How universal are international law and development? Engaging with postcolonial and Third World scholarship from the perspective of its Other*

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I. Decolonisation, development and the universality of international law

How "universal" is international law? And what is international law's relationship to development and decolonisation? These questions are of particular concern to postcolonial scholarship, and more generally to critical thinking about international law from the perspective of the Third World. But even beyond these approaches, the question of universalism is crucial for the understanding of contemporary international order.[1] In this discourse, much depends on the respective understanding of the notion of universality: international law can be universal in many ways, and non-universal in others at the same time. Hence, one way of approaching the question is to distinguish different conceptions of universality, three of which are often pointed out[2]: In a first, "classical" understanding, universality signifies that international law is valid for and binding on all states on a global scale, and is thus defined by its inclusiveness and its global reach. If understood in this sense, decolonisation as a historical and political process has certainly contributed considerably to the universality of international law.

This is less clear if universality is taken to mean that international law constitutes an organised whole, a coherent legal system. From this second, "thicker" perspective, the inclusion of the decolonised Third World may rather look like a challenge for universality, because it makes the international legal system more heterogeneous and possibly more fragmented. This also holds true for a third form of universalist thinking, which conceives

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1 See *Armin v. Bogdandy / Sergio Dellavalle*, The Paradigms of Universalism and Particularism in the Age of Globalization: Western Perspectives on the Premises and Finality of International Law, in: Collected Courses of the Xiamen Academy of International Law, 2009, 47, who argue that much of contemporary international legal discourse can be understood in terms of differing assumptions about the (im)possibility of universal global order.

2 For the following typology, see *Bruno Simma*, Universality of International Law from the Perspective of a Practitioner, EJIL 20 (2009), 265.

of international law as a public legal order not only for states but also for individuals, based on, varyingly, common values, constitutional architectures, or cosmopolitan pluralism.[3] Thicker notions of universality often go hand in hand with attempts to restore the unity of international law, to constitutionalize its architecture, or to postulate the existence of a multi-level "global" administrative law.[4]

Postcolonial scholarship has contributed diverse critical perspectives to the universality discourse. Some authors emphasize the Eurocentric epistemology of international law and its genesis in the colonial encounter that impede true universality[5]; others point to the persistence of unequal economic and power relations instituted by colonialism in contemporary international law and international institutions[6]; and again others locate their criticism of universality in the culturally constructive character of postcolonial international law, which continues to form our understanding of regimes concerning, for instance, the formation of nation states, minorities or development.[7] The wider –overlapping, but not identical – literature on "Third World Approaches to International Law" (TWAIL) has contributed an even greater array of explicit or implicit universality critiques.[8]

One recurring theme in the universality debate is the issue of "development". Many authors, irrespective of their origins, recognize the persistence of poverty and the unequal distribution of wealth as continuing obstacles to a truly universal international legal order.[9] And from the perspective of the Third World, often at the receiving end of international law both literally and figuratively, much of the activities and discourses rooted in international law look even more like "development" than from the point of view of the industrialized West. The challenge of development can mean different things for the universality of international law. An instrumentalist view of the relationship between law and development acts on the assumption that legal rules should be means to promote development.[10] The promo-

3 *Ibid.*, 267 et seq.

4 Cf. *v. Bogdandy/Dellavalle* (note 1), 99 et seq.

5 *Anthony Anghie*, Imperialism, Sovereignty and the Making of International Law, Cambridge 2004. See also *Martti Koskenniemi*, Histories of International Law: Dealing with Eurocentrism, Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte 19 (2011), 152.

6 *Bhupinder Chimni*, International Institutions Today: An Imperial Global State in the Making, EJIL 15 (2004), 1.

7 For an overview of these and other prevailing themes in postcolonial or "anti-colonial" international legal scholarship, see also *James Gathii*, International Law and Eurocentricity, EJIL 9 (1999), 184.

8 For an overview and a bibliography of "TWAIL", see *James Gathii*, TWAIL: A brief history of its origins, its decentralized network, and a tentative bibliography, Trade, Law and Development 3 (2011), 26.

9 See only *Martti Koskenniemi*, International Law and Hegemony: A Reconfiguration, Cambridge Review of International Affairs 17 (2004), 197; *v. Bogdandy/Dellavalle* (note 1), 125.

10 For a critical account of the early "Law and Development" movement, see *David Trubek/Marc Galanter*, Scholars in Self-Estrangement: Some Reflections on the Crises in Law and Develop-

tion of development through international law can thus be seen as contributing to its universality. At the other end of the spectrum, critical scholars question the very notion of development as pursued by international donors and perceive development discourse itself as a hegemonic exercise that perpetuates much of the structural inequalities its purports to overcome. In this view, the obstacle to the universality of international law is not "underdevelopment", but precisely the attempt to overcome it by international legal means.[11]

The latter view sits uneasily with thicker notions of universality as elaborated above, and consequently with responses based on such notions, such as global constitutionalism or administrative law. However, recent scholarship illustrates that a principled rejection of international law's developmental frame can indeed be reconciled with an affirmation of its universal potential. This distinctive approach is at the core of Sundhya Pahuja's 2011 book "Decolonising International Law. Development, Economic Growth and the Politics of Universality". Pahuja, a professor of law and director of the Law and Development research programme at Melbourne law school, is among a younger generation of critical international legal scholars who writes from the perspective of the "Global South" and operates under the scope of the TWAIL network. She has already published widely on postcolonialism, critical legal theory, law and development as well as international law and globalization. Her first monograph in many ways represents the state-of-the-art in contemporary critical and postcolonial writing on international law. At the same time, it seems to leave room for a constructive engagement from the perspective of key approaches to international law originating from Europe and the US and situated within a more or less universalist paradigm.

