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Reviewing Principles of Governance
branches of government at the global level

Introduction

The articles in this issue of *Policy Quarterly* explore the challenges facing humanity in the modern age, and the implications they hold for political and legal thought. The essence of global studies is to explore those implications from a new perspective, a new world view which assumes the existence of a global community – 'we the peoples' – whose common interests must be met by the international community of states collaborating together in qualitatively different ways. The thinking, therefore, extends to addressing the concept of global constitutionalism.

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The challenges identified – degradation of the commons and an ecological overshoot beyond the carrying capacity of the planet, dysfunction in the maintenance of international security and the illusory nature of universal peace, shortcomings in international law and the impunity enjoyed by states and leaders for manifest breaches – raise deep-seated questions pertaining to values, principles and institutions.

The values are embraced by the international community, in rudimentary fashion in the United Nations Charter, modernised in the 2005 World Summit Outcome Document and updated in the 2016 World Humanitarian Agenda. In recent years humanity is beginning to 'self-realise' and 'self-constitute', to cite Dag Hammarskjöld and Philip Allott. The principles remain largely incarcerated in the charter. More recent principles found in global declarations – the 1978 UN special session on nuclear disarmament (UNSSOD I), the 1992 Rio

Declaration on sustainability, the World Summit Outcome Document and the 2015 Sustainable Development Goals – have modified but not reshaped the basic principles of the charter.

The institutions remain quintessentially those created in the 1940s: the political institutions of the UN and the economic institutions of the Bretton Woods system. Whereas the stipulation of human values, and to to a lesser extent the principles, are more amenable to evolution because of their theoretical nature, any change to institutional structures is more intractable since they reflect and bestow power relationships.

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It is not accidental that the nature of the UN Security Council and the General Assembly, of the International Monetary Fund and the World Bank, and of the International Court of Justice has scarcely altered in three quarters of a century.

Proposals for institutional reform, never mind restructuring, founder on implacable opposition from the major power-holders of the status quo. Yet it is institutional reform, and perhaps even restructuring, to which we must turn if 21st-century politics is to keep pace with the increasingly fast-paced technological and social change around us. This article examines the current nature of the major international institutions and their interrelationships.

Overview: the branches of government at the global level

At the national level of governance, it is generally recognised that there are three branches of government. The legislature creates the law. The executive implements policy within the law. The judiciary interprets and applies the law. Across civilisations, however, some fundamental

divides prevail. First, the source of legitimacy is disputed: whether it is of divine or popular origin. Second, and partly as a result, the branches are seen as either integrated and unified, or discrete and separate: in one major civilisation the Divine is regarded as the source of authority for all three branches, and all three branches are accordingly integrated; in another the people bestow legitimacy, yet the three branches operate under a single, overarching secular structure; while in a third the people bestow legitimacy, and the branches are essentially separate. In one version all three branches are separate; in another the legislature and executive are partially merged while the judiciary remains independent.

At the global level of governance the relationships are rudimentary, almost shapeless. First, there is as yet no enduring consensus over the source of legitimacy. While the UN Charter begins in the name of 'we the peoples', there is an immediate sequential step in delegated power, instructing governments to act in their name 'for the common ends'. The charter may be in the name of the people of the United Nations but nowhere does it stipulate that the source of legitimacy and authority is the same people, and nowhere is there mention of the Divine. While that may appeal to some civilisational belief patterns, it does not command universal consensus. The lack of such a consensus in political discourse at the global level underlies much of the dysfunctionality and rancour among nation states today.

Second, when governments take over the UN system in the peoples' name, the action defaults to the executive branch of member governments. It is the diplomatic arm of the executives of the world that

assemble at the UN in New York and Geneva and elsewhere to ply the trade of international relations. The legislatures are not to be seen in any formal context. They assemble collectively in a separate institution in Geneva, the Inter-Parliamentary Union (IPU). The IPU is an old and august institution, having preceded the League of Nations. It is only in the past two decades that it has formed any kind of meaningful relationship with the United Nations, and it still has no real relationship with the Bretton Woods system, this being left to an independent parliamentarian network.

Third, international law itself is not made by the countries' legislatures but rather by their executives. It is not the lawmakers assembled at the IPU in Geneva but the diplomats assembled under the authority of the UN who propose, negotiate and conclude international treaties. During the negotiating period, the executive branch largely ignores the legislative branch, the extent depending upon the particular governmental style and political convention within a country. Once a treaty is concluded and adopted, it is referred in each case by the executive to the legislature. Depending, again, on the country, the ensuing obligations under international law transfer directly and unaltered into domestic law, or they pass, laboriously and occasionally in modified form, through a constitutional firewall that separates international and domestic law. Either way, international law remains a focus and function of the executive branch of government.

Fourth, the relationship between the international judiciary and the UN system is complex. The principal body, the International Court of Justice, was established in 1945 by the United Nations Charter. It is empowered to decide contentious cases between states and offer advisory opinions on the application of international law. While it operates independently under its own statute (which is an 'integral part of the Charter'), its judges are elected jointly by the UN General Assembly and the Security Council. The more recent International Criminal Court, established under the Statute of Rome (1998), is empowered to decide cases of individual

criminality. The International Criminal Court has an intimate relationship with the Security Council, with the latter possessing the right of referral to the court and, in the case of aggression, the right of deferral.

