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Globalization vs. State Sovereignty: Constitutional Rights in a Crisis?

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Globalization vs. State Sovereignty: Constitutional Rights in a Crisis?

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Leiðbeinandi: Timothy Murphy

Ég lýsi því hér með yfir að ég er einn höfundur þessa verkefnis og að það er ágóði eigin rannsókna.”

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Undirskrift

Það staðfestist hér með að lokaverkefni þetta fullnægir að mínum dómi kröfum til B.A. –prófs í Félagsvísinda- og lagadeild.

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Undirskrift

ÚTDRÁTTUR

Í bókinni *Constitutional Rights after Globalization* (2005), höfundurinn Gavin M. Anderson heldur því fram að okkar frjálslynda hugmyndafræði um stjórnaskrárréttindi eigi ekki við þann raunveruleika sem við búum við eftir heimsvæðingu. Hin frjálslynda hugmyndafræði stjórnarskrárréttinda er sú að réttindin eigi einungis við í sambandi milli ríkis og þegna, á þeirri forsendu að ríkið hafi fullveldi yfir þjóðríkinu. Með heimsvæðingu hafi aftur á móti komið fram alþjóðlegir opinberir og einkaaðilar, svo sem WTO og fjölþjóðafyrirtæki, sem hafa meiri og meiri áhrif á opinber stefnumál og löggjöf þjóðríkja, þessir aðilar eru aftur á móti ekki ábyrgir gagnvart stjórnarskrárréttindum. Þessi þróun gefur til kynna að stjórnarskrárréttindi séu í hugmyndafræðilegri krísu líkt og Anderson hefur haldið fram. Í þessarri ritgerð verður skoðað hvort kenning Andersons eigi við rök að styðjast og einnig að skoða hvort alþóðleg mannréttindi hafi einnig haft áhrif á stöðu stjórnarskrárréttinda eftir heimsvæðingu. Því verður eigi neitað að heimsvæðing hefur haft gífurlega áhrif á heim okkar og samfélög heimsins er stöðugt að verða háðari hvor öðru. Að mörgu leyti hefur þessi þróun neitt okkur til að endurmeta stöðu lagakerfi þjóðríkja þar sem ekki er lengur hægt að líta á lagakerfin sem einangruð og óháð frá ytri áhrifum. Af þeirri ástæðu er ekki lengur hægt að líta svo á að ríki hafi fullveldi yfir þjóðríkinu þar sem hluti af fullveldisvaldinu hefur verið yfirfært á aðra aðila. Aftur á móti þá er aðrir áhrifavaldar eins og alþjóðleg mannréttindi sem styrkja stöðu stjórnarskrárréttinda auk þess sem þau þrýsta á alþjóðlega aðila að framfylgja hugmyndafræði mannréttinda í störfum sínum. Þrátt fyrir að stjórnvöld hafi að einhverju leyti tapað fullveldi sínu þá halda þau enn formlegum pólitískum völdum sínum, því er það enn á ábyrgð þeirra að sjá til þess að stjórnarskrárréttindi séu varin gegn ágangi opinberra og einkaaðila. Þessi ritgerð mun því sína fram á að sú krísa sem stjórnaskrárréttindi eru sögð vera í er hugsanlega ýkt. Auk þess sé mikilvægi fullveldis ekki svo mikið þegar kemur að verndun stjórnarskrársréttinda í ljósi þess að mannréttindi er stöðugt að verða stærri hluti af samfélgasvitund okkar.

ABSTRACT

In the book *Constitutional Rights after Globalization* (2005), the author Gavin M. Anderson questions whether our traditional liberal concept of constitutional rights is valid today because of the influence of globalization. The liberal theory of constitutional rights is that they apply in the relationship between the state and its citizens, on the presumption that the government holds the sovereign power over the nation-state. With globalization there are now public and private international actors, such as the WTO and MNCs that are having increased influence on public policy and legislation of nation states, however these international entities are not accountable towards constitutional rights, which could indicate that constitutional rights are in a crisis situation as Anderson suggests. This dissertation aims to investigate if Anderson's hypothesis has some merit to it and perhaps look at whether international human rights have also influenced the status of constitutional rights after globalization. There is no denying that globalization is having immense influence around the globe and societies are becoming increasingly interdependent. This has led us to re-evaluate the position of national legal systems and they can no longer be viewed as independent and isolated phenomena, as a result of them being influenced by outside forces as well as forces from within its own system. For that reason it will be established that state sovereign power is no longer sovereign and some of that power has been transferred to other entities. However there are other forces such as international human rights that are enforcing the status of constitutional rights and influencing international actors to abide by the doctrine of human rights. Additionally state governments still hold the political power despite the loss of some of its sovereign power, therefore we must consider what states are doing to protect constitutional rights in these new circumstances so they are not infringed by public or private actors. In conclusion this dissertation will show that this constitutional rights crisis maybe exaggerated and that perhaps sovereign power is not necessary for the protection of constitutional rights as long as international human rights are increasingly becoming a larger part of our social consciousness.

Þakkarorð

Ég vil þakka leiðbeinenda mínum, Timothy Murphy fyrir alla hans aðstoð og þolinmæði. Auk þess vil ég þakka kærustunni minni Hrafnihildi Gunnarsdóttur fyrir ómældan andlegan og setningarfræðilegan stuðning.

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INTRODUCTION

In the last three decades there have been dramatic changes on a global scale to fundamental legal and social institutions, such as the state and interstate relations, economic activity and supranational institutions. This evolution has been referred to in broad terms as globalization. As a result of these changes there has been a shift in roles and power from the nation-state to: international institutions such as the WTO and the World Bank, supranational entities such as the EU. There are even suggestions that transnational economic actors such as multinational corporations are having increased influence on the public policy of national governments.

In Gavin Anderson's *Constitutional Rights after Globalization* (2005), the author challenges the contemporary liberal understanding of constitutional rights as applying in the relationship between the nation-state and its citizens. As a result of economic globalization there has been a dramatic shift in legislative and political power from the state to economic actors and supranational institutions. According to Anderson the consequence of this transfer of power makes the presumption, that only the state is accountable to human rights, invalid and as a result there is need for a new understanding of constitutional rights accountability.

In this dissertation the focus will be on the changing role of the state, in an age of globalization, and on whether this transformation of state power will have such an effect as to change they way we look at constitutional rights, and if they are in any way under threat as result of new global powers, which are not constitutionally accountable towards constitutional rights. To reach any conclusion regarding this issue it is important to look at the effects that globalization, especially economic globalization, has had on nation-state legal systems and look to legal theory and how it can in some way explain the international and national legal environment of today. What that research will show is that there are multiple legal systems influencing our society and that we can no longer look at national legal systems as "hypothetically closed and self-sufficient unit[s]".[1]

[1] William Twining, *Globalisation & Legal Theory* (Cambridge: Cambridge University Press. 2000) p. 8

Given the liberal concept of state accountability is based on the fact that the state holds the political power over its given national territory, in other words the state is sovereign. However when looking to multiple international actors, private or public, that can influence national legislation, can we still say that the state is sovereign? Has the sovereign power perhaps been transformed to include other actors, or does sovereignty even exists as a valid concept today? If it is so that the state has lost it sovereign power, does that affect they way we look at constitutional rights and can we say that they are being protected if actors with certain sovereign power are not accountable towards those rights?