Hence, the present review essay uses the discussion of Pahuja's important book to offer some tentative reflections on the potential and the limits of such a dialogue. The first part of the review situates Pahuja's main argument in the context of postcolonial and Third World scholarship (II.1.), retraces the main lines of thinking within the book (II.2.), and discusses some possible criticisms (II.3.). The second part engages with some of Pahuja's arguments from the perspective of international constitutionalisation (III.1), global administrative law (III.2.) and international public authority (III.3.). The last part concludes with questions for further research (IV.).

ment Studies in the United States, Wisconsin Law Review (1974), 1062. See further *Michel Virally*, Vers un droit international du développement, Annuaires francais de droit international 11 (1965), 3; Werner Meng et al. (eds.), Das internationale Recht im Nord-Süd-Verhältnis, Berichte der deutschen Gesellschaft für Völkerrecht, Heidelberg 2005.

11 *Balakrishnan Rajagopal*, International Law from Below. Development, Social Movements and Third World Resistance, Cambridge 2003. For a fundamental discourse critique, see *Arturo Escobar*, Encountering Development, Princeton 1995.

II. The (lacking) decolonisation of international law in a critical Third World perspective

1. Situating approaches in postcolonial legal scholarship: Between "imperial" and "dual" international law

Pahuja's book opens with a question that has animated postcolonial and Third World scholarship since long: "Why has international law, from the perspective of the Third World, been so disappointing?" (p. 1). Part of the reason is found, according to Pahuja, in the "postcolonial" nature of international law. In line with familiar motives of postcolonial (legal) theory[12], postcoloniality in this sense is defined by the specific "cuts", or categorical distinctions that constitute international law as a discipline beneath its surface (p. 25 et seq.): Between law and non-law, state and non-state, the international and the domestic, the universal and the particular, the developed and the underdeveloped, the West and non-West. These categories do not exist as such, but constitute themselves only in a normative claim of differentiation from their Others. These Others are in turn constructed and naturalized in that very same invisible move of differentiation. As the power to make that differentiation resides in the West, "universal" international law thus owes its existence to the construction of a non-Western alterity, i.e. other value systems and forms of normative ordering that are "particular" (p. 28 et seq.).

This postcolonial nature gives international law an inherently imperial or hegemonic quality that undercuts its universality, as most scholars operating under the – not identical but often overlapping – frameworks of postcolonialism or "Third World Approaches to International Law" (TWAIL) argue. They differ however on the conclusions to draw from this finding. Some more radical writers assume that this quality is exclusive and thus recommend that the Third World should give up international law as a site of struggle altogether.[13] More commonly, international law is seen to have both a hegemonic and counter-hegemonic dimension that makes a (re-)engagement with its norms and principles possible from a Third World perspective.[14]

12 See e.g. Eve Darian-Smith/Peter Fitzpatrick (eds.), Laws of the Postcolonial, Michigan 1999; Anne Orford (ed.), International Law and Its Others, Cambridge 2009. Generally Henry Schwarz/Sangeeta Ray (eds.), A Companion to Postcolonial Studies, Oxford 2000. Classical *Edward Said*, Orientalism, New York 1978.

13 For a radical rejection of any emancipator value of international law, see *China Miéville*, Between Equal Rights: A Marxist Theory of International Law, Leiden 2005.

14 See e.g. *Balakrishnan Rajagopal*, Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy, Third World Quarterly 27 (2006), 767; *Anghie* (note 5), 310 et seq. For an overview of Third World reactions to international law raging from resistance to reform see *Luis Eslava/Sundhya Pahuja*, Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law, Verfassung und Recht in Übersee 45 (2012), in this volume.

Pahuja's book can be seen as adopting this latter approach: for her, postcolonial international law has a "dual quality", or in other words, both an imperial and a counter-imperial dimension (p.1.): it is used at the same time to challenge established relations of power and exploitation, and to deradicalise and constrain those challenges. Third World states have time and again attempted to base claims for political, economic and social change on the promised universality of international law, which purports to include them on an equal footing through the doctrine of sovereign equality. However, the radical potential of such Third World demands has been contained by the operation of what Pajuha calls a new "rationality of rule" (p. 2). This rationality is not exhausted by its postcolonial dimension, but rather rests on a wider set of discursive and institutional practices within the "ideological-institutional complex we know as international law" (p. 10). Here, Pahuja's account goes way beyond a merely postcolonial lens and offers an impressive discursive and theoretical critique of contemporary international law and its institutions, rooted in the legal history of post-war international law and the political economy of the UN and the Bretton Woods institutions.

