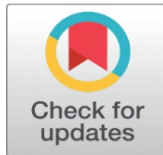
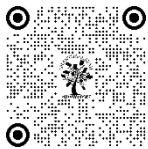


# POPULIST NATIONALISM WHETHER ‘TRUMP’-ING THE LEGITIMACY IN THE CAUSE OF SOCIAL EQUALITY IN INTERNATIONAL LAW?

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## DOI

10.29121/shodhkosh.v5.i6.2024.2759

**Funding:** This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.

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## ABSTRACT

The election of Trump marks the watershed in the history of International Law being an exemplification of a growing trend of populist nationalism globally, particularly after Brexit. Scholars recognize the predominant mode of articulation of these nationalist sentiments to be within the ‘cultural backlash’ theory. The authors explore the underlying legitimacy of the nationalist cause as being depicted by the concern of the economic have-nots over the unequal spread of the gains of globalization as having the potential to shatter the uncertain basis of international co-operation founded on trans-national economic integration. Deep tension ensues from this discrepancy between the non-progressive, retaliatory and state-centered claims of nationalism despite the legitimacy of the cause being universal. Such elitist articulation of a state’s interests/concerns in international law paves the way for a predominant use of the consensual theory to explain the scope of international co-operation, raising a problematic concern as to whether it is possible to by such distorted representation of the underlying legitimate claims of the people to trivialize the central liberal values, now universally accepted, as matters of mere politics and not governed by rules of law? Constitutionalism in international law is considered herein as an instrument to institutionalize the hierarchical superiority of certain liberal values and non-derogable core principles including the ideal of social equality as a basis of world peace. The researchers present this as one method to optimally reconcile the tensions in the present global order as it ultimately provides a framework to curtail the ability of those wielding the state’s political power to further the elitist agenda at the cost of the legitimate demand of the people, the ultimate beneficiaries of an international legal order. The paper emphasizes the urgent need to ease out these tensional elements, as realizing the goal of social equality is possible only by international co-operation.

**Keywords:** Globalization, Populist Nationalism, Constitutionalization of International Law, Consensual Theory, International Co-Operation, Socio-Economic Equality, Elitist Articulation Of State Interests

## 1. INTRODUCTION

The rise of populist nationalism in the West exemplified by the election of Trump has caused turbulence not only in the field of politics but, also amongst the scholars of international law. As the great (?) nations of the West reflect the rise of nationalism in the articulation of their foreign policies in cultural and protectionist terms, a genuine concern crops up as to whether this trend of social mobilization has the capacity to challenge and shatter the existing basis of international co-operation on economic lines? The authors in this research article put forward the premise that as long as the state leaders succeed in framing this surge of populist demand in cultural terms the same cannot displace the mode of international co-operation in any manner whatsoever. This article seeks to unearth the legitimate economic basis underlying the growth of populist nationalism in the West and asserts that unless this legitimate concern is framed in its

true sense and accordingly reflected in the public debate, it is not going to alter the basis of international law, which promotes globalization through an integration of the world economy. The authors suggest a fresh starting point within the framework of constitutionalization of international law to restructure the current public debates so as to reflect the legitimate economic concerns of the have-nots of the western societies whereby empowering them to push for a more equitable basis of international co-operation grounded in deference to obligatory standards.

This article is written within the framework of critical international law. Prominent critical international law scholars have increasingly emphasized that academic scholarship within their paradigm should not only question and criticize the current theoretical underpinnings of international law for its own sake, but, rather must do it with the view to provide an workable alternative theoretical foundation that better addresses the concerns of ethics and justice.<sup>1</sup> The authors realize how without taking into account this framework for analyzing issues within the approach of critical international law any academic engagement would remain only peripheral and not 'critical'. Therefore, this article not only seeks to identify the problem but also offers an alternative solution to better articulate the legitimate concerns responsible for the rise of populist nationalism in the West.

## 2. LOCATING THE LEGITIMACY IN THE RISE OF POPULIST NATIONALISM – THE CONTEXT

It is difficult not to notice that the strongest surge of populist nationalism witnessed in the recent years is concentrated in the developed countries of the world.<sup>2</sup> When we come to accept of this empirical correlation between the rise of populist nationalism and the level of economic development, it becomes increasingly evident that the process of globalization and economic integration of the world, which was intensified in the recent decades, has led to a more equal distribution of economic resources amongst the countries.<sup>3</sup> This can be understood as the production chains of the multinational companies (MNCs) are now located transnationally, whereby outsourcing of segments of work to developing countries in order to enjoy lower costs, which in turn has contributed to their prosperity. The production houses located in the developed countries maximized their profits by outsourcing the manufacturing jobs abroad, however, in this process the working class has lost their means of economic sustenance. The inevitable outcome on the macro scale that followed was the concentration of wealth and the gains of globalization amongst the elites.<sup>4</sup> Overtime, as the number of have-nots increased, the democratic calculus shifted and manifested itself as the populist challenge to the alleged equitability of the international order.<sup>5</sup>

This is where we can map the surge of nationalism and its variant manifestations in the form of Brexit, the rise of Trump, the growing popularity of the National Front in France etc. The supporters of these populist nationalist movements are the losers from the process of globalization, or, the have-nots as we may call them. This claim of the authors is in connection with the ground reality as we observed that the majority of Trump supporters are geographically located in the rural, small town settings of America where deindustrialization has hit at its hardest.<sup>6</sup> Similarly, the pro-Brexit vote

<sup>1</sup> Sébastien Jodoin & Katherine Lofts, *What's Critical about Critical International Law? – Reflections on the Emancipatory Potential of International Legal Scholarship*, in *Critical International Law – Postrealism, Postcolonialism And Transnationalism* 334 (Prabhakar Singh & Benoît Mayer 1st ed. 2014).