To discover how well constitutional rights are being protected after globalization and decreased state power, it is vital to look to how the status of international human rights are as a result of globalization. Constitutional rights and international human rights are connected in a fundamental way. Most constitutional rights are based on international human rights and international human rights count to a large extent on national courts for their protection. When states have ratified human rights conventions, those conventions will normally prevail over constitutional rights, should those rights offer less protection. Therefore it is important to look to international human rights when discussing the status of constitutional rights.

Looking at the influence of globalization on state sovereignty, it is clear that there are now multiple global actors influencing national legal systems. As a consequence there are now actors with public power that are not accountable towards constitutional rights. Does this put constitutional rights in a crisis situation? This dissertation will show that despite the transfer of power from the state, the state is still the actor holding most of the political power, and that the globalization of human rights has perhaps made our concept of state sovereignty redundant. Additionally, international human rights and globalization have created an environment that puts pressure on states to respect constitutional rights and set rules that prevent violations of human rights by private actors.

The first chapter of the dissertation will take a closer look at the concept of globalization. Emphasizing the role of economic globalization and its main actors and the part they play in this new legal and social landscape created by globalization.

Attention will be given to the challenges of globalization to relevant concepts of legal theory, such as our understanding of national and international legal systems.

The second chapter will focus on the challenges to state sovereignty and the possible power shift from the state to economic actors and supranational institutions. We will look to legal pluralism as a descriptive theory to understand better the legal landscape of the world after globalization.

The third chapter looks at the globalization of human rights and constitutionalism its ideology that has exploded around the world. A closer look will be taken at the Universal Declaration of Human Rights (1948), and its influence on human rights in a global perspective. Additionally, the sharp increase of constitution making in states moving from under post communist states, and the inclusion of constitutional rights entailed in those constitutions.

The fourth chapter will juxtapose two globalizations, i.e. economic and human rights, and will position them as opposite forces in this world. Where the actors and institutions of economic globalization represent the hegemonic forces and human rights the counter-hegemonic force. Additionally we will look at the human rights obligations of international organizations, which will show that external influences from these entities do not threaten human rights, and that the state is still the preferred platform for the protection and enforcement of human rights. Finally, we will propose that economic globalization and human rights can form coherent synergies that can work together at reaching mutual objectives.

CHAPTER 1. GLOBALIZATION

Globalization is a hotly debated issue: what does it stand for, what does it represent for our society and how can it be defined? Difficult questions which scholars of different disciplines within humanities and science have tried to answer. Almost without exception these definitions of globalization will be different, depending on the perspective applied to the phenomena. In William Twining's book *Globalisation and Legal Theory* (2000), the author gives an example of what a typical definition of globalization looks like:

> "In social science there are as many conceptualizations of globalizations as there are disciplines. In economics globalization refers to economic internationalization and the spread of capitalist market relations … . In international relations, the focus is on the increasing density of interstate relations and the development of global politics. In sociology, the concern is with increasing worldwide social densities and the emergence of 'world society'. In cultural studies, the focus is on global communications and worldwide standardization, as in CocaColonization and McDonaldization, and on the post-colonial culture. In history, the concern is with conceptualizing 'global history' …"[2]

It is noteworthy that there is no mention of law. It seems that legal theory has been a bit late to the debate on globalization. However legal theory seems to be realizing the fundamental importance of the challenges created by globalization. These challenges will be discussed later in this dissertation.[3] First it is important to look at how the concept of globalization is defined in broad terms by some legal scholars.

1.1. Broad definition of Globalization

In this chapter the main focus will be on the broad definition of globalization given by two scholars William Twining and Boaventura de Sousa Santos who both had a great influence on Anderson's work *Constitutional Rights after Globalization.* It will show that we are now living in an increasingly interdependent world where local cultural

[2] William Twining, *Globalisation & Legal Theory* (Cambridge: Cambridge University Press. 2000) p. 4.

[3] See chapter 1.3. Globalization and its challenges to legal theory

phenomena are being exported around the world and societies are forced to evolve with these global influences.

In the introduction to *Globalisation and Legal Theory,* Twining defines globalization as: "… those processes that tend to create and consolidate a unified world economy, a single ecological system, and a complex network of communication that covers the whole globe."[4] In order to clarify the concept better, Twining refers to Anthony Giddens who characterizes globalization as a process of ever increasing social inter-relation on a global scale to the extent that events happening in one place have impact on societies many miles away.[5] From this, Twining comes to the conclusion that we are living in an ever more interdependent world. However that does not mean that we are moving towards a single world, rather the mood of the modern day is cultural relativism. In some places there is movement towards more centralization as in the EU and sometimes the movement is towards "smaller nationalism and local identities"[6] as in the Balkans.

Twining engages with the debate on what globalization is or means. Scholars have differing opinions of the concept: some are skeptics and question the "globalizing rhetoric" provided by those who Twining refers to as "firm believers". Then there are theories that are in between those two opposite poles. Twining does not place himself in any definite corner, he is of the opinion:

> "… that the world is increasingly interdependent, that the significance of national boundaries and of nation states is changing rapidly, and that one cannot understand even local law by adopting a purely parochial perspective."[7]

Among those "firm believers" is Boaventura de Sousa Santos. In describing the main features of globalization, Santos sees it as not only economic globalization but also as a political and cultural phenomenon. Nevertheless, regarding economic globalization

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[4] William Twining, *Globalisation & Legal Theory* (Cambridge: Cambridge University Press. 2000) p. 4.

[5] 'the intensification of world-wide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa'. A Giddens, *The Consequences of Modernity* (1990),

[6] William Twining, *Globalisation & Legal Theory* (Cambridge: Cambridge University Press. 2000) p. 5

[7] Ibid. p. 7

he sees the transnational corporations as key actors and the main features of this new world economy being worldwide sourcing, flexible systems of production and low transportation costs in conjunction with neo-liberal objectives of privatization, deregulation and the free and open market.[8] This has led to the nation state appearing to have "lost its traditional centrality as the privileged unit of economic, social and political initiative".[9]

Santos also sees globalization as a dual process that can be described as "globalized localisms" where a local culture is exported on a global scale, and "localized globalism" where the effect of globalization transforms local cultures as a response to this outside influence.[10] To put it simply "globalized localisms" is when a local phenomenon is globalized such as "the spread of the English language or Coca Cola or American copyright laws".[11] On the other hand "localized globalism" refers to when local communities are affected by forces and ideas from around the world such as the effects of tourism on ecological systems and the adaptation of local laws to deal with transnational transactions.[12] According to Santos the world can generally be divided into two groups: the North and the South. Where the North represents the industrialized countries that specialize in "globalized localisms", the less advanced South countries, affected more by the influence of the North countries, manifest "localized globalism" to a greater extent. This North-South theory is in many ways definitive of a certain form of globalization called economic globalization.

