

# ‘We the heads of state ...’: Pitfalls of global constitutional practice

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**Abstract:** Constitutions are social and historical artefacts that take part in the government of humans. Based on a comparison of how contemporary ‘global’ and historical ‘local’ constitutional documents establish power relations between ‘humans’ and their ‘government’, this article suggests that both types of documents involve different constitutive logics. Global constitutional documents create a ‘new normativity’ – a reversed constitution – that turns the historical relationship between *pouvoir constituant* and *pouvoir constitué* on its head. Such documents shift the primary responsibility for human rights from governments to humans. Research in the academic field of global constitutionalism omits this constitutional reconfiguration. By offering a more historically sensitive and reflexive account of constitutionalization, the field of global constitutionalism can realize an as yet unexplored critical potential.

**Keywords:** constituent power; constituted power; global constitutionalization; heads of state; history; practice

## I. Introduction

We, the Heads of State and Government and High Representatives ...  
(GCM 2019, A/RES/73/195)

From a constitutionalist perspective, these opening words of the Global Compact for Safe, Orderly and Regular Migration (GCM) strike a discordant note. They are out of tune with ‘We, the People’. But the GCM is only one recent example of a fundamental reconfiguration of traditional constitutional patterns.<sup>1</sup> This article identifies a critical shift in constitutional practice at the global level from the people to the executive. Compared with

<sup>1</sup> Documents of the UN General Assembly (UNGA) have used such a wording since the 2000s. See, for example, the United Nations Millennium Declaration and the 2030 Agenda for Sustainable Development Declaration.

modern constitutional texts from the eighteenth century, more recent global constitutional landmarks – such as the United Nations Charter (UN Charter), the Universal Declaration of Human Rights (UDHR) and human rights treaties, like the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) – follow a different logic. These documents reverse the historical relationship between *pouvoir constituant* and *pouvoir constitué*. Yet academic treatment of global constitutionalism has neglected this transformation.

To address this research gap, this article advances a comparison between historical ‘local’ and contemporary ‘global’ constitutional documents.<sup>2</sup> It focuses on how such texts constitute the relations between *humans* and their *government*, and argues that the similarities in the texts hide a critical shift between *pouvoir constituant* and *pouvoir constitué*. Local constitutions and global constitutions involve different, and indeed opposite, constitutive logics. This suggests that these categories of documents belong to two distinct constitutional practices, and that global constitutional practice follows a historically novel pattern. Global constitutional practice turns the relationship between constituent and constituted power upside down, reversing the normative pattern of eighteenth-century constitutional practice. This inversion, in which the primary responsibility for protecting human rights is placed on humans rather than governments, is referred to as the *reversed constitution*.

This article stresses three particular dislocations of the human–government relationship.<sup>3</sup> First, in the eighteenth century humans held governments accountable for recognizing and respecting ‘the rights of man’ (i.e. humans). Today, governments assign the responsibility for the recognition and respect of such rights to humans. Second, in the eighteenth century humans established governments based on their rights, which included the right to abolish governments encroaching on these rights. Today, governments stipulate that humans exercise human rights and grant themselves exceptional provisions. Finally, in the eighteenth century humans declared their rights vis-à-vis governments through the medium of representatives who had been authorized for this task. Today, governments authorize themselves to declare human rights and tell humans what these rights imply. Thus, humans and governments have become decoupled at the global level. This decoupling, as this article will show, is accompanied

<sup>2</sup> Following scholarship on globalization, the ‘global’ and the ‘local’ are not considered to be mutually exclusive (e.g. Sassen 2006).

<sup>3</sup> This enumeration offers a rather ideal-typical contrast.

by a replacement of politics with law and development as the means of allowing humans to seek their rights.

The findings support the proposition that, at the global level, ‘a specific type of constitutionalism has gained priority, and perhaps exclusivity, over the principle of democracy’, which deviates from ‘the historical development’ (Tully 2002a: 212). They also illustrate how important historical contrast is for establishing a critical view of the present global constitutional practice. This article draws a comparison between the UN Charter, the UDHR, the ICCPR and the ICESCR, as global constitutional documents, and the Virginia Bill of Rights (VBR), the Declaration of Independence, the Constitution of the United States of America (US Constitution), its Bill of Rights, the Declaration of the Rights of Man and the Citizen (DRMC) and the first French Constitution (FC), as eighteenth-century constitutional documents. These texts are analysed as historically situated statements of the relations between humans and their government. How they establish this relationship (as a power effect) shapes the historical space for constitutional imagination and conduct. The focus is inspired by work in fields like critical legal studies and critical international relations scholarship (e.g. Bartelson 1995; Constantinou 2013; Kennedy 2007), specifically the relationship between a Foucauldian notion of government as ‘a “conduct of conduct”’ (Foucault 1994: 341) and ‘the politics of rights’ (Golder 2015).<sup>4</sup>

This article first provides an overview of prominent accounts of the constitution in global constitutionalism. It argues that more debate is needed from a historical perspective on the self-transformative potential of the constitution. Even accounts that view the constitution as a social process tend to see constitutional continuity rather than contingency. The article then proceeds to its main analysis, and explores the different patterns of eighteenth-century constitutional practice and global constitutional practice with regards to human-government relations. This analysis suggests that eighteenth-century and global constitutional practice involve distinct constitutive logics that are difficult to reconcile. The conclusion calls for scholars to undertake further comparative historical analysis of constitutional practice since the eighteenth century, with particular sensitivity to modes of governance.

<sup>4</sup> For a political-theoretical argument for such an approach, see Tully (2002b). James Tully’s work distinguishes between constitutions, which are fixed sets of rules, and constitutionalism, which is an open-ended process of dialogue and negotiation between members of a democratic society over the constitutive practices and norms of that society. Wiener (2008) develops the implications of this distinction between constitutions and constitutionalism for global politics. I thank Antje Wiener for pointing me to Tully’s work.

## II. The constitution in global constitutionalism

Global constitutionalism is ‘an interdisciplinary ... research field’ (Wiener *et al.* 2012: 6), which responds to the challenges of globalization as well as the related transformation of the nation-state and law (e.g. Dobner and Loughlin 2010; Klabbers 2009; Wiener *et al.* 2012: 6). Cutting across disciplines such as international law, international relations, political theory and sociology, the field addresses an emerging ‘constitutional quality’ in a previously ‘non-constitutional global realm’ (Wiener *et al.* 2012: 5). Thus, concepts of the constitution structure the debate in the field. Although some accounts are sensitive to the historical contingency of the constitution, these accounts do not consider how the constitution is being remade at the global level. This article argues that scholars must consider constitutional practice with greater historical sensitivity to fully grasp how global constitutional practice compares with past constitutional practice.

Many accounts observe the topic of global constitutionalization through the lens of an ideal concept of the constitution. In doing so, these accounts follow a modern constitutional tradition, traceable to the eighteenth century (e.g. Fassbender 2009a, 2009b; Gardbaum 2008: 766–67; Grimm 2010: 5, 7–8; Kumm 2009: 261, 315; Paulus 2009: 90, 90 n 81, 92; Peters 2006: 584–85; Peters 2009c: 346; Preuß 2010: 37; Wahl 2010: 220).<sup>5</sup> While protagonists debate sites of global constitutionalization (e.g. Fassbender 2009a: 137, 145–47; Gardbaum 2009: 256–57; Macdonald 1999; critical Dunoff 2009), or argue whether or not to apply constitutional semantics to the global level (e.g. Paulus 2009: 108; Peters 2009a: 154–57, 198, 2006: 585; critical Grimm 2010: 21–22; Wahl 2010), and if so how (e.g. Besson 2009; Dunoff and Trachtman 2009: 10; Kumm 2009: 261–66; Preuß 2010; critical Klabbers 2004), the corresponding vision of the constitution remains relatively fixed. The constitution establishes, organizes and limits (legitimate) political power based on legal norms (e.g. Fassbender 2009a: 139; Gardbaum 2009: 233–34; Kumm 2009: 267; Paulus 2009: 75; Peters 2009c: 349; Preuß 2010: 43). Moreover, a canon of core constitutional principles exists that includes separated powers, checks and balances, the rule of law, human rights, state rights and democracy (Paulus 2009: 92; see also Peters 2006: 582–83).<sup>6</sup> Many accounts also seek to adapt the idea that it is the people, as the *pouvoir constituant*, who are the origin of the

<sup>5</sup> Ernst-Ulrich Petersmann (1997: 422, 426, 428) assumes a history of several thousand years. Usually, a modern constitutional tradition is associated with the American and French Revolutions, though some include late-seventeenth-century England. In contrast, David Armitage’s (2007) global history of declarations of independence also mentions, for example, Haiti.