<sup>2</sup> Deidre McPhillips, *Democracy Versus The People – Elections in 2017 will show if Donald Trump and Brexit are two examples of an ongoing global movement*, **U.S. NEWS & WORLD REPORT**, January 19, 2017.

<sup>3</sup> "Postwar globalization achieved two major things: Open trade made conditions more equal *between* countries, but at the cost of creating more inequality *within* countries thanks to the flood of industrial jobs that fled to cheaper shores, seeking a lower "China price", as it was once called." – See Michael Hirish, *Why The New Nationalists Are Taking Over*, **POLITICO**, June 27, 2016.

<sup>4</sup> David Brooks, *The Post-Trump Era*, **THE NEW YORK TIMES**, March 25, 2016.

<sup>5</sup> Judah Grunstein, *A Survival Guide for Liberal Internationalists in the Trump Era*, **WORLD POLITICS REVIEW**, November 14, 2016.

<sup>6</sup> "Class has been a bigger factor in this election than in any election since the New Deal era. Trump's insurgency rode largely on middle- and working-class fears about globalization, immigration and the cultural arrogance of the "progressive" cultural elite...Trump owes his election to what one writer has called "the leftover people." These may be "deplorables" to the pundits but their grievances are real – their incomes and their lifespans have been decreasing." – See Joel Kotkin, *The Improbable Demographics Behind Donald Trump's Shocking Presidential Victory*, **FORBES**, November 9, 2016.

was concentrated in the rural settings outside of London.<sup>7</sup> Putin, the Russian nationalist leader, enjoys massive public support from the rustic settings of the countryside rather than from the more educated and urbanized cities of Moscow and St. Petersburg. Even Victor Orban, the Hungarian premier, basis his support in smaller cities outside of Budapest.<sup>8</sup> All of this cannot but be a mere co-incidence.

Taking cue from the American example, it becomes evident as to how the Republicans with their capitalist ties as well as the Democrats with their emphasis on identity politics are both unwilling to directly propagate the cause of welfare and socio-economic equality.<sup>9</sup> The ideological void created by this mismatch needs to be addressed by the state leaders who at least ought to appear accountable to the electorate. In such a situation, it is easiest for the state leaders to put to use a loose, abstract and vague concept of nationalism<sup>10</sup> framed in cultural and ethnic terms to appear as the only possible realistic solution to salvage the people out of their problems. Such a cultural articulation of the sentiments is likely to be accepted by the vulnerable have-nots who aren't looking for a rational explanation but merely an emotional ventilation of their grievances in the short-run.<sup>11</sup> In the case of Trump, such propaganda of ethnic nationalism takes angry and nostalgic overtones in the articulation of xenophobic sentiments, policies curtailing immigration, possible talk of exit and/or renegotiation from/of the regional cooperative arrangements such as NAFTA, NATO etc.<sup>12</sup> Couched in such narrow, protectionist and cultural terms the clash of the different nationalisms of the western societies is inevitable.<sup>13</sup> This foregoing analysis will make clear that the cultural articulation of the populist nationalism is only a symptom and not the underlying legitimate cause.<sup>14</sup>

'Make America Great Again' was the phrase that led Trump to victory in the American Presidential election. The use of such a vague and loosely defined phrase signals the element of diplomacy and the pressing need to sound politically correct, which avoids directly attacking the existing status quo in a manner that would adversely affect the capitalists who are the elites and who in close conjunction with the state machinery shape the discourse of both municipal and

<sup>7</sup> Ashley Kirk, *EU Referendum: Which type of person wants to leave, and who will be voting to remain?*, **THE TELEGRAPH**, June 22, 2016.

<sup>8</sup> Francis Fukuyama, *US against the world? Trump's America and the new global order*, **FINANCIAL TIMES**, November 11, 2016.

<sup>9</sup> *Ibid.*

<sup>10</sup> Hirish, *supra* note 3.

<sup>11</sup> "And yet, there are cultural anxieties. But, I think that you shouldn't let that blind you to the fact that there are much deeper roots to people's feelings than just the country changing and changing too fast...They may be upset about the cultural changes anyway, but, they're much more upset because in the aftermath of a financial crisis, which is essentially an economic problem that goes back for decades now. And now, they are pretty furious and they have no faith in Washington to solve these problems. So, I think Trump can take action on some of these immigration related issues and he may get applause from his base for a period of time but, *that is not the reason they voted for him*. They voted for him because he was going to make 'America great again', which means he is going to make their lives greater again. And, the fact that a lot of the stuff he proposes to do, including this immigration bit as it is not going to promote that the changes that they would really like to see and, its surely a problem for him. The only question remaining how long it is going to take the pipe to reach there." – Ruy Teixeira, Senior Fellow, Centre For American Progress in the panel discussion organized by CATO Institute (January 25, 2017), <https://www.cato.org/events/populism-nationalism-trump-era>.