The "rationality of rule" embodied in contemporary international law is a mode of discursive power that succeeds in positing "development" and "economic growth" as purportedly extra-legal and universal values and aims of international law (p. 2). Here Pahuja takes issues with "development" as the seemingly universal normative point of reference for international law. She reverses the common perspective of law as means to bring about development and attempts to uncover how the concept of development has come to frame our present international legal order. In this perspective, the developmental rationality becomes the real obstacle to both a truly universal and emancipatory international law. Hence, Pahuja's central concern is to uncover the workings of this developmental rationality in international legal discourse, with a view to enabling the Third World to make better use of the counter-imperial, emancipatory dimension of international law.

2. *How contemporary international law universalizes and depoliticizes economic development*

Pahuja unfolds her argument in six chapters. After a summarizing introduction, chapter 2 theorizes the structural and institutional characteristics of international law that account for its dual quality and the "rationality of rule". Chapters 3-5 explore three "telling instances" of how the Third World used counter-imperial international law to advocate change, but was eventually constrained by its imperial nature. These examples are decolonisation, the claim to Permanent Sovereignty over Natural Resources made in the 1950s and 1960s, and the ongoing international discourse on "rule of law" and development. Chapter 6 concludes with a discussion of strategies to reclaim the emancipatory potential of universal international law.

The second, theoretical chapter develops the main argument in three steps. Firstly, Pahuja argues that, historically, the new rationality of rule was inaugurated after WW II

when it was embedded in the institutional structure of contemporary international law. This structure namely formalized the ideological and institutional separation of the "economic" and the "political" (p 18 et seq.). While the UN was created as a site for – potentially emancipatory – political contestation over sovereign equality, the Bretton Woods system essentially preserved the existing material inequalities and dependencies. This separation limited equality to the political sphere and served to legitimize the "undemocratic" system of weighted voting in the economic institutions, where the economically "backwards" nations had little say. Differential institutional control in turn meant that the West could constrain Third World claims by reinterpreting them as "economic" and thus channel them into Western-dominated institutional settings.

Secondly, this political-economic split helped contain a more general, "critical instability" at the heart of international law. This "critical instability" arises from two core properties of international law, namely its "postcolonial" and its "political" qualities (p. 25 et seq.). The *postcoloniality* of international law, as explained above (II.1.), is characterized by the tendency to universalize Western particulars and to redefine Third World claims as particular, and thus as impossible to sustain in a normative order that must by definition be universal. Yet this universalization remains contestable and thus contributes to the "critical instability" of contemporary international law (p. 30 et seq.). The critical instability is further exacerbated by the *political* quality of international law: that is, the capacity of international law to refer beyond positive legal rules, as embodied in treaty and custom, to an ideal of "justice". International law also operates as a screen onto which people project a variety of political aspirations and struggles for a more just order. This relation to justice makes international law amenable to Third World demands and potentially destabilizes its existing body of rules (33 et seq).

According to the third step of Pahuja's argument, this critical instability is however stabilized by another operation of the rationality of rule (p. 37 et seq.): namely, the positioning of development and economic growth as "transcendent grounds" to international law, or uncontestable extra-legal universals to be achieved by all states. In this way, the postcolonial hierarchy of knowledge and ostensibly "scientific" measures of development such as GDP succeed in safeguarding the model role of the West and in placing economic development beyond the reach of political decision. Third World demands for change are thus subsumed within a universal claim for a particular way of life, as defined by the (idealized) developmental path of the West. Here, Pahuja's argument comes full circle: If development is the overarching rationality of international law as applicable to the Third World, and if the split between the economic and the political locates the juridical power over developmental interventions within the North-controlled Bretton Woods institutions, then international law will eventually constrain rather than sustain Third World demands for change (p. 38).

After this theoretical exposition, Pahuja devotes most of the book to three "telling instances" that illustrate her argument. A first example discusses how Third World claims for decolonisation were channeled into the system-stabilizing form of the developmental

nation state. While decolonisation has often been seen as the moment when international law became truly universal, postcolonial interpretations typically stress persisting continuities and inequalities. Pahuja distinguishes herself from both interpretations when she argues that the dual quality of international law made decolonisation a moment of both continuity and change (44 et seq.): On the one hand, international law provided a language in which claims for decolonisation gained audibility and eventually succeeded. On the other hand, decolonisation claims could only succeed in a very specific form, imposed by doctrines of colonial international law: the form of nation statehood, which alone accorded international legal personality. Decolonisation was thus also the moment when the Western-style nation state was universalized as the only valid form of social organisation. This acceptance of the nation state form embedded the new Third World states in the universal historical narrative of economically "developed" statehood. It thus established a new hierarchy based on an economic measure that replaced prior hierarchizations along the lines of race or "civilization". In this way, the act of political liberation was channeled into a logic of necessary self-transformation in economic and social terms. This logic subordinated aspirations for justice to the universal and uncontestable goal of economic growth, and thus served to legitimize ever intensifying "development" interventions by Western donors and international institutions dominated by them (p. 84 et seq.).