1.2. Economic Globalization

According to Anderson economic globalization is one of the main factors behind this paradigmatic crisis to constitutional rights. When defining economic globalization as it pertains to his theory, Anderson emphasizes the role of neo-liberalism as being:

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[8] Boaventura de Sousa Santos, *Toward a New Legal Common Sense,* (London: Butterworths, 2002) p. 167
[9] Ibid. p. 168
[10] Ibid. p. 179
[11] William Twining, *Globalisation & Legal Theory* (Cambridge: Cambridge University Press. 2000) p.5
[12] Ibid. p. 5

> "One of the most significant political phenomena of the past twenty five years has been the spread of the ideas and practices of economic neoliberalism which stresses the virtues of the free market and the vices of the big government".[13]

This neo-liberal vision may have been materialized during the Thatcher and Reagan governments and has become a global phenomenon since the "Washington Consensus"[14], which Santos also refers to as "*the neo-liberal economic consensus"*. He describes it in the following way:

> "[…] global economy, including both global production and global markets of goods, services, and finance, and [it] is based on free market, deregulation, privatization, state minimalism, control of inflation, export orientation, cuts in social expenditure, reduction of public deficit, concentration of market power in the hands of transnational corporations and of financial power in the hands of transnational banks".[15]

In many ways this evolution has led to a reduced role of the state in the market and even in the public sphere. This can be seen to involve three elements.

First, with increasing deregulation and privatization, public services have increasingly been put in the hands of private actors, mainly corporations, including prisons, air traffic control and school meals.[16] This has led to a reorientation of the goal of these services from being there for the public interest to profit oriented goals.[17]

Secondly, the doctrine of the "free market", which is central to the neo-liberal doctrine, has increased the influence of certain international actors such as the WTO, the goal of which is to protect free trade. The WTO has set regulations that states have accepted to abide by. Thereby, the states are obliged to follow regulations that limit to some extent their own public policy.

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[13] Gavin M. Anderson, *Constitutional Rights After Globalization.* (Portland, Oregon: Hart Publishing, 2005) p, 7

[14] The term 'Washington consensus' was originally used to describe policy adopted by some Washington DC based institutions such as the International Monetary Fund, the World Bank and the US treasury department as a response to a financial crisis in Latin America in the 1980's. Lately the concept has been strongly linked by many such as Anderson and Santos with neo-liberal doctrine.

[15] Boaventura de Sousa Santos, *Toward a New Legal Common Sense,* (London: Butterworths, 2002) p. 314

[16] Gavin M. Anderson, *Constitutional Rights After Globalization.* (Portland, Oregon: Hart Publishing, 2005) p, 8

[17] Ibid p. 8

Finally, there has been a rise of private international regimes that have in many ways supplanted the state. For instance international commercial arbitration has taken the role of the courts in settling transnational commercial disputes, international business associations set norms and standards for industries and professions and international financial markets assign credit ratings on states.

Another result of economic globalization is to give financially strong entities the opportunity to delve into markets that have been harder to access before. A chain reaction of this evolution was the emergence of the multinational corporations (MNC)[18] as powerful force on a global scale. According to Anderson, the increased power of global economic actors in recent years has made the notion that they are only economic entities, unsustainable and it is plain that they must be considered as major political actors.[19]

In discussing economic globalization it is easy to simply focus on the increasing influence of private economic actors (MNC) and public international actors (e.g. EU, WTO, UN). However, one must not forget the importance of the state in this evolution. Economic globalization would not have prospered like it has without the active participation of nation-states in creating an optimal environment with legislation, public policy and international treaties. Therefore it would not be fair to focus only on the development of the global market, deregulation or privatization and abandon the role of the state in relation to threats to constitutional rights. It is also important to consider how states are responding to these challenges.[20]Before discussing the position of the state it is important to look to some challenges that globalization brings to legal theory, specifically to national legal systems and our traditional understanding law.

[18] The MNC's or Multinational Corporations are sometimes also referred to as TNC's or Transnational Corporations.
[19]Gavin M. Anderson, *Constitutional Rights After Globalization.* (Portland, Oregon: Hart Publishing, 2005) p, 9
[20] Andrew Clapham, *Human Rights Obligations of Non-State Actors,* (New York: Oxford University Press, 2006) p. 5

1.3. Globalization and its challenges to legal theory

According to Twining globalization poses three fundamental challenges to traditional legal theories. These challenges are too so called "black box theories", the traditional Anglo-American concept of the dualism of law as municipal state law and public international law and that there is a need for a new legal meta language which can transcend legal cultures.[21]

The first challenge focuses on the problems that globalization and increased interdependence bring to so-called "black box theories", which say that nation states, societies or their legal systems can be observed and studied in isolation, the challenge is twofold. On the one hand is the opinion that "municipal law can no longer be treated in isolation from outside influences, legal or otherwise".[22] To emphasize this point Twining takes examples of the daily impact that European Law, the European Convention on Human Rights, GATT and transnational religious law have on the lives and legal relations between persons and legal persons. The other side of this challenge involves the theory of sovereign states and non-interference in their internal affairs, derived from the presumption that in international law sovereignty is sacroscant. Twining says this theory does not hold water in the modern day when taking into account the influence international human rights law and regional legal orders have on the internal affairs of independent states.[23]

The second challenge to legal theory is a challenge to the traditional Anglo-American concept that law can be divided into two categories: municipal state law and public international law. The legal world today is much too complex to simply divide it into these two categories. Twining discusses some new problems in relation to our concept of law that have surfaced with globalization. He states that there is a call for new "legal orderings" on the subject of communication, the environment and on natural

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[21] For this dissertation the focus will be on the challenges to 'black box theories' and to Anglo-American concept of the dualism of law. The subject of the legal meta language will not be commented since it has little reference to this dissetation.

[22] Saskia Sassen, *Losing Control: Sovereignty in an age of Globalization,* (New York: Colombia University Press, 1996) p. 51

[23] Neil McCormick "Beyond the Sovereign State" (1993) 56 *Modern Law Review* 1.

resources on this planet and other planets.[24] Additional to those challenges Twining mentions: the possible future of *ius humanitatis* or the common heritage of mankind, the ability of public international law to deal with the environment, international crimes and the human needs and human rights on a global level, the resurgence of international *lex mercatoria,* and the list goes on. According to Twining "one theme that links the emergence or re-emergence of these new kind of legal orders is the disengagement of law and state".[25] The new legal orders mentioned above, according to Twining, definitely belong to a category of non-state law.

In this chapter we have discussed how globalization has made this world increasingly interdependent where different cultures around the world are influencing each other more and more. One kind of globalization is economic globalization which emphasis the free market and less state interference in the economic sphere. This has led to increased power going to economic actors at the expense of the state. Globalization has also challenged our concept of national legal systems and our concept of law which is highly relevant to the subject of the next chapter where the concept of state sovereignty, which has been highly influenced by globalization, will be discussed.