<sup>12</sup> See Hirish, *supra* note 3; Mary Dejevksy, *Donald Trump's Foreign Policy Ideas aren't as crazy as they seem*, **INDEPENDENT**, November 9, 2016.

<sup>13</sup> Timothy Garton Ash, *Under President Trump, we'll enter an age of global confrontation – A narcissistic bully will face nationalist leaders just as dangerous. Prepare for a direct clash with China.*, **THE GUARDIAN**, January 21, 2017.

<sup>14</sup> A more nuanced understanding of the interplay of the economic and cultural causes shows the possibility of the two theories of economic insecurity and the 'cultural backlash' theory co-existing together with varying relative importance in determining the outcome. Also, it is likely that the cultural backlash theory that explains why majority of the people in the short-run voted for Trump and pro-Brexit, in the long-run this theory may loose its appeal as the number of its adherents decrease as a proportion of the political population as they are majorly members of the older generation and also it isn't a logical and/or rational concern that is going to hold the attention of the more educated youth. – See Ronald F. Inglehart & Pippa Noris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash*, **FACULTY RESEARCH WORKING PAPER SERIES OF THE HARVARD KENNEDY SCHOOL** (July 29, 2016, 08:20 PM), <https://research.hks.harvard.edu/publications/getFile.aspx?Id=1401>.

international law.<sup>15</sup> Speaking openly about socio-economic equality with respect to making America great again would be a restricted appeal to a pre-defined economically backward class. If so stated, it would raise different questions of accountability, which are detrimental and capable of shattering the existing power relations and therefore, such an approach was deftly avoided. But, it is this use of politically correct language to restrict the scrutiny of the performance of public institutions,<sup>16</sup> particularly in the context of international law and ideologically minimizing the scope of resistance from the public that is problematic.

Such estrangement of the majority of the people from domestic structures of governance and in the larger picture excluding them, or, rather marginalizing them from benefiting from the gains of globalization is in effect alienating the have-nots from determining the outcomes of international co-operation. This economic explanation and its link to the spiral of alienation and powerlessness with respect to the working of international law structures and arrangements explains the legitimacy of the nationalist cause. If correctly framed, this underlying legitimacy responsible for the surge of populist nationalist sentiments has the capacity to challenge the current uncertain basis of international co-operation. But, as explained above, the presence of economic insecurities also leaves the masses in a vulnerable state where they will be readily accepting the prejudicial, diplomatic and hypocritical political campaigns/agenda and political language, which they don't even fully understand, let alone critically appreciate as it plays on the deep-rooted feelings and emotions of the people. This vulnerability of the have-nots lets the powerful to maneuver the way in which international law and order is structured and organized. This article proposes that the concept of constitutionalization of international law is one possible method to effectively bring to the forefront the legitimate economic concerns responsible for the rise of populist nationalism in the West.

### 3. IDENTIFYING THE 'BEST' OF THE MULTIPLE POSSIBLE SOLUTIONS – *THE PREMISE*

The consistent escalation of the populist nationalist sentiments poses a genuine concern as to the equitability of the current model of international co-operation, which forms the foundation of the rules of international law. In order to identify the best possible solution to address the demands made by the participants of this populist upsurge, we need to analyze and locate the position of the various states in the world, which informs their capacity to act.

The conclusion of the Uruguay rounds of negotiation and the subsequent establishment of the World Trade Organization (WTO) marks a turning point in the history of international law that cannot be reversed considering the wide ranging effects it has had on the world states. The arrangements made in international law thereafter reflect that the stages agreed that only by an integration of their economies could long lasting and undisturbed peace be established in the world.<sup>17</sup> Globalization and the growth of technology has only increased the levels of integration and widened its scope to cover many new areas.<sup>18</sup>

Therefore, if today US under the leadership of Trump puts into practice protectionist economic foreign policies<sup>19</sup> justified on grounds of cultural nationalism, it would almost immediately lead to a retaliation in a similar manner by US

<sup>15</sup> See Fukuyama, *supra* note 8; Cato Institute, *Populism And Nationalism in the Trump Era*, CATO Institute (January 25, 2017), <https://www.cato.org/events/populism-nationalism-trump-era>.

<sup>16</sup> For instance, see the diplomacy and misinformation delivered to the public by Trump's campaign regarding his possible tax policy and international agreements such as the TPP respectively from the two sources mentioned herein. See Steve Holland and Emily Stephenson, *Trump, now President, pledges to put 'America First' in nationalist speech*, **POLITICS**, January 21, 2017 and Michael Brenner, *American Foreign Policy in the Post-Trump Era*, **COUNTER PUNCH ORG**, October 28, 2016.

<sup>17</sup> Hirish, *supra* note 3.

<sup>18</sup> See Heba Shams, *Law in the Context of "Globalisation": A Framework of Analysis*, 35 Int'l L 1589 (2001).