The same logic also functioned to contain a second Third World attempt to effect change through international law: the claim for Permanent Sovereignty over Natural Resources. During the 1950s and 1960s, newly decolonised states mounted attempts to sever the privileged access of former colonial powers to natural resources and to assert political control over the economic sphere via the deployment of national sovereignty (p. 95 et seq). The Third World chose the UN, and namely the General Assembly, as site of struggle, where it advanced the international law argument of sovereignty to legitimize nationalization and to contain claims for compensation. However, what had begun as an affirmation of national political control was soon recast by the prevailing developmental rationality as international and economic in nature. The project was thus transformed by and subsumed within a nascent regulatory framework designed to promote economic growth, which was to be achieved through the protection of foreign investors and commodified private property. This framework was eventually imposed on the Third World by means of Bretton Woods conditionality (p. 160 et seq).

A final example of the duality of international law is the evolution of the "rule of law" discourse that pervades international law since the 1990s until today. After the end of the Cold War, the Third World, namely in the formation of the non-aligned movement, set out to launch, yet again, a political project in the UN General Assembly. This time, it was the initiative to declare 1990-1999 the "UN Decade of International Law" and to strengthen the rule of international law *between* nation states (172 et seq). This initiative began as a formalistic attempt to check the exercise of power in a unipolar world by enhancing the effectiveness of international legal rules. However, it was soon transformed into something different: for the end of the Cold War also brought with it the expansion and universaliza-

tion of liberal notions of democracy, human rights and market economy. These concepts concerned the *internal* characteristics of "developed" statehood, and soon refocused the international legal discourse on the rule of law *within* the domestic sphere. Together with the rise of institutional economics and a new concern for "governance", the domestic focus meant that rule of law within the state came to be understood as both instrumental and constitutive in bringing about development (p. 185 et seq.). This understanding expanded the mandate of the Bretton Woods institutions and legitimized yet another series of interventions into the legal systems of the Third World (p. 190 et seq.). Moreover, the initially formal or indeterminate concept of rule of law was soon filled with substantive notions of, either, property rights protection and access to markets, or human rights protection (p. 213 et seq.). These notions also widened the concept of development, as seen in "human rights based approaches to development" and the Millennium Development Goals. For Pahuja, this widening is however not a welcome departure from exclusively economic notions of development. Rather, the conflation of market, human rights, and development not only legitimized an even further expansion of international development interventions, but also subordinated whatever was left of the political quality of international law and human rights to a pervasive economic logic (p. 233 et seq.). Namely the embrace of human rights by the development project is, according to Pahuja, dangerous because it reduces rights to the "technical" and "programmable". This reduction pre-empts the use of human rights for political mobilization in the struggle for justice, which is so essential for realizing the counter-imperial potential of international law (p. 248 et seq.).

Pahuja's conclusion is sobering for the Third World as well as international law as a whole: despite its openness for Third World demands, international law has not lived up to its promise. Instead, it has enabled Western intervention embedded in a universal developmentalist frame, a frame that is part of the problem, not of the solution. The alternative solution Pahuja proposes is to decolonise international law through a strategy of re-politicization (p. 9, 252). Such an approach must explore "what becomes politically possible" in international law "when making clear the contingency of law's grounds" and the political-economic structures which shape its current claim to universality (p. 260). It must resist the recognition of certain values as universal and embrace an open "universalism which is not one" (p. 9, 260). A first step in this direction is to "abandon development as a proxy for human well-being and challenge the implicit positioning of economic growth as the path to salvation" (p. 260).

3. Evaluation and critical responses

Pahuja has written a thought-provoking book that brings together and advances many threads of postcolonial and critical legal scholarship. Her account elegantly links legal theory, institutional history and political economy of international law, and her detailed close readings of primary sources offer fresh perspectives on legal materials like the GA decolonisation resolutions, or on foundational texts of development such as Truman's 1949

inaugural speech. Her theoretical argument, her case studies and her engagement with key thinkers such as Hernando de Soto or Amartya Sen is much more complex than this short review can do justice to. Her critique is not merely insightful from a theoretical and historical point of view, but also has implications for the legal solutions and frameworks applied in current practice. It may call for caution in the design of "human rights based approaches to development", and the current debate on how to engage with "fragile" states may appear more ambivalent in light of Pahuja's critique of postcolonial nation statehood.[15] "Decolonising International Law" is thus highly recommended reading for international lawyers as well as development scholars and practitioners interested in the subcutaneous intellectual structures and implicit assumptions of dominant disciplinary discourse and practice.

At the same time, Pahuja's fundamental critique invites reactions from different quarters of international legal scholarship. From the perspective of "mainstream" international law and (economic) liberalism, familiar counter-arguments may be raised: that international donors deliver development aid, after all, with the recipients' consent, which firmly anchors its legal regime in sovereign equality; that the nation state is the only form that has so far succeeded in organising internal and external self-determination on a larger scale; that market-driven growth has lifted millions out of poverty world-wide; that legal certainty is also a valid concern of (international) law which must at least be balanced against political projects of change. However, much of that criticism will miss the point, because it acts on the very assumptions that Pahuja's book challenges.

