

# Constitutionalism in Global Constitutionalisation



Aoife O'Donoghue

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# CONSTITUTIONALISM IN GLOBAL CONSTITUTIONALISATION

Constitutionalism offers a governance order a set of normative values including, amongst others, the rule of law, divisions of power and democratic legitimacy. These normative values regulate the relationship between constituent and constituted power holders. Such normative constitutional legal orders are commonplace in domestic systems but the global constitutionalisation debate seeks to identify a constitutional narrative beyond the state.

This book considers the manner in which the global constitutionalisation debate has neglected constitutionalism within its proposals. It examines the role normative constitutionalism plays within a constitutionalisation process, and considers the use of community at both the domestic and global governance levels to identify the holders of constituent and constituted power within a constitutional order. In doing so this analysis offers an alternative narrative for global constitutionalisation based within normative constitutionalism.

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To Colin

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## Introduction

Tackling a debate contingent upon the interpretation of a contested legal form, particularly one as central as governance, requires innumerable pitfalls to be circumnavigated before a positive contribution to debate is possible. Constitutionalism, while a legal order perceivable everywhere in governance, exemplifies both the contestations and snags typified in such debates. Questions on constitutionalism's presence, absence or potential inculcation into the global legal order ought to stand in the midst of these controversies; yet often, concerns as to its nature are bypassed for the supposed glamour of constitutional global governance. Almost instinctively, global constitutionalisation appears as the epitome of international law's development. Constitutionalism is a form of legal order that is tried and tested in domestic law, proven to indicate the final maturing of domestic governance and a faithful servant of legitimacy. It offers international law its final repose as a 'good' legal order. But, perhaps in rushing towards the idyll of global constitutionalisation a few preliminary questions have been missed. By focusing on the conduct of the debate, this book seeks to consider an aspect of *a priori* constitutionalisation, the necessary aspects of constitutionalism as a normative legal order.

Constitutionalism, as an ideal legal order, as a documentary source of law, as a historical explanation or justification for the present form of state governance, or as a normative legal order suffused with a particular notion of what governance ought to be, deserves and requires consideration prior to any proposed consolidation of its place within the global legal order. Rather than tackling the entirety of constitutionalism's manifestations, this book concentrates on constitutionalism's normative content and its place in the global constitutionalisation debate. Admittedly, a focus upon constitutionalism as a normative legal order instilled with particular values omits other important questions necessary to a critical consideration of any debate on governance. But in considering its normative form, this work hopes to incite debate as to constitutionalism's worth within the global legal order and beyond, while also pointing to

some of the unsatisfactory aspects of global governance as it currently operates. Frankly, the debate on the suitability of global constitutionalisation should not end until all variations of constitutionalism's character are firmly underway and informing the actual process of transformation within the global legal order. Before the contemplation of a global constitutional order can truly begin, this book seeks to understand its meaning.

Underlying much of what follows is the assumption that there is purchase in constitutionalism's operation and that it is not a neutral indicator of legalisation or maturity but rather enjoys substantive form. Thus, to call something constitutionalised means to assert that a particular form of governance, immersed in a specific normative structure, exists. While such a claim could be contested, indeed usefully so, this assertion sets the tone for this discussion of constitutionalisation. To argue that it is something other than normative constitutionalism leads to a debate where constitutionalisation is a metaphor for an entirely different process. By purchase, this work denotes both the means of exercising governance and the advantages gained by those utilising its accoutrements within that governance order. Constitutionalism's purchase derives from both the form of governance order it establishes and the benefits accrued by those making use of its form. Clearly, this idea of purchase is not neutral. Constitutionalism's underlying rationales and values are a critical point that must be tackled. Yet, herein, beyond acknowledging that constitutionalism inculcates particular historical and cultural values that ought to be questioned (and that these form part of its purchase), this book restricts itself to arguing that its normative content ought to be conceded by proponents of constitutionalism's plantation into international law.

The means of exercising governance and the advantages gained by such utilisation must be held and accrued by some body. Thus constitutionalism's purchase requires that the means and advantages of constitutionalism ought to be readily identifiable and further, that those who hold those means, to whom such advantages accrue and their inter-relationship must also be extant. As such, part of the purchase that constitutionalism possesses and an aspect that must also be explored is who within global governance ought to gain from its operation. Constitutionalisation happens to a legal order but what does that legal order contain and whose order is it? If constitutionalism requires particular relational structures, how global constitutionalisation should inculcate these into its structure also forms part of the debate.