[24] William Twining, *Globalisation & Legal Theory* (Cambridge: Cambridge University Press. 2000) p. 51
[25] Ibid. p. 52

CHAPTER 2. STATE SOVEREIGNTY

The traditional understanding of state sovereignty is that the state has sovereign control over its national territory and in international law this power is sacrosanct. The meaning of sovereign rule has changed considerably over the centuries. For a long time sovereignty was attributed to the ruler of territories who drew their legitimacy from divine or historic authority. This has changed over time and the sovereignty of the ruler has become the will of the people. After "World War II the notion of sovereignty based on the will of the people had become established as one of the conditions of political legitimacy for a government".[26] This was confirmed by international law in the Universal Declaration of Human Rights of 1948, Article 21(3), "the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections…".[27]

The discussion on sovereignty and its source of legitimacy is central to the debate regarding the position of constitutional rights. The reason for this is that state sovereignty is one of the fundamental principles to the traditional theory on human rights. According to that theory only sovereign states can be made accountable to human rights from the presumption that they hold the political power. If there has been a shift of power from the sovereign state to other actors or institutions, constitutional rights could be in a paradigmatic crisis, as Anderson suggests.[28] Let us now examine the status of the sovereign state in an age of globalization.

2.1. Challenges to State Sovereignty

Here we come back to the challenges of globalization to the "black box theory" and to the Anglo-American concept of the duality of law as municipal state law and

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[26] Saskia Sassen, *Losing Control: Sovereignty in an age of Globalization,* (New York: Colombia University Press, 1996) p. 2

[27] Universal Declaration of Human Rights, 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, U.N. Doc. A/810, at 71 (1948).

[28] Gavin M. Anderson, *Constitutional Rights After Globalization.* (Portland, Oregon: Hart Publishing, 2005)

international public law, which were discussed earlier in the chapter on globalization's challenges to legal theory.

The "black box theory" is when there is the assumption that societies can be viewed as a "hypothetically closed and self-sufficient unit"[29] from a legal perspective. This can hardly be said to be valid today seeing the increased interdependence between societies today and the immense influence of international sphere from international human rights, WTO and private international actors (MNC's) and legal entities (World Bank) on national legal systems. Also there are now internal legal phenomena that are affecting our society like *sharia*[30] law. For Anderson our traditional liberal legal theory does not adequately represent this new legal reality and looks to the theory of pluralism, which he finds better equipped to explain the modern situation. The theory of pluralism and especially legal pluralism shows that within a single nation-state there are multiple sources of law, coming from within, as well as outside.

Looking back to the theory of normative and legal pluralism, it is a very descriptive of the world, especially so after globalization. According to Twining " the terms normative pluralism and legal pluralism refer to certain social facts rather than to a school of thought."[31] We all experience normative pluralism in our daily lives. These norms include all rules which apply to daily activity for example rules of a football game, rules of logic and grammar, good manners, traffic rules and legal orders of the courts.

Legal pluralism is a certain species of normative pluralism, and has been defined as a concept which in broad terms, refers to legal systems, networks or orders co-existing in the same geographical space.[32] However, different concepts of legal pluralism developed over time. It used to be defined as inhabiting a certain society where the

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[29] William Twining, *Globalisation & Legal Theory* (Cambridge: Cambridge University Press. 2000) p.8

[30] The term means "way" or "path to the water source"; it is the legal framework within which the public and some private aspects of life are regulated for those living in a legal system based on Islamic principles of jurisprudence and for Muslims living outside the domain.

[31] William Twining, *Globalisation & Legal Theory* (Cambridge: Cambridge University Press. 2000) p. 83

[32] Ibid. p. 83

"state recognized different rules for specific categories of person and legal person."[33] If, say, the society accepted the legal orders of common law of the UK, civil law and Islamic law all within the same state or society, as was the case with Tanzania during the 1960's.[34]

The concept of legal pluralism as equivalent only to state law was later considered to being too narrow or a misconception.[35] As a result a new theoretical perspective to legal pluralism evolved, challenging the concept of "state centralism", the idea "that the state has a monopoly of lawful power within its territory".[36] Instead it was suggested that there were multiple legal orders within each society and that state law was not necessarily the most powerful one. This theory "pave[d] the way for recognizing that local, national, transnational, regional and global orders can all apply to the same situation".[37] Twining is of the opinion that this theory is something that global jurisprudence has to come to terms with and incorporate this theory but concedes this may entail some difficulties.

Firstly he envisions a conceptual problem with drawing "distinctions between legal and non-legal phenomena and legal orders, systems, traditions and cultures."[38] Secondly, "very few orders or systems of norms are complete, self-contained or impervious. Many normative orders do not have discrete boundaries, they tend to be dynamic rather than static, and the relations between them are extremely complex."[39] Thirdly, Twining raises the point that "co-existing legal orders interact in complex ways."[40] Twining then continues to draw examples of the complexity of legal pluralism is and the difficulties it poses for global jurisprudence. In the end he concludes that the main difficulties with legal pluralism are not conceptual or semantic, rather the difficulties lie in "the sheer complexity and elusiveness of the

[33] William Twining, *Globalisation & Legal Theory* (Cambridge: Cambridge University Press. 2000). p. 83
[34] Ibid. p. 83
[35] Ibid. p. 84
[36] Ibid. p. 84
[37] Ibid. p. 85
[38] Ibid. p. 85
[39] Ibid. p. 85
[40] Ibid. p. 85

phenomena."[41] However, legal pluralism is a very good descriptive tool to apply to our modern world. Demonstrating that state law and municipal state legal systems cannot be considered isolated entities and with globalization there are now increasingly more actors influencing domestic legal systems.

2.2. Transformation of state sovereignty

This dissertation has already discussed how legal pluralism can be a very descriptive tool, which can be applied to the position of sovereign states, especially with regards to the impact legal regimes outside the nation-state are having on the society within the nation-state. From that perspective it could be deduced that in today's age of globalization the state is losing its sovereignty. That leads us to discuss the work of Saskia Sassen, *Losing Control: State Sovereignty in an Age of Globalization*. Sassen is of the mind that nation-states are indeed losing to a certain extent their sovereign power. Rather than disappearing, the power is being transformed into something that applies also to global actors, whether they be economic actors or supranational, or the nation-state.

According to Sassen economic globalization has had great impact on economic activity and politico-economic power. Sassen asks the question how this has affected the territorial exclusivity of sovereign states and how that has transformed sovereignty and systems of rule in sovereign states.[42] In discussing the changing role of sovereignty and territoriality, Sassen examines the major aspects of economic globalization and what she refers to as the new "geography of power". One of the important components she to examines in this respect is the "massive amount of legal innovation around the growth of globalization."[43] Sassen also wants to expand on the relation between the global economy and the nation state. She finds that the prevalent notion of global-national duality, where the national economy or state loses what the global economy gains, does not adequately or usefully capture this relationship.[44]

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[41] William Twining, *Globalisation & Legal Theory* (Cambridge: Cambridge University Press. 2000).). p. 88

[42] Saskia Sassen, *Losing Control: Sovereignty in an age of Globalization,* (New York: Colombia University Press, 1996) p. 1

[43] Ibid p. 6

[44] Ibid p. 6

When looking to economic globalization "much that we describe as global, including some of the most strategic functions necessary for globalization, is grounded in national territories."[45] Furthermore, when discussing legal innovations in connection with globalization they are usually associated with deregulation that is used for describing the declining influence of state. However "transnational firms need to ensure the functions traditionally exercised by the state in the national realm of the economy, such as guaranteeing property rights and contracts."[46] But because of the nature of the global economy this guarantee seems to be threatened. For this reason there has been a rise of legal regimes bypassing national legal systems and handing formerly legal regulation over to private regulatory regimes and institutions such as international commercial arbitration, which can be seen as being organized around one great *lex mercatoria.*[47] Sassen also considers debt security and bond-rating agencies to be an important part of this private global governance, where the international commercial arbitration works as a private justice system and the credit-rating agencies are private gate-keeping agencies. These private regimes could be referred to as "governance without government."[48]

However it is not just the global economy that is affecting the sovereignty of states. In fact, the states themselves have in many ways instigated the expansion of the global economy and therefore limited their own power.