<sup>19</sup> Not only would a protectionist economic policy be met with retaliation, but, it also suffers from another major conceptual problem in the sense that it misarticulates the problem by shifting the blame on other countries for the situation faced by the nationals of one's own state – all of this indicating the use of state power by the leaders and the attendant possibility of manipulation of the underlying genuine concern of the people. "...showing international good faith in accepting national responsibility rules out tempting complaints from rich countries about costs of economic displacement: one must not put costs of domestic injustice on foreign shoulders by supporting arrangements that are worse for needy foreigners in order to save vulnerable co-patriots from costs that they would not endure if social justice were secured. For example, costs of injustice in the United States should not be put on Chinese shoulders by instituting

allies in Europe as well as Asian economic giants like China.<sup>20</sup> Collectively, such inward looking policies of the other states has the capacity to inflict much more than just economic harm on US, which would restrict America's ability to fulfill its other objectives in isolation. This simplistic logic would make it increasingly evident that until and unless the high levels of socio-economic inequality are addressed by implementation of welfare measures, the legitimate reasons that have caused the uprising of the sentiments of economic nationalism, display of political extremism and cultural protectionism would only intensify and worsen the situation. So exacerbated without the implementation of proper policies, it would lead to magnifying the levels of existing conflicts, which could at its worst culminate in a third world war as the countries no longer identify with one another.<sup>21</sup>

Habermas has aptly noted in his work that the increasing functional differentiation of the production process across national boundaries is not only a matter of economic reality, but, rather these forces of the systematic integration of the world economies have gained an independent force that now has substantial capacity to affect the human reality worldwide.<sup>22</sup> Therefore, when the legitimacy of the cause responsible for the rise of populist nationalism is universal in nature, the common good of mankind is not likely to be served as long as the public is encouraged to make choices solely and exclusively considering their own nationalist interests.<sup>23</sup>

Habermas eloquently articulates the pressing and immediate need for the nationals of one country to identify with the similar needs of the members of the other country. He does not justify the need to look for political solidarity transnationally either on moral or legal grounds as the former requires the citizen to be selfless, which is highly unlikely and the latter requires them to follow a rule due to threat of sanction.<sup>24</sup> The authors believe that this threat of sanction is not likely to be present when the states do not see the need to foster solidarity in its own interest as the state leaders who wield political powers are unlikely to enact such a law, either domestically or internationally, which has the capacity to undermine its own powers. Therefore, the claim of Habermas to ground the necessity to develop political solidarity transnationally on the basis of ethical concerns that expects reciprocity and similar display of trust by other people of the world due to existing natural connections. This natural connection for him is precisely the systematic integration of the world economies that ties the fate of the national of one state inherently to that of a national of another state.<sup>25</sup>

This manner of intertwining one's self interest with the legitimacy of a global human concern of achieving a higher level of socio-economic equality seems to be a good solution to the problem of the present day society. However, the same is not realistically workable as the state continues to remain the principal actor in international law.

Alongside globalization, the relationship between the people and the state was reconfigured due an increased flow of information and a rapid pace of privatization. This together resulted in the shift of power from the state structures to a few selected elite individuals, who now increasingly through a process of lobbying affect the articulation of state's interests internationally.<sup>26</sup> This nexus between the elites and the state machinery precludes the existence and effective functioning of organizational, economic and political setup to further the cause of economic equality, as there is no space for the voice of the have-nots. Therefore, expecting the state leadership to honestly articulate in the form of state interests the legitimate demands of the have-nots is nothing but a myth. In such a situation, it is futile to expect that state practice and *opinio juris* will develop into customary international law or further even into the non-derogable norms of *jus cogens*, which restrict the ability of a state to enter into arrangements that detrimentally affect the existing

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trade protection instead of the protection of the displaced American workers by a safety net that domestic justice requires." – See **CHARLES R. BEITZ & ROBERT E. GOODIN** eds., **GLOBAL BASIC RIGHTS** 166 (1st ed. 2009).

<sup>20</sup> Anonymous, *Trump's World – The New Nationalism: With his call to put "America First", Donald Trump is the latest recruit to a dangerous nationalism*, The Economist, November 19, 2016.

<sup>21</sup> David Gow, *Globalization and Its Discontents*, 16 Geo. J. Int'l Aff. 52, 53-58 (2015).

<sup>22</sup> Achilles Skordas & Peer Zumbansen, *Kantian Project of International Law: Engagements with Jurgen Habermas' the Divided West*, German Law Journal Vol. 10, No. 01 1, 1 (2009).

<sup>23</sup> Jürgen Habermas, *Plea for a Constitutionalization of International Law*, XXIII World Congress Of Philosophy, Athens 1, 8 (August 2013).

<sup>24</sup> *Ibid* at 9 – 11.

<sup>25</sup> Habermas, *supra* note 23 at 9-11.

<sup>26</sup> Shams, *supra* note 18 at 1600, 1608-09.

level of socio-economic inequality. Negotiation of treaties that put a similar restriction on the power of a sovereign state cannot be expected for the same reasons.<sup>27</sup>

#### 4. CONSTITUTIONALIZATION OF INTERNATIONAL LAW AS SETTING THE FRAME TO RESTRUCTURE PUBLIC DEBATE

From the preceding section of this article, we realize that neither the existing structures for the articulation of state interest and its translation into international law on the basis of state consent (i.e. customary international law and treaties) and nor protectionist, inward looking foreign policies of states are feasible alternatives to ensure world peace and co-operation in the face of the disturbance caused by the rise of populist nationalism. The authors believe that the approach of constitutionalization of international law can in the present context provide a better workable solution to the challenge posed by the growth of populist nationalism.

