

# Global Constitutionalism in International Legal Perspective

Christine E. J. Schwöbel



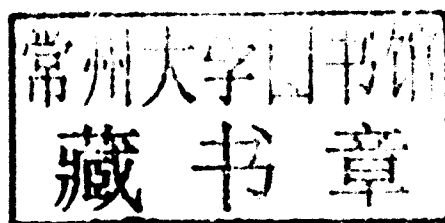
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*By*

Christine E. J. Schwöbel



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# Global Constitutionalism in International Legal Perspective

# Queen Mary Studies in International Law

*Edited by*

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VOLUME 4

*For my parents*

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## INTRODUCTION

Global constitutionalism is the international legal term *du jour*. The last years have seen a great influx of debates on constitutionalism in international law, sparked by various globalisation processes. All manner of terms, ranging from 'international community', 'global rule of law' to 'global governance' have been engaged to explain increased interdependence, cooperation, and collaboration in the *international*, *intranational* and *transnational* sphere. The increased multifariousness of activities in the sphere that transcends the national has made the idea of a legal umbrella to frame the various activities and impulses an attractive enterprise. The unifying terminology is all the more interesting amidst the growing importance of the fragmentation of international law. One such legal umbrella that has been suggested is that of a global constitution.

This book critically examines public international law contributions to the debate on global constitutionalism. There is of course no single recognised global constitution; rather there are a number of visions of what a global constitution is and should be and what constitutionalisation in the international sphere is spurred by. The following takes a step back from the debate to call into question these prevailing visions, attempting to bring into focus the ideas which they entail. A critical examination highlights that contemporary visions of global constitutionalism are predominantly shaped by central tenets of the political form of government referred to as liberal democracy which is predicated on the ideology of political liberalism. Liberalism in this sense is characterised by the two elements of formal autonomy and abstract equality; democracy is characterised by popular representation in the public sphere. Public international law contributions to the debate on global constitutionalism are largely animated by a belief that these liberal democratic ideas define not only constitutionalism in nation States, but also constitutionalism for a global order. Indeed, they are often regarded as the only available ideas. This leads to significant limitations including the creation of an environment that favours hegemonic ambitions at the possible expense of diversity. In an effort to reengage with constitutionalism on a global scale, a suggestion is made as to how such limitations can be reduced, by employing an approach that I refer to as 'organic global constitutionalism'.

What then is global constitutionalism? So as to avoid exclusions from the outset, the term 'constitution' is not predetermined here. I will predominantly refer to 'constitutionalism' as the theory and practice pertaining to something that is 'constitutional'. In order not to leave readers completely in the dark (although this is unlikely, even impossible, since the term itself evokes a number of associations), as a first step to examining the idea of global

constitutionalism, one can break the term down to its components of 'global' and of 'constitutionalism'. The word 'global' refers to the assumption of the universality of the concept. In the very broadest sense, the word 'constitutionalism' pertains to a certain social, political, cultural, economic, and legal system of ideas. The suffix 'ism' denotes a belief in or a practice of the system of ideas. At this stage, this extremely broad definition of global constitutionalism as a universal system of certain social, political, cultural, economic and legal ideas will have to suffice. This study aims at being as inclusive as possible and therefore shies away from exclusion through definitions. The constitutionalism that is the object of this book has been referred to as 'international constitutionalism', 'transnational constitutionalism' or 'global constitutionalism'. Although these terms are often used synonymously, the following discusses constitutionalism that is believed to concern matters *between* States (*international* constitutionalism) as well as constitutionalism that is believed to concern matters *beyond* States (*transnational* constitutionalism). *Worldwide* visions of constitutionalism are examined; this means that although the discussions on regional visions of constitutionalism (such as the constitutional treaty for the European Union) are mentioned, indeed are key to some of the ideas of global constitutionalism, this book focuses on visions concerning the whole world. The term 'global constitutionalism' thus seems most fitting.

