

Introduction—Global Constitutionalism from an Interdisciplinary Perspective

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This issue discusses the process and substance of global constitutionalism from an interdisciplinary perspective.¹ The contributions look at international law and governance through constitutionalist spectacles. These spectacles have normative and empirical-analytical lenses. Seen through the normative lens of lawyers, a constitutionalist reading of current international law is, to some extent, an academic artifact. It has a creative moment, even if it only emphasizes certain characteristics of international law. From a legal perspective, such an intellectual construct is nothing unusual. If we accept the hermeneutic premise that a naked meaning of a text, independent of the reader, does not exist, then the reconstruction of some portions of international law as international constitutional law is just an ordinary hermeneutic exercise. It is a legitimate form of interpretation, not a distortion of norms that are “objectively” something else.

Seen through the empirical-analytical lens, the major question is whether there is strong empirical evidence for the emergence of an effective constitution beyond the nation-state. The term “effective constitution” denotes the idea that these constitutional rules make a difference for individuals and are not just cheap talk by politicians.

Most analyses of constitutionalism are written by legal scholars. Only recently,

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1. Authors in this special issue with a legal background are Daniel Bodansky, Thomas Cottier, André Nollkaemper, Ernst-Ulrich Petersmann, and Anne van Aaken. Authors with a political science background are Petra Dobner, Karolina Milewicz, and Beth Simmons. Alec Stone Sweet is a wanderer between both worlds. Andreas Føllesdal is a political philosopher.

social scientists, and in particular political scientists, have joined the debate. Constitutionalism is an important theme for political scientists in various respects. In contrast to legal scholars, social scientists tend to put emphasis on empirical rather than normative aspects of constitutionalism; they try to explain variations in constitutionalization or to identify the empirical impacts of constitutions beyond the nation-state. In theoretical terms, their analyses are framed by at least three major controversies. The first of these controversies arises in the research on international relations; the second debate relates to democratic theory; and the third dispute concerns research of comparative politics and analysis of multilevel governance.

The realist, liberal, and constructivist schools in international relations disagree as to whether international rules and their effects can be explained by the pursuit of national interests of states or whether internal dynamics of international organizations and regimes limit and even hurt national interests.

Researchers in the field of democratic theory disagree about the chances for a democratic international order. One school of thought argues that requirements for democracy are not met beyond the level of nation-states and in all likelihood will not be met in the near future. Others either deny the necessity of democratic international rule, which is more than governance through intergovernmental deals between (democratically elected) national governments, or they see chances for cosmopolitan democracy.

Multilevel governance is not a theory; rather, it is a label for the joint and interconnected governance of subnational, national, regional, and global political actors. From the perspective of researchers in comparative politics, one of the most controversial questions concerns the extent to which national politics and policies are influenced by other layers of governance. In addition, explaining interaction effects of the various layers is one of the most important research fields.

I. THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW: FROM CONSTITUTION TO CONSTITUTIONALISM

As the debate on global constitutionalism suffers from conceptual confusion, we need to clarify the key terms “constitution,” “constitutionalism,” and “constitu-

tionalization” in advance.² All these terms are “evaluative-descriptive terms” that inevitably evaluate whatever they are employed to describe.³

Writing in 1758, Emer de Vattel explained: “The fundamental law which determines the manner in which the public authority is to be exercised is what forms the constitution of the State.”⁴ Extrapolating this concept to the international political process, the bulk of the most important norms which regulate political activity and relationships in the global polity could be called an international constitution. Indeed, there is a longstanding tradition in international legal scholarship of doing so.⁵ However, an international or global constitution cannot be gained by simply scaling up a typical state constitution. We must be aware of the problems of translation. This is one reason why we prefer the term “constitutional law” to “constitution.” We seek to highlight that this body of law is not codified in one single document, but is dispersed in various treaties, soft law texts, and customary law. In particular, the U.N. Charter is not the World Constitution. Global constitutional law is a subset of international rules and principles which are so important that they deserve the label “constitutional.”⁶