<sup>6</sup> Accounts can invoke such principles selectively or emphasize the constitution’s basic function.

constitution as the highest law (e.g. Besson 2009: 396–99; Gardbaum 2008: 756; Gardbaum 2009: 241; Peters 2006: 599; Peters 2009a: 178–79; critical Kumm 2009: 272). No doubt such accounts have great appeal – for example, where they address legitimacy deficits resulting from a transfer of political authority to the global level (e.g. Besson 2009: 384; Kumm 2009: 286–88, 296–301; Peters 2006: 592; Peters 2009b: 263–64; Peters 2009c: 351). However, analytically, they assess the constitutional present by the standards of the past.<sup>7</sup> This assumes modern constitutional continuity, and omits that the constitution and its normative core are made and remade (or at times unmade). Thus, the *actual historical practice* of the constitution and its *potential for self-transformation* are sidelined and under-estimated.

This problem is addressed in more reflexive accounts that consider the constitution in social context (e.g. Brunnée and Toope 2017; Gill and Cutler 2014; Kennedy 2008; Teubner 2012; Thornhill 2012, 2016; Walker 2007; Wiener 2008). While some of these accounts stress the interaction of individuals who interpret legal norms,<sup>8</sup> others point to language, grammar or communication as a constitutive force.

Accounts that foreground intersubjectivity view the constitution as the product of socially (re-)produced meaning – for example, context-dependent subjective interpretations (Wiener 2008: 4) or ‘shared understandings’ within ‘communities of legal practice’ (Brunnée and Toope 2017: 170, 174). Yet, although the constitution is conceived as a social phenomenon, the intersubjectivists leave the full analytical potential of this insight untapped. Contrary to their aim to explain the constitution by its social practice, such accounts still draw on a (pre-)configured idea of what the constitution is. This includes the view that certain principles, such as the rule of law, are required for a constitution (Brunnée and Toope 2017: 175–77)<sup>9</sup> or that such principles indicate the (formal) constitutional character of treaties agreed upon by governments (Wiener 2008: 10–11, 21–23). While the making of the constitution is understood by researchers as an ongoing social process, the standard for what comprises a constitution remains outside that social process. Even if the historical situatedness and contingency of this standard are commonly acknowledged, they are not further explored.<sup>10</sup>

<sup>7</sup> Paradigmatic is Bardo Fassbender’s (2009b: 285) view that ‘an established legal notion such as “constitution” is malleable only to a certain degree’, even if ‘the constitutional idea in international law must be understood as an autonomous concept rather than an extrapolation from national constitutional law’.

<sup>8</sup> For an overview of constructivist research in global constitutionalism, see Wilkens (2017).

<sup>9</sup> On the rule of law as ‘a practice of legality’, see Brunnée and Toope (2011). For a critique of the theory’s incorporation of LL Fuller’s criterion of legality, see Liste (2011: 592).

<sup>10</sup> For an intersubjective account see Kratochwil (2018).

Accounts that stress the constitution as an effect of language, grammar or communication have gone further. Notably, Chris Thornhill's (2016) sociological history of constitutions observes a shift in the grammar of rights from a national to a human-rights frame since 1945. In this new stage of constitutional evolution, legally (re-)produced (human-rights) norms – for example, international and national court decisions – replace constituent power as the basis of legitimacy and functional capacity (Thornhill 2016: 4, 12, 100–01). Yet, by assuming this shift to be a coherent adaptation of the modern political system to rights-based pressures for inclusion, Thornhill's history domesticates the corresponding remaking of constitutional governance (2016: 8–9, 11–12, 28–30). Although the perspective highlights actual historical practice and its historical contingency, this history conveys a narrative of constitutional continuity and indeed necessity by privileging functional considerations over constitutive logics.

Consequently, the sociological perspective of reflexive accounts points to the constitution as an actual historical practice and raises the practice's historical contingency. Yet such accounts assume modern-constitutional continuity rather than historical difference to analyse global constitutionalization. As Thornhill's history also implies, the current global frame and form of the constitution involve a rather substantial change. Research therefore needs to continue unlocking the field of (contingent) historical constitutionalization across time and scale to better grasp the global-constitutional present in historical view. As more reflexive accounts of law suggest, by confronting us with the contingent historical 'limits of our imagination', historical contrast 'provides a sense of the possibilities that could exist today' (Koskeniemi 2001: 5).<sup>11</sup> In this vein, Martti Koskeniemi (2007: 22, 32, 14, 15) also contrasts constitutionalism as a, 'Knowledge of the law' entailing a 'critical attitude to law' and a moral politics with an increasingly prevalent 'managerial jargon of "legitimate governance"', which reduces law to the interests of 'rational egoists'.<sup>12</sup> Applying such a contrast to global constitutionalization can open a historical field of contingent constitutionalization, allowing comparisons of global constitutional practice. The next section demonstrates how the constitutive logic of constitutional practice has been reversed through a comparison of global and historical constitutionalization.

<sup>11</sup> In *The Gentle Civilizer*, Koskeniemi (2001: 5) uses this method to revive a normative legal position and struggle from which international lawyers still 'could ... learn'.

<sup>12</sup> As a legal vocabulary and mindset, constitutionalism implies a (Kantian) 'moral-political project' of universal freedom and the rule of (moral) law, and thus politicises law (Koskeniemi 2007: 32). Somewhat ironically, Koskeniemi's example for a persisting constitutionalism is the Study Group on the Fragmentation of International Law of the International Law Commission, chaired by himself (2007: 21).

### III. Historical and global constitutional practice: Then and now

The remainder of the article explores the historicizing potential of a reflexive account that contrasts constitutional practice. It compares constitutional documents as historically situated statements of the relationship between humans and their government. The comparison suggests that global constitutional practice in the twentieth century reverses the constitutional practice of the eighteenth century.

The comparison, as indicated above, uses the Virginia Bill of Rights, the Declaration of Independence, the US Constitution, the US Bill of Rights, the Declaration of the Rights of Man and Citizen and the first French Constitution on the one hand, and the UN Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights on the other. In addition to being emblematic constitutional monuments, these texts also are taken to represent constitutional continuity, given their similarities – such as the UN Charter's reference to 'We the Peoples' (e.g. Fassbender 2009a, 2009b). However, the same or similar words can have quite different implications. This depends on the modality and the practical-textual context of their utterance (Foucault 1972: 101–05). Constitutional documents engage in founding a government of humans (Derrida 1986). In so doing, they follow a pattern that, as an (inter-)textual power effect, circumscribes the space for the constitution as an art of government, as a way of thinking, and of conduct (see Foucault 1980: 112–13; Foucault 1991: 78–82; Gordon 1980: 236–37). Furthermore, the selected documents establish a government by referring to both a constitutional and a global frame. As David Armitage's (2007) global history of declarations of independence suggests, the Declaration of Independence in the eighteenth century 'inaugurated a genre of political writing' – that is, 'a distinct but repeatable structure of argument and literary form' (2007: 13–14). This genre was globalized (2007: 3–5). The Declaration of Independence contributed to the conception and the making of a world of states, and was itself situated within a global web of social exchange (2007: 3–4, 10–23). As Armitage (2007: 14) reminds us, however:

Genres are born. They break apart and recombine with elements of other genres. Sometimes they die. Like the ideas they contain, they are both movable and mutable, and they do not recognize national borders.