> "In many ways, the state is involved in this emerging transnational governance system. But it is a state that has itself undergone transformation and participated in legitimating a new doctrine about its role in the economy. Central to this new doctrine is a growing consensus among states to further the growth and strength of the global economy".[49]

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[45] Saskia Sassen, *Losing Control: Sovereignty in an age of Globalization,* (New York: Colombia University Press, 1996). p. 14
[46] Ibid p. 15
[47] The *Lex mercatoria* was a body of rules and principles in commercial law developed by merchants in medieval times as response to civil law not being able to respond to the needs of those merchants. This is the foundation of the modern international commercial law which includes the choice of arbitration institutions, procedures, applicable law and arbitrators, and the goal to reflect customs, usage and good practice among the parties.
[48] Saskia Sassen, *Losing Control: Sovereignty in an age of Globalization,* (New York: Colombia University Press, 1996), p. 17
[49] Ibid p. 23

According to Sassen this participation of the state in the global economy and the international arena is very complex and there are different interpretations to what it means. One group is of the opinion that the role of the state in the global economy is to further the progress of neo-liberalism to the point of being constitutionalized.[50] Another group holds that this state participation on the international sphere is strengthening the rule of law on a global level.[51] Finally there are some who consider state participation contributies to the loss of sovereignty, as can be seen by the effect the WTO can have on the political autonomy of the nation-state.[52]

As can be seen the state has had considerable influence on the evolution of economic globalization and Sassen argues that even though the state has in some way lost some of its sovereign power with economic globalization it is still vital for its growth. For instance, in legitimating new legal regimes, and in being crucial to the guarantee that contract and property rights are enforced.[53]

It has been established that economic actors have been given the power to demand accountability of states. But there is also another global legal regime that can demand accountability from the state, namely so-called universal human rights codes:

> "Human rights codes have become a somewhat autonomous source of authority that can delegitimize a state's particular action if it violates such codes. Thus both the global capital market and human rights codes can extract accountability from the state, but they do so with very different agendas. Both have gained a kind of legitimacy."[54]

Sassen's argument is that following globalization, sovereignty has been transformed and is now located in more places than just in the state.

> "[Sovereignty] is now located in a multiplicity of institutional arenas: the new emergent transnational private legal regimes, new supranational organizations (such as the WTO and the institutions of the European Union), and the various international human rights codes. All these institutions

[50] Saskia Sassen, *Losing Control: Sovereignty in an age of Globalization,* (New York: Colombia University Press, 1996) p. 25
[51] Ibid. p. 25
[52] Ibid. p. 25-26
[53] Ibid. p. 27
[54] Ibid. p. 28-29

> constrain the autonomy of national states; states operating under the rule of law are caught in a web of obligations they cannot disregard easily."[55]

To summarize the topics of this chapter it is obvious that legal pluralism gives us a good view of the multiple sources of law affecting our daily lives and our society as a whole, as a consequence the traditional theory that state has sovereign power must be re-evaluated. What we have found here is that much of the sovereign power of states has been transferred to other entities such as international organizations and private global economic actors. This has largely been as a result of globalization, however it must not be forgotten that the state plays a big role in facilitating this transfer of power. Up till now this dissertation has mainly been focusing on the part of economic globalization in limiting state power, but there is another form of globalization which is limiting state power, the globalization of human rights which will be our topic in the next chapter.

[55] Saskia Sassen, *Losing Control: Sovereignty in an age of Globalization,* (New York: Colombia University Press, 1996). p. 30-31

CHAPTER 3. CONSTITUTIONAL RIGHTS AND INTERNATIONAL HUMAN RIGHTS IN AN AGE OF GLOBALIZATION

The preceding chapters have mainly been looking at economic globalization, and its effect on the sovereign power of nation-states, however there is another kind of globalization, the globalization of human rights. Since the creation of modern human rights with the Universal Declaration of Human Rights of 1948, the idea of human rights has expanded around the globe. In the last 25 to 30 years at least forty countries from all over the world from central and Eastern Europe to Africa to Latin America and Asia, have gone through major constitutional reform and, nearly every one of them has included a bill of rights in their constitution and some active form of adjudication.[56] In this chapter we will look at the globalization of human rights and the nature of constitutional rights and international human rights.

3.1. Constitutional Rights

Today most nation-state governance is based on the fundamental principle of the "rule of law". This principle means that the state should be governed on the basis of law. In democracies the constitution is considered as the highest form of law and they have been defined as, "codes of norms which aspire to regulate the allocation of powers, functions and duties among the various agencies and officers of government, and to define the relationships between these and the public".[57] Constitutional rights are rights afforded to the citizens against the state. The reason why these rights apply only to the lateral relationship of the citizens and the state is based on the premise that the state is the only actor powerful enough to infringe on those rights and constitutional rights are also considered as a counter-hegemonic force that is meant to constrain the state's power.

Constitutional rights are often based on human rights as they appear in international covenants on human rights such as the Universal Declaration of Human Rights,

[56] R Hirscl, 'The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions' (2000) 25 *Law and Social Inquiry* 91 at 92, fn 1.
[57] S.E. Finer, V. Bogdanor and B. Rudden, *Comparing Constitutions* (Oxford: Clarendon Press, 1995) p.1.

International Covenant of Civil (1966) and Political Rights and the International Covenant on Economic, Social and Cultural Rights (1966), The Convention on the Rights of the Child (1989), International Convention on the Elimination of all Forms of Racial Discrimination (1965), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and Convention on the Elimination of All Forms of Discrimination against Women (1979). However constitutional rights and international human rights are not always identical and constitutional rights can vary in scope of the protection they provide between states and compared to international human rights. Nevertheless if a state has ratified any of these international covenants on human rights, the state is obliged to interpret their legislation in accordance with those conventions. Additionally if the nation-state's constitutional rights do in any way afford a lesser scope of protection then the international covenants usually they should prevail over the domestic rights. From this it can be seen that international human rights are essential to the debate on the status of constitutional rights after globalization.

3.2. International Human Rights

International human rights are a part of international law where the most prominent actors are states, in fact they are the only official actors with legislative force in international law based on the concept of sovereignty. Therefore it were the states themselves that created international human rights which would in essence limit their own power.