These facts of international life make it clear how undeveloped constitutional life is at the international level. Constitutional life is what it is at the international level. That is to say, it is adequately developed in a Westphalian context. But when it comes to the idea of a global community the reality is constitutionally undeveloped. If we are to seek legitimacy in values, principles and institutions, the layout needs fundamental rethinking. This article focuses on one aspect of this dilemma: the relationship between the world's collective body of national legislatures, the IPU, and the body of national executives, the UN.

The legislature and the executive: the IPU–UN relationship
Exploration of the relationship between the Inter-Parliamentary Union and the United Nations contributes to our understanding of two fundamental theoretical problems in a supranational world: which institutions are best suited to the challenges of global governance; and how are the voices of citizens, and the interests, best represented in these global institutions? The starting premise is that the relationship between the two organisations has evolved into a partnership in which the UN has primacy, but that the true nature of the relationship should be one between two organisations of equal status and capacity. For this to occur, some fundamental review of the nature and application of international law may be required.

The Inter-Parliamentary Union was formed in 1889, 31 years before the first intergovernmental organisation (the League of Nations) and 56 years before the second generation (the United Nations). The League of Nations was seen as the first international organisation of universal scope. Its membership constituency was 42 'high contracting parties', comprising the governments not only of independent states but of dominions and colonies.

The status of the IPU in both Swiss law and international law has evolved. It has developed from a non-governmental organisation of individual parliamentarians in the 1880s into an international organisation of national parliaments (Albers, 2012, p.190). In the years prior to the First World War the IPU focused on the development of international arbitration law and on encouraging nation states to voluntarily adhere to legal norms where these were clearly delineated (Sabic, 2008). The change of membership in 2001 from national groups in parliaments to parliaments per se resulted in the IPU

gaining recognition of its international personality by governments.

The IPU's goals are to foster worldwide parliamentary dialogue, to work for peace and co-operation among peoples, and to work for the firm establishment of representative democracy. The IPU currently focuses on six themes of international concern: representative democracy; peace and security; sustainable development; human rights and humanitarian law; women in politics; and education, science and culture. These themes are, of course, broadly similar to those advanced within the United Nations.

Based on a headquarters agreement in 1971, the Swiss government recognises the personality and legal capacity of the IPU, and grants it a number of freedoms. The IPU is also recognised as a public international organisation in the United States, where it enjoys the privileges, exemptions and immunities conferred by the International Organizations Immunities Act and a corresponding presidential executive order (1998). The

IPU had no meaningful relationship with the League of Nations, and for many years had little relationship with the United Nations. However, since the early 1990s it has sought a closer relationship with the UN, one described as 'providing the parliamentary dimension to the United Nations', and in 1996 a co-operation agreement was struck between the two.

In 1999 a legal opinion offered the view that the IPU 'enjoys special status in international law'. It concluded that the IPU 'is *sui generis*, that is, it is an international parliamentary, political and representative organization' and it 'enjoys a significant measure of international

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personality'. Even though the teachings of the most highly qualified publicists of the various nations are only subsidiary means for the determination of rules of law in international law (under article 38(1)(d) of the International Court of Justice statute), it can be assumed that the IPU has de facto acquired a special inter-parliamentary status, which is partly recognised *de jure*.

The United Nations Millennium Declaration of 2000 (paragraph 30) noted the importance of relations between the United Nations and national parliaments, and encouraged such co-operation through the IPU (Sabic, p.264). In 2002 the IPU attained observer status at the General Assembly. This brought the right to circulate its official documents within various UN bodies, and marked the start of regular presentations by IPU representatives at sessions of the General Assembly, its subsidiary organs and major UN conferences and high-level events: no fewer than 170 IPU presentations were delivered to UN meetings between 2002 and 2016.

The IPU's objectives for the period 2012–17 include developing a parliamentary dimension to the work of the UN and other multilateral institutions, and building parliamentary support for international development goals (Inter-Parliamentary Union, 2011). The second of these objectives includes:

- contributing to and monitoring international negotiations and debates at the UN and related agencies;
- overseeing the enforcement of what is adopted by governments; and
- ensuring national compliance with international norms and the rule of law. (Second World Conference of Speakers of Parliament, 2005.)

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In 2014 a partnership agreement between the IPU and the UN was drawn up, and this is currently under active consideration.

Notwithstanding these advances in the IPU's status, it remains unclear what precisely the relative status of the IPU is vis-à-vis the UN, and what source of international law might be applicable to determine this. Some uncharted political terrain perhaps lies ahead. The UN recognises that parliaments are responsible for giving effect to international commitments, and, as they comprise representatives of the people, are essential allies in educating the public on matters of peace and security, human rights, sustainable development and democracy. IPU global assemblies regularly include UN speakers, and have passed numerous resolutions on key global issues being addressed by the UN, from nuclear disarmament to specific conflict situations, trade, financing for development, and protecting and strengthening the rights of citizens in various situations (Filip, 2004, p.9). Between 2002 and 2014 the General Assembly passed 12 resolutions on its

relationship with the IPU and received five reports from the secretary general. Yet there is a general sense of a lacuna in the IPU's global role, and a recognition that something needs to be done.

