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International Quasi-Constitutionalism and Corporate Citizenship: Language, Troubles, Dilemmas

Abstract

Why are companies increasingly adopting the language of ‘citizenship’ to describe themselves? This is the issue taken up in this article. It is suggested the claims and forms of address in respect to ‘global corporate citizenship’ are part of wider governance moves in the international system, associated with a certain constitutional terminology and moves to progressively juridicalize the international arena. The article explores the forms of these moves as regards company activity in particular, and illustrates the difficult consequences of the processes being described from the point of view traditional international law and corporate governance.

1. Introduction

For several years I have been interested in the idea of ‘corporate citizenship’ (Thompson 2005, 2006, 2008a, 2008c). Why are companies either adopting the terminology of corporate citizenship to describe themselves as, or being addressed through the language of, corporate citizenship? Many MNCs are overtly claiming to be ‘good global corporate citizens’ as they expand their activities and put corporate social responsibility commitments at the centre of those business activities. The UNs *Global Compact* explicitly addresses its signatories as ‘citizens’ and the World Economic Forum has a long standing programme of corporate citizenship (Schwab 2008; WEF 2008). What is more, countries are also adopting this language to describe themselves, e.g. the Australian

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Prime Minister's recent claim that the country's foreign policy would be guided by the principle of 'good global citizenship' (Rudd 2007).

These claims and forms of address are, I suggest, connected to a larger set of governance moves in the international system which will be outlined in a moment. In part this is a response to the widely perceived undermining of the traditional system of nation-based governance as global and transnational forces are argued to have swept aside the possibility of continued sovereign state interactions forming the core of 'global governance' (e.g. in the form of multilateralism or inter-governmentalism). Rather, in this 'post-Westphalian world' a new cosmopolitan order is in the process of being constructed where the axis of identity and politics will be decidedly 'above' or 'beyond' the nation state. Never mind the actual reality of 'globalization' being far from the mythical versions of its characterizations (Hirst et al. 2009), the idea of globalization is so firmly entrenched that it has become the taken for granted commonsense of the current international system by almost all academics, politicians and political commentators alike. This itself is both intriguing and worrying. Quite why this terminology has become so effective and ubiquitous in its embrace when any serious examination of the evidence about its claims shows these to be at best ambiguous but more often simply wrong, is a complex issue and something that cannot be addressed here. But the strong perception of globalization persists nonetheless.

But before proceeding we need to draw an important analytical distinction between an inter-national economic structure (note the hyphen – not an 'international' one) on the one hand and a global economic structure on the other (Hirst et al. 2009: chapter 1). An *inter-national economy* is an economy made up of a series of individual national economies that interact between themselves mainly via activities like trade interdependency, investment integration and migration (trade, investment and labour flows across borders). The most significant feature of this – though not the only one – would still be these separated national economies that interact between themselves.

On the other hand a *global economy* would be an economy that existed as a single economy in its own right somewhat beyond the interacting individual national economies. This economy would be driven

by market forces and competition between ‘footloose’ economic agent (companies, banks, financial institutions, individuals) that are not clearly tethered to any single national economy but which would take the global arena as their sphere of operations: producing, sourcing, marketing etc., and moving their operations across the globe according to the profitable opportunities that present themselves anywhere. These two types of economy are ‘ideal types’ – a kind of conceptual model – that do not exist as such in practice or on the ground, so to speak. They provide an abstract image of two different possible types of economy and when referring to the idea of a global system in the analysis that follows I am explicitly invoking the second type of economic structure just outlined.

