# Global Constitutionalism

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## Strands of Global Constitutionalism

Global constitutionalism comprises different strands of thought most of which read (or reconstruct) some features of the status quo of global law and governance as "constitutional" and even "constitutionalist" (positive analysis), and which also seek to provide arguments for their further development in a specific direction (normative analysis).

Constitutionalism claims that the principles of the rule of law, a separation of powers, fundamental rights protection, democracy, and solidarity, together with institutions and mechanisms securing and implementing these principles, are (comparatively) well suited to safeguard and promote as much as possible the well-being of natural persons not only as atomized individuals but also in their group relationships. The claim of probably all types of global constitutionalism is that the respective principles, institutions, and mechanisms can and should be used as parameters to inspire strategies for the improvement of the legitimacy of an international legal order and institutions without asking for a world state.

The starting point of the contemporary debate were reconstructions of the founding treaties of some international organizations as constitutions of those organizations. This type of reconstruction has been conducted for the European Union (EU) (Peters 2001; Pernice 2009) and for the World Trade Organization (WTO) (Cass 2005; Petersmann 2011). In contrast, the United Nations Charter has been reread as "a constitution of the international community at large" (Fassbender 2009: 170; Habermas 2006: 159–65).

Habermas has used Kant's concept of a "cosmopolitan status" (*weltbürgerlicher Zustand*) to demand a transformation of international law into a law of and for the global citizen (Habermas 2006). For Habermas, following Kant, a constitution deserving that name must be "republican," established by the citizens to govern their affairs (Habermas 2006: 130–1). Because this type of democratic foundation and a global political power to enforce the law are lacking on the international plane, international law as it stands is only a "proto-constitution" (Habermas 2006: 131).

Fusing Kant, Habermasian discourse theory, and social constructivism, Kleinlein has elaborated a concept of constitutionalization "in, not of international law" (Kleinlein 2011: 685). Here constitutionalization is perceived as a process of identity change and self-entanglement of states and other international actors. The process of constitutionalization has not brought about formally higher laws, but has merely created a burden of justification (Kleinlein 2011: 687). Emmerich-Fritsche has traced the emergence of a "global constitution" in the form of a basic order of principles in positive law, and has diagnosed a paradigm shift from a law of nations to global law (Emmerich-Fritsche 2007: 1034).

Teubner has highlighted that constitutional theory's challenge today is both privatization and globalization. Constitutionalism must therefore move beyond the nation-state, but in a double sense: into the transnational sphere *and into the private sector*, for example by obliging transnational corporations to respect human rights. A multiplicity of civil constitutions is emerging through "auto-constitutionalization," with constitutionalization meaning the juridification of reflexive social processes (Teubner 2012).

A yet different strand highlights the absence of a single observer standpoint from which to assess claims to constitutionalization (epistemic pluralism). In that perspective, constitutionalism beyond the state is less a matter of positive norms than of a discourse and a vocabulary with a symbolic value, an "imagination" (Walker 2012). This approach has been further

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developed into a social constructivist account (Diggelmann & Altwicker 2008).

Law and economics scholars have espoused a "functional approach" which highlights the enabling, constraining, and supplemental functions of constitutional law and sees concomitant dimensions of constitutionalization of international law (Dunoff & Trachtman 2009). Constitutional functions are also the focus of "compensatory constitutionalism" which calls for the development of global constitutional law as a strategy to compensate for the de-constitutionalization of domestic governance (Peters 2006). The argument here is that globalization and global governance have put the state and state constitutions under strain. Global problems have compelled states to transfer previously typically governmental functions, such as guaranteeing human security, freedom, and equality, to "higher" levels, and to nonstate actors acting in a transboundary fashion. This has led to governance which is exercised beyond the states' constitutional confines. National constitutions are, so to speak, hollowed out; traditional constitutional principles become dysfunctional or empty (Peters 2007). In consequence, if the achievements of constitutionalism are to be preserved, compensatory constitutionalization on the international plane is required.

A related concept is that of "multilevel constitutionalism" (Cottier & Hertig 2003: 299, 301). Here, the idea is that all layers of governance should be considered, as a whole, as one overall constitutional system, and that constitutionalism should focus on how the constitutional functions can be secured.