To establish whether the documents are similar or different, this analysis focuses on how the relations between 'humans' and their 'government' are constituted. Such a comparison may seem trivial. Following the modern constitutional tradition, the constitution as a subordination of governments

to the will of the people may seem self-evident; however, this has never been the case. How constitutions govern also has to do with the power operating in and across such texts. The focus on the establishment of the relations between ‘humans’ and their ‘government’ can, of course, only be the starting point.

The comparison emphasizes the documents’ opening and closing passages, but uses further passages for clarification. Following Jacques Derrida and Cornelia Vismann, the opening and closing passages hold important insight. Derrida (1986: 8) reveals the intricate relationship between the ‘instituting act’, such as a constitution, and its ‘actual signer’, such as ‘the people’. Vismann (2011: 39–40) argues that preambles situate law within a historical context and aim to govern the interpretation of law, but thus ‘contaminate’ legal claims to timeless generality with historicity.<sup>13</sup> To trace constitutional documents as statement-events in their space and time, the presentation proceeds chronologically. The next section elaborates on the pattern of the eighteenth-century constitutional documents, starting with the constitution of humans and their relationship to their government. This provides the basis for comparison of such a pattern with the twentieth-century constitutional documents, which is explored in the second step.

### *Rights as the basis and limit of government: Eighteenth-century constitutional patterns*

The Virginia Bill of Rights describes itself as, ‘A Declaration of Rights made by the representatives of the good people of Virginia’. But these rights predate this act.<sup>14</sup> The Virginia Bill of Rights attributes rights to the Virginian people and ‘their posterity’ as human beings by virtue of nature.<sup>15</sup> It states the Virginian people ‘are by nature ... free and independent and have ... inherent rights’ (VBR: Section 1). These rights relate to ‘the enjoyment of life and liberty’ and the means necessary to this end – namely, the pursuit of ‘property ... happiness and safety’ (VBR: Section 1). Because rights originate in nature, the Virginian people generally ‘cannot, by any compact, deprive’

<sup>13</sup> The First Commission, for example, following Hans Kelsen (1946: 143, see also 142), understood the UN Charter’s preamble as informing the treaty’s interpretation and as having ‘the same binding force’.

<sup>14</sup> On the undecidability between the constative and the performative, see Derrida (1986: 9–10).

<sup>15</sup> For a discussion of the exclusion of women, slaves and native Americans in US constitutional history, see Lepore (2018). For a discussion of slavery in the context of the French Revolution and constitution, see Covo (2015). The FC distinguishes between citizens and active citizens. I thank one anonymous reviewer for pointing me to the issue of exclusion and Lepore’s book. Given its focus and limited space, this article cannot dwell on the constitution of ‘humans’. This is an important topic for future research.



future generations of these (VBR: Section 1). When humans form a society they, as the people, are – and remain – the source of 'all power', while any power exercised over them must be to 'their common benefit' (VBR: Section 2, 3; see also Section 5, 15).<sup>16</sup>

The Virginian people, 'their posterity' and their 'representatives' all appear as having and rightfully invoking such rights. The Virginia Bill of Rights describes the representatives as 'assembled in full and free convention'. This implies that they do so as a complete body and of their own accord, which resonates with the principles of human freedom and independence and the right to enjoy 'life and liberty' (VBR: Section 1). However, the representatives relate to the Virginian people as a means to an end. As humans, the people, have the right to use means suited to attain 'life and liberty' (VBR: Section 1), the representatives' 'representativity' (Derrida 1986: 10) deriving therefrom.

Finally, the Virginian Bill of Rights' opening passage determines that the rights declared within provide 'the basis and foundation' for 'government'. Any government over the Virginian people therefore must originate from and express these rights. The government is distinct from the people and their descendants. Its representatives are elected by the people 'in assembly' that 'ought to be free', all having 'the right of suffrage' – provided that they are 'men' and display 'permanent common interest with, and attachment to, the community' (VBR: Section 6; see also Section 3, 5). Government representatives also differ from the representatives who declare the Virginia Bill of Rights. In any case, the opening passage states that it is the rights of the Virginian people, their future generations and their (current) representatives that from that point onward are at the basis of any government. After the Virginia Bill of Rights has been declared, 'government is, or ought to be, instituted for the common benefit, protection, and security' and done in such a way as to inhibit oppressive tendencies of 'the legislative and executive powers of the state' (Section 3, 5; see also Sections 7–9, 12, 13, 15–16). Crucially, in relation to 'any government ... found inadequate or contrary to these purposes', the Virginia Bill of Rights gives the Virginian people – precisely, their majority – 'an indubitable, inalienable, and infeasible right to reform, alter, or abolish it' (Section 3).

What characterizes the Virginia Bill of Rights is thus a constitution of humans as being 'by nature equally free and independent' – that is, they are individuals – and possessing rights (Section 1; but see fn 15). These rights and attributes therefore appear as predating the Virginia Bill of Rights while also being possessed by humans as 'the people, nation, or community'

<sup>16</sup> 'That all power is vested in, and consequently derived from, the people; the magistrates are their trustees and servants and at all times amenable to them' (VBR: Section 2).

(Section 3). All this establishes the people, as humans, as the basis of any governing authority exercised over them. Any act claiming to represent or govern the people must originate from their rights as humans. Such an act is thus narrowed to upholding these rights and is limited by them. Only in this way can this act be coextensive with – that is, indistinguishable from – the people and their exercise of their rights. At the same time, the people, as humans, can resist and can replace any such wrongful act, by virtue of their rights.

The Declaration of Independence displays the same pattern. Its concluding passage states: ‘We, ... the Representatives of the united States of America, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare’ the Declaration of Independence. These representatives therefore act on behalf of the people’s will and at their behest. The people are associated with ‘these [c]olonies’ that form ‘the united States of America’ and are qualified as ‘good’ (Declaration of Independence). Moreover, the Declaration of Independence attributes rights to the people as human beings. These rights are ‘unalienable’ and include ‘Life, Liberty and the pursuit of Happiness’ (Declaration of Independence). The role of ‘[g]overnments’ is to ensure that humans enjoy such rights (Declaration of Independence):

We [the representatives] hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. – That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. – That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute a new Government, laying its foundation on such principles and organizing its Powers in such form, as to them shall seem most likely to effect their Safety and Happiness. (Declaration of Independence)

The rights of humans thus oblige the government in particular to enable humans to exercise these rights. Yet these rights also impose a duty on humans themselves. Humans must defend their rights against a government that ‘becomes destructive’ of its responsibility ‘to secure these rights’ (Declaration of Independence). However, ‘prudence’ demands that humans do not resort hastily to resistance and change and turn to such means only in grave circumstances (Declaration of Independence). Given humans’ rights, a government exercises ‘just powers’ only based on ‘the consent of the governed’ (Declaration of Independence).

The Declaration of Independence traces the origin of humans’ rights to God, as the ‘Creator’. This foundation lends weight to these rights, as God speaks both the truth and the law (Derrida 1986: 12). It also bolsters the people’s assertion of these rights via representatives, as well as the claim that the authority of both the current representatives and the representatives of any future government depends solely on the people’s will, whose authority derives directly from God.