However, in this article, far from engaging in yet another round of utopian calls for a new global covenant, global democracy or wishful thinking about a new enlightened cosmopolitanism as the responses to these supposed forces of globalization, I examine the actual practices of governance that are immanent and already embodied in the nature of the ‘international disorder’ that typifies this field. To do this I first set up the idea of global corporate citizenship to ask why companies might be prepared to adopt this terminology since it has many dangers attached to it for them (as well as potential benefits, of course). I then go on to argue that there is a connection between the adoption of the language of ‘citizenship’ and that of ‘constitutionalism’ and suggest that there is a shadowy ‘quasi-constitutionalization’ of the international system underway for which the terminology of global (corporate) citizenship is an important part (Joerges et al. 2004; Schepel 2005). In turn, this connects to various senses of the juridicalization of international affairs, where new or revitalized types of law are increasingly being brought into play as the mechanisms for resolving disputes or organizing governance. Various claims as to the nature of the constitutionalization process are then investigated, one of which I try to mine for an appropriate terminological resource to discuss the legitimization of the emerging international system as I see it. Finally, I sum up on the troubled nature of these deliberations, since my argument is that this leaves us with several unpalatable implications and dilemmas that will not be easy to resolve.

2. Corporations and Citizenship

Why might companies adopt the language of citizenship to describe themselves? In this section I concentrate on why many companies are adopting this terminology.

The main point is that it reveals a basic *vulnerability* that companies perceive in terms of their general business position. Companies – even the very largest companies – feel increasingly threatened by developments in the international financial system in particular and in respect to their business environment in general. Companies have always been subject to the normal dictates of stock market discipline, involving the market for corporate control or the possibility that new and innovative competitors will arise with an invention that can quickly undermine even the most carefully crafted business model. But new ubiquitous threats are arising, this time from hedge funds, private equity funds and sovereign wealth funds. These have had such extensive resources available that they can stalk and takeover even the largest of companies. Often these funds are allied with ‘activist shareholders’, so targeted companies can now be subject to a level of harassment that they find difficult to combat or resist. In the wake of the 2007/08 credit crunch – when liquidity from the investment banking system dried up – private equity has begun to tap into the resources offered by sovereign wealth funds as a way of by-passing the (remaining) banks of Wall Street and the City of London.

What private equity does is to take companies out of public floatation, ‘restructure’ them to extract ‘shareholder value’ and then to re-float them once they are supposedly ‘slimmer and fitter’. Thus effectively private equity ‘privatizes’ the public limited liability company, at least for a time, so that it is subject to neither the minimal transparency requirements and supervisory oversight of stock exchanges, nor the operation of internal corporate governance. If this mechanism were to expand after the 2007/08 credit crisis subsides (which it is likely to do) it could herald the demise of the robust public company in the Anglo-American economies where it is most active (but beware other economies, where this mechanism is also likely to take hold). It could leave only a rump of out-of-favour or terminally weak companies floated on stock exchanges, and hollowed out companies that are re-floated in the wake of their private equity experience.

A second source of vulnerability for companies is rather of their own making, however. This arises from the elaborate and extended supply chains they have constructed as part of the internationalization of their production process. Such supply chains become progressively difficult to manage as their scope expands. In particular two type of vulnerability arise. First in respect to the sheer physical difficulty and complexity of supply-chain organization as suppliers are more and more remotely located and differentiated into sub-subcontracting, and so on. But secondly – and as a direct consequence of this increased differentiation – they are vulnerable from the socially irresponsible activities and conditions often found in their suppliers in these remote locations. NGOs and others positively relish drawing public attention to these ‘socially irresponsible’ practices that have somehow escaped the notice of the main branded contractor in the metropolitan countries.

So what are vulnerable companies doing in the light of these developments? They are re-branding themselves ‘corporate citizens’. However tentatively, cautiously and hesitantly at times, as a response to these pervasive threats leading companies are trying to shore up their position *politically* by claiming to be ‘corporate citizens’ and ‘corporately socially responsible’ in one way or another. And this is a definite political tactic on their part, if also a potentially dangerous one from their point of view. Corporate citizenship represents a claim by companies for recognition that they too have rights, that they perform civic duties, that they are public spirited, that they are ethical agents in one way or another, and so they should be treated like every other citizen and be subject to the same protections. But of course, if companies claim a deserving citizenship in this way, they also open themselves up for a different – and possibly intrusive – kind of scrutiny. They must be accountable and transparent to a wider audience, and above all they must be responsible agents (Thompson 2008b).

