New wine, old wineskins: on the geographical assumptions of international constitutional law

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Abstract

One of the central claims in the international constitutionalism literature posits that, through the process of constitutionalisation, the nation-state can be overcome. Drawing on John Agnew, this paper shows that the international constitutionalism literature is caught in a 'territorial trap'. It argues that our conception of constitutionalism is profoundly shaped by the territorial logic of the state, and that, as a result, the linkage between constitutionalism and the state is deeper and more complex than has been previously acknowledged. By leaving the underlying territorial assumptions of constitutional law unproblematised, international constitutionalism, as it stands today, reinforces and re-enacts the state rather than overcoming it.

The so-called constitutionalisation of international law has been one of the most thriving developments in international legal scholarship in recent years. The main rationale of international constitutionalism as a normative and analytical project is to provide a framework within which authority can be exercised and legitimised beyond the grip of the state. One of the main reasons for the recent flourishing of the international constitutional discourse lies in its normative potential, as a constitu- tionalised international legal order would serve as the basic normative framework to regulate institutions of power and

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authority globally. Democracy, human rights and the rule of law would become the pillars of this new world order.

The rise of constitutionalism in international law is a response to the changes that have come to affect the practice of international law and the state over the course of the last decades. International law no longer consists of a minimal set of rules regulating the relations of absolute sovereign states. Rather, it has become a complex and highly institutionalised construct, crucially affecting decisions and relations in various communities and fields. To give an example, the rise of international criminal law and human rights has severely limited the ability of states to carry out violations against their own population. Likewise, public and private institutions including the World Trade Organization (WTO), the International Monetary Fund and credit-rating agencies have come to play a crucial role in determining how economic relations are carried out. Conventional concepts like authority, power, legitimacy, and law are of limited use in explaining and evaluating the rise of such institutions (Tuori 2014).

The constitutional approach to international law has been subject to various criticisms. Among these, it has been argued that constitutionalism beyond the state is simply impossible because of its historical origins. Constitutionalism emerged alongside the nation-state as a result of a series of contingent and particular circumstances during the eighteenth and nineteenth centuries. Critics, therefore, argue that only the state can provide the necessary preconditions allowing for the rise of constitutionalism; these are deemed to include the demos and centralised institutions (Grimm 2005: 447). According to this view, constitutionalism comes into being by providing the normative resources specifically related to the state, that is, tailored by and for the state. On this basis, it is argued that the extension of constitutionalism beyond the state is inappropriate and inconceivable.

International constitutional scholars have summarily dismissed this critique. While they acknowledge the rise of constitutionalism alongside the state, they argue that, as a conceptual matter, there is no necessary link between constitutionalism and the state (e.g., de Wet 2006; Peters 2006: 581–82; Kumm 2009: 263). Accordingly, they posit that, whenever there is a community with certain normative structures, constitutional language could be invoked (e.g., Fassbender 1998: 556–57). Moreover, others argue not only that

constitutionalism can be extended to different levels, but also that the state as such is no longer necessary, and that international constitutionalism aims to serve as a guide for a new 'state-decentred framework of legal authority' (Walker 2008: 540).

In this paper, I posit that the debate should be approached from a new angle. The argument held by international constitutionalists that there is no conceptual 'barrier' impeding the augmentation of constitutionalism to the supranational realm is convincing. As Suganami (1989) notes, there is a long-standing tradition of constructing world proposals on the basis of domestic ones. For instance, the evolution of international courts and tribunals has been shaped significantly by domestic experiences (Koskenniemi 2008). However, I will show that the international constitutionalists' assertion that we are moving towards a 'state-decentred' framework is contestable. In fact, I will demonstrate that international constitutionalism is conceptually still deeply embedded in a state-oriented framework as a result of the so-called territorial trap.

Famously introduced by Agnew (1994), the territorial trap is a notion that problematises the assumption, whereby the state is understood as a timeless entity, with fixed and clearly demarcated boundaries, having as its territory its physical substratum (Shah 2012). I will argue that international constitutionalists often focus on states as precisely such entities and, as a result, become caught in the territorial trap. In particular, this trap leads them to fall into an epistemological state-centrism whereby 'state territoriality [is] understood as the basic reference point in terms of which all sub- and supra-state processes are to be classified' (Brenner 1999: 46). I will show that international constitutionalists, by leaving the implicit geographical assumptions of constitutionalism unproblematised, are prone to expanding inadver- tently and reinforcing the territoriality of the state onto the international arena instead of overcoming it.