As Derrida (1986: 11–12) notes, by ‘appealing to the Supreme Judge of the world’, the Declaration of Independence invokes another authority – ‘this ultimate signature’ – in addition to the people and the representatives they have authorized. On Derrida’s (1986: 11) reading, this invocation guarantees ‘the whole game’, as God ‘founds natural laws’, and certifies ‘the rectitude of popular intentions, the unity and goodness of the people’. By appealing to supreme authority, the representatives also ask God to punish them if their own ‘intentions’ (Declaration of Independence) were dishonourable. In any case, the appeal signals to the people that the representatives are trustworthy, while indicating to the British Crown that resistance is in vain. The combination of this appeal and the absence of a divine objection to it both supports the representatives’ authority to act ‘in the Name of’ and ‘by Authority of the good People’ and lends the represented people integrity (Declaration of Independence). This divinely seals the Declaration of Independence.

By invoking God, the Declaration of Independence does not follow a pattern different from that of the Virginia Bill of Rights. In comparison, it solely explicates God as the source of humans’ rights.<sup>17</sup> This underscores the truth of such rights and imposes a divine duty on humans to exercise them. Ultimately, this gives humans, as the people, the task of ensuring that their rights are (and remain) at ‘the basis and foundation of [any] government’ (VBR). The Declaration of Independence, like the Virginia Bill of Rights, thus conceives humans as having rights by ‘the Laws of Nature and of Nature’s God’ qua their being human (Declaration of Independence). For this reason, any governing authority exercised over the people requires their consent, which in turn presupposes that representatives and the government abide by and foster humans’ rights. If this is not the case, the people, as humans, can – and indeed must – resist, given their duty to stand up for their rights.

The US Constitution and the Bill of Rights support this pattern of the human–government relationship. The US Constitution’s opening and closing passages establish ‘We the People of the United States’, represented by

<sup>17</sup> The VBR leaves the relationship between God and nature implicit. It traces humans’ rights to nature and refers to God as ‘our Creator’ (VBR: Section 2, 16).

‘the States present’, as this constitution’s ultimate subject(s).<sup>18</sup> Furthermore, the concluding passage presents the US Constitution as the Declaration of Independence’s culmination.<sup>19</sup> Noteworthy are also the 9th and 10th amendments,<sup>20</sup> as they invoke rights that the people of the American states possessed prior to the US Constitution:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. (Amendment 9)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. (Amendment 10)

The US Constitution and the Bill of Rights, like the Virginia Bill of Rights and the Declaration of Independence, thus conceive the people as having rights prior to these documents. They also conceive the people as the origin of any government over them while requiring any such government to abide by the people’s rights and enable the exercise thereof. If government representatives do not act accordingly, the Bill of Rights allows the people ‘to petition the government for a redress of grievances’ (Amendment 1), the US Constitution being also amendable (Article V). Additionally, representatives can be impeached and, upon conviction, can be dismissed.<sup>21</sup> If none of these means is available, the people may ultimately abolish a wrongful government, including the Constitution of the United States, ‘its foundation’ (Declaration of Independence). This seems at least to be implied in the Bill of Rights’ stipulation that rights not listed by it or the US Constitution are ‘retained by the people’.<sup>22</sup>

<sup>18</sup> Remarkably, the US Constitution stipulates that, ‘The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying’ (Article VII).

<sup>19</sup> The passage links both by the way it counts: ‘the Seventeenth Day of September in the Year of our Lord ... and of the Independence of the United States of America the Twelfth’ (US Constitution).

<sup>20</sup> According to its opening passage, the Bill of Rights aims ‘to prevent Misconstruction or Abuse of its [the US Constitution] Powers’ by stipulating ‘further declaratory and restrictive Clauses ...: And as extending the Ground of public Confidence in the Government will best insure the beneficent Ends of its Institution.’

<sup>21</sup> This includes ‘The President, Vice President and all civil Officers of the United States’ who ‘shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors’ (US Constitution: Article II, Section 4).

<sup>22</sup> This interpretation is solely based on textual analysis. As indicated above, the Declaration of Independence and the VBR hold that the decision to abolish a government must not be taken lightly. It requires ‘a long train of abuses and usurpations’ (Declaration of Independence) and must be ‘judged most conducive to the public weal’ by the majority of the people (VBR).

To further underscore the pattern, it is necessary, finally, to turn to the Declaration of the Rights of Man and the Citizen and the French Constitution. Both documents constitute humans and government by repeating the pattern already observed above. As the Declaration of the Rights of Man's opening passage indicates, '*Les représentans du peuple François, constitués en assemblée nationale ... ont résolu d'exposer, dans une déclaration solennelle, les droits naturels, inaliénables et sacrés de l'homme*'. This declaration aims to continually remind '*tous les membres du corps social*' of both their rights and the corresponding duties (DRMC). The document thus seeks to enable the people to judge both legislative and executive acts against humans' rights, these rights being '*le but de toute institution politique*' (DRMC; see also Article II). These rights are delineated as '*la liberté, la propriété, la sûreté et la résistance à l'oppression*' (DRMC: Article II). The opening passage also indicates that the representatives consider the ignorance and oblivion of, as well as the disdain for, humans' rights '*les seules causes des malheurs publics et de la corruption des gouvernemens*' (DRMC). They recognize and declare these rights '*en présence et sous les auspices de l'Être suprême*' (DRMC).

By associating the verb *exposer* and the adjective *naturel* with the rights declared by it, the Declaration of the Rights of Man and the Citizen emphasizes these as not being invented by the representatives, but as existing prior to their declaration. Article I underscores this by stating: '*Les hommes naissent et demeurent libres et égaux en droits; les distinctions sociales ne peuvent être fondées que sur l'utilité commune*' (DRMC). By additionally using the verb *résoudre* in relation to the representatives, this declaration further points to representatives making a decision before declaring these rights. However, this does not solely imply that the representatives have the authority to do so on behalf of the French people as humans. Rather, it points to the representatives' reasons for and the consequences of their act. After all, they expose the rights of humans as the sole 'basis and foundation of' (VBR) any authority or government over the French people and humans in general, and in doing so they invoke God, both as a witness and as a protector.

Similar to the Declaration of Independence, this appeal to God attests to both the truthfulness of the representatives' intentions and evinces the truth and law of humans' rights. But the Declaration of the Rights of Man, unlike the Declaration of Independence, expressly addresses all humans, as citizens.<sup>23</sup> Accordingly, this appeal solidifies the truth that the rights declared

<sup>23</sup> This is not say that both do not resonate with each other historically. As indicated above, the Declaration of Independence addresses 'the ... People of these Colonies', who dissolve their ties to the (British) Crown, and a 'candid [i.e. honest, truth-loving] world'.

apply to all humans, as citizens, and that these rights are declared on their behalf. The Declaration of the Rights of Man in this way empowers humans, as the people and citizens, vis-à-vis governments everywhere, but it also imposes duties on them. As Article III states: *‘Le principe de toute souveraineté réside essentiellement dans la nation. Nul corps, nul individu ne peut exercer d’autorité qui n’en émane expressément.’* (DRMC) Article IV adds:

*La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui. Ainsi, l’exercice des droits naturels de chaque homme n’a de bornes que celles qui assurent aux autres membres de la société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la loi.* (DRMC)

Consequently, the Declaration of the Rights of Man makes *‘principes simples et incontestables’* available to humans, as citizens, for lodging complaints that preserve the ‘Constitution’ and the *‘bonheur de tous’*. The constitution here means *‘la garantie des droits’* and *‘la séparation des pouvoirs’*, the absence of which would mean that there is no constitution (DRMC: Article XVI). Moreover, the appeal to God by the representatives also solidifies the truth that they themselves apply the declared rights as guidance. As the opening passage of the French Constitution – which follows a reproduction of the Declaration of the Rights of Man and the Citizen – highlights, *‘[l’]Assemblée nationale’* intends to implement by means of this constitution *‘les principes qu’elle vient de reconnaître et de déclarer’*.<sup>24</sup>