State constitutions are very diverse. However, they share some family resemblances. They (roughly) set in place political institutions and define their competences, lay down the terms of membership, establish the relations between the members and the community, and (again roughly) regulate the institution’s core functions of lawmaking, conflict resolution, and law enforcement.⁷ Finally and im-

2. For excellent conceptual analyses see Daniel Bodansky, *Is There an International Environmental Constitution?*, 16 *IND. J. GLOBAL LEGAL STUD.* 565 (2009); Anne van Aaken, *Defragmentation of Public International Law Through Interpretation: A Methodological Proposal*, 16 *IND. J. GLOBAL LEGAL STUD.* 483 (2009).

3. See QUENTIN SKINNER, *VISIONS OF POLITICS: REGARDING METHOD* 148 (2002).

4. “[L]e règlement fondamental qui détermine la manière dont l’Autorité Publique doit être exercée est ce qui forme la Constitution de l’Etat.” EMER DE VATTEL, *LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE: APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* Livre 1, ch. 3, § 27 (James Brown Scott ed., Carnegie Inst. 1916) (1758).

5. See GEORGES SCELLE, *PRÉCIS DE DROIT DES GENS: PRINCIPES ET SYSTÉMATIQUE* 4, 9-11 (1934); ALFRED VERDROSS, *Preface* to *DIE VERFASSUNG DER VÖLKERRECHTSGEMEINSCHAFT* (1926); Sir Humphrey Waldock, *General Course on Public International Law*, 106 *ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE RECUEIL DES COURS* 1961, at 5, 7 (1962).

6. Whether these norms (rules and principles) of potential constitutional quality are superior to ordinary international norms; whether they are created by states or by other actors as well; whether they are always “hard” legal norms; whether they embody a specific set of material principles; and whether they are “constitutional” only to the extent that they are enforceable by some form of judicial review, remains to be seen.

7. Cf. GEORG JELLINEK, *ALLGEMEINE STAATSLAHRE* 505 (1914) (“Die Verfassung des Staates umfasst demnach in der Regel die Rechtssätze, welche die obersten Organe des Staates bezeichnen,

portantly, constitutions contain rules for their own amendment. In the international legal order, we find rules and principles which deal with exactly these questions, albeit often in a rudimentary form. These rules may be viewed as global constitutional law. Global constitutional law overlaps with global administrative law, which is understood as “comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.”⁸ We submit that core principles such as due process, proportionality, legality, and transparency are both administrative and constitutional in nature. Also, any administration should generally be informed by constitutional values. It is therefore difficult, and maybe not even necessary, to distinguish sharply between the global administrative law movement and global constitutionalism, to which we now turn.

“Constitutionalism”⁹ is both a mode of governance and an intellectual movement. Constitutionalism is not about observing data in a constitutional landscape, but is necessarily itself a constitutive process.¹⁰ Historically, constitutionalism was the seventeenth- and eighteenth-century political quest for a written constitution of a nation-state. The basic purpose of the constitution was to make political power (the monarchy) subject to the law, hence creating a government of laws, not of men. In order to reach that objective, the constitution was to embody certain material principles, most importantly the separation of powers and checks and balances. Contemporary constitutionalism may be considered a “mindset,” “a tradition and a sensibility about how to act in a political world.”¹¹ It is important to realize that the

die Art ihrer Schöpfung, ihr gegenseitiges Verhältnis und ihren Wirkungskreis festsetzen, ferner die grundsätzliche Stellung des einzelnen zur Staatsgewalt.”).

8. See Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 15, 17 (2005).

9. See Olivier Beaud, *Constitution et constitutionnalisme*, in *DICTIONNAIRE DE PHILOSOPHIE POLITIQUE* 133 (Philippe Raynaud & Stéphane Rials eds., 2003); Gerhard Casper, *Constitutionalism*, in 2 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 473 (Leonard W. Levy et al. eds., 1986); Ulrich K. Preuss, *Constitutionalism*, in 2 *ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY* 618 (Edward Craig ed., 1998); *Konstitutionalismus*, 4 *HISTORISCHES WÖRTERBUCH DER PHILOSOPHIE* 1005 (Joachim Ritter & Karlfried Gründer eds., 1989).

