



FROM PEACE TO JUSTICE SERIES

MORLY FRISHMAN AND SAM MULLER - EDITORS

**The Dynamics of
Constitutionalism in
the Age of Globalisation**

Hague Academic Press

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THE DYNAMICS OF CONSTITUTIONALISM IN THE AGE OF GLOBALISATION

Edited by
Morly Frishman and Sam Muller



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PREFACE

This book stems from an international conference that took place in the Peace Palace, The Hague, on 15-16 May 2008, entitled – like this book – *The Dynamics of Constitutionalism in the Age of Globalisation*. The conference was organised by the Hague Academic Coalition (HAC)* as the fifth conference in the *From Peace to Justice* series of annual HAC conferences. Against the backdrop of the overarching ‘From Peace to Justice’ theme that has characterised the annual HAC conferences since 2004, the speakers and participants – national and international academics and practitioners from a variety of disciplines – met to discuss the various contexts in which the discourse on constitutionalism takes place nowadays. The various institutes that make up the HAC participated in this collective effort, but the leading role in organising the conference and publishing this book was played by the Hague Institute for the Internationalisation of Law (Hiil).

Following words of welcome from Professor Jaap de Zwaan, Chairman of the HAC, and Mr Jozas van Aartsen, Mayor of The Hague, Professor Bertrand G. Ramcharan opened the conference with an inspiring keynote address (the written version of which appears in this book, following the introduction). The next day started with a plenary session, featuring two complementary lectures: Professor Michiel Scheltema (Chair the Programmatic Steering Board of Hiil) talked about the national dimensions of constitutionalism, while Professor Erica de Wet (University of Amsterdam) discussed its international dimensions. Subsequently, the conference branched out into four parallel sessions (interactive workshops), each organised by one or two HAC partners. The Institute of Social Studies (ISS) organised the session on *International Law, Development and Con-*

* For more information about the Hague Academic Coalition, see page IX of this book.

flict: Comparative Perspectives on Cultures of Constitutionalism. The second workshop, entitled *Constitutional Protection, the Internationalisation of Law and Transnational Constitutional Principles* was co-organised by the Hague Institute for the Internationalisation of Law and the Grotius Centre (Leiden University – Campus The Hague). The Netherlands Institute of International Relations Clingendael organised a session on *Constitutionalism in the European Union*. Finally, the workshop on *Constitutionalism in Public International Law* was organised by the T.M.C. Asser Instituut.

The exchange of views and experiences during this conference was particularly rich. This book aims to bring these discussions to a wider public. At the same time, however, it is able to do so only to a limited extent, as not all of the conference's lectures and interventions could be included. With respect to those presentations that did find their way into the book, readers will notice that we left it entirely to the authors to decide in what form and style they wished to present their contributions. Accordingly, some of the chapters preserve the nature of an oral, rather informal, presentation. Other chapters are the result of further development of the ideas presented during the conference. Yet other chapters should be read as 'think pieces', which is to say that they are more modest in form and scope and that their purpose is to provoke thought and further research on the topics concerned rather than presenting a fully motivated academic article. Finally, it should be mentioned that the chapters stemming from the workshop organised by the Institute of Social Studies (namely, the chapters by Barbara Oomen, Surya Subedi and Susan Akram) were edited under the primary responsibility of Karin Arts and Jeff Handmaker, who were the organisers of that workshop and who also added a short introduction to that section of the book.

We would like to thank all the speakers at the conference and the contributors to this volume for their inspiring input. A word of gratitude also goes to the Mayor of The Hague and his colleagues, who continue to show their support – in word and in deed – for building the knowledge infrastructure of The Hague through events such as our conference. Gratitude also goes to the rest of the HAC team: Jan Anne Vos (T.M.C Asser Instituut), Karin Arts and Jeff Handmaker (ISS), Jaap de Zwaan and Jan Rood (Clingen-

dael) and Wim Voermans (Leiden University, Campus The Hague, Grotius Centre for International Legal Studies). We would also like to thank Ed Maan, coordinator of the HAC Secretariat, for his unrelenting support and patience and for exemplifying that the Hague Academic Coalition is more than the sum of its parts.

Finally, we would like to thank Daniel Stephens, the language editor of this book, for his excellent work.

The Hague, February 2010

Morly Frishman and Sam Muller

THE HAGUE ACADEMIC COALITION

The Hague Academic Coalition (HAC) is a consortium of The Hague's major academic institutions in the fields of international law, international relations and international development.

The Coalition promotes joint research, education and public debate in support of the enhancement of international policy, law, governance and international negotiations towards justice, peace and sustainable development.

As part of this broad objective, the HAC in particular seeks to support the work of the various international courts, tribunals and other international organisations in The Hague. Joint HAC activities in support of this mission include:

- annual conferences on topics of relevance given the mission statement, organised by members of the consortium;
- the provision of postgraduate and post-academic courses relevant to students and practitioners in the fields indicated above;
- scholarly and policy-orientated research as well as consultancy activities;
- public events targeted at the international community in The Hague, aiming at practitioners and students of international law, diplomacy and development;
- management of joint programmes like the Hague Justice Portal (www.haguejusticeportal.net) and the Hague Forum for Judicial Expertise (www.hfje.nl), its annual conference series 'From Peace to Justice', its Hague Dialogues; and
- publications.

Its current members include:

- Carnegie Foundation
- Hague Institute for the Internationalisation of Law, HiiL

- International Institute of Social Studies of Erasmus University
Rotterdam, ISS
- Leiden University - Campus The Hague / Grotius Centre
- Netherlands Institute of International Relations, Clingendael
- The Hague Academy of International Law
- The Hague University of Applied Sciences / Haagse Hogeschool
- T.M.C. Asser Instituut

For further information, you may consult www.haguejusticeportal.net.