The constitutional logic of the Declaration of the Rights of Man and the French Constitution then follows the same pattern as the Virginia Bill of Rights, the Declaration of Independence, the US Constitution and the Bill of Rights: humans possess rights by nature as human beings, but they can only realize these by means of government – that is, as citizens. Any authority or government, including the *‘assemblée nationale’*, must therefore be based on humans’ rights and be to humans’ benefit. Any authority or government must thus abide by the rights of humans while also being contained by these rights. If their representatives disobey these rights, humans have a right (and duty) to resort to (legal) punishment or, ultimately, resistance and/or regime change.<sup>25</sup>

<sup>24</sup> *‘L’Assemblée nationale voulant établir la Constitution française sur les principes qu’elle vient de reconnaître et de déclarer, abolit irrévocablement les institutions qui blessaient la liberté et l’égalité des droits.’* (FC)

<sup>25</sup> As the DRMC holds: *‘Ceux qui sollicitent, expédient, exécutent ou font exécuter des ordres arbitraires, doivent être punis’* (Article VII). Its Article II, as indicated, gives humans the right to resist oppression, while Article VI establishes that: *‘La loi est l’expression de la volonté générale; tous les citoyens ont droit de concourir personnellement, ou par leurs représentants, à sa formation’* (DRMC). Similarly, the FC’s ‘Titre Premier’ points out that everyone is free to petition the

In summary, these diverse constitutional documents are all marked by the same pattern. In the first place, these documents all ascribe rights to humans, granted by nature and God. For this reason, these rights appear as preceding these documents. This is clearest in the Declaration of Independence, which takes these rights to be ‘self-evident truths’, but this antecedence of rights also characterizes the other texts. This both empowers humans to be the ultimate authors of their lives – that extends to their government – and imposes a duty on them to exercise these rights for their own benefit. Anyone whose life deviates from these rights violates the truth. The same goes for any government or authority. Yet, to live in accordance to these rights, humans are presented in the documents as requiring representatives, (representative) government and the law. Second, the documents conceive any such authority as flowing from humans, as the people, who in the process become citizens. This vesting of authority is seen as conditional. It continues only when the rights of humans are adhered to and promoted. It is under this condition that representatives, government and the law can appear as being coextensive with the people, as humans. Finally, the documents conceptualize the relationship between humans and their government as involving necessity, peril and an asymmetry of rights. These documents describe humans as requiring a government only for the benefit of their rights. By founding a government, humans do not relinquish their rights to this. As a result, the government paradoxically appears to be ultimately responsible and accountable for upholding humans’ rights, but is simultaneously the greatest threat to them as well. Given that humans retain their rights, these rights can be realized in the case of a government that consistently shows no respect for them.

The eighteenth-century constitutional documents thus establish a shared responsibility between humans and their government for the human realization of rights. But the primary responsibility for the recognition of these rights lies with the government, with the purpose of enabling humans to enjoy them. Humans must protect their rights should a government refuse to do so. As the next section argues, it is this constellation that global constitutional practice has refashioned since the mid-twentieth century.

### *Reversing constitutionalization at the United Nations*

Global constitutional documents have frequently been officially presented as continuing a modern constitutional tradition, most prominently by the United

constituted powers individually and that: ‘*Le Pouvoir législatif ne pourra faire aucunes lois qui portent atteinte et mettent obstacle à l’exercice des droits ... garantis par la Constitution; mais comme la liberté ne consiste qu’à pouvoir faire tout ce qui ne nuit ni aux droits d’autrui, ni à la sûreté publique, la loi peut établir des peines contre les actes qui, attaquant ou la sûreté publique ou les droits d’autrui, seraient nuisible à la société.*’

Nations Charter's reference to the US Constitution;<sup>26</sup> Eleanor Roosevelt's (1948) description of the Universal Declaration of Human Rights as 'the international Magna Carta' updating the Declaration of the Rights of Man and Citizen and the Bill of Rights; and the name 'International Bill of Rights' given to the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) by the UN General Assembly (UNGA) (1948, A/RES/3/217). This section therefore studies how the UN Charter, the UDHR, the ICCPR and the ICESCR, as global constitutional documents, constitute 'humans' and their 'government'. As will be demonstrated, these documents break – and in fact reverse – the pattern of the eighteenth-century constitutional practice previously analysed.

The UN Charter's preamble opens with the words: 'We the peoples of the United Nations [UN]'. These peoples have decided to jointly pursue common objectives in the interests of humanity, which they thus represent. They reiterate their belief that humans, as individuals and collectives, have equal 'fundamental human rights' and personal 'dignity and worth' (UN Charter).<sup>27</sup> They aim to avoid wars, support justice and international law, and to further social advancement and freedom (UN Charter). To 'these ends', these peoples want to 'live together in peace', cooperate to maintain 'international peace and security', use 'armed force' only 'in the common interest' and promote the progress of all peoples in economic and social terms (UN Charter). They thus intend to 'combine ... [their] efforts' and submit to 'principles', 'methods' and 'international machinery' (UN Charter). It is under this condition that their 'respective Governments [-] through representatives assembled in ... San Francisco' whose powers were verified – do 'agree[d] to the' UN Charter 'and hereby establish ... the' UN (UN Charter).<sup>28</sup>

Accordingly, the UN Charter's preamble conceives humans as having human rights and dignity. Yet it ties the truth of such rights and dignity to humans' 'faith' (UN Charter). What comes to the fore is a new pattern that links the significance of human rights to humans' recognition of these rights. This makes humans primarily responsible for the creation of a world in which such rights reign. Governments are conceived as assisting humans in this task, provided that humans first accept their own shared responsibility for this endeavour. The governments consent to the UN Charter and found the UN only after their peoples, as members and representatives of humankind, have

<sup>26</sup> A report by the First Commission indicates that this was a conscious act (quoted in Kelsen 1946: 137 n 4).

<sup>27</sup> The notion of fundamental rights generally refers to the constitution.

<sup>28</sup> Katja Freistein and Philip Liste (2012: 89) also note that it is the governments' representatives that found the United Nations, but they do not elaborate on this as a part of a broader pattern.



(been) committed (again) to recognize human rights. Therefore, the United Nations is an organization of governments that support and guide their people's realization of human rights. Counter-intuitively, the UN Charter's preamble then gives humans, rather than governments, the primary obligation to fulfil human rights. Moreover, in an ironic twist, it (inter-)governmentally authorizes government representatives to speak for, and thus represent, the UN peoples, as humanity, and to testify to these peoples' good intentions.

Compared with the pattern of eighteenth-century constitutional practice, this marks a fundamental difference. The new pattern is underscored by the articles of the UN Charter. For example, Article 1 gives the United Nations four tasks. The first is 'To maintain international peace and security' (UN Charter). The second and third tasks are 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples', as one means, among others, 'to strengthen universal peace', and 'To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction' (UN Charter: Article 1; see also Article 55). These two tasks imply that human rights and respect for them are issues relating primarily to nations, peoples and their conduct.<sup>29</sup> Article 1 links 'universal peace' to 'friendly relations among nations',<sup>30</sup> which in turn require 'nations' to observe their 'equal rights' and the 'self-determination of peoples' as a 'principle' (UN Charter). The fourth task of the United Nations – 'To be a center for harmonizing the actions of nations in the attainment of these common ends' (UN Charter: Article 1) – fits well with the emerging pattern. Article 1 thus basically gives representatives of governments the task of jointly overseeing the mutual conduct of nations and peoples,<sup>31</sup> a conduct that is considered central to humans' realization of equal human rights, but one that is also precarious.