Drawing from critical geography, the aim of this paper is to create awareness of potential impediments caused by a particular territorial thinking within the literature of international constitutionalism. While the predominant spatial perception in the literature is one in which states are elements of a fixed partition of the world, I will argue for a deeper examination of territory, constitutionalism and the state in order to move towards a broader and more

fluent approach to spatiality. Apart from notable exceptions (e.g. ,Aoki 2000; Raustiala 2004; Mahmud 2007; Osofsky 2007), interna- tional legal scholarship has, for the most part, neglected the importance of geography. Territory, space, and boundaries have been largely taken for granted, while their relation to international law has been left unproblematised. A turn to spatial considerations may have two beneficial effects. Firstly, moving to a broader spatial perception may lead the debate on the extension of constitutionalism beyond the state and onto a more fruitful route. In particular, problematising territorial thinking can help us abandon our spatial perception of the world as an assemblage of fixed and timeless states, and instead emphasise its fluid and processual character. Secondly, disentan- gling constitutionalism from its territorial origins is crucial for international constitutionalism's analytical and normative potential. Since constitutional law came about within a particular territorial understanding, international constitutionalism, as it is currently thought of, may not provide sufficient resources to cope with the ongoing changes to the international legal landscape.

The international constitutionalisation project

The constitutionalisation of international law has become 'one of the "hot topics" of international legal research' (Breau 2008: 56). While constitutional language has not been alien to international law (see Fassbender 1998: 538–50), it is only recently that it has become prominent within international legal literature. The importance of the international constitutionalists' project rests on the ability to make sense, both analytically and normatively, of the undergoing transformation of international law.

Constitutionalism entails more than a mere working order; it is concerned with establishing a normative framework, regulating how power is exercised among political institutions, controlling those institutions, and laying down a series of fundamental rights for the protection of citizens (Cottier and Hertig 2003: 280; Klabbers 2009: 9). In sum, constitutionalism aims to address, limit, and regulate political power (Werner 2007: 331).

The driving force behind the turn towards constitutionalism in international law lies in the material and normative changes occurring in the international legal order.[1] Traditionally, international law has been seen as a composite of rules, norms, and principles governing exclusively interstate relations. States created and enforced those rules, while in their own jurisdiction, they organised themselves as they preferred. Likewise, for a state to be bound by any international norm required its

prior consent (see Weiler 2004).

This traditional image of international law has been progressively disappearing over the course of recent decades. International organisations like the United Nations (UN) represent a novel type of supranational institution that is not comparable to previously existing international organisations in terms of scope, ambition, and powers. Furthermore, with the rise of increasingly complex, interdependent issues like arms control or finance, states have begun to create manifold types of international regimes (Keohane and Nye 2011), leading to a complex, interconnected, and dense international legal order. This expanding normative depth is reflected in the dramatic increase of international organisations, the proliferation of international tribunals, and the simultaneous rise of transnational actors, sometimes operating in the shadow of the 'public' institutional architecture (e.g., see Dezalay and Garth 1996; Cutler 2003; Diggelmann and Altwicker 2008: 628–31; Weller 2009: 179–80).

As a result of this evolution, international law has not only become more plural and more fragmented, but also more hierarchical (Klabbers 2009: 11–18). Firstly, with the emergence of multiple regimes, 'authority now springs from a variety of sources and institutions' (Klabbers 2009: 13–14) including influential private actors, making international law more plural. In particular, alongside public institutions including the UN and the WTO, we find transgovermental institutions like the Basel Committee on Banking Supervision, which is composed of bureaucrats from regulatory agencies or central banks and does not have any formal transnational regulatory authority, but whose role in banking regulation has been crucial for the governance of the global financial system (Alexander *et al.* 2006). As a result, authority comes to be allocated among a range of international organisations, international courts and tribunals, committees, and networks. Secondly, the increased fragmentation of international law refers to the amplified diversification and expansion of the international legal order, leading to different legal regimes governing various fields (including the economic, criminal, human rights, etc), each of which is endowed with their own institutions and norms (Koskenniemi and Leino 2002). The independent evolution of such specialised regimes sometimes creates problems of coherence, not only among themselves but also in relation to general international law. For example, the *MOX Plant* case, in which Ireland and the United Kingdom disputed the radioactive discharges of a nuclear processing plant in Sellafield, England, ultimately went before four different and unrelated international courts. Thirdly and finally, while traditionally international law was previously strictly horizontal, in the sense that states could not be obligated in respect of norms to which they did not consent, there are now various fundamental norms that are deemed not to be left at the disposal of states (e.g., the prohibition of torture), thereby making international law more hierarchical.

These structural changes have brought some pressing normative dilemmas into the spotlight. The shift of authority from national to supranational and transnational

institutions, like the European Union (EU), the International Organization for Standardization, and transnational commercial arbitration courts, has created a legitimation problem. Such novel forms of law and lawmaking may bypass the traditional political controls of the state (Cohen 2008: 467), thereby endangering principles like democracy, the rule of law, and the principle of social security, as Peters (2006: 580) suggests. As a result of such predicaments, constitutionalism as an analytical and normative framework has received increasing attention. As Kumm (2009: 324) summarises, '[c]onstitutional paradigms do not just make intelligible and help interpret the present legal and political world. They also show how we imagine its future'.