There are two main reasons for the timeliness of this book. Firstly, although there have been many contributions by international lawyers to what they view as 'the global constitution' or what they view as features of 'global constitutionalism', there has been no comprehensive analysis of these contributions, particularly in terms of situating them within a particular political tradition. The second reason for the timeliness is a shift that has supposedly taken place through the events surrounding 9/11. While in the 1990s there was much debate about diversity, recognition, and inclusion, the 9/11 attacks have arguably provoked something of a reorientation towards a search for a global common set of values and the exclusion of those that do not share these values. The Western States, led by the United States, have engaged in a policy of identifying allies and enemies respectively in the fight against terrorism. This has been the source of the emergence of a clear and accepted divide between those who operate within the liberal democratic consensus and those who are wary of its possible hegemonic implications. Against this background, there has crystallised a feeling that there is no need to question the premises on which liberal democracy is predicated. This book hopes to heighten awareness that it is still (or perhaps even more so) necessary to question dominant political forms. I hope to sensitise the reader to the fact that such political forms should not be applied to a global sphere – and, to that extent, universalised – without questioning the validity and generality of their premises.

As is customary with such research, the first Chapter sets the scene: It identifies and categorises the contemporary debates on public international law

visions of global constitutionalism, and highlights the different issues that are addressed therein. This chapter reviews a wide variety of contributions, introducing the distinction between what I have called the four dimensions of constitutionalism: *Social Constitutionalism*, *Institutional Constitutionalism*, *Normative Constitutionalism*, and *Analogical Constitutionalism*.<sup>1</sup> These categories are an attempt to group the various approaches or schools of thought by reference to the key themes of global constitutionalism. The categories are, of course, only one way of describing the debate on global constitutionalism in international legal perspective.<sup>2</sup>

*Social Constitutionalism* is a vision of constitutionalism that views the international sphere as an order of coexistence. Concerns about participation, influence, and accountability are at the centre of these visions of global constitutionalism. A distinction is made between Social Constitutionalism that focuses on the international community as a global constitutional order and the form that focuses on global civil society. Hermann Mosler, Bardo Fassbender and Christian Tomuschat are identified as promoting the former; Gunther Teubner, Andreas-Fischer Lescano, and Philip Allott the latter. Visions of *Institutional Constitutionalism* are predominantly centred on the ways in which power is allocated among institutions in the international sphere. A distinction is made here between global governance ideas of constitutionalism (advanced for example by Anne Peters and Jürgen Habermas), ideas that put forward United Nations law as global constitutional law (advocated by Ronald St. John Macdonald and Bardo Fassbender), and ideas that suggest World Trade Organisational law and International Labour Organisational law as global constitutional law (described by Ernst-Ulrich Petersmann and Stefan Kadelbach/Thomas Kleinlein respectively). *Normative Constitutionalism* encompasses those visions that focus on the existence of a common normative (value) system. This section is divided into three types of Normative Constitutionalism. First, visions of a world law, as portrayed by Angelika Emmerich-Fritsche and Jost Delbrück; second, visions pertaining to a hierarchy of norms put forward by Brun-Otto Bryde and Luigi Ferragoli; and third, visions of fundamental norms will be presented as ideas stemming from Michael Byers, Erika de Wet and Jost Delbrück. Finally, *Analogical Constitutionalism* includes visions of global constitutionalism that are modelled on existing constitutional orders. Analogical Constitutionalism can focus on meta-rules (as suggested by the early writings of Alfred Verdross and

<sup>1</sup> Christine E. J. Schwöbel, 'Situating the Debate on Global Constitutionalism' (2010) 8 (3) *International Journal of Constitutional Law* forthcoming; Christine E. J. Schwöbel, 'Organic Global Constitutionalism' (2010) 23 *Leiden Journal of International Law* (LJIL) 530–533.

<sup>2</sup> For another way of ordering the debate, see Jeffrey L. Dunoff and Joel P. Trachtman, 'A Functional Approach to International Constitutionalization' in *idem* (eds), *Ruling the World: Constitutionalism, International Law, and Global Governance* (CUP, Cambridge 2009) 3–35.

Christian Tomuschat), on domestic constitutional orders (as suggested by Robert Uerpmann), or on European constitutionalism (as put forward by Mattias Kumm). It emerges from this that there are five key themes of constitutionalisation that shape the contemporary debate on global constitutionalism: the limitation of power, the institutionalisation of power, social idealism (meaning an idea for the future that is based on societal values), the standard-setting capacity of constitutions in the sense of a systematisation of law, and the recognition of individual rights. The five key themes can be found in various combinations in the four dimensions of global constitutionalism. One can compress the four dimensions of global constitutionalism further down to visions centring either on ideas of democratic processes or on ideas of liberal processes.