The reference to constitutionalization of international law in this article shall mean embodying and accepting a restriction on the ability/power of a sovereign state to articulate its interests. Such a restriction would mean that no sovereign state can frame its state interests at the time of entering into agreements or consenting to growing customary practices, in such a manner where such articulation would have the effect of imposing an international obligation the state that further widens or intensifies the socio-economic inequalities existing domestically.

This in effect means that no sovereign state can enter into treaties or consent to evolving practices of customary international law that permit the process of globalization to continue without ensuring that international co-operation for the same does not widen the already existing socio-economic inequality domestically. Such a restriction imposed on the ability of sovereign states by the presence of obligatory non-derogable standards of an international constitution would provide great momentum and support to the domestic demand for laws allowing for a more equitable spread of the gains of globalization as between the haves and the have-nots. The ultimate ability of a state to enact laws in response to the domestic demands of the population cannot be curtailed, the state being a sovereign. However, the authors suggest herein that the process of constitutionalization of international law would only lend support to such legitimate demands of the have-nots by restricting the capacity of states to enter into international arrangements that worsen the existing socio-economic inequality. Therefore, in effect, where a state's internal sovereignty is not curtailed directly by the process of constitutionalization of international law, the same restricts the scope of formulation and manifestation of a state's external sovereignty.

To properly appreciate the above argument made by the authors it is essential to have a basic idea of what it means when the phrase 'constitutionalization of international law' is used. To understand the concept in its most fundamental and simplistic sense, we can draw an analogy to the working of a constitution within a state. Just as in a domestic constitution, the process of constitutionalization of international law<sup>28</sup> involves the creation of an international constitution that embodies two basic elements namely – the substantive norms that creates rights and obligations for the members of the international community and secondly, the institutions to enforce the same.<sup>29</sup>

The substantive norms, which are a part of the international constitution, are hierarchically superior to the other norms of international law (subject to the existence of preemptory *jus cogens* norms). Hence, in cases of conflict they prevail and determine the obligation of a state and other members of the international community.<sup>30</sup> The main object of these

<sup>27</sup> For a role of the state in the formation of rules of treaty law and customary international law as well as the evolution of opinion juris to the level of pre-emptory norms of *jus cogens* – See **MALCOM N. SHAW, INTERNATIONAL LAW** 49-91 (7th ed. 2014) and **I.A. SHEARER ed., STARKE'S INTERNATIONAL LAW** 28-45 (11th ed. 1994).

<sup>28</sup> The establishment of the normative substance forming a part of the constitution for the international community is a process that happens over time and is subject to change, therefore indicating that the contents of the constitution are flexibly determined. – See Markus Kotzur, *Overcoming Dichotomies: A Functional Approach to the Constitutional Paradigm in Public International Law*, *GoJIL* 4 (2012) 2, 585, 590 (2012).

<sup>29</sup> The existing literature on the concept of constitutionalization of international law also terms an emphasis on both these elements individually within a conception of an international constitution as normative constitutionalism and social constitutionalism. For a detailed understanding of both of these dimensions, See – Rossana Deplano, *Questioning Unstated Assumptions Of International Constitutionalism*, 4 *J. Phil. Int'l L.* 99, 100-101 (2013).

<sup>30</sup> Jeffrey L. Dunoff & Joel P. Trachtman, *A Functional Approach To International Constitutionalization*, in *Ruling The World? Constitutionalism, International Law and Global Governance* 11-13, 19, 21 (Jeffrey L. Dunoff & Joel P. Trachtman 1st ed. 2009).

substantive norms is to legitimize, control, limit<sup>31</sup> and restrict a sovereign state's power.<sup>32</sup> Therefore, the process of constitutionalization of international law although does not eliminate the existence of sovereign states as the primary subjects/actors of international law, it changes the content over which sovereignty can be exercised by a state.<sup>33</sup> This is so because by the virtue of being a member of the international community, the sovereign states are bound to show deference to the obligatory, non-derogable, minimum standards incorporated in the international constitution.<sup>34</sup> This constitution of the international community not only constitutes it but also as indicated above incorporates certain substantive norms that recognize the inherent rights and dignity of the human beings who are to be the ultimate beneficiaries of international law.<sup>35</sup> It therefore flows from the above discussion that the international community which is subject to the international obligatory standards incorporated in the constitution consists not only of the sovereign states but, also of the individuals whose involvement ought to be secured within the process of making of international law by providing a cross check to the exercise of sovereignty by the state.<sup>36</sup> Therefore, a constitution of the international community expands the scope of international law and alters the identity of the sovereign states by influencing the manner in which the sovereignty can be exercised. The aim of this process of constitutionalization of international law is to ensure that the practices of global governance secure the existence of an international rule of law. Given the nature of international law as it exists today, the enforcement of these constitutional norms can be done best by the utilization of domestic legal machinery as is explained by the principle of subsidiarity.<sup>37</sup> Although the existing literature on the concept of the constitutionalization of international law nowhere employs the phrase as the authors in this article envisage it, the authors now seek to justify the appropriateness of the use of the concept as it articulated herein. The phrase as employed by the authors does not suffer from the central weaknesses and limitations of the concept when primarily applied in the context of human rights and other socio cultural rights. The principal criticism leveled against the idea of constitutionalization of international law is that it may propagate a hegemonic tendency by incorporating as superior norms in the international constitution, those that only reflect predominant Western liberal values.<sup>38</sup> However, in the manner articulated by the authors it is an idea for further development that ensures the existence of a stable and lasting peace. Also, it does not promote conceptual hegemony as it merely describes the manner in which the existing unity in the legitimate cause responsible for the rise of populist nationalism can be best articulated to make the basis of co-operation in international law more equitable. Scholars also criticized the process of constitutionalization of international law in the sense that the substantive norms incorporated in the international constitution may not reflect a democratic concern as individuals will not involved in