The idea that international law is being constitutionalised, and should be constitutionalised, is contested. To start with, the evidence documenting the processes of constitutionalisation remains vague. In particular, it is unclear what precisely these processes are and to what extent different institutions are being constitutionalised. This ambiguity can be identified in the fact that the literature is not always able to distinguish between a constitutional process and a mere evolution of international law (Brown 2012: 211). For example, in the aftermath of the 2011 intervention in Libya, Powell (2012: 303) has argued that the intervention represented a multilateral constitutional moment, 'a normative shift with implications for the constitutional underpinnings of the multilateral system – specifically […] the UN Charter'. According to her, the intervention embodied a change from our traditional understanding of 'sovereignty as a right' to an understanding of 'sovereignty as responsibility' (Powell 2012: 298). This claim is highly contestable, given the fact that there was no intervention in Syria, despite resembling circumstances. It reminds one of Loughlin's (2009: 21) perceptive remarks about the tendency to equate 'recent international arrangements for co-operation […] as a new moral stage of development rather than the continuation of *Realpolitik* in changed circumstances'.[2]

Secondly, there are important disagreements on the 'normative and moral components [which] *ought* to ultimately underwrite global constitutionalism' (Cottier and Hertig 2003: 273; Brown 2012: 216). For instance, we find authors like Petersmann (2012) for whom the WTO should be at the centre of the process of the constitutionalisation of international law. This would entail that individuals and corporations are given the right to trade and access to markets, and would further require that WTO law is applied directly in domestic courts in order to further economic liberalisation. On the other hand, we find authors like Gill (2008: Chapter 7) for whom the constitutionalisation of the international economic law regime, the WTO included, should be opposed because it supposedly reinforces the dominance of Western economic power and transnational corporations.

Finally, and most interestingly for our purposes, critics of international constitu- tionalism have posited that the emergence of constitutionalism is linked inextricably to the rise of the nation-state. In particular, it is observed that constitutional language, or at least those concepts associated with constitutionalisation, for example, human rights or the rule of law, have evolved alongside the state (Walker 2003: 30). Critics argue that the provision of the necessary and sufficient preconditions for the establishment and development of constitutionalism requires the state (Grimm 2005: 447). As Cottier and Hertig (2003: 281) aptly point out:

> it is clear that recourse to the normative concept of the constitutional Nation State, containing democratic, liberal, social and often federal traits, is […] not helpful. It is evident that not all attributes can realistically be achieved in fora other than the Nation State. For example, it would simply not be realistic or desirable to transpose the majoritarian principle 'one man, one vote' to polities lacking the necessary degree of integration which only renders majority decisions acceptable.

International constitutional scholars acknowledge the historical importance of the rise of constitutionalism within the state, but argue that there is no necessary link between constitutionalism and the state as a conceptual matter (Fassbender 1998: 532–38; de Wet 2006; Peters 2006: 581–82; Kumm 2009: 263). One reason advanced for this posits that the various concepts that make up constitutional discourse, such as democracy or human rights, came into being long before the emergence of the modern state (Walker 2003: 30). Furthermore, the literature argues that 'constitutionalism's explanatory value and justificatory are […] universal' and can therefore be adopted 'independent of its original context' (Krisch 2010: 36; also Loughlin 2010: 68). It follows that constitutional language can be employed whenever there is a body politic with a fundamental legal order (Fassbender 1998: 556–57), regardless of whether this legal order is tied to a state or not.

The claim of international constitutionalists goes even further. Not only do they argue that constitutionalism can be extended beyond the state, but they also assert that state-like institutions and structures are not necessary for its implementation. In particular, international constitutionalists posit that there is no need to generate supranational institutions resembling those of the state as a constitutionalist frame- work for the global arena 'does not depend on the structures of government or governance exactly state-like' (Peters 2009: 351; for a similar thought, see Kumm 2009). Constitutionalism is seen as a normative and symbolic frame of reference, tied together by a series of substantive and procedural values, that is, democracy, the rule of law, separation of powers, equality and so forth (Walker 2003). This supposedly allows not only for the possibility of transferring constitutionalism to the suprana- tional arena, but also for overcoming the state's grip on how to normatively think of the appropriate structure. As Cass (2005: 241) emphasises, the international constitutionalists' approach tries to be 'more functional, less dogmatic, and have greater flexibility than its statist counterpart'.

To sum up, international constitutional law has become one of the most prominent responses to the evolution of international law that is currently underway. It attempts to supply both the analytical and the normative resources necessary for the exercise of political and legal power beyond the state. This idea has been contested. In particular, it has been argued that the necessary preconditions for constitutionalism are provided by the state and cannot be replicated at the supranational level. International constitutionalists have replied that, despite the historical entanglement between the state and constitutionalism, there is no *a priori* logical link between the two (Werner 2007). They conclude that constitutionalism can be extended beyond the state without relying on institutions resembling those of the state.