Of course this idea of citizenship also goes along with a new found fondness of these companies not only to both care for the environment and act in a socially responsible manner, but also to become an active ‘partner’ with governments and NGOs in meeting the UNs Millennium Development Goals (WEF 2008) or engaging in other civic activities that have nothing directly to do with the own business activities. The language of MDGs has invaded this area, with companies seemingly willing to take on more and more of the tasks associated with these

goals. But this could tend to overwhelm them of course, and undermine any longer-term commitment to more limited CSR objectives.

Additionally, there are the marketing opportunities associated with being socially responsible and an active corporate citizen. This is part of the re-branding of the leading companies, who argue that to integrate citizenly activities within their core business operations – and not to see it just as an ‘add-on’ – is a way to ensure customer loyalty as and when things get tough with the purely financial bottom line.

So what we have is a package of reasons why companies might want to adopt a citizenship language. But I would stress the political nature of this on the part of companies. It is part of their response to a feeling that they should become more overtly ‘political animals’ in a transparent manner, so as to be able to try to publicly shore up their positions (Crane et al. 2008). Of course, companies have always played a very active political role – they are adept at lobbying and contributing to political causes – but this has tended to be done, at the international level at least, ‘behind the scenes’ as it were. For instance, companies learned a lot from the various WTO negotiating rounds: they felt frustrated by the fact that they could not lobby overtly in these arenas, but have had to do so via their governments, and this frustration has increased as the Doha Round ground to a halt with governments seeming unable to reach agreements. A citizenly language – justified in terms of public mindedness and civic virtue – provides a potential way out of this dilemma for companies.

Table 1 shows what companies can at present claim and not claim in respect to citizenship rights that are analogous to those rights afforded to ‘natural persons’ (in the USA in this case – but this is largely paralleled elsewhere). Companies are collective agents (sometimes expressed as ‘artificial’ or ‘virtual’ persons), so there is a debate about the appropriateness in the use of the terminology of citizenship analogously between so called ‘natural persons’ (who are far from ‘natural’ of course – these are legal categories) and ‘corporate persons’, but I leave this aside here (see Thompson 2008a and 2009d).

They can claim the following:

- a) equality of protection and treatment
- b) trial by jury
- c) protection from unreasonable searches and seizures (e.g. of property)
- d) no takings without compensation
- e) the exercise of due process
- f) non-discrimination.

They cannot claim the following:

- a) protection against self-incrimination (i.e. the prevention of a witness from testifying against him-self or her-self)
- b) that corporations and their officers are the same 'persons' (thus corporations are separate from their officers – whereas there is no analogously similar claim that can be made by 'natural person')
- c) claim certain protections whilst abroad
- d) they cannot command a vote, or exercise any of the political consequences that follow from this capacity.

Table 1. Corporations Claims on Formal 'Legal Citizenship' (USA)
Source: Compiled from Aligada (2006)

The features illustrated in Table 1 pertain to a particular country: they are written into US constitutional practice or are a consequence of judgements made in the courts there – and are similarly enacted in other countries. So the protections they offer relate formally to that jurisdiction only. An obvious question is whether they can be extended into the international arena, so that citizenship rights for companies along these lines might also be afforded to MNCs. Clearly, extending these kinds of features – and formal citizenship into this arena – is doubly difficult: there is no obvious polity to which companies can be held accountable or that could legitimize their 'citizenship'. Jurisdictions, in the main, still remain tethered to definite territories (there are some extra-territorial jurisdictional competences claimed and exercised by some countries – the case of the Alien Tort Claims Act (ATCA) in the USA comes

to mind – but not in respect of formal company law). However, companies are claiming citizenship in the manner discussed above nevertheless. And they are organizing this along the lines illustrate by the features in Table 2.