A United Nations Parliamentary Assembly

The question therefore arises as to whether a parliamentary assembly should be a direct component part of the UN system. The idea has been around since the League of Nations, and was revived in the 1990s. The logical alternatives are an 'evolution' of the IPU into such a body or the separate creation of a United Nations Parliamentary Assembly (Wikipedia, n.d.).

Despite the stronger ties now existing between the IPU and the UN system, there is no serious discussion about whether the IPU might undergo such an evolution. In the early 1990s the idea of a United Nations Parliamentary Assembly attracted interest in the Canadian parliament.[1] In 2007 an international civil society body, the Campaign for the Establishment of a United Nations Parliamentary Assembly, was established, and it has been increasingly active and influential in advocacy work to governments, parliaments and leaders. The same year the Pan African Parliament adopted a resolution calling for such an assembly. The campaign had the titular leadership of former UN secretary general Boutros Boutros-Ghali. In January 2016 the EU's high representative for foreign affairs and vice-president of the European Commission expressed personal support (UNPA Campaign Secretariat, 2016). In November 2016 former UN under-secretary general Ibrahim Gambari, having served as co-chair of the Commission on Global Security, Justice and Governance, also expressed support. But the idea does

not figure, at least as yet, in discussions within the UN or within governments.

Constitutionalism and the United Nations

Perhaps before these fundamental issues are resolved there is a need for discussion and dialogue on the question of constitutionalism at the global level.

The idea of the UN Charter as a prototype document for some form of global constitutionalism is as old as Hammarskjöldian thought of the mid-20th century, building on Wilsonian doctrinal precepts for the League of Nations. This has been given added philosophical depth in the writings of Philip Allott and others. The Commission on Global Governance in its 1995 report *Our Global Neighbourhood* devoted some attention to the question and a new genre of academic enquiry into global constitutionalism has emerged in the past few decades. Such enquiry, however, has not entered, or perhaps even reached, the fortress of intergovernmental thinking.

If one adheres to the classic Westphalian perspective on peoples and states, citizens receive their standing, their rights and protections from nation states, beyond which there is no higher source of sovereignty, and nation states retain all rights of engagement in international affairs. People are citizens of nations, and are represented solely by their nations in international organisations. In this view, Sabic points out, '[a] parliamentarian as an international actor remains a contradiction in terms' (Sabic, 2008, p.267). In the specific instance of international parliamentarianism, Jancic suggests 'that the traditional, inward-looking role of parliaments is gradually changing under the pressure of transnational policy challenges'; we now witness the 'trans-nationalization of policy making' and see that 'democracy is becoming a "global entitlement"' (Jancic, 2015, pp.198, 199). 'As the public becomes more aware of the extent of the global problems, and will increasingly demand efficient solutions from their governments and representatives', suggests Sabic, 'the investment of time and energy of parliamentarians, active in IPIs, will make ever more sense' (Sabic, 2008, p.268). Due to their 'double

mandate, whereby they are democratic representatives in both domestic and international arenas' (Jancic, 2015, p.205), members of national parliaments are, it turns out, in the first ranks of global citizens. Under the forces of globalism their duties to domestic constituents require their close consideration of global public policy challenges and imperatives.

Constitutional thinking is under way, however, at the regional level. Doctrinal development is more far-reaching than commonly supposed, not only in Europe but in Africa and America as well. The Organization of American States requires 'representative democracy' as its system of government for its member states. The Constitutive Act of the African Union empowers the union to intervene in 'grave circumstances' (genocide, war crimes, crimes against humanity), and the union recently requested its International

Law Commission to examine the proposed international constitutional court. The European Court of Justice recently ruled that an EC regulation derived from a binding (chapter VII) resolution of the UN Security Council was unconstitutional in European law.[2] In a recent study, International IDEA has released insights into constitutionalism at the regional level in Africa, Asia, America, Europe and the Pacific. As the UN deputy secretary general put it in the foreword,

The rule of law and constitutionalism are among the key principles and core mandates of many regional organizations … the Inter-regional Dialogue on Democracy, in particular through its meeting on the rule of law and constitutional governance and this resulting publication, has played a valuable role in advancing

these intertwined, universal and global themes from the critically important regional perspective. (Corenillo and Sample, 2014)

The issues raised here penetrate deeply into established doctrine of political and legal thought, and traditional diplomatic method. That is not a reason to turn away from them. The 21st century is already proving to be an era of rapid and fundamental change, and issues of legitimacy and empowerment at the global level simply cannot be ignored. That is the challenge of the new sub-discipline known as global studies.

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1 Eighth report of the Standing Committee on External Affairs and International Trade, House of Commons, Parliament of Canada, spring 1993, chaired by Jon Bosley.
2 Kadi v European Commission (2008).

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