The territorial trap and epistemological state-centrism

In a seminal article, Agnew (1994) put forward the notion of the 'territorial trap'. The territorial trap refers to the implicit assumption in International Relations whereby the state is understood as a timeless, ahistorical

entity providing a 'unique source and arena of political power in the modern world' (Agnew 1999: 503). The trap has three main features (Agnew 1994: 76–77, 1999: 503). Firstly, states are perceived as a territorially fixed unit with clearly defined boundaries and having the exclusive exercise of power within these demarcated boundaries. Secondly, there is a sharp distinction between the domestic arena, 'the world of politics, law […] and civil society' (Levy 2012: 11), and the international arena, an anarchical sphere inimical to society. Lastly, conditional on this view of the international realm, the state is seen as the sole provider of a space in which society can thrive (Agnew 1994: 60, 1999: 503; Brenner 1999: 46).

Territorial thinking became ingrained in the discourse partly because conceptions of how to organise social and political space during early modern Europe were intertwined with the rise of sovereignty and of the nation-state as the basic conceptual blocks of Westphalia (Murphy 2013: 2). As highlighted by some scholars, due to the mathematical and technological advances of the time, space was abstracted from its immediate social context and treated as blank and homogenous (e.g., Lefebvre 1991: 287; Elden 2005; Strandsbjerg 2010: 148), thereby creating the conditions for a novel understanding of territory, and in turn for the rise of the state (Strandsbjerg 2010:142; Murphy 2013: 2). The Earth's surface was divided into discrete territorial units, and within each demarcated unit, power became centralised, freed from external interferences (Murphy 2005; Elden 2010). This development led to the territorialisa- tion of authority. As Shah (2012: 62) remarks, 'as much as territory informed the modern State's spatial arrangement, the consolidation of political power in state sovereignty increased territory's political significance'. By abstracting sovereignty from the ruler, territory was understood as part of the body politic of the sovereign and, thereby became inseparable from the state (Shah 2012: 63).

The lessons that can be deduced from Agnew's account of the territorial trap have a historical, ideological, and epistemological dimension. Regarding the historical dimension, territory needs to be seen as a 'historically specific, incomplete, and conflictual *process*, rather than pregiven, natural, or permanent condition' (Brenner 2004: 43). Without this historical perspective, one runs the risk of reifying a particular and contingent territorial organisation as a universal and timeless one.

In respect of the ideological dimension, by accepting and taking for granted the spatial premises of state territoriality, one may stop interrogating and questioning its status and accept it uncritically (Taylor 2004). Given that historically, state territories were never bounded or exclusive, perceiving the state as a timeless and fixed entity is 'a politically mediated misrecognition' (Brenner 2004: 42). This has led the state, as an exclusive territory with well-defined boundaries, to become the pre-eminent form of 'production and distribution of political power, irrespective of [its] historical veracity' (Agnew 1999: 510; Brenner 1999: 51). The ideological dimension of the territorial trap is closely related to this implicit normativity. The territorial trap not only has to be understood as an analytical blindfold but also as providing a normative blueprint, however abstract, for how to organise space. As Shah (2012: 62) writes, 'the consolidation of political power in the state sovereignty increased territory's political significance'. Accordingly, even if we move away from the state nominally, territory remains the focus of political authority (Shah 2010: 353; Shah 2012: 60).

Finally, there is an epistemological dimension to the territorial trap. This was already suggested by Agnew (1994: 76–77) when he argued that, by idealising the territorial state, 'we cannot see a world in which its role and meaning change'. This aspect of the territorial trap is taken up insightfully by Brenner (1999, 2004), in what he dubs the epistemology of state-centrism. He argues that: (a) space is treated as a 'a static platform of social action that is not itself constituted or modified socially', a phenomena referred to as spatial fetishism (Brenner 1999: 45, 2004: 38); and (b) that state territoriality is perceived 'as a preconstituted, naturalized, or unchanging scale of analysis', referred to as methodological territorialism (Brenner 1999: 45).[3] Taken together, the particular and contingent territorial and scalar configurations

of the state become accepted and incorporated as 'a generalized model of sociospatial organization' (Brenner 2004: 40). Consequently, by not taking up the territorial trap, the territorial logic of the state is furthered tacitly along different scales (Elden 2010; Shah 2012: 69).

The trap in the international constitutional discourse

A careful reading of the international constitutionalism literature reveals that international constitutionalists operate within the territorial logic of the state. The territorial trap functions as an unstated assumption with which 'all sub- and supra-state processes are to be' compared (Brenner 1999: 46). The state is conceptualised as a self-propelled and self-enclosed entity, while the spatial logic of the state is extended to the globe. Its ontological primacy is entrenched by adding varied layers and levels on top of the state, and normative proposals tend to replicate state-based institutions.[4] In the rare instances that territory receives attention in the international constitutionalism literature, the debate tends to miss some important points. Either territory is treated superficially as it is asserted that it has lost its erstwhile prominence in ordering affairs and that the world is moving towards a post-territorial era, or its treatment has conceptual limitations. Preuss's (2010) attempt to disconnect constitu- tionalism from statehood is an interesting case of how territory is misrecognised.