Unlike more radical Third World approaches, she also eschews the more fundamental criticism of moral nihilism or relativism which is mounted against postcolonialism and other critical approaches[16]: she avows that "not all values called universal are in themselves unreasonable" and that "a universal orientation is unavoidable if there is to be law" (p. 40), and she is "not content only to reveal a 'false' universality [because] such a revelation would simply lead us to either relativism or an attempt to (re)found 'genuine' universality", which is both theoretically untenable (p. 41, 260). Instead, she advocates an "open" or "empty" universalism "which is not one" (p. 9). Although somewhat substantiated with ideas from Laclau's writing, this concept of universality, its exact construction, and its institutional and legal implications are eventually left open for discussion. This is a deliberate choice and invites – and, unlike other critical approaches, leaves room for – further exploration from the perspective of legal scholarship situated in a universalist paradigm. The next part offers some tentative reflections in this regard.

15 On the discourse regarding state "fragility", see *Marie v. Engelhardt*, Die Völkerrechtswissenschaft und der Umgang mit Failed States - Zwischen Empirie, Dogmatik und postkolonialer Theorie, Verfassung und Recht in Übersee 45 (2012), in this volume.

16 For such criticisms, see *David Fidler*, Revolt Against or From within the West? TWAIL, the Developing World, and the Future Direction of International Law, Chinese Journal of International Law 2 (2003), 29; *Jose Alvarez*, My Summer Vacation Part III: Revisiting TWAIL in Paris, Opinio Juris 2010, available at http://opiniojuris.org/2010/09/28/my-summer-vacation-part-iii-revisiting-twail-in-paris/ (last visited 30.03.2012).

III. Engaging with postcolonial and Third World approaches from the perspective of their "Other"

Despite Pahuja's universalist avowal, engaging with her work meets with obstacles at first sight. For she explicitly rejects three key heuristics developed in European and US-American scholarship that addresses deficiencies of international law in a more or less universalist paradigm: "Fragmentation, Constitutionalisation and Global Administrative Law […] could each be seen as analytics that refract consideration of international law through a different facet of the mode of power I bring to light here. [...] Constitutionalisation is the name lawyers give to the project of producing an empire of right, implicitly secured by a developmental frame, and much of Global Administrative Law could be seen as a projection of a technical web of administrative expertise over a depoliticized world" (p. 8). In this, Pahuja shares a feeling of discomfort in wider Third World scholarship, which often ascribes an inherently apolitical and technocratic tendency to the project of global governance at large.

In response to this tendency, efforts at decolonising international law must therefore reject "efforts to 'consolidate', 'integrate' or 'cohere', constitutionalise and otherwise unify the various strands of international law and their normative foundations" (p. 253). Taking this at face value, the rejected approaches appear almost as the "Other" of critical postcolonial and Third World thinking along Pahuja's lines. Indeed, if constitutionalism is understood to place strong sets of values beyond political decision, and if an administrative law perspective is seen to diffuse political claims for emancipation in the nitty-gritty of bureaucratic rules and regulations, then they may well seem to be the exact opposite of Pahuja's call to "reclaim international law as a site of politics" (p. 252).

However, the question is whether all variants and strands of these literatures must be understood in such a way or even be constructed as a sort of reverse "Other". While they are situated to varying extents in a universalist paradigm of global order, the individual enumerated approaches differ considerably from each other, and each of them displays a great internal diversity. Hence, the following part attempts to explore some potential intersections of critical thinking along the lines of Pahuja with three approaches to global governance: constitutionalism (1.), administrative law thinking (2.), and a public law approach focused on the exercise of international public authority (3.).

1. Constitutionalist approaches

The debate on international constitutionalism has generated a variety of approaches that differ in more than nuance. Some authors discuss the constitutionalisation of international law as a whole, while others have a more narrow focus on international institutional law or only on specific international organisations, say the World Bank. There is an equally marked difference between notions of constitutionalism based on universal values on the one hand, and thinner conceptions that focus on enabling governance and deliberation on

the other hand.[17] So on the one hand, Pahuja's critique is indeed hard to reconcile with a globally applicable and value-laden concept of "constitutionalism" and "international community", namely if based on strongly universalizing and legalized notions of human rights.[18] On the other hand, it is precisely the technocratic desire for an "end of politics" that other constitutional approaches see as problematic.[19] They rather advocate a limited constitutionalist framework that mainly ensures free and unencumbered debate among equals and includes procedural guarantees for the minority view (but also for the majority view that must eventually become effective).[20] After all, what constitutionalism in domestic settings does is precisely not to end politics, but rather to locate it in the separation of powers structure and to organise its interplay with law. While analogies on a global scale seem problematic, such analogous thinking can also remain limited to individual international organisations, precisely in order to rectify a deficient internal relationship between law and politics.[21] Hence, "limited" constitutionalist thinking about international organisation may well address some of the concerns connected to a "rationality of rule" of sorts, and thus entail the possibility to open concepts such as "development" up for political discussion and re-negotiation.