10. See Neil Walker, *The EU and the WTO: Constitutionalism in a New Key*, in *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* 31, 39 (Gráinne de Búrca & Joanne Scott eds., 2001).

11. See Martti Koskenniemi, *Constitutionalism as a Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 *THEORETICAL INQUIRIES L.* 9 (2007) (opposing the constitutionalist mindset to the “managerial mindset,” which replaces “law” by functionality, cost-benefit analysis, and other forms of “ersatz normativity”).

concept of “constitutionalism” is more than the term “constitution” loaded with material content: “Constitutionalism does not refer simply to having a constitution, but to having a particular kind of constitution, however difficult it may be to specify its contents.”¹² Put differently, constitutionalism relates not just to the concept of constitution, but to a specific conception of constitution. Constitutionalism asks for a legitimate constitution. This strand of thought cannot simply be transplanted to the international level, and one must beware of false domestic analogies. Global constitutionalism is constitutionalism “in a new key.”¹³ We employ the term “global constitutionalism” in order to characterize an academic and political agenda which identifies and advocates the application of constitutionalist principles, such as the rule of law, checks and balances, human rights protection, and possibly democracy, in the international legal sphere in order to improve the effectiveness and the fairness of the international legal order. Therefore, global constitutionalism has both descriptive and prescriptive elements. It does not merely claim to describe some features of the status quo of international relations, but also seeks to provide arguments for their further development in a specific direction.

“Constitutionalization” is a shorthand term both for the emergence of constitutional law within a given legal order, and for the spread of constitutionalism as a mindset. The concept of constitutionalization implies that a specific type of constitution (or constitutional law), namely a constitutionalist constitution, can come into being in a process extended through time. It also implies that legal texts can acquire or lose constitutional properties in a positive feedback process. A text can be more or less constitution-like and more or less constitutionalist. It may be, in short, a constitution-in-the-making. Also, constitutionalization is multi-factorial. The emerging constitutional profile of the international order might be well-developed in one or more areas or even special branches of law, but underdeveloped in others. The process of global constitutionalization is not all-encompassing. It is contingent and path-dependent. Patterns of coexistence and cooperation persist

12. See Casper, *supra* note 9, at 747; see also Beaud, *supra* note 9, at 136-42 (speaking extensively on the “divorce” of constitution and constitutionalism); J.H.H. Weiler & Marlene Wind, *Introduction: European Constitutionalism Beyond the State*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 1, 3 (J.H.H. Weiler & Marlene Wind eds., 2003) (correctly pointing out “that there is a difference between constitution and constitutionalism. Constitutionalism . . . embodies the values, often non-stated, which underlie the material and institutional provisions in a specific constitution. At this level, separating constitution from constitutionalism would allow us to claim, rightly or wrongly, for example, that the Italian and German constitutions, whilst very different in their material and institutional provisions, share a similar constitutionalism vindicating certain neo-Kantian humanistic values, combined with the notion of the *Rechtsstaat*”).

13. See Walker, *supra* note 10.

even in a more constitutionalized world order. Moreover, constitutionalization is accompanied by and may even be hampered or undone by, antagonistic, anticonstitutional trends in contemporary international relations, such as the fragmentation of international law, the predominance of one superpower, the privatization of international law, and the revival of the sovereign state,¹⁴ as manifested in the recent financial crisis. Constitutionalization can be distinguished from legalization¹⁵ in that constitutional law is a special kind of law. Therefore, constitutionalization is more specific and also more ambitious than legalization.¹⁶ It engenders a “*normativité renforcée*” of a legal order. In consequence, “global constitutionalization” is a catchword for the continuing, but not linear, process of the gradual emergence and deliberate creation of constitutionalist elements in the international legal order by political and judicial actors, bolstered by an academic discourse in which these elements are identified and further developed.