Preuss (2010: 26) begins his account by correctly identifying the crucial importance of territory for the rise of the state and the novel forms of political authority. He distinguishes several aspects of the territorial dimension of sovereignty. The most important one, and from which everything else follows, is that sovereignty no longer relates 'to individuals but to the impersonal order of the territory', meaning that authoritative power does not depend on personal relations but rather on the spatial limits of a given territory (*ibid.*: 27). This can be viewed as moving from 'a social definition of territory [to] a territorial definition of society' (Soja 1971: 13). Secondly, Preuss (2010: 27) suggests that, because of this change, authoritative power requires only 'a minimum of communication regarding object and limits of the ruler's power', as the physical boundaries of territorial space provide an 'evident demarcation of subordination'. Lastly, given that social relations are no longer the primary determinant of the obligations and duties of a person, Preuss (*ibid.*: 27) argues that the rise of the territorial state allows for uniformity and standardisation of 'the scope and intensity of domination'.

Moving on to territoriality and constitutionalism, Preuss (2010: 42) then argues that the primary functions of constitutions can be disconnected from territory. From a historical point of view, he asserts that the rise of constitutionalism over the last centuries has signified a shift from territorially based sovereignty to popular sovereignty (*ibid.*: 35–39). In particular, he reasons that:

> [t]he modern constitutions which, since the end of the seventeenth (England) and the eighteenth centuries (France and the other monarchies of the European continent), replaced the absolutist systems of domination based upon the territorial character of the modern state, established an alternative mode of rule. They disconnected the idea of sovereignty from the control over a territory and connected it with the idea of collective self-rule of a multitude. (Preuss 2010: 37)

This conclusion is contestable. Modern constitutions are connected with the idea of collective self-rule *in* control of a territory. This is a subtle but significant aspect. Territory remains crucial for modern constitutions because the evolution of self-rule is intimately connected to a particular territorial demarcation. First, the rise of territory allows 'for self-reference in terms of an abstract geo-body independently of the actual rulers of the state' (Strandsbjerg 2010: 86). This abstraction allows for the multitude belonging to a territory to become 'the people', territory is the underlying constant rendering this transformation possible. So, while Preuss (2010: 37) argues that the ceding of power from the

absolutist prince to the absolute power of 'the people' led to a detachment of sovereignty from territory via constitutionalism, in fact, sovereignty remained territorial as territory constitutes the crucial factor in defining 'the people'. Thus, territory is not only essential for the definition of who belongs to a certain multitude, but it is also equally critical for the very existence and identity of the polity.

Regarding international constitutionalism, Preuss's argument for disconnecting constitutionalism from statehood is based on the intuition that constitutions are not 'intrinsically bound to the concept of the territorially bounded state', but to 'the idea of collective self-rule' (*ibid.*: 37). For Preuss:

> constitutions establish a political system which provides an institutional space in which the affairs of a multitude as such become the matter of collective will formation, the conditions under which the collective has supremacy over the individuals' sphere and the procedures through which individual obligations are created and their enforcement guaranteed. Moreover, they establish rules of accountability of those who act on behalf of the collective and finally stipulate rules about changing the rules of the constitution. (Preuss (2010: 43)

This leads him to posit that whenever a well-defined group of people establishes a regime through which it generates rights and obligations for its individual members, this group 'has constituted itself as a distinct entity by a constitution' (*ibid.*).

Although this description fits well with our understanding of the constitutions of states, Preuss (2010: *ibid.*) argues that his definition might incorporate political formations that 'do not incorporate territorially defined multitudes'. The evidence Preuss offers is scant, and when he does provide examples, they either do not apply well or operate to demonstrate the prevalence of territory. An example for the former is the case of voluntary associations, which, Preuss (*ibid.*: 32) argues, need 'rules on the formation of its corporate will, the creation of its various organs and their respective functions, and the determination of the rights and duties of its members'. While there is an appealing resemblance, the analogy to the constitution of a state does not hold as states are hardly 'voluntary' associations. This difference is important because the absence of an entry and exit option allows state constitutions to implement more ambitious values and rights.

Another example Preuss advances is the extension of constitutionalism to international law. The body of evidence of constitutionalisation that he provides is threefold. Firstly, he discusses the rise of obligations like *jus cogens* or *erga omnes*,[5] which are directed to the international community as a whole, entailing 'relationships of interdependence and mutual responsibility alien to the traditional conception of sovereignty Preuss (2010: 44). Secondly, Preuss refers to the radical changes of international lawmaking such as world-order treaties like the UN Charter and the UN Convention on the Law of the Sea. Thirdly, he discusses the trend towards a compulsory international judiciary, arguing that 'the institution of an independent compulsory judiciary would be a major step towards the constitutionalization of the international community' (*ibid.*: 45). As an example of this trend, he refers to the International Criminal Court.