Conversely, Pahuja's account may prompt further reflections along constitutionalist lines in at least three regards: if anything, her book is an eloquent call for keeping substantive questions open, and thus for the need to carefully consider "constitutional" procedures for amendment that enable the revision of entrenched but precarious orthodoxies. Secondly, her work is a reminder to take seriously the challenge that constitutionalism, even in domestic settings, generally benefits some more than others.[22] From the perspective of the Third World, there seems little point in increasing the accountability of international organisations if this only makes them more accountable to already influential and well represented groups. Thirdly, her critique raises fundamental questions concerning the conditions of possibility of a democratic constitutional founding, which are exacerbated on the

17 For an overview of the variety of constitutionalist thinking, see *Jan Klabbers*, Setting the Scene, in: Jan Klabbers / Anne Peters / Geir Ulfstein, The Constitutionalization of International Law, Oxford 2009, 1, at 20 et seq.

18 For an influential rendering of such an approach emphasizing human rights, see *Christian Tomuschat*, International Law: Ensuring the Survival of Mankind on the Eve of a New Century, Recueil des Cours 281 (2001), 13.

19 Explicitly *Jan Klabbers*, Constitutionalism Lite, International Organizations Law Review 1 (2004), 31, at 47, 55.

20 *Ibid.* at 55, 58.

21 See e.g. *Armin v. Bogdandy*, Law and Politics in the WTO - Strategies to Cope with a Deficient Relationship, Max Planck Yearbook of United Nations Law 5 (2001), 609.

22 See e.g. *James Tully*, Modern Constitutional Democracy and Imperialism, Osgoode Hall Law Journal 46 (2008), 461.

international scale.[23] Pahuja rejects, somewhat less elaborately, alternative philosophical foundations for universalist order based on neo-Kantianism (p. 259), and also dismisses, quite implicitly, conceptions of global order founded on variants of discourse theory.[24] Instead, her reliance on Laclau attempts to eschew the binarism of particularism and universalism and understands universality as something fundamentally "unstable and undecidable" that cannot be settled in advance; it is rather a function of an ongoing and conflict-ridden process that connects but does not overcome particularisms.[25]

It remains open to discussion what concrete institutional consequences such an empty universalism entails and what role law has to play in an essentially political negotiation of an ever provisional universalism. Does formalization have the potential of protecting weaker actors by subjecting power politics to considerations of equality?[26] Are precisely the less powerful likely to succeed with a strategy of politicisation in the absence of rules and procedures that ensure proper representation and discursive fairness? What might a framework for "free and unencumbered debate among equals" look like?

2. *Administrative law on an international level*

From perspective of the Third World, much of what international institutions do probably looked like "administering" member states for quite some time. The idea to conceive of global governance in terms of administration is thus nothing new to the Third World. More recently, the approach of "Global Administrative Law" has generated a new literature on administrative rules and principles in global governance that is rather diverse and sometimes more, sometimes less "technical" in nature. Its protagonists well recognize that their administrative frame has normative implications. Namely, it may stabilize and legitimate the status quo "in ways that privilege current powerholders and reinforce the dominance of Northern and Western concepts of law and sound governance."[27] On the other hand, they also point out that exposing much of global governance as administrative activity may provide a point of focus for resistance and a language for critique that is more targeted than elusive notions of "accountability" and "legitimacy of global governance".[28] At first sight,

23 See e.g. *Ciaran Cronin*, On the Possibility of a Democratic Constitutional Founding: Habermas and Michelman in Dialogue, Ratio Juris 19 (2006), 343, for a discussion of an approach based on discourse theory.

24 Cf. *Linda Zerilli*, This Universalism Which Is Not One, Diacritics 28 (1998), 3, at 7: Laclau's "empty" universalism refuses to be subsumed under a notion of dialogical consensus that purports to settle universalism's content in advance.

25 *Ernesto Laclau*, Emancipation(s), London 1996, at 15. See also *Zerilli* (note 24), 9 et seq.

26 For an argument for formalism, see *Martti Koskenniemi*, Constitutionalism as Mindset, Theoretical Inquiries in Law 8 (2007), 9.

27 *Benedict Kingsbury / Nico Krisch / Richard B. Stewart*, The Emergence of Global Administrative Law, Law and Contemporary Problems 68 (2005), 15, at 24, and also 52.

28 *Ibid*., 24 et seq.

it seems open which tendency would prevail in specific contexts. In any event, if there is such a thing as "global" administrative law, it is certainly characterized by a measure of legal pluralism.[29]