The following pattern thus characterizes the United Nations Charter: All humans have human rights and personal dignity. However, in contrast to

<sup>29</sup> The UN Charter distinguishes between 'states' and 'authority', on the one hand, and 'nations' and 'peoples', one the other (see also Chapter XII, XIII; for a different view, see Kelsen 1946: 150–51).

<sup>30</sup> This relates the absence of 'respect for the principle of equal rights and self-determination of peoples' to the primary task of the United Nations (UN Charter: Article 1).

<sup>31</sup> The members of the United Nations are 'peace-loving states' that sign and ratify the UN Charter (Article 4). The United Nations is not 'authorize[d] ... to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII' (UN Charter: Article 7). Generally, the members participate in the UNGA and the Security Council through representatives appointed by them (UN Charter: Article 9, 23).

the eighteenth-century constitutional documents, these rights take effect only when humans believe in them and behave accordingly. Governments cooperate with each other to assist and supervise their peoples' realization of their human rights and, if necessary, enforce humans' shared responsibility in this task.

The UDHR, the ICCPR and the ICESCR solidify this pattern. The UDHR's preamble, like that of the UN Charter, conceives humans as having equal human rights and personal dignity, which it further specifies as 'inalienable' from and 'inherent' in them as 'members of the human family' – that is, their being human. Along with this, it ties the possibility of achieving 'freedom, justice, and peace in the world' to the recognition of these rights and dignity (UDHR).<sup>32</sup> As it emphasizes, the absence of such a recognition has led to 'barbarous acts which have outraged the conscience of mankind' (UDHR). Yet the UN peoples 'have in the Charter reaffirmed their faith in' human rights and dignity, and have decided to further social advancement and freedom (UDHR). Consequently, it is primarily humans' task to recognize and realize these. In fact, the preamble presents the UDHR 'as a common standard of achievement for all peoples and all nations', addressing 'every individual and every organ of society'.<sup>33</sup> By proclaiming the UDHR, the UN 'Member States', as the UNGA, in turn deliver on their promise in the UN Charter 'to achieve', together with the United Nations, 'the promotion of universal respect for and observance of human rights and fundamental freedoms' (UDHR). To this end, 'a common understanding of these rights and freedoms' is crucial (UDHR). Above all, this makes humans the primary actors. By 'keeping this Declaration constantly in mind', it is individuals and civil society who 'shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction' (UDHR).

The UDHR's preamble again makes humans, not governments, primarily responsible for the realization of human rights. It links such a realization, first and foremost, to humans' recognition of these rights and corresponding conduct. This realization is portrayed as the objective of the UN peoples who, given this objective, represent 'the common people' (UDHR). In contrast,

<sup>32</sup> Freedom here means 'freedom of speech and belief and freedom from fear and want ... as the highest aspiration of the common people' (UDHR).

<sup>33</sup> Although the notion of 'organ of society' may at first seem to include governments and their representatives, it only implies civil society, given the additional use of the words 'Member States', 'General Assembly', and 'territories' (UDHR). Humans are classed with civil society, alternatively described as 'the peoples', 'the common people', 'nations', 'individual[s]' and 'organ[s] of society' (UDHR).

the UN 'Member States' – that is, governments and their representatives – are given the sole task – 'in cooperation with the UN' – of fostering the observance of human rights by the member states' peoples (UDHR). It seems that governments accomplish a large share of this task by agreeing on the meaning and implications of such rights, thus enabling humans to do likewise (UDHR). By this means, governments not only support humans' quest for human rights but also shape it according to their understanding of these rights. The UDHR thus contrasts strongly with the Declaration of the Rights of Man and the Citizen. The Declaration of the Rights of Man and the Citizen declares human and citizen rights, as well as the duties they imply, vis-à-vis governments, and in doing so seeks to enable humans, as citizens, to check their government and its actions.

The UDHR's articles further underscore the pattern. For example, Article 1 asks humans to 'act towards one another in a spirit of brotherhood', given their freedom and equality 'in dignity and rights' by birth and their shared faculties of 'reason and conscience' (UDHR). In the same vein, Article 29 UDHR determines:

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

This article is the only one in the UDHR that refers expressly to 'duties', and it imposes these on humans generally rather than specifically on states. Apart from that, the UDHR solely specifies human rights as entitlements rather than as duties, and articulates the general implications of these entitlements for social order and human conduct. It attributes these rights to humans, as both individuals and groups, vis-à-vis each other and society; the law and law enforcement agencies; the state government; and the economy. Regarding the state government, Article 21 stipulates that, 'Everyone has the right to take part in the government of his country, directly or through freely chosen representatives', and 'to equal access to public service' (UDHR). The Article continues:

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. (UDHR: Article 21)

This formulation is both weak and intricate. This condition is fully apparent only in comparison with eighteenth-century constitutional documents, including the Declaration of the Rights of Man and the Citizen, alluded to by the UDHR's title. Article III of the Declaration of the Rights of Man and the Citizen states: '*Le principe de toute souveraineté réside essentiellement dans la nation. Nul corps, nul individu ne peut exercer d'autorité qui n'en émane expressément.*'<sup>34</sup> In contrast, the UDHR invokes 'the will of the people' as 'the basis of the authority of government' solely to ensnare this will immediately by stipulating that it 'shall be expressed in ... elections'. As it is the UN 'Member States' that 'proclaim' the UDHR, this reverses the eighteenth-century constitutional practice of forming the human–government relationship in terms of constituent and constituted power. This tendency to reverse is already implied in the UDHR's preamble, especially its statement that 'human rights should be protected by the rule of law' to liberate humans from the need to ultimately resist unjust authority violently.<sup>35</sup> This wording suggests that it is this need, not the unjust government, that is problematic for humans in the first place and must therefore be eliminated. It also suggests that the UDHR aims, among other things, to keep humans from seeing such a need in relation to the states that are proclaiming the UDHR. Lastly, this wording does not invoke a right, and thus contrasts even more strongly with eighteenth-century constitutional practice.<sup>36</sup>

The ICCPR and the ICESCR share and sharpen this pattern. After reiterating 'principles proclaimed in' the UN Charter and the UDHR,<sup>37</sup> their shared preamble states that 'the ideal of free human beings ... can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights' (ICCPR/ICESCR).<sup>38</sup> The preamble indicates that the ICCPR and the ICESCR serve to ensure that '[t]he States Parties' cater for such conditions, and thus 'promote universal respect for, and observance of, human rights and freedoms', as is their 'obligation ... under the' UN Charter. Ultimately, though, '[t]he States Parties'

<sup>34</sup> The other eighteenth-century constitutional documents analysed contain similar passages – see, for example, the VBR (Section 2), the Declaration of Independence, the FC ('Titre III').

<sup>35</sup> 'Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law ...' (UDHR)

<sup>36</sup> As already indicated above, the Declaration of Independence holds that 'it is the *Right* of the People to alter or to abolish' a government that becomes 'destructive of' humans' rights (emphasis added). For further examples, see the VBR (Section 3) and the DRMC (Article II).

<sup>37</sup> The preamble solely adds 'that these rights [‘equal and inalienable rights of all members of the human family’] derive from the inherent dignity of the human person' (ICCPR/ICESCR), thus further underscoring that such rights in principle inhere in human beings qua their being human.

<sup>38</sup> '[I]n accordance with the' UDHR, this ideal implies 'civil and political freedom and freedom from fear and want' (ICCPR/ICESCR).

understand that 'the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant' (ICCPR/ICESCR). Governments thus again make humans primarily responsible for the realization of rights. In contrast, they give themselves the task of explicating the meaning and implications of these rights as well as of creating an institutional framework for the human pursuit of these rights.