1: ‘Acts’ Citizenship

- a) Act in a way that invokes a civic virtue
- b) Stresses active engagement or involvement in public affairs and in the public sphere
- c) Voluntaristic
- d) Behavioural
- e) Represents a ‘claim’ only

2: ‘Status’ Citizenship

- a) Rights and obligations determined within the context of a definite polity
 - b) These embodied in a clear legal form
 - c) Involves the democratic exercise of membership duties and obligations
 - d) Obligations thrust upon citizens in a ‘take it all’ manner.
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Table 2. Characteristics of Two Types of Citizenship

This table divides citizenship into two basic types: ‘acts’ and ‘status’. This is not altogether satisfactory since clearly they are both aspects of a single category – the real issue is the relationship between these two sets of elements. But it is useful to retain the distinction for analytical purposes.

Companies that claim citizenship do so largely on the basis of their ‘acts’. Their public mindedness is driven by the ‘softer’ elements included under the acts heading. Clearly, in an international context in particular, the ‘harder’ elements included under the heading of status citizenship cannot be fully realized, for the reasons just outlined. But perhaps what the earlier discussion of company citizenship demon-

strates is that companies are beginning to think about claiming several of the aspects included under the status heading? They certainly want a clear status recognition to be associated with their citizenship. And they may be gradually accumulating these as the law imparts various constraints on, and opportunities for, companies to demonstrate their citizenship credentials in an informal manner through the gradual legal codification of CSR initiatives (McBarnet 2007; Zerk 2006).

3. International Juridicalization and Constitutionalization

The rest of this article develops this point by situating global corporate citizenship within a wider set of suggestions about what is going on in the international arena in respect to its juridicalization and constitutionalization. The motive for this discussion is the way citizenship, the law and constitutionalism have traditionally been closely linked together, both in political theory and in jurisprudential analysis and practice. There are two main elements to this discussion. The first is to draw attention to the emergence of new forms of legal scrutiny and adjudication in the international arena, especially those associated with commercial activity. Here the argument will be that we see not only an increase in the pertinence of international law proper, but also – and perhaps more importantly – of private law, of customary law and of regulatory and administrative law (Thompson 2008c). A lot of this is well known and not all of these forms of law can be dealt with in the detail they deserve. I concentrate on the most pertinent aspects for the purposes of outlining why companies might be choosing to adopt the language of citizenship in this context. The second main aspect is to develop an argument about what is termed here the ‘quasi-constitutionalization’ of the international arena. I begin by outlining this aspect but both of these – juridicalization (the subjecting of an increasing range of matters governmental to legal forms of scrutiny and adjudication) and constitutionalization (involving a distribution of powers) – are closely linked.

Constitutions are relatively modern instruments of rule, and are closely associated with the formation of national states from the 18th Century onwards. But there has been a proliferation of these as written documents since the Second World War as decolonization gathered pace. Traditionally constitutions do two basic things: they allocate powers and they determine rights and responsibilities. One of the issues as-

sociated with the writing of constitutions is where exactly to place these two aspects. The first aspect has to do with ‘order’ broadly speaking: it constitutes the institutions of the state and governance and their respective powers and relationships, distributing powers between these and – very importantly – limiting them in various ways. The second aspect has to do with the establishment of the civil rights, obligations and responsibilities of the parties to the constitution, not just of citizens but also of the other institutions of state. Broadly speaking the evolution of constitution making has seen the move of the issues associated with ‘order/powers’ from the front of these documents, with the question of ‘rights/obligations’ being tucked away at the back, to the reverse; rights and responsibilities now occupy the bulk of the documents at the front while questions of institutions and powers appear at the back (a classic example of this can be seen in the case of the 1871, 1919 and 1949 German Constitutional documents). Most modern, post Second World War, constitutions now follow this latter pattern (Dodd 1909; Blaustein/Flanz 1971 onwards).