> "In today's world, human rights is characteristically imagined as a movement involving international law and institutions, as well as movement involving the spread of liberal constitutions among states. Internal developments in many states have been much influenced by international law and institutions, as well as by pressures from other states trying to enforce international law".[58]

In other words human rights are in essence part of international law and have great influence on states and are vital when assessing the changing nature of state sovereignty and therefore their accountability towards constitutional rights that are

[58] Henry Steiner, J. Phillip Alston, *International Human Rights in Context,* (New York: Oxford University Press, 2000) p. 57

closely connected to international human rights. It can be said that the UDHR was accepted as international law by all states in the UN when it was adopted without a dissenting vote. Which meant that all those states accepted it to be a part of international law. The UDHR and the United Nations Charter:

> "Taken together, [they] represent the first concrete efforts by the community of nations to constitutionalize respect for, and observance of, human rights as a matter of international concern and international legal obligation"[59]

Since then there has been an explosion in human rights covenants being adopted on the international level most notable are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESC) of 1966, they are considered to be the second generation of human rights after the first one was UDHR. The difference between the UDHR and the second generation of the ICCPR and the ICESC is that when the UDHR is adopted by states "it is hortatory and aspirational, recommendatory rather than, in a formal sense binding".[60] However later covenants adopted and ratified by states are binding on states according to their provisions and, like constitutional rights they are only applicable to the state and citizen relationship on same premise as constitutional rights that the state holds all political power and additionally because states are the only entities how can be a party to international treaties and therefore these treaties cannot bind anyone except the state.

3.3. The Globalization of Human Rights

In recent years there has been an explosion in constitution making all over the world from Europe to Latin America to Africa. One of the most prominent aspects of these new constitutions are the inclusions of a bill of rights and the influence of human rights on those constitutions. "Indeed the successful export of a judicially administered charter of fundamental rights is itself a high profile example of

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[59] Herbert V. Morais, "The Globalization of Human Rights Law and the Role of International Financial Institutions in Promoting Human Rights" [2000], *The George Washington Journal of International Law and Economics,* Vol. 33, Iss. 1, p. 75

[60] Henry Steiner, J. Phillip Alston, *International Human Rights in Context,* (New York: Oxford University Press, 2000) p. 142

globalization".[61] In its strongest form this evolution could be said to represent the emergence of universal principles of constitutional law that are influencing the activity of governments all over the world.[62] This globalization of human rights has been described as a revolution that has:

> "burnished the consciousness of mankind forever. It is now the duty and obligation of 'every individual and every organ of society' (Universal Declaration of Human Rights, preamble) including the international financial institutions, to help promote human rights"[63]

Obviously the major revolution has been on the international level in connection to the UDHR and the Covenants following. However there has also been major promotion of human rights at regional levels for example, the European Convention on Human Rights of 1950 and the European Court of Human Rights and the Inter-American Convention on Human Rights of 1969 establishing the Inter-American Court of Human Rights. Additionally you could also mention the International Criminal Tribunals for the former Yugoslavia and Rwanda.

> "This formidable body of international conventions and declarations can truly be said to have finally elevated individuals to the status of subjects of international law, whose human rights are entitled to full protection under both national and international law"[64]

Apart from these conventions and institutions there is a new force in the world, globalization, that is promoting human rights to a new level so that they transcend the national forum and into the international. This new globalized world has manifested itself in a number of ways.

First the fall of the Communist regimes in the Soviet Union and Eastern Europe led to a new regimes based on democracy, the rule of law and human rights which paved the

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[61] Gavin M. Anderson, *Constitutional Rights After Globalization.* (Portland, Oregon: Hart Publishing, 2005) p, 4
[62] Ibid. p. 5
[63] Herbert V. Morais, "The Globalization of Human Rights Law and the Role of International Financial Institutions in Promoting Human Rights" [2000], *The George Washington Journal of International Law and Economics,* Vol. 33, Iss. 1, pp. 72-73
[64] Ibid. p. 76

way for free market systems. "Thus, today there is greater harmonization of political and value systems recognizing democracy and the dignity and rights of individuals"[65]

Secondly the rise of multinational corporations has given private economic actors the possibility to partake in the promotion of human rights through their investments and operations worldwide. However these economic actors do not always use this opportunity and according to Anderson these private economic actors as well as public authority have the power to infringe on human rights.[66] But there has been work done by the OECD and the UN on codes regulating the conduct of MNC's which deal *inter alia* with human rights issues. Additionally with human rights being slowly but assuredly more integrated into our social consciousness,[67]there has been a rise of human rights activist organizations that form a force that can challenge the power of private international actors, which will be discussed later.

Thirdly the technological globalization has greatly increased the power of human rights around the world. The main reason for this is the internet which has opened the activities of nation-states to the world so that they are no longer able to hide their human rights violations and thereby increasing the likelihood that those states are condemned by the international community.

Lastly one of the most important factors in promoting human rights on a global scale in the last decades has been the emergence of non-state actors such as human rights NGOs (Amnesty International, Human Rights Watch, Doctors Without Borders and many more). On the UN level the official actors with any power are states, nonetheless non-state actors have been extremely influential with regards to human rights and humanitarian issues. If we focus mainly on the human rights NGOs, they have consultative status and participate in meetings of the Human Rights

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[65] Herbert V. Morais, "The Globalization of Human Rights Law and the Role of International Financial Institutions in Promoting Human Rights" [2000], *The George Washington Journal of International Law and Economics,* Vol. 33, Iss. 1, p. 77

[66] Gavin M. Anderson, *Constitutional Rights After Globalization.* (Portland, Oregon: Hart Publishing, 2005) p. 9

[67] Christopher Marsh, Daniel P. Payne, "The Globalization of Human Rights and the Socialization of Human Rights Norms" [2007], *Brigham Young University Law Review*, Vol. 2007, Iss. 3, p. 665-687

Commission[68] and submit private reports of human rights violations around the world and their monitoring information is used by UN agencies that are responsible for the promotion of human rights. The cumulative effect of these NGOs has been such that it has vilified many states to the point that those states have protested their consultative status within the UN.

With the globalization of human rights states have become increasingly conscious of the importance of human rights as can be seen by more and more states being part of the UN covenants on human rights and the explosion of new constitutions including a bill of rights as well more the rise of regional human rights institutions.[69] Additionally this has increased the pressure on states that have not adopted a bill of rights or ratified human rights conventions to do so. However despite the increased influence of international human rights the state is still central to their enforcement which will be discussed in the next chapter.

[68] The Human Rights Commission is a body within the UN framework which objective is to promote human rights, receive complaints on human rights violations and develop methods of enforcing human rights.

[69] European Convention on Human Rights, Inter-American Commission of Human Rights, African Charter of Human Rights and the Arab Charter of Human Rights. Asia still has not adopted a regional convention but there is work being done on the subject.