Other administrative law approaches do not have "global" ambitions, but adopt a more limited, sectoral view on specific multi-level regimes of global governance – for instance, development. The legal rules applicable to the administration and allocation of Official Development Aid (ODA) by various donors on various levels of governance are thus reconstructed as an "administrative law of development cooperation", which revolves around common structures and principles.[30] This research does descend into the technical nitty-gritty of administrative rules of institutions like the World Bank, but does not necessarily have a technocratic impetus. For one, it provides a more comprehensive understanding of the entirety of rules that guide the process of ODA allocation, which go way beyond issues of mandate extension and weighted voting and also encompass the whole body of intra-institutional soft and hard law, including for instance the more than 500 pages of World Bank Operational Policies and Bank Procedures. A better understanding of these rules helps ascertain the structures of control they embody and the potential of existing mechanisms for contestation, such as the World Bank Inspection Panel.[31] Moreover, it may also serve as a basis for a critique of the existing rules based on principles that donors have committed to, such as collective autonomy, or ownership, of recipients.[32] In this vision, administrative law has direct implications for political self-determination, particularly in traditions that closely link administrative law to notions of democracy.[33] It also complements rather than refracts a discursive critique, for the notion of "development" is not only shaped by global structures and discourse, but is also contested, renegotiated and reinterpreted on the ground in the many small processes that result in "Poverty Reduction Strategy Papers", "Country Assistance Strategies", "Project Appraisal Documents" and evaluation reports.

Conversely, Pahuja's critique equally offers serious food for administrative thought. Much as with constitutionalism, it namely raises the question of how to construct an organisation-specific, or even potentially universal, administrative law that is mindful of

29 *Nico Krisch*, The Pluralism of Global Administrative Law, EJIL 17 (2006), 247; *Ibid.*, Beyond Constitutionalism. The Pluralist Structure of Postnational Law, Oxford 2011.

30 For a comprehensive analysis of the administrative law of the World Bank, the EU, and Germany and a critical assessment based on principles such as collective and individual autonomy, see *Philipp Dann*, The Law of Development Cooperation, Cambridge 2012 (forthcoming).

31 On these mechanisms, see *Philipp Dann*, Accountability in Development Aid Law: The World Bank, UNDP and the Emerging Structures of Transnational Oversight, Archiv für Völkerrecht 44 (2006), 381.

32 *Dann* (note 30).

33 Cf. *Eberhard Schmidt-Assmann*, Das allgemeine Verwaltungsrecht als Ordnungsidee, 2nd ed., Berlin 2006, 87 et seq. See also *Kingsbury/Krisch/Stewart* (note 27), at 48, 92.

difference and the plurality of legal traditions in the world. At the very least, this means taking the question of the sources of administrative law seriously. Moreover, Pahuja's contribution draws attention to the fact that the international system affects autonomy not only through legal coercion. It is also implicated in the creation of economic incentives and communicative pressures, and it generates discursive power and hierarchies of knowledge that administrative law might have to capture and to open up for scrutiny if it wants to address Third World concerns.[34]

3. Public law thinking and a focus on international public authority

Despite these potential intersections and interactions, the question remains whether the analytics discussed so far on balance still "refract consideration of international law through a different facet of the mode of power" which Pahuja brings to light in her book. On the one hand, it may be true that compared to discursive critiques, doctrinal reconstructions of positive law, critical as they may be, are limited in terms of their political and emancipatory potential if they do not want to indulge in wishful thinking. On the other hand, doctrinal reconstructions of public law are not an end in themselves, but have an important wider function: they link claims of illegitimacy or "injustice", as voiced e.g. by Third World critics, to questions of legality. Indeed, it is an essential function of public law to help translate concerns about the legitimacy of governance activities into meaningful arguments of legality. Such a *translation* of political claims need not necessarily entail their *transformation* into entirely legalized and deradicalised language.

This function of law is the starting point of another distinct approach to global governance that is emphatically "public" in nature. Publicness in this conception indicates first and foremost a focus on the "exercise of international public authority", a term of art explicitly defined to capture forms of power and domination that go beyond traditional instruments like binding decisions or law-making.[35] It rather implies that any unilateral act, regardless of its legal nature, may be regarded as exercise of public authority if and when it has the capacity to determine other subjects and to reduce their collective or individual autonomy. Such a determination may also occur through a non-binding act which only "conditions" another legal subject, that is, which builds up sufficient communicative power

34 For a recent step in that direction see *Kevin Davis / Angelina Fisher / Benedict Kingsbury / Sally Engle Merry* (eds.), Governance by Indicators. Global Power through Quantification and Rankings, Oxford 2012 (forthcoming).

35 *Armin v. Bogdandy / Philipp Dann / Matthias Goldmann*, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities, German Law Journal 9 (2008), 1376, at 1381 et seq. For a thorough application of this framework to diverse global governance activities, see the contributions in Armin v. Bogdandy / Rüdiger Wolfrum / Jochen v. Bernstorff / Philipp Dann / Matthias Goldmann (eds.), The Exercise of Public Authority by International Institutions. Advancing International Institutional Law, Heidelberg 2010.

for that subject to follow its impetus.[36] This explicit concern for the exercise of more subtle forms of authority, and for the autonomy of those subjected to it, does not refract, but is conceptually open for discursive modes of power so aptly described in Pahuja's book. Her work, in turn, corroborates the claim that authority is not limited to formal mechanisms of lawmaking and institutional control but extends to discursive means of power, such as the (re)production of knowledge, the generation of orthodoxies and the social construction of reality.