The fact that Preuss is able to discuss the possibility of the constitutionalisation of the international legal order is telling insofar as the basis of legitimate authority in international law is grounded on territory. In particular, principles like territorial integrity, self-determination or *uti possidetis juris*[6] revolve around territory as the foundation of authority. Secondly, the changing notion of sovereignty does not alter the fact that the territorial model remains intact. While historically there have been substantive fluctuations in the conception of sovereignty, the political-territorial ideal is unchanged (Murphy 1996). Thirdly and most importantly, Preuss transfers the territorial logic of the state onto the globe, the boundaries being the actual confines of Earth. He envisages the UN Charter as a piece of worldwide, international legislation, and argues for an 'independent compulsory judiciary' to complete the constitutionalisation of international law.

Taken together, Preuss proposes another territorial layer added to that of the state. Such an extension and

reinforcement of the territorial logic is widespread in the international constitutionalism literature, well beyond Preuss. In addition to this territorial layer on top of the state (e.g., Fassbender 1998; Cottier and Hertig 2003), the state is consistently conceptualised as a self-propelled and self-enclosed entity (e.g., de Wet 2006; Peters 2006), and normative proposals tend to replicate state- based institutions (e.g., Habermas 2008; Cohen 2012). The next section will show how these conceptual biases may severely affect the international constitutionalism project and its aspiration to overcome the state.

Moving beyond the state?

Uncovering the territorial thinking underlying the international constitutional literature allows us to approach its debate and goals from a new angle. One of the most important and contested ideas in this literature concerns the detachment of constitutionalism from its state origins. I would argue that the way we approach and perceive constitutionalism is deeply influenced by its historical relation to the state. This influence has a practical dimension and an epistemological dimension.

The practical dimension, well-recognised in the literature (e.g., Werner 2007), refers to the fact that the functioning of international constitutionalism is assessed in terms of its relative performance in comparison to its state counterpart. As considered above, international constitutionalists argue for the extension of constitutional principles, such as human rights, democracy, and the rule of law, to the international realm (see Walker 2002: 335; Kumm 2009: 290ff; Preuss 2010). As these principles have 'undergone centuries of development and refinement within the context of the

state' (Walker 2003: 30), it is concluded that the state must be the implicit standard according to which a normative assessment can be made (Buchanan 2006: 6; Werner 2007). International constitutionalists recognise this issue as part of path dependency,
but argue that the longer that constitutional practices exist beyond the state, the less the state itself will be needed for normative guidance (Walker 2008; Kumm 2010).

Even if we accept the idea that the state's influence on the evaluation of constitutionalism beyond the state will eventually fade away, I would argue that this
does not necessarily imply that constitutionalism will break away from the state. Owing to the territorial logic embedded in the constitutionalist literature, the state's influence on constitutionalism has a second, maybe more important epistemological dimension. On the one hand, constitutionalism as a discourse shapes our under- standing of the 'political organization of space' (Soja 1971). On the other hand, the modern understanding of space influences deeply the manner in which politics in general and constitutionalism in particular are organised spatially (Strandsbjerg 2010: 149). Specifically, our spatial perception of the world is very much shaped by its territorial partition. As the state is intimately tied to territory, this suggests that the relationship between constitutionalism and the state is not one of simple historical coincidence but may be rather more intricate. Accordingly, even if, as a matter of logic, constitutionalism can be detached from the state, its influence is profoundly felt because of the shared territorial epistemology.

The existing link between constitutionalism and territoriality can be clarified by discussing some of the central components of constitutionalism. As a first example, one can consider the case of the rule of law. Modern law, from which the rule of law emerges, presupposes and operates with the state territory as its spatial background.
The rule of law, as the name suggests, 'is impersonal because its authoritative power is independent of any particular characteristics of the addressee and therefore can be imposed upon everyone within the territory' (Preuss 2010: 30). Another central tenet of constitutionalism is democracy. As Agnew (2009: 97–99) notes, democratic theory necessitates the fiction of an absolute popular sovereignty within a territorially demarcated popular community in order to operate. Without the constitutive role of sovereignty, democracy cannot function, as it does not encompass any criteria of self-application. 'Sovereignty defines

political spaces and posits that there is only one legitimate political authority within any such space' (Goodhart 2001: 256). This notion of sovereignty is very much linked to exclusivity but also to territoriality (*ibid.*). Finally, human rights, a case frequently referred to in the literature as a positive example of de-territorialisation, shares some similar characteristics. While it is true that human rights seem to offer the potential for escaping territoriality, there are limits to this pursuit. In particular, while some core human rights, such as the right to life and to physical integrity, apply to all humans regardless of their territorial positioning, there are other rights that critically depend on citizenship, which in turn is linked to the existing territorial communities (Kesby 2012).[7] Furthermore, the actual institutional structure of human rights protection, such as the ECHR or the Inter-American Court of Human Rights, relies heavily on the state and its territory. As de Feyter (2005: 1) maintains:

> [i]nternational human rights law developed at a time when states monopolized international relations. The international human rights system was similarly state- orientated. Domestic states carried human rights obligations *vis-à-vis* their inhabitants, but not *vis-à-vis* anyone else. The entire system relied on connecting every individual to a responsible state that had the capacity to deliver protection.