CHAPTER 4. THE COUNTER-HEGEMONIC FORCE OF HUMAN RIGHTS

As has been discussed in this dissertation there is a serious question about the liberal legal theory of constitutional rights in a world of globalization. The fundamental principle of constitutional rights only applying to the relationship between the state and its citizens on the premise that the state holds the political power does seems to be in a paradigmatic crisis. The reason for that is mainly that this political power seems to have moved to some extent from the state onto the hands of other entities such as strong private economic international actors (MNCs), international institutions (WTO) and supranational institutions (EU).

However this chapter will propose that this crisis is perhaps overstated and that the globalization of human rights has the possibility to integrate human rights into a fundamental principle which will be a part of the international legal regime whether it be public or private and that states continue to be the actors accountable to human rights for even though they have to some extent lost some of their sovereign power they still hold the traditional political powers in their hands, which they can apply to all entities within their boundaries. Additionally this method of making the state responsible for human rights is still the most efficient way of securing human rights for individuals.

4.1. Integration of Human Rights into the law of Worldwide Organizations

When discussing how the state has lost its sovereign power it is often in relation with increased power of public international institutions or organizations (UN, WTO, World Bank) or supranational entities (the EU). But are these entities in any way under any obligation to respect and promote human rights? If we start by looking to the EU, all EU member states have ratified the European Convention on Human Rights (ECHR). This has prompted the European Court of Justice to construe all legislation by the EU in the context with the human rights entailed in the ECHR, therefore the responsibility for protecting human rights lies not only with the member states of the EU but also with the EU itself. Additionally the EU has decided to incorporate human rights clauses in all international agreements with third states, this

shows that economic integration can promote human rights beyond the economic area, and therefore enabling a more comprehensive effective protection of those rights.[70] According to Ernst-Ulrich Petermann[71] this method of integrating human rights into international organizations is something that the UN should try to do, and he argues that to some extent these international organizations are already responsible for the protection of human rights. If we turn our eyes from the EU, which is assuredly dedicated to incorporate human rights responsibilities into its legal framework, what about international organizations and institutions where it is not so clear such as the WTO, the World Bank and the IMF?

The WTO has 144 member states and most of them have ratified the two 1966 UN Human Rights Covenants (ICCPR and ICESC) and other UN human rights conventions, as well as regional and bilateral treaties on human rights. Looking to the precedent from the EU where their legislative acts have been interpreted in accordance with the ECHR since all its member states are a part of that convention, the same could be said to apply to the WTO. Additionally there is international law that explicitly indicates that rules and decisions of international organizations and institutions should be interpreted according to international human rights. All 189 UN members have committed themselves to inalienable human rights as a part of general international law and most of those states have also incorporated such rights in their respective constitutions, "human rights have thus also become part of the general principles of law recognized by civilized nations. (Article 38 of the Statute of the International Court of Justice)"[72] Also Article 31(3c) of the 1969 Vienna Convention on the Law of Treaties states that when interpreting international treaties, "there shall be taken into account, together with the context: any relevant rules of international law applicable in relations between the parties",[73] and since human rights have been accepted as international law this would also apply to human rights. The WTO has accepted this interpretation, in the summary records of the UN Sub-Commission on

[70] Ernst-Ulrich Petermann, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration" [2002] *European Journal of International Law,* Vol. 13, No. 3, 631
[71] Ibid. p. 621-650
[72] Ibid. p. 633
[73] Vienna Convention on the Law of Treaties, Vienna: 23 May 1969. United Nations, *Treaty Series*, vol. 1155, p. 331.

the Promotion and Protection of Human Rights there is a statement by Gabrielle Marceau from the Legal Affairs Division of the WTO, who is reported as saying:

> " The WTO secretariat, as a distinct legal personality, and the WTO member States, were consequently under an obligation to respect human rights instruments. Furthermore, the WTO Agreements specifically mentioned that members should interpret all the provisions of those Agreements in the light of any relevant rules of international law. The mandate of WTO dispute settlement panels was limited to deciding whether or not a violation of the WTO Agreements had occurred. They were unable to change the rules agreed upon by the member states."[74]

From this it can be seen that the WTO treaties and regulations should be interpreted according to international human rights. Therefore we can assume that this should also apply for International Financial Institutions such as the World Bank and the IMF, at least to a certain extent. However the nature of these institutions is different from the WTO in that their mandate is strictly apolitical and according to Ibrahim Shihata, a senior Vice-President and General Counsel of the World Bank, "[the] politicization of the Bank's work, even for moral purposes, could undermine its ability to play the roles for which it was created and for which no other institution is nearly so well qualified".[75]

A similar position has been taken by the IMF, that its mandate does not include the promotion of human rights but that it does engage in activity that promotes human rights such as: poverty reduction, higher spending on education and health, and the enhancement of governance which includes improvements in information availability which increases accountability and dialogue, strengthening of the rule of law and the promotion of transparency in government politics.[76] However these institutions are according to their Articles of Agreement, Art.VI, para. 1, that each institution "will in the conduct of its activities, have due regard for decisions of the Security Council under Articles 41 and 41 of the United Nations Charter".[77] Also it should be noted

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[74] Andrew Clapham, *Human Rights Obligations of Non-State Actors,* (New York: Oxford University Press, 2006) p. 164

[75] Ibid. p. 139

[76] Ibid. p. 140

[77] Agreement between the United Nations and the International Bank for Reconstruction and Development, Approved by the General Assembly on November 15, 1947.
International Organization, Vol. 2, No. 1 (Feb., 1948), pp. 198-201

that the World Bank and the IMF have in practice responded publicly to major human rights violations, like after events in East Timor in 1999.[78]

As can be seen by looking at the EU, WTO, the World Bank and the IMF human rights play a big role in the world of international organizations, those same organizations that are now holding much of the sovereign power that the nation-states have lost. Therefore instead of constitutional rights being worse off because these entities are not accountable towards those rights is perhaps not completely accurate, in fact it can be argued that since these international organizations are to a certain extent obliged to honor human rights in their operations this could enhance the protection of human rights on the national level. However the protection of human rights is still achieved through the nation-state and not international organizations. The reason for this is that:

> "the protection of universally recognized human rights often remains ineffective because the complementary constitutional principles needed for effectuating human rights, such as democratic participation, parliamentary rule-making, transparent 'deliberative democracy' and judicial protection of the rule of law, are not yet part of the law and practice of most worldwide organizations."[79]

These principles are all a part of the nation-state's legal system and as will be discussed in the next chapter show that human rights or constitutional rights protection is still best served by making the state responsible for them.

4.2. The Political Power of Governments

It has been argued in this dissertation that as a consequence of globalization that the state has lost some of its sovereign power to public or private global actors, and there are now legal entities which are influencing national legislation and public policy without being accountable to constitutional rights. However it might be necessary to

[78] Andrew Clapham, *Human Rights Obligations of Non-State Actors,* (New York: Oxford University Press, 2006) p. 140

[79] Ernst-Ulrich Petermann, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration" [2002] *European Journal of International Law,* Vol. 13, No. 3, 627

reverse this perspective and realize that it is not only the development of the global market, deregulation or privatization which is threatening our concept of constitutional rights. Perhaps we should rather focus on what the state is doing to respond to these new challenges.[80] There is no question the states themselves are responsible for creating these new regimes and created the legal environment to facilitate for economic globalization. It would therefore be shortsighted to consider states as less important even if they have lost some of their sovereign power. They are still the most powerful international actors.

