CHAPTER THREE

QUESTIONING THE CONTRIBUTIONS OF PUBLIC INTERNATIONAL LAW TO THE DEBATE ON GLOBAL CONSTITUTIONALISM

Every portrait that is painted with feeling is a portrait of the artist, not of the sitter.¹

Introduction

We have already learnt that the contemporary debate is largely confined to the trajectories of liberal democratic political tradition, so why not already dismiss it as not ‘global’? In his collection of essays, The Thing, G. K. Chesterton contemplates, inter alia reform and how to go about it. He imagines the existence of a certain institution or law, which he exemplifies as the installation of a fence or gate across a road. Chesterton considers that the modern type of reformer says he does not see the point of the fence and demands for it to be taken down. The more intelligent type of reformer will respond: ‘if you don’t see the use of it, I certainly won’t let you clear it away.’ He urges the modern reformer to go away and think about what the use may be; ‘Then, when you come back and tell me that you do see the use of it, I may allow you to destroy it.’²

The following will critically examine the dimensions of global constitutionalism, will raise questions about their tenability, and (as the intelligent type of reformer would do) will consider the use of the contemporary visions. At the heart of the analysis lies the question of whether the liberal democratic idea of global constitutionalism can appropriately be treated as the only available reference-point for global constitutionalism.

To begin with, it must briefly be explained which traditions are meant when the term ‘liberal democratic’ is employed. Distinctive of liberalism are the two themes of formal autonomy and abstract equality. Ideas of limiting State power and accountability emanate from these traditions – ideas that are today often believed to be realised through democracy. According to David Held, one can distinguish between three different types of democracy.³ Firstly, there is the direct or participatory democracy that is often associated

---

As it happens, most democratic politics involve a mixture of the first and second types of democracy at the national level. In such a democracy, citizens are directly involved in the decision-making processes. Secondly, there is liberal democracy, in which representatives bound by the rule of law are elected to act on behalf of the body of citizens as a whole in decision-making processes. Thirdly, there is the (socialist) one-party model of democracy. The first type of democracy is often regarded as unworkable at a national level of government (and certainly at an international level), particularly as a pure model, and the third type of democracy is regularly viewed as not democratic at all – at least in terms of how it has historically played out. When speaking of democracy, most writers (of international law) therefore refer to the second type of democracy. This chapter is dedicated to questioning precisely such premises: What does it mean to assume that the politically dominant form of liberal-democracy is associated with the democratic functions of constitutionalism? It seems most sensible to begin with an examination of the five key themes that inform the current debate. However, it has emerged that there are in fact certain common presumptions that underlie the five key themes. While the key themes are the building blocks of the dimensions, there is something that makes the blocks what they are in the first place.

Section I begins with an examination of these basic common assumptions of global constitutionalism. The sections are all arranged similarly in that they follow the same structure: A description of the respective assumption or key theme including, where appropriate, a brief outline of the historical background; the concerns that grow out of the assumption or key theme; and the relevant dimension of global constitutionalism influenced by the assumption or key theme. The first common assumption discussed here is the belief that constitutions can exist beyond the domestic legal system and the nation State. The second common assumption maintained in prevailing international law visions of global constitutionalism is that a certain unity or homogeneity of the international sphere exists. The universality of the idea of global constitutionalism itself is the third common assumption depicted here. Section II scrutinises the key themes of global constitutionalism found to inform the prevailing dimensions of global constitutionalism. Rather than this being a criticism of liberal democratic government, the study attempts to unveil some of the ways in which liberal democratic traditions limit global constitutionalism. It is contended that the seeming divergences of the visions of global constitutionalism of public international law simply reflect the different visions and trajectories of liberalism. The critique that will be undertaken in the following is a synthesis of writings by critical scholars, rather than exclusively a composition of new ideas. The novelty lies in the association of the critique

---

4 As it happens, most democratic politics involve a mixture of the first and second types of democracy at the national level.