In this vein, the ICCPR and the ICESCR's shared Article 1,<sup>39</sup> for example, attributes 'the right of self-determination' to 'all peoples', allowing them to 'freely determine their political status and freely pursue their economic, social and cultural development' and, 'for their own ends, freely dispose of their natural wealth and resources'. In turn, 'The States Parties ... shall promote the realization of' this 'and shall respect that right' (ICCPR/ICESCR: Article 1). This commits governments to support peoples who establish themselves as independent political communities,<sup>40</sup> including others' recognition of their right to do so. It also commits governments to honour this right as long as these peoples' aspirations do not contravene the 'provisions' of the UN Charter (ICCPR/ICESCR: Article 1). Therefore, to have their 'right of self-determination' furthered and respected by governments, peoples must exercise it consistent with that of other peoples and without posing a 'threat[s] to the peace' (UN Charter: Article 1). They must further use 'their natural wealth and resources' without compromising 'obligations arising out of international economic co-operation, based on the principle of mutual benefit, and international law' (ICCPR/ICESCR: Article 1).<sup>41</sup> The ICCPR and the ICESCR only conditionally grant peoples such a right, with governments determining when its exercise is acceptable. This is another instance of the reversal of the relationship between humans and government characteristic of eighteenth-century constitutional practice.

Moreover, the ICCPR's Article 4 allows 'the States Parties' in a situation of 'public emergency' to temporarily curtail or suspend some of the stipulated civil and political rights of humans,<sup>42</sup> except those listed in 'articles

<sup>39</sup> Articles 1–5 of both treaties are similar, and at some points identical.

<sup>40</sup> Referring to Article 1, the UN Charter's Article 76 relates self-determination to 'self-government or independence'. Similarly, the so-called Friendly Relations-Declaration relates 'self-determination' to the absence of 'external interference' and gives 'every State ... the duty to respect this right in accordance with the [UN Charter's] provisions'. This declaration also distinguishes states as governments from nations or peoples as humans.

<sup>41</sup> Article 1 further specifies that, 'In no case may a people be deprived of its own means of subsistence' (ICCPR/ICESCR).

<sup>42</sup> Such a situation 'threatens the life of the nation and ... is officially proclaimed' (ICCPR: Article 4). It allows derogations from the ICCPR 'to the extent strictly required by the exigencies ... , provided that such measures are not inconsistent with ... other obligations under international law and do not involve discrimination'. Governments must 'immediately inform the other States

6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18<sup>43</sup>.<sup>43</sup> In fact, in relation to most rights listed in it, the ICCPR allows ‘restrictions’ or ‘limitations’ that ‘are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized’ (Article 12; see also Article 13, 14, 18, 19, 21, 22).<sup>44</sup> In the national or human interest, governments can always constrain humans’ civil and political rights and the exercise thereof.<sup>45</sup> In contrast, humans are given a continuous ‘responsibility to strive for the promotion and observance of’ such rights in relation to each other (ICCPR: preamble). Regarding governments, finally, the ICCPR’s Article 25 solely determines that:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

This formulation is even weaker and more intricate than its UDHR counterpart. It replaces the UDHR’s (Article 29) feeble notion of ‘the

Parties’ of such a derogation and ‘the Provisions’ concerned and indicate both its ‘reasons’ and ‘the date on which it terminates such derogation’ (ICCPR: Article 4). Thus, it is governments that determine an emergency situation and the measures it requires.

<sup>43</sup> Non-derogable are (only) the ‘Right to life (art 6)’; ‘[p]rohibition of torture, cruel, inhuman and degrading treatment or punishment’ and ‘medical or scientific experimentation without consent (art 7)’; ‘Prohibition of slavery, slave trade, and servitude (art 8)’; ‘Prohibition of imprisonment because of inability to fulfil contractual obligations (art 11)’; ‘Principle of legality in criminal law ... (art 15)’; ‘Recognition everywhere as a person before the law (art 16)’; ‘Freedom of thought, conscience and religion (art 18)’; see OHCHR (2013).

<sup>44</sup> This includes ‘the right to liberty of movement’, but ‘the right to enter’ one’s ‘own country’ cannot arbitrarily be denied; ‘the right to freedom of thought, conscience and religion’ and religious practice; ‘the right to hold opinions without interference’, ‘to freedom of expression’ and ‘to seek, receive and impart information and ideas of all kinds’; ‘the right of peaceful assembly’ and ‘to freedom of association with others, including the right to form and join trade unions’ (ICCPR: Articles 12, 18, 19, 21, 22).

<sup>45</sup> It seems that nothing in the eighteenth-century constitutional documents analysed compares with the ICCPR’s notion of ‘public emergency’ and its consequences. The FC, for example, states: ‘*Le Pouvoir législatif ne pourra faire aucunes lois qui portent atteinte et mettent obstacle à l’exercice des droits naturels et civils consignés dans le présent titre [I], et garantis par la Constitution*’, including the right to peaceful assembly, but the law can punish acts that undermine public safety or the rights of others (see also VBR: Section 7; Bill of Rights: Amendment 1).

people' with 'citizen[s]' as 'electors' (ICCPR: Article 25). These electors are firmly situated within the constituted political order. The Article 'guarantee[s]' electors 'free expression of ... will' in 'periodic elections' (ICCPR: Article 25), but without guaranteeing that this expressed will 'shall be the basis of the authority of government' (UDHR: Article 29). The wording 'without unreasonable restrictions' furthermore suggests that there are reasonable limits to 'the right and ... opportunity' of 'citizen[s]' to political participation and 'public service' (ICCPR: Article 25). As the substance of these words is unspecified, the determining their content is left to governments.

The same pattern basically marks the ICESCR, which states in Article 2:

Each State Party ... undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized ... by all appropriate means, including the adoption of legislative measures.

However, although 'The States Parties' are said 'to guarantee that the rights enunciated ... will be exercised without discrimination', the article allows 'Developing countries, with due regard to human rights and their national economy,' to 'determine to what extent they would guarantee the economic rights recognized ... to non-nationals' (ICESCR: Article 2). As Article 4 adds, 'The States Parties may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society' (ICESCR).<sup>46</sup>

Both the ICCPR and the ICESCR again make humans, not governments, primarily responsible for the realization of human rights. Furthermore, while these treaties establish a framework for the realization of human rights, they allow governments a significant discretion to limit human rights. Governments prescribe the content of human rights and determine which institutional setting and human conduct are adequate for such rights and the exercise thereof. In doing so, they grant humans only thin political rights which, practically and conceptually, sidestep humans and their rights as the origin of power exercised by governments. As the central means of humans' realization of civil and political rights, the ICCPR presents (national) law and 'effective remedy', which must be 'claim[ed]', the 'rights thereto determined by competent judicial, administrative or legislative authorities', and

<sup>46</sup> Trade unions are one specific example for the application of such 'restrictions' (ICESCR: Article 8).

which ‘competent authorities shall enforce ... when granted’ (Article 2).<sup>47</sup> The ICESCR, in turn, does not mention remedy, but legislation and other means (Article 2), including economic growth and education (Article 6, 13).<sup>48</sup> All this implies that, ultimately, humans must themselves undertake the realization of their (prescribed) rights.