Chapter 2 examines the intellectual origins of the five key themes. The examination begins with thinkers of Ancient Greece and their influence on notions of the universality of certain principles. Whereas in those days there were no written constitutions as we know them today, many modern views on constitutionalism have their roots in the writings of philosophers of classical antiquity. The oldest key theme, closely connected to conceptions of natural law and ideas of universality, is the *limitation of power*. This key theme is related to the second key theme, attributed to Aristotle, the *institutionalisation of power*. The limitation and the institutionalisation of power foreground participation, accountability, governance, and representation. The third key theme, *social idealism*, is also rooted in Ancient Greece. It emerged with the teachings of the Stoics of the 3rd to 1st centuries BCE, who introduced notions of virtue and morality as dimensions of a universal law. The fourth key theme of *standard-setting* can be regarded as instituted by the Romans. In the 6th century CE, the Roman Emperor Justinian ordered the closing of the philosophical schools and thereby facilitated the practical application of law that was from there on distinct from philosophy. Legal principles were increasingly regarded as part of a legal system that society had to orient its conduct by. It was not until the 16th century CE that the fifth key theme of global constitutionalism emerged: the significance of the *protection of individual rights*. The spread of Christianity placed the individual at the centre of ideas on law and morals. These thoughts evolved further in the Enlightenment, which facilitated the development of the idea of certain fundamental rights that were inherent in every human. While the European thinkers were dwelling on questions of fundamental rights, their respective nation States were establishing colonies and empires throughout the world. For the first time, global constitutional history looks beyond Europe. It is illustrated how international law is instituted as an area of law and how its concept and concepts of constitutionalism were utilised to legitimise European imperial ambitions. The present day is only portrayed briefly since this is the focus of Chapter 1. It is noted that the domain of the universal is predominant in many other fields of research that

award attention to globalisation. Much academic work today is dominated by reflections on changes regarding the significance of the nation State and the international sphere.

Having mapped the landscape in this way, the next chapter seeks to highlight what is missing from it – the omissions and biases of the prevailing notions of global constitutionalism. The aim is both to expose the limitations of global constitutionalist discourses, and to indicate what is at stake if visions of global constitutionalism are subject to those limitations. It is observed that many of the limitations are linked to the fact that the central ideas of global constitutionalism are at the same time central tenets of liberal democracy. This work does not intend to challenge liberal democracy itself (which in any event encompasses a wide diversity of political practices and arrangements), but it does point to the weakness of visions that depend exclusively on established traditions in liberal democratic thought, believing that they can be applied to global constitutionalism without further scrutiny. The Chapter begins with an examination of some common assumptions about global constitutionalism and then goes on to examine the different focal points of the contributors, in the form of the key themes of global constitutionalism. At the beginning of the chapter it is revealed that, despite the differences, there exist a range of common assumptions. These include: the belief that constitutions can exist beyond the nation State; the assumption of a certain unity or even homogeneity of the international sphere; and the assumption that the idea of global constitutionalism is itself universal. Under critical scrutiny, it becomes evident that the first assumption rationalises and idealises the existence of an international legal community in a manner that tends to overlook both the complexity of the international sphere and the political dynamics that are unique to it. The second assumption has the effect of downplaying ongoing concerns about the fragmentation of international law, hegemonic power struggles, self-awarded legitimacy, and cultural diversity. The third assumption encourages us to ignore the fact that much of the literature comes from European, particularly German, writers. It is questioned whether a concept that is so closely tied to a particular legal culture, or particular legal cultures, can really be described as universal. The five key themes of global constitutionalism as determined in Chapter 1 are subsequently scrutinised for their limitations. It is argued that the constraint of power always also includes the granting of power, and that the constraint of power by means of purely legal equality could lead to a marginalisation of minorities. The second key theme of global constitutionalism, the institutionalisation of power, is criticised as having the potential to create a chasm between the public and the private spheres, which could lead to a downgrading of abuses in the workplace and home, often of particular concern to women. Social idealism, as the third key theme, is criticised in terms of its focus on normative ideals of society, exclusively based on human rights. It is observed that human rights have been accused of conceptual or ideological

imperialism, overlooking the benefits of diversity, if they are interpreted in a way that is particular to a certain philosophical, historical, and ethical viewpoint. The fourth key theme – standard-setting – is criticised for its bias towards ideas associated with a certain political tradition, privileged as those most ‘progressive’. Finally, it is observed that individual rights carry with them an indeterminacy that invites political decision-makers to interpret the content of a norm, and therewith encourages hegemonic approaches that may disadvantage minority traditions. To conclude the chapter, it is noted that limitations of the predominant liberal democratic traditions would be manifested and reinforced on a global scale if applied to global constitutionalism.