Of course, it remains a subject of further research to explore the potential overlap between the respective concerns and notions. Two aspects that may give rise to discussion shall be raised here: the emphasis on international institutions, and underlying notions of self-determination. Firstly, a public law conception of international law emphasizes the role of international institutions and international institutional law in global governance. This means that international public authority always has locus from where it originates, be it a formal international organisation or a more informal institutional context.[37] After all, public law insists on the clear attribution of action and responsibility to assess legality. This differs from approaches of discursive critique like Pahuja's, who explicitly states that the "rationality of rule" has "no originating mind, locale or institution" but instead is a "diffuse rationality, operative through a constantly reconfigured relation between the constituent parts of the ideological-institutional complex we call 'international law'" (p. 254). Her account contributes much to understanding the "ideological" dimension of the complex, while analysis of the "institutional" aspect mainly comes down to the – well made – point regarding the separation of political and economic international organisations, which otherwise appear as somewhat amorphous, yet influential, black-boxes. Ironically, this "diffuse" object of her critique seems to mirror the equally diffuse nature of global governance, which eschews clear attributions of agency and authority. It is here that Pahuja's thinking invites further exploration, not only along the lines of internal institutional law, but also with a clear focus on international institutions as actors and authors of authority.

This emphasis may not exhaust all relevant features of and concerns with discursive power in global governance. However, it does justice to two parallel developments in practice which might justify a closer look at international institutions: namely, the increase not only in authority, but also in the autonomy of these institutions. For international organisations have not only expanded their formal powers and developed new techniques of governmentality that extend the reach and intensity of their interventions far beyond what was possible a few decades ago. Maybe more significantly, they have also become increasingly autonomous actors, driven not only by powerful member states, but also by independent technocratic bureaucracies removed from domestic constituencies and electorates.[38] While

36 *Bogdandy/Dann/Goldmann* (note 35), at 1382.

37 *Ibid.*, at 1385 et seq.

38 *Jochen v. Bernstorff*, Procedures of Decision-Making and the Role of Law in International Organizations, German Law Journal 9 (2008), 1938.

bureaucratic expertise is not abominable per se, it is also clear that it may influence discourse, mediate eventual policy outcomes, and put them into practice on the ground in ways that do not necessarily reflect the plurality of the views of those affected.[39] It may be worthwhile to further explore whether this institutional fabric explains at least partly why the plurality of views on development and economic theory, which is present both within the West and elsewhere, has not translated itself into the policies of international institutions.

In the end, the diagnosis of increased authority and autonomy of international institutions may not be too controversial, but rather be corroborated by Pahuja's critical account of intensified interventions by the Bretton Woods institutions. Moreover, few would probably disagree that increased international authority is a challenge for individual and collective self-determination. A concern for autonomy is the very point of departure of public law thinking along the lines of international public authority. Equally, "self-government" and "democracy" are ideals that repeatedly surface as the horizon of Pahuja's political struggle of the Third World (e.g. p. 22, 255), and many scholars place self-determination at the heart of Third World approaches to international law.[40] This entails outspoken criticism of contemporary international organisations, namely the financial institutions.[41] But what are the consequences of such critiques for international order? Do they imply a return to sovereignty and democracy bounded by the nation state? What does an "empty" universalism mean for democracy, international organisation and international institutional law?

IV. Conclusion

In the end, much of the universality debate comes thus down to the respective understanding of collective self-determination. Given the many disappointments with international law, the Third World may well opt for a return to sovereignty and a more particularist stance on global order that attempts to realize self-determination within the nation state rather than beyond it. Conversely, international lawyers arguing within a universalist paradigm of international order, as outlined at the outset, will assume that democracy is not exhausted by the self-determination of a macro-subject, i.e. the "nation" (that may, after all, be colonially pre-determined in many cases), but is also about giving voice to all those affected by particular decisions. And since each and every citizen will always be subjected to the effects of decisions taken elsewhere by the governments of other states or by interna-

39 Cf. *Ingo Venzke*, International Bureaucracies from a Political Science Perspective – Agency, Authority and International Institutional Law, German Law Journal 9 (2008), 1401.

40 The concern for self-determination underpins much of Third World scholarship, cf. *Upendra Baxi*, What May the "Third World" Expect from International Law?, in: Richard Falk / Balakrishnan Rajagopal / Jacqueline Stevens (eds.), International Law and the Third World: Reshaping Justice, Abingdon 2008, 9, at 10.

41 *Chimni* (note 6).

tional organisations, collective autonomy cannot be achieved within the sovereign nation state alone.[42]

Would these assumptions provide new, falsely universal grounds to international law and thus go beyond an "empty" universalism that is fundamentally undecidable? Would they be incompatible with Third Worldism's "mentalities of self-determination and self-governance, based on the insistence of the recognition of radical cultural and civilisational plurality and diversity"[43]? Or conversely, might it rather be argued that such assumptions, contingent as they may be, are all the more true for the smaller and less powerful states in the Third World, because they are affected disproportionately by the decisions taken in, say, the US or the EU, over which they have no influence – except through an international legal system that makes their voices heard?

42 Cf. *v. Bogdandy/Dellavalle* (note 1), 123.

43 *Baxi* (note 40), at 10.