Compared with eighteenth-century constitutional practice, these twentieth-century exemplars of global constitutionalization establish a fundamentally different pattern of relationships between humans and their governments. Three such differences especially need to be stressed. First, such international documents tie the real and true existence of human rights to humans’ belief in and their recognition of such rights. In doing so, the documents delegate the primary responsibility for respecting and realizing human rights to humans. The UN Charter even portrays humans as promising each other their acceptance of this responsibility and joint efforts to meet it through conduct. Second, international documents present governments as assisting and guiding humans in achieving human rights as humans’ own responsibility. For example, governments provide humans with an understanding of the meaning and implications of their rights (UDHR; ICCPR; ICESCR) or supervise them in maintaining peace (UN Charter). Thus, governments act as facilitators of the humans’ fulfilment of the responsibility to realize human rights, rather than these governments having the primary obligation to protect these rights. Given their role, governments may, in circumstances such as during a ‘time of public emergency’ (ICCPR) or the development of ‘their national economy’ (ICESCR), deviate from their duty to protect human rights. Finally, international documents interrelate humans and governments to the effect that governments bind their peoples in the name of humanity, and indeed so bind all people through human rights. Governments claim to speak in the name of their peoples, as both particular peoples and as members of humanity generally, and are (inter-)governmentally authorized to do so. By the same

<sup>47</sup> The ICCPR’s Article 2 mentions ‘legislative or other measures’ as the means ‘to give effect to the rights recognized’. Moreover, the ICCPR repeatedly alludes to an (alleged) opposition between ‘arbitrariness’ and ‘lawfulness’ (see, for example, Article 6, 9, 12, 17).

<sup>48</sup> In addition to being a right, education ‘shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups’ (ICESCR: Article 13). The ICESCR’s Article 6 refers to ‘the right to work’ and ‘technical and vocational guidance and training programmes, policies and techniques [as means] to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual’ (similar Article 11). Other non-legal means include health and hygiene or ‘the conservation, the development and the diffusion of science and culture’, including respect for scientific and artistic freedom (ICESCR: Article 12; see also, for example, Article 8(b), Article 15).



means, governments make humans primarily responsible for human rights and prescribe the content of these rights, while taking responsibility themselves only for working towards an institutional environment that enables humans to have those rights when they are actively sought. The corresponding state obligations are thus rather weak or remain indirect. Moreover, governments even limit humans’ free exercise of human rights by subordinating it to existing international law and cooperation and granting themselves exceptional provisions.

Consequently, at the global level *pouvoir constitué* takes the place of *pouvoir constituant*. Global constitutional practice shifts focus from the relations between humans and governments and human rights as the ‘basis and foundation of [any] government’ (VBR) to the relations between humans and their human rights conduct. In obliging humans rather than governments to observe such rights, the two are decoupled. Furthermore, this practice reduces the room for politics as a means for allowing humans to realize their rights. A legalistic approach to human rights and a turn to socio-economic progress replace the political moment of human rights as established in eighteenth-century constitutional documents. Humans must thus seek their human rights within constituted order. In effectively reversing the eighteenth-century constitution, this would imply a fundamental constitutional change.

#### IV. From constitutional continuity to change and critique

As constitutional practice, global constitutional documents change the space for constitutional thinking and conduct. They enable a new mode of constitutional government that requires humans to promote human rights that governments globally ‘grant’ or ‘take away’ (Lauterpacht, cited in Koskeniemi 2011b: 155). While such documents derive much of their normative purchase from a modern constitutional tradition, they in fact undermine this tradition. Based on a comparison of how global and historical constitutional documents interrelate ‘humans’ and their ‘government’, this article suggests that constitutional practice at the global level has been re-made, and indeed *reversed*. It is this practice that turns the historical relationship between *pouvoir constituant* and *pouvoir constitué* on its head. This transformation is epitomized by the language ‘We, the Heads of State and Government and High Representatives’ (GCM 2019) used in UNGA documents since at least the 2000s (see fn 1). To ‘not ... be governed *like that*’ (Foucault 1997: 44, emphasis in original), the ‘new normativity’ of constitutional practice at the global level needs to be addressed. This suggests scholars should

undertake further scrutiny of constitutionalization as a historically contingent social process, rather than presuming what it can and cannot imply.

As their historical comparison reveals, global constitutional documents, such as the UN Charter, the UDHR, the ICCPR and the ICESCR, constitute an executive, jurist and developmentalist constitutionalism. This stands in contrast to the popular constitutionalism of the eighteenth century. The global constitutional documents (re)allocate the responsibility for human rights primarily to humans, instead of governments. Essentially, to have human rights, humans must recognize and realize these rights themselves. In doing so, governments guide and support humans, but are themselves only weakly bound by such rights. All this is declared by government representatives. While subjecting the human exercise of human rights to existing international law and (economic) cooperation, governments grant themselves exceptional provisions in the name of (public) security or development. Additionally, they replace politics with law and (further) development as the primary means by which humans may vindicate their human rights. This pattern differs significantly from eighteenth-century constitutional documents, which originated from humans, as the people, and their representatives. Such documents declared rights unambiguously as well as inalienably vested in humans by nature and God vis-à-vis a government. Governments had to recognize and respect these rights, thus allowing humans to exercise them. Humans, meanwhile, had the right (and duty) to ultimately resist a government that consistently failed to respect such rights.

This new art of constitutional government at the global level resonates with familiar accounts of a global power shift towards the executive,<sup>49</sup> but the reallocation of the primary responsibility for human rights to humans complicates the picture. This prompts the question of how global constitutional practice relates to the shift in government associated with neoliberalism, as a mode of government, thinking and conduct (e.g. Gill and Cutler 2014). Certain aspects of constitutional practice, both global and historical, particularly deserve further exploration. Given its centrality to constitutional practice, the conceptualization of ‘humanity’ and its inherent exclusions require greater attention. In addition, the relationship between global constitutional practice and globalization, and their interactions with local constitutional practice, deserve further study. The empirical focus of such research should include further global, local, historical and non-Euro-

<sup>49</sup> The new art of global constitutional government is also a new empire of governments. As Koskeniemi (2011a: 73) and Tully (2007) note, constitutionalism does not exclude empire or imperialism (see also fn 15).

American constitutional texts, legal interpretations, policies and the activity of non-governmental organizations.

The constitution is an art of government, thinking and conduct. As such, it is shaped by and varies with the pattern of how constitutional practice constitutes (as a power effect) the human–government relationship.<sup>50</sup> The constitution is thus both social and historical. Taking this into account, this article has advanced a critical account of the remaking of the constitution in global constitutional practice. The purpose has been genealogical rather than explanatory in exploring the historicizing potential of reflexive accounts in global constitutionalism. Critique of global constitutional practice cannot be achieved by invoking the historical relationship between *pouvoir constituant* and *pouvoir constitué*, a classical cosmopolitanism, or a traditional recourse to law (Kennedy 2007). Arguments like these lack plausibility given the reversed constitution’s disconnect between humans and governments, and because this constitution is also the historical product and condition of legal practice. As a ‘question of attitude’ (Foucault 1997: 67) or democratic ethos (Tully 2002b: 536), critical constitutionalism requires us to situate global constitutionalization and its counter-Enlightenment tendencies within an historical account of constitutionalization as practice.

## Acknowledgements

Earlier versions of this article were presented at the Scholars Workshop: Challenges to Global Constitutionalism at Wissenschaftszentrum Berlin in 2018 and the workshop Evolution and Constitutionalization at Maastricht University in 2016. For their valuable comments, I thank Hauke Brunhorst, René Gabriëls, Poul Fritz Kjaer, Regina Kreide, Mattias Kumm, Antje Wiener and the workshop participants. I also thank Philip Liste, the two anonymous reviewers, and the editors for their constructive critique. For language editing, I am grateful to Robert Mayer and Connor Ruby. This publication was completed in the Cluster of Excellence “Contestations of the Liberal Script” (EXC 2055, Project-ID: 390715649), funded by the Deutsche Forschungsgemeinschaft (DFG, German Research Foundation) under Germany’s Excellence Strategy.

<sup>50</sup> A shift in constitutional practice thus suggests a transformation of the rules regulating the pattern of this practice, such as who can speak authoritatively or how things can be said. This topic cannot be covered in this article and must be studied elsewhere.

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