<sup>31</sup> "What is a constitution all about? It is all about legitimacy. All public powers being exercised have to be legitimized, limited and controlled." – See Kotzur, *supra* note 28 at 587.

<sup>32</sup> "These traditional constitutional functions are to: limit political power, organize a political entity, offer political and moral guidelines, justify governance, constitute a political system as a legal community and, finally, contribute to integration." – See Anne Peters, *Global Constitution Revisited*, 11 Int'l Legal Theory 39, 46 (2005).

<sup>33</sup> José E. Alvarez, *Review Of Recent Books On International Law – Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism by Jean L. Cohen*, American Journal Of Int'l L Vol. 107, No. 3 697, 697-698 (July 2013).

<sup>34</sup> Stephan Motataianu, *Theories About "Constitutionalism" In International Law*, 2014 Annals Constantin Brancusi U. Targu Jiu Juridical Series 121, 125 (2014).

<sup>35</sup> Therefore, legitimacy of rules in the field of socio-economic equality should be tested on the touchstone/standard of human dignity, just as in the case of human rights law and not state consent as is the basis of the legitimacy of the sources of International Law listed in Article 38(1) of the ICJ Statute. For understanding the basis of this proposition, See Harlan G. Cohen, *From Fragmentation to Constitutionalization*, 25 Pac. McGeorge Global Bus. & Dev. L.J. 381, 388 (2012).

<sup>36</sup> See Anne Peters, *Membership in the Global Constitutional Community*, in *The Constitutionalization of International law* 153-262 (Jan Klabbers, Anne Peters & Geir Ulstein 1st ed. 2009).

<sup>37</sup> Gier Ulfstein, *The Relationship Between Constitutionalism And Pluralism*, GoJIL 4 (2012) 2, 575, 579 (2012).

<sup>38</sup> "A common argument is that today's domination by standards that are rooted in the West is a 'conceptual imperialism'. Although formal imperialism has been abandoned, some States are believed to have adopted this new means of imperialism. Conceptual imperialism in constitutionalism is the conceptual domination of constitutional ideas rooted in a distinctly European tradition...The supposed unity of the international sphere could obscure these hegemonic struggles taking place. Indeed, they could *institutionalise* hegemonic domination." – See CHRISTINE E.J. SCHWÖBEL, *GLOBAL CONSTITUTIONALISM IN INTERNATIONAL LEGAL PERSPECTIVE* 96-102 (1st ed. 2011).

their articulation.<sup>39</sup> However, in the present context when the process of constitutionalization of international law is undertaken in response to lend a voice and legitimacy to the core concerns that led to the rise of populist nationalism, the necessity to elevate a norm to being a part of international constitution as originates from the people, this criticism too doesn't stand as a drawback of the concept as articulated by the authors. Therefore, a related drawback of the general concept of constitutionalization of international law as being non-discursive in its origin<sup>40</sup> also does not apply to concept as framed by the authors. This is because the need to constitutionalize such a norm is the outcome of ongoing public debate.

The idea of constitutionalization of international law is widely criticized for not taking into account the existing social and cultural diversity of the human population around the world.<sup>41</sup> However, as articulated in the second section of this article the legitimate cause explaining the growth of populist nationalist sentiments in the many states of the West, being common there exists no diversity. At this juncture it is essential to clarify that the existence of unity does not in itself necessarily mean that the factor agreed upon is necessarily good, for instance, the agreement of the world states on the right to free trade as a rudimentary norm of an international constitution did not produce equitable results in the long run for humanity at large. However, the legitimacy of the main reasons that reflect the fundamental concerns of the populist nationalism movements are equitable and beneficial for mankind at large as they articulate the need to promote a basic condition that is needed for the peaceful co-existence of human individuals in a society.