As a slight aside here, this is not unconnected to the way Liberalism has itself been recast over this period. The original issue for Liberalism in the wake of the 17th Century European religious wars was one of establishing a certain ‘liberal order’ (both domestically and internationally), from which it was expected rights, justices and fairness would follow. Modern – particularly post Rawlsian – Liberalism reverses this direction of expectations: justices, fairnesses and rights come first, which will in turn secure the order necessary for social cohesion. And this pattern of expectations is mirrored in a whole host of other institutional contexts that deal with social governance: witness the UN system as a conspicuous example – human rights are paramount.

My argument is that companies are tapping into this trend. They want to have their rights and obligations more clearly articulate and formally recognized like everyone else. They want recognition for the civic duties and social obligations being thrust upon them or for which they are taking responsibility. They want to become more openly political, to operate more transparently as public actors and be recognized as such. They are tentatively moving in this direction, quietly exploring the implications of claims to the capacity of citizenship that these moves entail, but at the same time opening themselves to a different type of scrutiny. Thus along with these claims for ‘rights’ goes concomitant calls

for increased 'obligations' as well; to become more transparent and accountable, something companies are perhaps less comfortable with but which they are having to cope with nevertheless.

In addition, I would stress three further issues that might be behind these moves which are part of several larger trends going on in the international system.

The first of these is the growth of private forms of self-regulation and governance. This is part of what has been termed elsewhere the 'second phase of globalization' (Hirst et al. 2009): a move from the emphasis on the flows of resources over space, territories and borders to the setting of global standards that do not involve flows of resources over space to secure 'global integration'. This second phase has seen the proliferation of such standard setting activity associated with a huge range of commercial activities. It involves sometimes the delegation, sometimes the devolution but often the simple seizure of the capacity to set these standards by quasi-private or totally private bodies. These now both claim and exercise the public powers associated with the governance of activities involved with these matters.

A second trend is the one alluded to above: the growth of juridicalization of international matters involving legal forms of deliberation, adjudication and judgement. This is something that does not just affect commercial activity of course. A growing number of areas are affected by a similar trend: human rights, environmental protection, conflict and wars. All of these are increasingly being subject to legal forms of international regulation and governance. Indeed, this looks to be a ubiquitous trend, and an un-stoppable one (Campbell et al. 2001).

Finally, of course there is the surrogate process of constitutionalization; itself not a coherent 'programme' or set of rounded outcomes but full of contradictory half-finished currents and projects: an 'assemblage' of many disparate advances and often directionless probings. But a process nonetheless: it is building norms of conduct, rule making, and a distribution of powers in a 'global polity' that is itself in the making by this very process. Or that is the argument of its proponents.

All this poses many difficult and controversial issues which will be explored in a moment. And companies are caught up in these wider processes: the idea of corporate citizenship and global corporate citizenship finds a convenient home amongst these linked processes. In the

next section I outline several takes on the idea of transnational constitutionalization or 'quasi-constitutionalization' as I prefer to call it.

4. Characterizing the New International Constitutionalism

There are several stands of constitutionalist debate that are outlined here. I discuss these in turn, though again they are often overlapping and partly fused together.

The first of these is the Neo-liberal stand (Jayasuriya 2001; Gerber 1994). This very much welcomes the developments discussed so far, which it sees as a form of *economic constitutionalization without politics* at the international level: the final vindication of the 'law and economics' school's long quest for such an outcome at the domestic level. From this perspective constitutions are viewed as a decision making tool, based upon rational calculation and an organicist invisible hand. The history of the present celebration of this position can be traced to the German Order-liberal tradition closely associated with Freiberg School theorists such Böhn and Eucken in the 1940s, who fought so hard to have this position embodied in the German constitution of 1949 (in which they were partly successful) (Gerber 1994; Grosseckler 1996; Nörr 1996).

