of the QPC in 2010, the Conseil has registered 1520 applications. It has taken 255 decisions on 297 applications, among which 137 decisions reached a conclusion of conformity, while the others concluded on the at least partial non conformity of the law to the Constitution.

<sup>50</sup> Decision n°2012-297, QPC, 21 February 2013, note by Ariana Macaya and Michel Verpeaux, *La Semaine Juridique*, n°15, 8 April 2013, 426.

specific cases or situations. But he will, for instance, rarely be directly involved in issues related to culture, health or economy... thus granting the “ministers” in charge of these areas a large degree of autonomy.

b) The second element which tends to moderate against the characterization of the Constitution as democratic and federal is, more generally, the weakness of existing international institutions. Certainly, it is not possible to say anymore that the international society is inorganic. There are today a great number of international institutions which play a fundamental role in the fulfilment of social functions at all levels. However, these institutions can rarely be said to be democratic. It is clear that the idea of representative democracy (like a world parliament or deliberative assemblies elected by citizens of the world) is clearly out of reach at this stage of the development of international law. The only options to be explored are deliberative democracy type of institutional arrangements allowing the effective participation in the processes of deliberation by a maximum number of stakeholders.<sup>51</sup> Another weakness of international institutions lies in their fragmentation and their limited powers. For instance, in the field of human rights, the galaxy of mechanisms and procedure at the universal and regional levels have a least the virtuous effect of obliging states to justify themselves, but their effectiveness still ultimately depends on the voluntary cooperation of states.

### Conclusion

The International Constitution as it appears today reflects the reality of an international society caught between the search for efficiency and the quest for legitimacy.

The *search for efficiency* is an incentive towards federalization and autocracy. It reflects the project of the survival of humanity: efficient global governance seems imperative in the face of global risks like the shortage of natural resources, demographic growth, mass migration or global warming. If such efficient governance is to take place, states will have to renounce their national egoisms and waive short term national interests. Such a waiver cannot be granted – at least not in the proportions needed to attain the desired efficiency – by governments subject to periodic election or facing strong oppositions ready take advantage of nationalist passions, at the risk of compromising the fulfilment of cosmopolitan obligations. Such waivers should be imposed from the federal level through binding legislation. In the present state of the Constitution, however, it is hard to conceive how such a bond could be imposed democratically – that is how to reconcile constraint with freedom. There is no procedure that would enable the implementation of the principle of autonomy and that would guarantee that all individuals would understand themselves as having authored such legislation. The only body which would have the capacity to overcome national interests in the field of, say, global warming, and impose an efficient plan of reducing carbon emissions through a binding unilateral legislation, would be the Security Council. But it is quite obvious that this oligarchic body would not respect the minimum conditions of democracy. It is even hard to believe that it would respect the principle of equality, as the P5 would be in a position to exempt themselves from the restrictions. In fact, it is more likely that they would resist taking such a decision in the first place. And there exists no counter power to prevent this from happening, or to substitute itself in cases where the Council should be found to be

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<sup>51</sup> On the role of NGOs in coping with the democratic deficit in international organizations, see Pierre-Marie Dupuy, “Sur les rapports entre sujets et ‘acteurs’ en droit international contemporain”, in L.C. Vohrah et al. (eds.), *Man’s Inhumanity to Man*, 261 ; “Le concept de société civile internationale. Identification et genèse”, in H. Gherari, S. Szurek, *L’émergence de la société civile internationale. Vers la privatisation du droit international ?*, Paris, Pedone, 2003, 5. See also the broad and thorough analysis by Anne Peters, “Dual Democracy”, in J. Klabbers, A. Peters, G. Ulfstein, *The Constitutionalization of International Law*, op. cit., 263.

deficient.<sup>52</sup> Paralysis or refusal of the Council to act when it should act is obviously one of the main constitutional defects of the Charter: as long as this remains unchanged, the Constitution will retain a strong autocratic dimension and will constantly be at risk of being ineffective.

This search for efficiency is supported by global economic actors promoting a neo-liberal agenda: a certain unification of the world would facilitate trade and lead to the maximization of profits and of general wealth. Citizens would become mainly consumers and this depolitization of the world would bring peace. The undesirable effects of such a process – the increase of social inequalities, with “winners” and “losers” of world trade liberalization – would be dealt with by insisting that states should concentrate on their core functions and in particular on ensuring security and stability in societies within their borders and keeping their borders safe to prevent mass migration. A minimum oligarchic federal state under the control of major economic trusts would ensure global security and see to the progressive dismantlement of barriers to trade and economic exchanges. This is roughly what a world liberal empire could look like.

On the other hand, the *quest for legitimacy* aims at implementing the principle of autonomy and is thus led by the idea of freedom. Globalization has seen the loss by states and their peoples of their autonomy. As globalization is mainly an economic phenomenon – and only world economic actors are able to establish efficient executive strategies at the global level – the economic order dominates the political order. Political life has lost its meaning within the States’ borders, as choices are dictated “from above” by the rules of the global economy under the guise of a neutral science.

This quest for legitimacy should rationally lead to the federalization and democratization of the International Constitution. The only way for the political order to recover its primacy over the economic order is to reconstitute the tools it disposed of at the domestic level before the economy became globalized. But it seems difficult to conceive and build a federal system which ensures the sufficient degree of constraint on its components and which would at the same time be fully democratic. Either the system is reactive and efficient and risks being accused of being non democratic; or the system gives sufficient space for discussion and deliberations, and risks being accused of maintaining the status quo at great (and unjustified) costs.<sup>53</sup> In both cases, people may draw on their communitarian passions in the desperate hope of finding in the nation or in any other type of community a way of regaining some pieces of their lost autonomy.

Finally, it seems that we end up with what was René-Jean Dupuy’s conclusion: the “International Community”, in the process of realizing itself, is constantly at risk of returning to the state of nature. Between anarchy and the federal state, autocracy and democracy, there is no certainty as to what the future brings, no certain destiny for humanity and no end of history that would flow from a rational dialectic. The dialectic remains “open”. It is subject to history and its hazards, to the irrational decisions of rulers heading superpowers... Nothing has ever been promised to us...

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<sup>52</sup> See Sandra Szurek, « La Charte des Nations Unies. Constitution mondiale ? », in J.-P. Cot, M. Forteau, A. Pellet, *La Charte des Nations Unies. Commentaire article par article*, Paris, Economic, 3rd ed., 2005, 23-68, 53. On the « democratization » of the UN Security Council, see in part. Ian Johnstone, “Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit”, *AJIL*, 102, April 2008, 275.

<sup>53</sup> Habermas has recently noticed that the economic crisis has led the European leaders to develop a kind of ‘executive federalism’ – supposedly efficient, but purely autocratic. Jürgen Habermas, “The Crisis of the European Union in the light of a constitutionalization of International law”, *EJIL* vol. 23, n°2, 335-348.