One of the major drawbacks of using the idea of constitutionalization of international law is its alleged incompatibility with the idea of pluralism.<sup>42</sup> Pluralism can be understood in two different ways – firstly, as denoting the co-existence of several specialized subsystems within the general idea of law<sup>43</sup> and, secondly, the permissible existence of varied rules

<sup>39</sup> "Understanding the constitutionalization of international law implies, this chapter claims, refocusing the discussion on the legitimacy deficit, and more specifically on the democratic deficit in current global law-making processes, whether national, European, or international... Respecting democratic outcomes implies organizing and trusting the democratic process about difficult substantive issues rather than replacing that very process with a theoretical judgment of what its results should be. Nor can democracy be deemed as one criterion among others in the weighing and balancing of international and national norms in conflict. It ought rather to be the super criterion: when its conditions are given, it subsumes all others as it were, as it constitutes the most legitimate way of deciding on the others. Of course, identifying the democratic pedigree of each norm in conflict, whether of international or national law, remains extremely complex. The assessment could be simplified a little, on the one hand, by the gradual development of a formal hierarchy of sources within international law itself as alluded to before. Thus, the rank of an international multilateral treaty might be judged more easily as superior to customary international law in democratic terms. And this in turn might make the ranking of multilateral international norms easier when they conflict with domestic or regional constitutional law..." – See Samantha Besson, *Whose Constitution(s)? International Law, Constitutionalism, and Democracy*, in *Ruling The World? Constitutionalism, International Law and Global Governance* 381-407 (Jeffrey L. Dunoff & Joel P. Trachtman 1st ed. 2009).

<sup>40</sup> The limitations of the treaty making process and the process of evolution of customary international law to form universal rules that partake the character of a global constitution are primarily in the lack of a discursive process existing in the creation of rules particularly in areas such as that of human rights (which touch upon and protect the most fundamental rights and dignity of human beings), where no consultation is done with the affected stakeholders. For a detailed elaboration of the basis of this argument – See Thomas Kleinlein, *Summary: Constitutionalization in International Law*, Max Planck 712 (2012) available at <http://www.mpil.de/files/pdf2/beitr231.pdf>.

<sup>41</sup> "In light of the diversity – of cultures, identities etc. – on the international sphere, instituting a common constitutional culture seems entirely unrealistic. Minorities are particularly vulnerable in the international sphere. It is in the international sphere that even more voices need to be considered than in the relatively more homogenous national legal systems. It seems that it is not unity or commonality that define us in the international sphere; rather it is particularity and diversity." – See SCHWÖBEL, *supra* note 38 at 106.

<sup>42</sup> Ulfstein, *supra* note 37.

<sup>43</sup> "The fragmentation of the international social world has attained legal significance especially as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice.<sup>12</sup> What once appeared to be governed by "general international law" has become the field of operation for such specialist systems as "trade law", "human rights law", "environmental law", "law of the sea",

after the satisfaction of the minimum rules prescribed by law.<sup>44</sup> The concept of constitutionalization of international law as articulated by the authors in this article is compatible with both the variants of pluralism as the substantive norm to be incorporated as a part of the international constitution majorly has a direct impact on the sub-system of International Trade Law, without affecting substantially the co-existence of other branches of international law. Also, upon fulfillment of the minimum requirement not to widen the existing socio-economic equality, the sovereign states retain their freedom to enact domestic laws to determine the manner in which the gains of globalization are to be re-distributed more equitably within the domestic population.

The authors in this section have attempted to articulate the basic concept of constitutionalization of international law and, has explained as to how it can provide a panacea to effectively articulate the legitimate economic causes responsible for the emergence of the forces of populist nationalism in the West.

## 5. WHY SHOULD STATES AGREE TO LIMITATIONS ON THEIR SOVEREIGN POWER? – THE WAY FORWARD

Having clearly understood the concept of constitutionalization of international law and its attendant curtailment of the powers of a sovereign state, it is easy to realize that the state leaders would not readily accept such a change/alteration in the power structure. The resistance that is thus likely to be offered against the process of constitutionalization of international law by state leaders poses a great inertia against any sort of progressive change. The pertinent question that remains to be addressed is why should the state leaders support the process of constitutionalization of international law? Here the authors seek to invoke a concept of ‘*sovereignty deficit*’, which can increasingly be observed in those countries of the West where populist nationalism is on the rise.

The term ‘*sovereignty deficit*’ indicates that the state leaders are lacking the attributes of sovereignty and hence, the legitimacy of their actions can be questioned. In an exceptionally critical and enlightening analysis of the concept of state sovereignty in the context of the possibility of the existence of a global constitution, Ulrich K. Preuss explains what it means when we call a state to be a sovereign. He lucidly explains that a sovereign entity is not necessarily the entity that wields the greatest magnitude of power within a territory, but rather is the one who embodies and exercises power on behalf of the collective polity it represents.<sup>45</sup>

When it is said that a sovereign enjoys the right to legitimately use the exclusive and absolute power within a state – these two words aren't used without a meaning. A sovereign having an exclusive right to the use of power is with respect to its ability to legitimately use the power within a state's territory, however, a sovereign's right over the legitimate use of power becomes absolute only because it reflects the people's capacity for self-rule.<sup>46</sup> Therefore, a sovereign's actions will only be considered legitimate if they reflect the collective will of the people, who it is bound to represent. In a democracy, where in abstraction the Constitution says that the collective of people are both the rulers and the ruled – the role of the elected state leaders remains to represent the collective will in all the decisions that they take.<sup>47</sup> This

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“European law” and even such exotic and highly specialized knowledges as “investment law” or “international refugee law” etc. - each possessing their own principles and institutions. The problem, as lawyers have seen it, is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law” – See Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising From The Diversification And Expansion Of International Law*, UNITED NATIONS GENERAL ASSEMBLY, pp. 10-11, A/CN.4/L.682 (April 13, 2006) [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf).