A second strand is that typified by Gunter Teubner's use of a Luhmannesque framework of system and subsystem communicative action to characterize the constitutionalization of the international sphere (despite their well known differences). Teubner is an inventive and prolific writer and exponent of this position, which views the current international commercial system as a vindication of the basic intellectual architecture of Luhmann's approach (e.g. Teubner 1997, 2002, 2004). For Teubner these developments are a key indicator of a wider radical transformation of the international system wrought by the forces of 'globalization'. In Teubner's new world globalization finally breaks the link connecting the law to democratically constituted political discourses and practices. It produces a double fragmentation; cultural polycentrism and functional differentiation. New 'linkage institutions' create a new law directly by transjurisdictional operations without being translated into formal political issues. They escape and evade regulatory claims of both national and international law and practice, and form legal sovereignties of their own (for instance a new *Lex Mercatoria* and

Lex Informatica). This global law has no legislation, no political constitution, no politically ordered hierarchy of norms. It is a 'polycontextual' law; law with multiple sources displaying no unifying perspective, produced by different mutually exclusive discourses of society. Such a system of recursive legal operations works in terms of more than one code, combining conjunctural and disjunctural operations, connected through transjurisdictional operational networks. It displays a heterarchical multitude of legal orders rather than a clear and traditional differentiation into legislation and adjudication; a plurality of law production comprising a patchwork of ethnic and religious minority laws, rules of standardization, variable professional disciplines, contracting, intra- and inter-governmental rule making, etc. (Walker 2002). Curbing the abuses of power – by the rule of law in the traditional sense – will not help in civilizing this many headed hydra. Indeed, we must face the impossibility of constitutionalizing this legal multiplicity in the language of legal restraint or the arbitrariness of the sovereign. In the final analysis, there is no single sovereign power left.

From a constitutional point of view, however, this imagery is complex and somewhat ambiguous. For Nikolas Luhmann – the spiritual father of this position – the social order is made up of a series of (relatively) autonomous spheres of meaning, displaying different 'logics of observation'. These systems may be economic, political, or legal systems, organizational entities or even individuals. Each of these systems orients itself according to its own distinctions, its own constructions of reality, and its own observational codes. Here the global system is characterized by overlapping relatively enclosed systems which poses the problem of their macro-level coordination and governance. Thus at one level, at least, there can be no formal 'global constitution'. The constitutive differentiation of society into (sub)systems means that they all operate according to their own distinctions, thereby continually reproducing new differences as they abut and collide with one another. The best that can be expected from this is loose couplings between different subsystems (of which the law is a key one). This frustrates any attempt at overall coordination or governance by a competent authority. Only 'self-governance' is possible driven by the enclosed inner logic of each (sub)system. One consequence is that new perturbations, differentiations, irritations, provocations and unexpected events continually arise in the world. This enables Tuebner to align it with an understand-

ing of the global as a radically differentiated ‘polycontextual’ space, where territories and national sovereignties are broken apart as contingent events produce a ‘global law without a state’: a transnational legal order for global markets that has developed outside of national and international law strictly speaking.

What to make of this vision? The problem is that it may be little more than an interestingly imaginative flight of fancy. Even Teubner recognizes that such law – if it exists in a stable and significant form – is always judged against and according to existing legal orders. Indeed, the strong trend in the contexts that Teubner celebrates is towards the Anglo-Americanization of such law (Teubner 1997, 2002; Kelemen/Sibbitt 2004; Levi-Faur 2005; Applebaum et al. 2001, Part 4; IJGL 2007). It is being driven by international legal firms and MNCs who all still have their own strong national organizational patterns and routines. The older and traditional trans-European network of constitutional lawyers and arbitration judges, who found and cultivated a specialist niche in the ICC and Hague Conference arbitration panels, are being displaced by new aggressive transnational legal firms under Anglo-American and German legal dominance. What is more, the empirical evidence suggests that the appeal to such transjurisdictional law is highly limited and marginal, and may even be declining, as MNCs and others seek judicial redress in national courts (Dasser 2001). Applebaum et al. (2001) thus conclude: “The *lex mercatoria*, at least at the present time, seems to have far greater significance in the minds of legal scholars and sociologists of law than it does for merchants themselves” (p.18).