II. CONSTITUTIONALIST PROCESSES, FUNCTIONS, AND FEATURES OF INTERNATIONAL LAW AND GOVERNANCE

In this issue, the merits of global constitutionalism as an academic approach are analyzed from a lawyer’s perspective by Anne Peters.¹⁷ Then Karolina Mile-

14. See Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LEIDEN J. INT’L L. 579, 602-05 (2006) (detailing some anti-constitutionalist trends).

15. Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT’L ORG. 401 (2000).

16. In the perspective of general systems theory, constitutions have been distinguished from ordinary law as follows:

[P]olitical constitutions . . . are not simply to be seen as higher legal norms, and must instead be understood as structural coupling of the reflexive mechanisms of law with those of politics. The characteristic of auto-constitutional regimes is their linkage of legal reflexive processes with reflexive processes of other societal spheres. Reflexive in this context means the application of specific processes to themselves, the “norming” of norms, the application of political principles to the political process itself, epistemology as theorizing theories, etc. Auto-constitutional regimes are defined by their duplication of reflexivity. Secondary rule-making in law is combined with defining fundamental rationality principles in an autonomous social sphere.

Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999, 1016 (2004).

17. Anne Peters, *The Merits of Global Constitutionalism*, 16 IND. J. GLOBAL LEGAL STUD. 397 (2009).

wicz develops a conceptual framework of global constitutionalization from a political science perspective.¹⁸ This framework allows for operational definitions of various aspects of constitutionalization which are critical for any empirical analysis in the field of global constitutionalization.

Such empirical analysis is undertaken by Beth Simmons, who explores the conditions under which international legal, and arguably constitutional, norms such as civil rights take effect.¹⁹ She presents empirical evidence for the claim that international organizations and norms have an independent and considerable effect on the protection individual rights. The causal chain works via mobilizing citizens. In order to effectively implement international norms of civil rights, citizens have to demand and fight for such implementation. This is hardly possible in autocracies and hardly necessary in stable and modern democracies. Hence, the effects of the global constitutional order can be observed most readily in countries transitioning from autocracy to democracy.

Anne van Aaken concentrates on constitutionalism as a means to solve the fragmentation problems of international law.²⁰ She suggests defragmenting public international law through a constitutional method of interpretation, namely a balancing approach. The fragmentation she has in mind is not only the emergence of specialized issue areas and the resulting conflicts of special treaties, but also the unbundling of constitutional functions and their dispersal on the national and supranational level. Special issue areas, such as human rights law or environmental law, might have a “horizontal” function of guiding the interpretation of other international rules. Van Aaken submits that the principle of “systemic interpretation,” as foreseen in Article 31 of the Vienna Convention on the Law of Treaties (Vienna Convention), allows for “practical harmonization,” a technique normally employed in constitutional law, and thus for the reconciliation of competing constitutional principles with help of the principle of proportionality as a metaprinciple. A constitutional balancing theory to underpin this approach is the one formulated by Robert Alexy, which Van Aaken aligns with cost-benefit analysis and Pareto optimality. Van Aaken then applies her method to some conflicts between investment protection and the host state’s human rights objectives, such as guaranteeing affordable water, empowering a black community, or protecting in-

18. Karolina Milewicz, *Emerging Patterns of Global Constitutionalism: Toward a Conceptual Framework*, 16 IND. J. GLOBAL LEGAL STUD. 413 (2009).

19. Beth Simmons, *Civil Rights in International Law: Compliance with Aspects of the “International Bill of Rights”*, 16 IND. J. GLOBAL LEGAL STUD. 437 (2009).

20. Van Aaken, *supra* note 2.

digenous rights in natural resources extraction. She concludes that the constitutional balancing technique is an important tool for reintegrating and thereby bolstering the legitimacy of diverse international regimes.