The decision of the US Supreme Court in *Kiobel vs Royal Dutch Petroleum* is quite paradigmatic in terms of how human rights are tied to the territorial space of the state. The Supreme Court ruled that the US jurisdiction could not be established to litigate human rights violations of multinational corporations that had no territorial connection with the United States. This decision highlights the continuing importance of territory for the protection of human rights. Thus, as in the case of democracy, human rights might not be conceptually linked to the territoriality of the state as a matter of necessity, but due to conceptual and practical difficulties it is unclear how eligibility might otherwise be demarcated. Taken together, these examples demonstrate that the entanglement between constitutionalism and territoriality may be more subtle than it appears at first glance.

This conceptual entanglement is reflected in the institutions to which the international constitutionalism literature frequently refers. The most prominent example is the discussion surrounding the constitutionalisation of the EU. The EU has well-recognised constitutional features and is sometimes described as the first 'post-modern institution' (Caporaso 1996), unique in its institutional character and scope. However, the evolution of the EU hardly seems to amount to a radical departure from the state or its particular territorial logic. Although there exist some non-territorial elements such as the open method of coordination or comitology,[8] the EU clearly has a well-confined territory, and a number of state-like institutions such as the parliament, the judiciary, and so on. This evokes the impression that the EU, ultimately, tends to re-enact the state on a larger scale rather than overcoming it. This is neatly summarised by Murphy (1996: 106–07):

> The tendency to think about the European Union in traditional state-based terms is evident in many recent assessments of the integration process. Most commentators evaluate the success or failure of the process in terms of the degree to which powers are being transferred from state governmental and economic institutions to
> the central decision-making bodies of the European Union. […] What lies behind this approach is the assumption that the political leaders of the European Union are, or should be, engaged in 'state building'. The critical question for the Union is assumed to be whether the Member States are willing to surrender increasing
> sovereignty to centralized European Union institutions. Such an approach necessarily posits the European Union as a super-state rather than as a new type of political framework.

A second prominent example from the international constitutionalism literature is that of the United Nations, which, together with its charter, is sometimes perceived to evidence the potential to emerge as the constitution of mankind (Fassbender 2009). The UN Charter not only reinforces territoriality directly by cementing the territorial integrity of the state (Article 2), but, more importantly, takes a fixed territory, namely that of the world, as its jurisdiction. Thus, the UN also has a territorial basis. In addition, the organisational features of the UN closely resemble the institutional architecture of the state: the Security Council represents the

executive, the General Assembly functions as the legislature, and the International Court of Justice operates as the judiciary. Both examples demonstrate that, in each instance where international constitutionalism has gained some traction, territory continues to play an important role.

Coming back to the discussion of whether or not it is possible to extend constitutionalism beyond the state, the previous argument allows us to examine the question from a new angle. While nominally it is possible to transplant constitutionalism from the state to the international realm, the question arises as to whether the territorial logic underlying international constitutionalism implies that the state in its 'essence' is also brought along. This would create a tension right at the heart of the international constitutionalists' project, which aspires to de-centre and to demystify the state. In particular, international constitutionalists stress the significance of the global transformation altering our conventional modes of comprehending the world, and argue that a state-centred view of how social life is politically and legally organised is futile. As an example, Cottier and Hertig (2003: 297) posit that the state framework 'fails […] to offer a useful analytical tool in a world where the boundaries between domestic and international law have been progressively blurred, and where new polities have emerged which challenge the states' exclusive legal and political authority'. The epistemic dimension of the problem brought to the fore in this paper has been hinted at occasionally, for example, by Walker (2008: 540), who suggests that state-centred constitutionalism has an unduly epistemic influence. However, the territorial roots of this influence have been overlooked thus far. As a result, international constitutionalism is still entrenched in epistemic state-centrism, reproducing and reinforcing the rationality of the state at higher levels (Elden 2005).

A way forward?

To free international constitutionalism from the logic of the state, it is important to recognise that its conceptual ambition contradicts to some extent its effective institu- tional design. In particular, virtually all central examples of international constitution- alism including those of the UN, the WTO and the ECHR, presuppose an authority in control of a bounded territory, ideally that of the world. This falls short of the goal of extending constitutionalism to the international realm insofar as it does not entail any radical conceptual change, but rather a replication, however modified, of institutions and organisations already found at the domestic level. As such, international constitution- alism implicitly preserves the *status quo*. In order for the international constitutionalism project to succeed, it is vital to tackle the existent territorial biases and the resulting epistemological state-centrism pervasive in the current debate. In Loughlin's (2009: 2) own words, international constitutionalists 'need to establish a coherent conceptual framework that can make sense of this new construct they seek to build beyond the world of the state'. This conceptual framework needs to provide answers to the question of how to be operative and meaningful without a territorial basis.