A third strand in this debate would be concerned with the political legitimation of this emergent constitutional regime (if it exists as such), and is associated with a reflection on a lively debate in the UK about the nature of the British Constitution (in the following paragraphs I draw liberally on: Loughlin 2005, 2006, 2008a, 2008b; Cane 2005; Law 1995; Tomkins 2005, amongst many others). This does not start with any preconceived ‘model’ of a constitution, or of an emergent order (as does Teubner, or the Freiberg School, for instance) but, rather, is based upon British pragmatism and an investigation of the immanent practices of the British constitution. Although this might seem a parochial concern, I will argue that it offers a rich language and conceptual resource for investigating the international sphere in this regard.

The debate in the UK is orientated around two different conceptions of the British Constitution (BC): a ‘Republican’ notion that argues there is already in place a semi-written and republican constitution based upon documents initiated after the Civil War in the 1640s-1670s; and secondly a ‘Common Law’ version that maintains the constitution is not a written one, but rather a result of a continually evolving set of acts and decisions made in a court led environment. For the purposes of my remarks I take the Common Law version. Why? I will argue that the nature of the BC is very much like the international quasi-constitutional process discussed so far: it is an assemblage of practices rather than a set of fundamental laws; it is a political constitution, based upon an evolving political compromise, rather than a legal constitutional settlement based upon a firm written document; it involves a combination and coordination of public and private rule making designed so as to preserve both the social autonomy and the public interest; it represents a structural coupling between diverse and fragmented social discourses. Is this not a reasonable description of the international arena as well?

The British debate is most concerned with the nature and role of the Rule of Law (RoL) in this context. It is not quite so ready to give up a strong notion of the RoL as many are in the context of the so called ‘global constitution’ making: here there is a conceding of the RoL, first to a notion of the ‘rule by laws’ (not the same thing as RoL); second to the rule by lawyers and law firms (who are in part making the rules as they go along in the international arena – what I would call a new ‘Guild of Lawyers’); and thirdly (and perhaps most problematically) to a rule by aging law professors who are the ones populating the various institutions of private law making and networks of rule making that is substituting for the RoL in the international domain (and one I would term a new ‘Clerisy of Law Professors’). None of these options appeals to the British debate (nor to me!).

Many might suggest that this is all very worthy, but how can these sentiments be rendered into principles that ensure legitimacy of this British evolving system? Here the ‘Diplock Principles’ are appealed to (named after Lord Justice Diplock who laid these out in the 1980s). I mention just the four main ones of these:

1. *Proportionality*: the idea that actions should be proportional to the offence, harm done, or possible consequences or

outcomes. This is also a criteria that is invoked in the case of armed conflict.

2. *Reasonableness*: the idea that there should be good reasons for things, and that the authorities should not act unreasonably. This is sometimes termed a 'rationality' criteria.
3. *Procedural fairness*: this idea is most pertinent in the context of administrative and regulatory law. It speaks against unfairness on the part of the authorities. But it has nothing necessarily to do with participatory fairness, though it is often confused with this.
4. *Due process*: this is the idea that there is a 'duty to hear the other side' and thereby allow some disputation.

All these criteria are argued to allow discretionary decision making but also to constitute ethical ideals as to the virtuous conducts of the courts, policing, statute making and the state's affairs; they create a prudential moral force for the control of public affairs. I would like to suggest that they could offer an effective set of criteria to be imported into the arena of quasi-constitutionalization so as to open up a discussion of the legitimacy of that rule making and power distribution system. More on this later.