Ernst-Ulrich Petersmann also focuses on international investment law and arbitration.²¹ He explains that multilevel constitutional restraints on abuses of power and multilevel judicial protection have contributed to the emergence of the rule of law as a defining element of international trade and investment law. He points out that investor-state arbitration awards have so far contributed little to reducing the fragmentation of international law. He suggests that the variety of alternative dispute settlement fora for international investment disputes should administer justice more coherently by interpreting the international treaties “in conformity with principles of justice” and with the universal human rights obligations of governments, as foreseen in the preamble of the Vienna Convention. He suggests that “constitutional justice” is an appropriate paradigm also for commercial investor-state arbitration. Petersmann concludes that “rule of law” in international investment law and arbitration requires multilevel judicial cooperation and more comprehensive judicial balancing of private rights and the corresponding constitutional obligations of governments.

André Nollkaemper investigates whether the law of international responsibility, in view of its emerging constitutional dimensions can maintain its traditional unity as a single set of principles that applies to all kinds of legal breaches.²² The traditional law of state responsibility was more concerned with the protection of “subjective” rights and to that extent resembled private law. On the other hand, the function of the law of international responsibility has always been to protect the integrity of the entire system by reinforcing the basic structure of the sovereign equality of states. This is a constitutional function, even in the guise of a private law model. Furthermore, the sanctioning of internationally wrongful acts is an element of the international rule of law. This means that the law of international responsibility was never only “private” law writ large. More recently, the constitutional features of this branch of law have been strengthened by the elimination of the requirement of legal injury as a condition for international responsibility, and by protecting legality in a freestanding way. Also, special regimes of responsibility, notably the European Convention on Human Rights (ECHR), have recently focused more on

21. Ernst-Ulrich Petersmann, *International Rule of Law and Constitutional Justice in International Investment Law and Arbitration*, 16 IND. J. GLOBAL LEGAL STUD. 513 (2009).

22. André Nollkaemper, *Constitutionalization and the Unity of the Law of International Responsibility*, 16 IND. J. GLOBAL LEGAL STUD. 535 (2009).

“objective” illegality. The European Court of Human Rights’ (ECtHR) new approach to systemic human rights deficiencies in certain member states can be seen as a shift away from redressing individual injuries, and to that extent as a more “public” law approach, by which the ECtHR assumes the role of a quasi-constitutional court. In a similar fashion, the World Trade Organization (WTO) dispute settlement mechanism is designed to bring the trade system back into a state of overall legality, and does not, in principle, allow states to buy themselves out of it. The question is whether the two functions of the legal regime—the redress of individual injury and overall protection of the legal order—can be served by a unitary set of principles or whether the introduction of the more “public” or constitutional elements into the regime has caused a “rupture of responsibility.” Nollkaemper argues that both paradigms can coexist, although the common ground is probably diminishing. Mechanisms to maintain unity are conceivable. However, hanging onto the unity of the regime of international responsibility might overburden the system and prevent much-needed further doctrinal refinement.

An important aspect of global constitutionalism is the microconstitutionalization of special regimes. Daniel Bodansky inquires whether there is an international environmental constitution.²³ He finds that numerous international environmental agreements are constitutional in the thin sense of establishing ongoing systems of governance which perform basic constitutive functions, such as specifying the rules that guide and constrain these institutions and entrenching these rules through their amendment procedures. However, claims about the constitutional status of international environmental law “usually serve as a shorthand for a stronger set of claims,” such as representing the law of an emerging international community with shared responsibility and solidarity. Bodansky finds that multilateral environmental agreements “clearly do not” establish constitutions in this thick sense, since they do not create governance systems with significant independence from states, and they do not effectively limit the institutions they establish. Due to these weaknesses, the multilateral environmental agreements rather establish “a balkanized system,” with a multiplicity of regimes, each with its own constitution. Bodansky then asks whether there is an international environmental constitution that applies to international environmental law as a whole. He argues that the distinctive features of this law do not amount to a constitution in any meaningful sense of the term; rather, they represent a toolbox. The final candidate to fill the role of an international environmental constitution is the general principles of international environmental law,

23. Bodansky, *supra* note 2.

such as the duty to prevent transboundary harm. But if these principles represent a constitution, it is “a weak and vague one.”