In the second chapter of this thesis we looked to legal pluralism as a descriptive theory of national legal systems. This showed that sources of law within a nation-state can derive not only from governments but also other entities, such as international organizations, and also from within the state and from private global actors such as the MNCs and the legal institutions surrounding them. These private legal regimes and the MNCs on the other hand are always accountable to the legal system they are a part of. However it is clear that with economic globalization these private international corporations have accumulated extreme financial power and in light of that there has been fear that they would be able to influence governments to act on their behalf regardless of constitutional rights. But with human rights globalization there have also risen counter-hegemonic forces to the hegemonic forces of global economic actors. These counter-hegemonic forces are NGOs and human rights activists which are also putting pressure on governments to adhere to and promote human rights. In between these two forces are the national governments the only actor which truly holds the political powers. Therefore the battle for the respect of human rights between MNCs and human rights activist should be a part of the political debate and the judicial adjudication of the national courts (or international courts where that is possible as in the European Court of Human Rights).

4.3. Positive effects of globalization on the promotion of human rights

From our discussion it can be seen that globalization has in many ways limited state sovereign power and therefore challenged traditional constitutional rights theory and

[80] Andrew Clapham, *Human Rights Obligations of Non-State Actors,* (New York: Oxford University Press, 2006) p. 5

put those rights in crisis as to the question of who can be accountable. This view on globalization is pretty bleak, but there is another perspective that can be applied to globalization, that is that globalization has actually entrenched human rights deeper into our social consciousness and strengthened their position on the international as well as the national level. Also there has been a tendency to demonize economic globalization as detrimental to human rights, but maybe the forces of economic and human rights globalization can also work well together to promote mutual objectives.

In the world today it is paradoxical that most of the developing countries remain poor despite the wealth of natural resources this situation has been attributed, by many economists, to the lack of human rights protection and liberal trade and competition laws.[81] Also recent history has shown us that governments that have repeatedly violated human rights have failed in their pursuit of economic growth and prosperity.[82] From that it can be assumed that economic growth is in some way connected to states protection of human rights. Therefore it would also be important for economic actors that constitutional rights are protected within the nation-state boundaries. Evidence of that can be seen in the willingness of international financial institutions (World Bank, IMF) to accept that human rights is something they must adhere to and promote to certain extent.[83] Additionally it has been proposed that UN human rights and WTO rules can "offer mutually beneficial synergies for rendering human rights and the social functions and democratic legitimacy of the emerging global integration law more effective",[84] it is also questionable that citizens would accept the integration law of organizations like the WTO if all they pursued was economic welfare without regards to human rights.[85]

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[81] Ernst-Ulrich Petersmann, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*"* [2002], *European Journal of International Law*, Vol. 13, Iss. 3, p. 632

[82] Herbert V. Morais, "The Globalization of Human Rights Law and the Role of International Financial Institutions in Promoting Human Rights" [2000], *The George Washington Journal of International Law and Economics,* Vol. 33, Iss. 1, p. 90

[83] Ibid. p. 71-96

[84] Ernst-Ulrich Petersmann, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*"* [2002], *European Journal of International Law*, Vol. 13, Iss. 3, p. 632

[85] Ibid. p. 624

Globalization has also created a number of human rights activists on a national and international level. According to the book, *The Power of Human Rights* (1999), which is a theoretical work with case studies, that a transnational network of international and national actors working at promoting human rights, can bring around a significant improvement to human rights protection by pressuring governments.[86] This collaborative effort could hardly have been a possibility without globalization.

[86] Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

Conclusion

This dissertation has focused on the influence of globalization on state sovereignty and that the transfer or disappearance of that sovereignty has put constitutional rights in a crisis situation.

In the first chapter we discussed the phenomena of globalization and how it has changed our social world. Especially we looked to economic globalization that has paved the way for the rise multiple private (MNCs) and public (WTO) actors who are influencing our national legal systems. The influence of these non-state actors could be seen as a threat to our concept of constitutional rights which are based on the notion that the state is sovereign.

In the second chapter we focused on this dilemma where state sovereign power is being transferred to other actors whether they be private economic actors or international organizations. What can be seen from that is that our traditional concept of sovereignty does not apply any more, given the influence of non-state actors on governments and states legal systems. From these two first chapters it can easily be assumed that constitutional rights are in a crisis and that there is a need to re-evaluated how constitutional rights can be protected. However there is another force influencing the position of constitutional rights which are international human rights.

In the third chapter we looked at the globalization of human rights and the enormous influence they have had on the rise constitution making in the world, where the most prominent feature of these new constitutions is the importance given to fundamental rights. Human rights have now also become a part of international law and recognized all over the world, as was evident when the Universal Declaration of Human Rights was adopted by all nations in the UN without a dissenting vote. Then one must wonder if this strong position of human rights in the world cannot in some way empower the position of constitutional rights within nation-states despite doubts concerning the state's sovereign power.

In chapter four the argument was made that even though international organizations are influencing national legal systems that should in no way threaten the protection of constitutional rights, notwithstanding that those organizations are not accountable towards constitutional rights. The reason for that are the obligations of those international organizations towards international human rights, which has been confirmed by the WTO, World Bank and the IMF. Therefore any influence these organizations have on national legal systems should never go against the principles of fundamental rights. Regarding the influence of private international economic actors it is clear that they do not have formal political power and therefore cannot set rules that contravene constitutional rights, unless the government condones such action. Therefore it is the state's responsibility to see to it that private actors do not infringe on constitutional rights. Additionally there has been a rise of human rights oriented organizations that are constantly pressuring governments to respect and protect human rights, and these human rights activists can be seen as a counter-hegemonic force opposite the hegemonic force of international economic actors in the political debate on human rights, where the state is responsible for responding to the debate.

Although globalization has often been said to threaten human rights usually in connection with the increased power of international economic actors. However this dissertation has tried to show that perhaps this view on globalization is too bleak. In many ways globalization has also increased the importance of human rights in our social life where it is now a fundamental part our culture. Also there is no reason to think that economic globalization cannot go hand in hand with the promotion of human rights, since economic welfare is closely connected to the promotion of human rights.

Hopefully this dissertation has shown the constitutional rights crisis to be an exaggeration and that the prerequisite of the state having sovereign power to be accountable towards constitutional rights is not necessary. Quoting Neil McCormick:

> " A different view would be that sovereignty and sovereign states, and the inexorable linkage of law with sovereignty and the state, have been but the passing phenomena of a few centuries, that their passing is by no means

> regrettable, and that current developments in Europe exhibit the possibility of going beyond all that."[87]

It is obvious that globalization is challenging many concepts we have taken as given, like our traditional liberal theory of constitutional rights. However this theory seems to be flexible enough to respond to these challenges to the extent that they do not jeopardize our ability to protect human rights.

[87] Neil McCormick, "Beyond the Sovereign State" [1993] *Modern Law Review,* Vol. 56, No. 1, p. 1

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