With these critical points in mind, Chapter 4 suggests a reconfiguration of global constitutionalism, in terms of what I call ‘organic global constitutionalism’. The chapter opens by asking whether, given the limitations of prevailing approaches, the project of global constitutionalism should be simply abandoned. The discourse on global constitutionalism is however established within international legal work to such an extent that it cannot viably be abandoned. What then accounts for this? How are we to understand the appeal of global constitutionalist thinking? It is asserted that the tenacity of the idea of global constitutionalism finds its reason in the rationalisation of new *allocations of power* in the international sphere, their belief that law has the *potency to impact on social reality* and the appeal of finding a means of *legitimising international law* itself. Towards the end of the chapter an alternative way of framing global constitutionalism – ‘organic global constitutionalism’ – is outlined. Underpinning it are four key elements: first, the idea of constitutionalism as *process*. By this is meant that, instead of viewing global constitutionalism as a fixed framework, and one organised with reference to a single and ultimate source of authority, constitutionalism is regarded as flexible and adaptable. Second, the idea of constitutionalism as *political*. This points to the possibilities for challenging technocratic decision-making, and for rendering that which has become rigid revisable through discourse. The emphasis is on a normative order that is determined discursively rather than being presupposed by pre-political convictions. Third, the idea of constitutionalism as a ‘*negative universal*’. Referencing the work of Ernesto Laclau on democracy, it is suggested that global constitutionalism should remain an ‘empty space’ in the sense that it has no ‘positive’ content, but instead is shaped in and through particular practices and institutions. And fourth, the idea of organic global constitutionalism as a *promise for the future*. A notion of ‘constitutionalism to come’, analogous to Jacques Derrida’s idea of ‘democracy to come’, is advocated, as a way of suggesting the importance of orienting change without fixing its precise course.

Although this is predominantly a theoretical study, the final chapter attempts to address the many practical issues that would attend the implementation of organic global constitutionalism. This comes with a disclaimer that the study



does not offer a comprehensive 'solution' to the problems of global constitutionalism; rather, it attempts to elucidate those problems, and to suggest possible ways of re-thinking global constitutionalism so as to get beyond them. Chapter 5 attempts to do this by revisiting the four dimensions of global constitutionalism and considers first how these are likely to play out in practice and then how this may be corrected by means of a more organic approach.

In the first two chapters, the authors relied upon are those that seemed most representative of a certain time or of a certain idea. This was in a way easiest for the contemporary debate illustrated in the first Chapter. I merely collected as much literature on global constitutionalism by international lawyers and those scholars thinking about international law as possible. I was however restricted by language, focussing largely on German and English publications. For considering the history of key constitutional themes I began with Aristotle of Classical Antiquity. When the examination moves to the Enlightenment, the work of Kant is referenced as the work of a thinker who had enormous impact on contemporaries and successors. The literature that was most influential for the critique of global constitutionalism (Chapter 3) stems from scholars that are critical of the predominance of liberal democratic themes in matters concerning power structures. The work of political philosophers such as James Tully, feminist social theorists such as Carol Gilligan, postmodernists such as Derrida, and international lawyers such as Martti Koskenniemi, was employed. The arguments draw on, *inter alia*, notions of participatory democracy, Marxist theories, approaches that grapple with the accommodation of cultural diversity, and anti-imperialist thought. Interestingly, while much of the literature on global constitutionalism is very recent, the relevant critical literature comes predominantly from the 1990s. In the 1990s, there was a wave of critical work that proved extremely valuable for this book. Concerns about the marginalisation of minorities, about governance by experts and bureaucrats, and about the dominance of male over female interests, were voiced in critical literature. Recalling these concerns, the fourth chapter suggests a new approach to global constitutionalism. This chapter draws largely on the thoughts of philosophers and political scientists such as Jürgen Habermas, James Tully, Ernesto Laclau and Jacques Derrida, and extrapolates them to the discourse on global constitutionalism.

Public international lawyers have long been attracted to the idea of global constitutionalism. Alfred Verdross was among the first to treat constitutionalism as relevant to international law. His work with the ambitious title *The Constitution of the International Legal Community* was published in 1926.<sup>3</sup> For him, global constitutionalism was a matter of the structure and subdivision of spheres of jurisdiction in the international community. His emphasis on

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<sup>3</sup> Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (J. Springer, Wien 1926).