Two articles focus on global democracy. Andreas Føllesdal makes the case for a democratic global constitution.²⁴ He convincingly takes issue with arguments that see no need for democracy beyond the nation-state, and also with authors that consider the emerging international (or at least European) order to be sufficiently democratic. His contribution is an impressive review of the major arguments in this debate. While showing that there is indeed a need for democracy, Føllesdal does not answer the questions of what this global democracy should look like or how it could be achieved.

Petra Dobner destroys hopes for an alternative mode of democracy beyond the nation-state.²⁵ She criticizes the idea that global policy networks may be a major cornerstone of a democratic global political order. Based on empirical analyses, she enumerates the major arguments showing that global policy networks are neither governments by the people nor, necessarily, governments for the people.

While the work by the preceding authors could be related to the “thick” understanding of constitutions, Alec Stone Sweet argues in favor of a “thin” concept: Constitutions are meta-norms that tell us how other, lower-order legal norms are to be produced, applied, and interpreted.²⁶ According to this definition, we already have global constitutional order, such as the treaty regimes of the ECHR, the European Union (EU), or the WTO. In addition, Stone Sweet shows that constitutional pluralism is no major objection to the idea of global constitutionalism. Legal pluralism also exists on the level of the nation-state. Finally, he argues that the European Court of Justice, the Appellate Body of the WTO, and the ECtHR meet the criteria of constitutional courts.

Thomas Cottier also advocates a pluralist and procedural, and to that extent “thin,” version of global constitutionalism.²⁷ He considers multilayer constitutionalism as an intellectual framework that overcomes the classic division between domestic and international law, and which permits a more coherent and rational interaction of different regulatory layers. An important element of global constitutionalism is

24. Andreas Føllesdal, *When Common Interests Are Not Common: Why the Global Basic Structure Should Be Democratic*, 16 IND. J. GLOBAL LEGAL STUD. 585 (2009).

25. Petra Dobner, *On the Constitutionality of Global Public Policy Networks*, 16 IND. J. GLOBAL LEGAL STUD. 605 (2009).

26. Alec Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 16 IND. J. GLOBAL LEGAL STUD. 621 (2009).

27. Thomas Cottier, *Multilayered Governance, Pluralism, and Moral Conflict*, 16 IND. J. GLOBAL LEGAL STUD. 647 (2009).

therefore the allocation of powers to the various layers of governance. Cottier points out that significance and weight, the exact contours, and the concrete consequences of basic general principles and rights are inevitably controversial when it comes to their application. Global governance is in that regard not categorically different from domestic governance but different in degree. Principles of international law and notably of international economic law, such as human rights, non-discrimination, equal conditions of competition, and the four economic freedoms in the EU, operate much as constitutional principles. Because of the controversies about these and other principles, Cottier argues that we need to develop appropriate peaceful procedures of negotiation, discourse, decision-making, and dispute settlement. As “procedures are key,” shared processes ultimately determine the extent to which global constitutionalism is viable.

III. TOWARD A RESEARCH AGENDA OF GLOBAL CONSTITUTIONALISM

The academic objectives of the contributions to this issue are to identify the constitutional predispositions and indices in the international system, to rationally structure the current constitutional chaos, to measure and explain constitutionalization beyond the nation-state, and to encourage reflection on how the process of global constitutionalization might be broadened and intensified, and, in doing so, to help vindicate claims for an even more constitutionalized world order. We are also interested in the question whether constitutions beyond the nation-state are effective and democratic, and whether the effectiveness and democratic legitimacy of international constitutional law can be improved. That said, we do not purport only to analyze the *lex lata*, but also to argue *de lege ferenda*.