Focusing on the interface between domestic and international law, Kumm has elaborated a "cognitive framework" of "cosmopolitan constitutionalism" which, he claims, is not radically different, conceptually, from domestic constitutionalism (Kumm 2009).

## Current Constitutionalization in International Law

Parts of international law have recently evolved in a way that can be described and interpreted as constitutionalization (Klabbers, Peters, & Ulfstein 2011). Constitutionalization in this sense is an evolution from an international order based on some organizing principles, such as state sovereignty and consensualism, to an international legal order which acknowledges and has creatively appropriated principles and values of constitutionalism.

When transposed to the international level, constitutionalist principles have been and must to some extent be modified, as well as their modes of implementation. Also, the relevant legal rules need not necessarily be united in one single document called "world constitution." The scattered legal texts and the case law together might form a body of international constitutional law which is a specific subset of the international legal order, and which has a particular normative status.

The agents of this (putative) process of constitutionalization are the international lawmakers as political actors, and also academics. Overall, constitutionalization is both a process and an accompanying discourse.

## Critique

Criticism has been raised both against the diagnosis of constitutionalization (as a legal process), and against constitutionalism as a discourse and intellectual framework. One objection is that the identification of a process of constitutionalization in international law (and of the de-constitutionalization of national governance through globalization) is descriptively false. There is, according to this objection, no real trend of constitutionalization; the international legal order remains minimalist, soft, and fragmented, because the international legal process is basically undemocratic, and because the enforcement of international law is deficient. In particular, the typical *formal* quality of constitutional law, its normative supremacy over other law, is lacking with regard to international law. Neither international *ius cogens* nor international law as a whole ranks over and trumps contrary (domestic) norms.

In any case, the (putative) constitutionalization process is lopsided. It is mainly driven by academics and to some extent by international courts, but not by governments and treaty-makers. This means that constitutionalization is either an academic artifact, or – if it is real – raises the normative problem of democratic legitimacy vis-à-vis an undemocratic *gouvernement des juges*.

A more fundamental epistemic critique is that constitutionalization in international law has so far not only failed to take place but is intrinsically impossible, because the preconditions are lacking in the international sphere (such as the lack of political power of global governance institutions).

Various types of normative critique are directed both against the legal process and against the accompanying discourse. The supposedly constitutionalist principles might be too general and imprecise to solve any concrete political problem or to guide legal reform. This seductive vagueness might even hinder the elaboration of concrete suggestions for concrete problems. Also, the discourse might be too Eurocentric, too rooted in nineteenth-century liberalism.

Finally, a fundamental pluralist critique is that the political, economic, intellectual, and moral diversity of the world population makes constitutionalism both unachievable and illegitimate. Any constitutional arrangement would be imposed by one group on another, and would thus be perceived as an imperial tool rather than as an expression of common self-government (Krisch 2010: ch. 2).

## Conclusion

Constitutionalization in international law is a matter of degree. It is an ongoing, but not linear, and often disrupted and sometimes reversed process. It is not all-encompassing, but accompanied by antagonist trends. It is a merit of the cognitive framework of global constitutionalism that it allows for a novel understanding of existing legal practice (both international and national, especially in their interplay), and that it opens a normative horizon for reform aspirations.

It is important, however, that constitutionalists not give up attempting to explain and understand, through a creative rereading, international law as it stands, and to engage with real international practice. Global constitutionalism should not become a self-contained discourse detached from legal reality. Only then will it be able to uncover structural ("constitutional") deficiencies of international law (such as the democratic deficit of the international legal process), will it allow an assessment of them in a new light, and will it facilitate constructive criticism.

Global constitutionalism is decoupled from a singular legal and political order. In substance, the constitutional principle of pluralism calls for accepting as much diversity as possible in the various spheres. This means that different standards (e.g., of fair trial), in different regimes (e.g., in the UN as opposed to in the EU) should be mutually recognized as long as a minimal threshold is not undercut. Of course, the question remains where this standard lies, and most of all who defines it. Ultimately, the normative and practical power of international law does not depend on the use of the concepts of constitution and constitutionalism, but rather on concrete institutions, principles, rules, and enforcement.

**SEE ALSO:** Constitutionalism; Constitutional Law, United States; Democracy; Governance; Human Rights; International Institutions; International Law; Legitimacy; Rule of Law; Sovereignty

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