But first there is a fourth strand in this debate, which, whilst it is sensitive to the language of constitutionalization in this area and deploys certain of its terminology, I would argue has a basically different underlying position. This is to argue that fundamentally we should give up on the language of 'constitutionalization' and, instead adopt the language of 'governance' (Cohen and Sable 2006; Zaring 2005). Very much drawing on a reflection from the EU and its governance practices, this position stresses the role of multilevel governance, open methods of coordination, and the like. Given the well known difficulty of the EU in developing a formal constitution of its own, I think the idea is to give up on this altogether and go for a different conceptual language. Constitutionalism is a language of state making in particular, it is therefore unsuited for the new era of globalization. The EU is not a state: at best it is a form of 'confederal public power', and this should be the model for the wider international/global arena.

One obvious difficulty with this approach is that the EU is already a deeply specified public legal order, but this is not the case with the global arena. The RoL already operates effectively in the case of the EU so its administrative laws and procedures are subject to this constraint and have to operate within this rule. At a more general level much of the analysis of global administrative law and the globalization of the RoL itself is couched in terms of its compatibility with or complementarity to existing international law (e.g. Dyzenhaus 2005; Salzman 2005; Zaring 1998; Zifcak 2005). But this is not the main problem. The issues highlighted here is one where there is no competent international public law (unlike in the case of the EU): how do we ensure at least some elementary conformity to the RoL in a system where there is no competent authority with the means to enforce whatever quasi-constitutionalized ‘administrative law’ there may be in the making?

5. Where Does This Leave Us?

Nothing argued above should lead us to feel comfortable about the way the international system is evolving in terms of its governance or quasi-constitutionalization. The RoL is effectively being given away here and there seems little that can be done to stop it. At best some *procedural* principles of democracy are still in play but *substantive* concerns are necessarily on the back foot. In this environment to defend a strong version of democracy, citizenship or constitutional practice is difficult.

But it might be possible to invoke several criteria of governance to provide for some legitimacy in this arena, and here I have argued that the ‘Diplock Principles’ of British constitutional practice might serve as a language to think about this problem.

For what it is worth my summary of the governance implication of this discussion can be found in Figure 1, which I term governance regimes for global legal order because I still remain concerned that there is some grounding of the international in a public legal order.

Governance Regimes for Global Legal Order

		TYPE OF DEMOCRACY	
		Popular	Constitutional /Republican
CHARACTER OF INSTITUTIONALIZED POLITICS	Representative	<u>World Government</u> (Deliberative, law making constitutional assembly to develop and authorise new international legal order)	<u>Intergovernmentalism/multilateralism</u> (WTO)
	Governmental	<u>Stakeholding</u> ((I)NGOs)	<u>Supra-national networks of elites/experts</u>

Figure 1. Governance Regimes for Global Legal Order

There are two dimensions in play here. Along the horizontal axis are ‘types of democracy’: ‘popular’ refers to a situation typified by political parties and direct engagement, ‘constitutional/republican’ to a more procedural emphasis on the division of powers proper and a space for various collective ‘civil actors’ to affect outcomes. Along the vertical axis are institutional characteristics of politics: the ‘representative’ form invokes parliamentarianism, while the ‘governmental’ emphasises the role of interest groups and social partners. Within the cells marked out by this matrix several forms of legal governmental orders can be found. We could all have our particular favourites amongst these. For fairly obvious reasons associated with the analysis undertaken above mine is the intergovernmentalism/multilateralism option (the poor cousin of governance modes in the debate about ‘global governance’), but one which at least gives some semblance of feasible democratic control. But I would argue collectively they mark out the range of possibilities (think of just the EU in respect to this matrix: elements of all four are present there I believe).

I would describe this as an ‘agonal public space’: a space of ‘unity-in-diversity’ or ‘unity-in-disagreement’. This might make it a *durable disorder* of sorts (rather than a non-durable disorder – a decidedly uncomfortable prospect). But this hints at the source of my residual disquiet and anxiety for this area.

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