LIST OF ABBREVIATIONS

AJIL	American Journal of International Law
All ER	All England Law Reports
ANC	African National Congress
AUMF	Authorization for Use of Military Force
BVerfG	Bundesverfassungsgericht
BverfGE	Bundesverfassungsgerichtsentscheidungen
BYIL	British Yearbook of International Law
CAT	Convention Against Torture
CFI	Court of First Instance
CIDT	Cruel, Inhuman, Degrading Treatment or Punishment
CLJ	Criminal Law Journal
CMLR	Common Market Law Reports
CSRT	Combatant Status Review Tribunal
CTC	Counter-Terrorism Committee
DTA	Detainee Treatment Act (2005)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
EHRLR	European Human Rights Law Review
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
EU	European Union
GA Res.	General Assembly Resolutions
GAOR	General Assembly Official Records
GSS	General Security Services (Israel)

HAC	Hague Academic Coalition
HiiL	Hague Institute for the Internationalisation of Law
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
ISA	Israel Security Agency
ISS	Institute of Social Studies
KFOR	NATO Kosovo Force
MCA	Military Commissions Act (MCA) of 2006
MNF	Multinational Force
MPNP	Multi-Party Negotiating Process
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organisation
Nordic JIL	Nordic Journal of International Law
NP	National Party
OHCHR	Office of the United Nations High Commissioner for Human Rights
OPT	Occupied Palestinian Territories
PCATI	Public Committee Against Torture in Israel
Q.B.	English Law Reports, Queen's Bench
RCADI	Recueil des Cours de l'Académie de Droit International

SCC	Supreme Court of Canada
SCSL	Special Court for Sierra Leone
UDHR	Universal Declaration of Human Rights
UKHL	United Kingdom House of Lords
UML	United Marxist-Leninist party
UN	United Nations
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly [sometimes referred to as just GA]
UNICEF	United Nations Children's Fund
UNMIK	United Nations Interim Administration Mission in Kosovo
UNMIN	United Nations Mission in Nepal
UNSC	United Nations Security Council [sometimes referred to as just SC]
UNTS	United Nations Treaty Series
WTO	World Trade Organization
Yale JIL	Yale Journal of International Law
YBILC	Yearbook of the International Law Commission

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INTRODUCTION

Morly Frishman and Sam Muller*

1. CONSTITUTIONALISM IN A GLOBAL AGE

This book brings together the notion of ‘constitutionalism’ – or more precisely, the dynamics of constitutionalism – and the phenomenon of ‘globalisation’.

Constitutions are known to us from domestic legal systems, where they have always been seen as fundamental pillars of stable societies. They provide the basic framework within which the actors in a society relate to each other, and they determine the relationship between those who govern and those who are governed. Correspondingly, ‘constitutionalism’ can be understood, in general terms, as a legal and political school of thought which holds that any form of governance should be constantly circumscribed by a system of checks and balances derived from a primary legal document or body of principles.

Globalisation has nowadays reached the stage where its influence is felt in literally every aspect of life. Beyond the economic aspects of globalisation, national legal systems are increasingly intertwined and connected as a result of this all-encompassing process. Increasingly, states have an interest in the functioning of each other’s legal systems. Ideas, notions and norms, including constitutional ones, have crossed borders. Constitutionalism itself has become more widespread than ever before, adopted as the legal framework in many ‘new democracies’ throughout the second part of the 20th century.

* Morly Frishman is a Research and Programme Officer at the Hague Institute for the Internationalisation of Law (HiiL). Sam Muller is the Director of HiiL. The authors would like to thank Lee Williams, Jovana Paredes and Guy Confino, interns at HiiL, for their invaluable assistance in bringing this book to light and finalising this introductory article.

At the same time however, globalisation presents many challenges to domestic legal systems. It also puts pressure on some of the most fundamental aspects of democratic and constitutional states, such as the doctrine of separation of powers, which lies at the heart of domestic constitutionalism, as originally conceived. The world has changed significantly since Montesquieu and Locke devised the paradigms that are so familiar to us today but which may need to be reassessed in the light of these developments. Furthermore, in some respects, states may find it increasingly difficult to offer constitutional protection, when such a large amount of policy and decision-making power originates outside the state's legal order, thus placing it beyond the reach of national constitutions. At the same time, the process of globalisation may be related to a process of constitutionalisation at the regional (particularly the European) level and of the international legal order as a whole.

Accordingly, while the concepts of constitutions and constitutionalism undeniably emerged in the context of the nation state, any contemporary discussion of the dynamics of constitutionalism cannot be confined to this traditional framework. With 'power' and 'governance' becoming more diverse, multifaceted, complex and international or transnational in nature, it seems opportune to reconsider the phenomenon of constitutionalism at the national, European and international level.

The emphasis on the *dynamics* of constitutionalism should not go unnoticed. As stressed by several contributors to this book, 'constitutionalism' may have different meanings and functions depending on the relevant context and perspective. As the conference of which this book is an outcome was never envisaged as a quest for the holy grail of constitutionalism or for a perfect, all-purpose definition, this book similarly and deliberately avoids any such attempt. Rather, it aims to explore, from a variety of viewpoints, the dynamics and (changing) meaning(s) of constitutionalism in today's globalising world.

Against this background, each of the chapters in this book relates to at least one of four major themes or clusters of questions, which correspond to the four workshops at which these themes were respectfully discussed during the conference:

- International Law, Development and Conflict: Comparative Perspectives on Cultures of Constitutionalism;