<sup>44</sup> For an articulation of pluralism in this sense – See Prabhakar Singh & Sonja Kübler, *Constitutionalism and Pluralism: Two Ways of Looking at Internationalism*, in *Critical International Law – Postrealism, Postcolonialism And Transnationalism* 304-326 (Prabhakar Singh & Benoît Mayer 1st ed. 2014).

<sup>45</sup> “Sovereignty is not defined as the greatest quantity of power in proportion to other power holders; rather, its quality of embodying the power of the polity as a distinct collective entity defines it.” – See Ulrich K. Preuss, *Disconnectiong Constitutions From Statehood – Is Global Constitutionalism A Viable Concept?*, in *The Twilight of Constitutionalism?* 33 (Petra Dobner & Martin Loughlin 1st ed. 2010).

<sup>46</sup> *Ibid* at 33-35.

<sup>47</sup> Preuss, *supra* note 45 at 35.

power of representation is always to be exercised subject to non-violation of the non-derogable and fundamental rights of its subjects both under domestic and international law.<sup>48</sup>

In this background, it becomes evident that as the state leaders enjoy the sovereign powers only in their capacity as representatives of the people, when they cease to act as per the mandate of the people they are no longer sovereign in the true sense of the word. Therefore, in order to retain their sovereignty in the true sense, the state leaders ought to represent the legitimate demands of the have-nots who represent the majority of the electorate. When the state leaders fail to represent these legitimate sentiments of the people not only do they risk not being elected again, but they also loose the authority to act as a sovereign and represent the community of people as a sovereign state at the international forums. Therefore, there exists a sovereignty deficit when the state leaders of the West presently wrongly articulate and misrepresent the causes of the populist nationalism upswing as being cultural rather than economic to preserve their own status quo.

This sovereignty deficit can only be overcome and true sovereignty can be exercised only when in theory and practice both the state leaders articulate the legitimate demands of the people as constituting the state's interests. In this process of constitutionalization of international law, whose aim is to create a more inclusive international community, the individuals need to be empowered in the process, whereby in every case of decision making by the states, the affected people are consulted and their opinions are considered as a part of the decision making/law making process as the case may be.<sup>49</sup> This will not only ensure that the process is more democratic and hence, the democratic deficit (that arises when the process of decision making and governance on the broader scale transcends national boundaries) ceases to exist. But, this involvement of individuals as important stakeholders in the law making process ensures that there can in no situation exist a sovereign deficit that still legitimately purports to impose unwarranted international obligations upon the state, which are detrimental to its people.

## 6. CONCLUSION

*"All truth passes through three stages. First, it is ridiculed. Second, it is violently opposed. Third, it is accepted as being self-evident."*

– Arthur Schopenhauer (1788-1860)<sup>50</sup>

The ascendance to the forefront of the forces of populist nationalism in the west marks a period of political turmoil internationally. Several state leaders, scholars and members of the public are skeptical as to whether the articulation of protectionist, inward looking nationalist foreign policies justified on cultural grounds by the state leaders particularly after Brexit and the election of Trump are reflective of a paradigm shift in the way international law functions. The authors in this article have attempted to analyze this global phenomenon from a novel perspective. This article suggests that unless the underlying legitimate economic grievances of the have-nots of the Western societies (who have lost out from the process of globalization) are made a part of public debate on a global scale, there is going to be no effect on the basis of international co-operation.

Constitutionalization of international law is articulated herein as one possible method by which theoretically it is possible to present a legitimate and powerful challenge to the inequitable economic and power structures established in the international law regime. The views represented by the authors may seem radical and unworkable to many readers who may dismiss the same as impracticable at the very outset. But, it is important to remember that everything that is practical and real today was once merely a theory and also it is this very close mined and narrow approach that poses the greatest hindrance in pushing for a change in the working of international law and its institutions in a more equitable manner. The analysis presented by the authors only seeks to provide a starting point to reframe the existing public debates so as to advocate for progressive change in the manner in which international cooperation considers the interests of the individuals affected thereby.

As a concluding remark, it is to be noted that today when economic rights are no longer regarded as second-class rights<sup>51</sup> a more equitable spread of socio-economic resources is a must to ensure the existence of everlasting world peace. Inequality is often pointed out to be one of the natural attributes of the coexistence of human beings, which the authors do not deny. The authors merely propose that the concept of constitutionalization of international law prevents the

<sup>48</sup> Preuss, *supra* note 45 at 35.

<sup>49</sup> Peters, *supra* note 36 at 153-161.

<sup>50</sup> As quoted in Hari Kalymnios, *The Three Phases Of Transformational Change*, **THE HUFFINGTON POST**, October 11, 2014.

<sup>51</sup> Peters, *supra* note 36 at 167.

further acceleration of the pace of globalization unless it ensures some betterment in the existing levels of socio-economic equality, or else inequality in existence would take the monstrous form of exploitation, which is not natural but rather a product of human creation.

Although the radical analysis presented herein may be doubted to have Marxist overtones in the construction of its arguments, the authors seek to emphasize as a matter of final words that peaceful coexistence in any society is only possible when each individual is granted enough resources not only to ensure minimum sustenance but also to explore fully his/her potential.

## **CONFLICT OF INTERESTS**

None.

## **ACKNOWLEDGMENTS**

None.