A starting point for disentangling constitutionalism from territory would be a thorough analysis of the territorial history of constitutionalism. While a historical investigation may not provide us with conclusive answers to the question of how the separation of constitutionalism and territory can be achieved, it might change the structure of the argument 'by directing attention to a new set of relevant questions' (Geuss 2008: 68). In particular, a better understanding of the circumstances under which certain features of constitutionalism have evolved might help us to distinguish conceptual relations between territory and constitutionalism from those that are purely coincidental. As Geuss (2001: 10) warns us, concepts have a history, and while history might not strictly circumscribe their application, it 'does affect to a very significant extent how easy or how difficult it will be to modify them, changing their meaning and reference in one direction rather than another'.

Taking a historical understanding as a starting point, one possible way forward could be an extension of Anderson's (2012: 380) account of 'the politics of constitutional knowledge'. In order to surpass the blindspots of Western constitution- alism, Anderson proposes to conceive of constitutionalism as an 'object of knowledge'. That is, rather than perceiving constitutionalism as a 'real object', Anderson argues for

abandoning pre-fixed conceptions and approaching constitutionalism in 'more open and contingent terms'. To enrich our notion of constitutionalism, he suggests that we pay attention to how constitutionalism is being redefined in the global South (*ibid.*: 381). As such, rather than taking our conception of constitutionalism for granted, Anderson (*ibid.*: 378) argues that we should move it to the centre of the debate. This point is very much related to my proposition of shifting attention to the epistemological side of constitutionalism in general and emphasising its underlying spatial logic in particular.

In a different context, Shah (2012: 71) reasons that the abandonment of territorial thinking requires an epistemological re-orientation. She advocates a novel concep- tion of globalisation, whereby the global is no longer treated as a mere extension of state territoriality, but instead conceptualised using a distinctive epistemological understanding of space. In particular, Shah (2012: 71) interprets the 'global' as a 'constitutive spatial logic' of the trends transforming our conventional notions of authority, law, politics, and legitimacy. She argues that such a change in interpretation may help us to overcome the territorial trap surrounding globalisation. For international constitutionalism, this amended notion of the global may provide a more appropriate lens through which current challenges can be assessed and understood. Taken together, a fruitful step forward in the international constitutionalism discourse could be an epistemological re-orientation of our perception of constitutionalism, allowing us to uncover new logics and to move on to a de- territorialised constitutionalism.

Conclusion

The purpose of this paper is twofold. Firstly, and most importantly, I have argued that the deep entrenchment of territorial thinking in the international constitu- tional discourse casts doubt on the claim that international constitutionalism is overcoming the state. By not having paid enough attention to the complex relationship and the shared territorial logic between constitutionalism and the state, international constitutionalists have inadvertently reinforced the normativ- ity of the state as the primary mode of constitutional organisation. If international constitutionalists are serious about their aspiration for overcoming the state rather than reproducing it at different levels, the relationship between constitutionalism and territory requires a systematic re-examination. The second goal of this paper was to show the advantages of adopting a critical perspective on the geography of international law. Space, territory, and boundaries are essential elements for our understanding of the social world, and international law plays a relevant role in how those concepts evolve. Critically analysing the geographical aspect of international law may, therefore, allow us to better grasp the complexities of the international legal order.

Notes

1 The reasons, however, are different. One quick possibility is functional considerations. The collective nature of many issues like global warming, international terrorism, free trade, or peace and security means that states alone cannot act but that it is necessary to act collectively. This is heightened with globalisation and the accompanying technological changes.

2 Powell does acknowledge the case of Syria. However, she simply mentions the case in a footnote and argues without much justification that the Syrian case merely represents a 'lingering resistance to this shift' (Powell 2012: 298, n. 3).

3 Brenner (2004: 38) introduces also a third dimension, dubbed *methodological nationalism*, referring to the treatment of the national scale as the basic ontological level of social relations.

4 The end of this section provides a number of instances in the literature, exemplifying each of those points.

5 *Jus cogens* norms are peremptory norms that cannot be derogated and that all states are obliged to observe. *Erga omnes* norms are those whereby the violation of a norm can be denounced not only by the state that suffered the violation, but also by any other state. The key difference between them is that the latter norms can be modified or altered, whereas the former cannot.

6 The principle, whereby, newly formed states need to have is that those borders that they had before become independent.

7 Take, for example, the recent reform of the health system in Spain with the Royal Decree-Law 16/2012, whereby illegal immigrants cannot have access to the national health system except for urgent cases.

8 Open method of coordination refers to an intergovernmental procedure whereby, instead of a binding law, the EU, in order to further certain objectives within its member states, relies on soft-law mechanisms like guidelines or best practices. Comitology

refers to a process, whereby the EU law is modified or adjusted within diverse committees.

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