Fassbender's statement that 'over the course of the last fifty years the "constitutional predisposition" of the Charter has been confirmed and strengthened in such a way that today the instrument must be referred to as the constitution of the international community', De Wet's claim that there is an 'emerging international constitutional order consisting of an international community, an international value system and rudimentary structures for its enforcement' or indeed Klabbers' declaration that constitutionalism is 'an attitude, a frame of mind' all require interrogation.<sup>1</sup> Constitutionalism's plantation into the global legal order ought to be accompanied by a rigorous examination of its potential utility and operation, and this can only occur if the global constitutionalisation debate is rooted in, amongst other analysis, a normative constitutional frame.

Theories supporting global constitutionalisation propose that aspects of constitutionalism have or will become attributes of public international law. There is much to commend these theories and the additions they make to our understanding of the global legal order. Nonetheless, the importance of investigating whether these constitutionalisation theories are based upon the existing doctrine of constitutionalism or are an entirely new theoretical phenomenon should not be overlooked. Most global constitutionalisation theories, exemplified by Fassbender, De Wet or Klabbers, appear to be based within international law and seek to inculcate constitutional attributes to its operation. This book suggests that they would benefit greatly from a change in starting point and a footing within constitutionalism. Thus, this book queries whether global constitutionalisation theory may be improved by a more rigorous approach to constitutionalism itself. If, ultimately global constitutionalisation is adjudged to be a novel form of governance, sharing attributes with constitutionalism but distinguishable from it, it is then further suggested that an alternative moniker would prevent much confusion or renunciation.

Seeking constitutionalism's purchase within the global constitutionalisation debate emerges from a desire to understand its allure for international lawyers. Why has the international or global constitutionalisation gained such momentum? Why have academics reached for constitutionalism above alternative narratives of governance, including

<sup>1</sup> This is not to pick on Fassbender, De Wet or Klabbers but rather it is an indicator of a broader phenomenon; B. Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529; E. De Wet, 'The International Constitutional Order' (2006) 55 *International and Comparative Law Quarterly* 51; J. Klabbers in J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalisation of International Law* (Oxford University Press, 2009), p. 10.

some that are more native to international law? Perhaps such a task is illusory, as it seems almost impossible to discover the attraction of a particular order, but perhaps in understanding its purchase, the rationales for the global constitutionalisation debate will emerge. In addition, this approach might also unpick troublesome aspects of the constitutionalisation debate; for example, whether the constitutional requirements for a governance order have been seriously deliberated upon or accommodated within these propositions. Further, whether constitutionalism's purchase has been considered, and if not, how should constitutionalism's requisite normative structure, the means of utilising its purchase and the benefits that should accrue to international law from its purchase be realised within global constitutionalisation? Thus, in light of the historical and present character of the global constitutionalisation debate, this work seeks to understand what constitutionalism may mean to global governance. It also attempts to ascertain whether constitutionalism and international law possess the wherewithal to become a mutually beneficial, interconnected form of global governance.

Constitutional language is frequently employed in the global constitutionalisation debate. But many of these terms are politically contingent, meaning that their use is not, of itself, evidence of convergence. Peters and Armingeon acknowledge, as do several others, that there is a lack of coherence in the use of the terminology surrounding constitutionalisation.<sup>2</sup> Rarely is there much agreement as to either its normative structure or the process of constitutionalisation itself. Thus, there are myriad definitions.<sup>3</sup> For those in favour of recognising an existing constitutional order, constitutionalisation is used to describe a process already completed, whereas for those who argue that constitutionalisation is currently taking place or may take place in the future, constitutionalisation is a contemporary development where the goal is a constitutional order that is, as yet, nascent.

In exploring the constitutionalisation debate this book understands that 'constitutionalism' and 'constitutionalisation' are used as legal terms of art, denoting a particular form of legal order and not simply to rename an entirely new process within global law. Klabbers argues that

<sup>2</sup> A. Peters and K. Armingeon, 'Introduction – Global Constitutionalism from an Interdisciplinary Perspective' (2009) 16 *Indiana Journal of Global Legal Studies* 385, 387; and K. Milewicz, 'Emerging Patterns of Global Constitutionalization: Towards a Conceptual Framework' (2009) 16 *Indiana Journal of Global Legal Studies* 413.

<sup>3</sup> Milewicz, 'Emerging Patterns', 415.

constitutionalism is something more than legalisation.<sup>4</sup> He claims that legalisation, juridification or other similar phenomena are related to issues of codification in discrete areas of trade or human rights. As Klabbers depicts it, changes in international law, such as the codification of particular rules like the Vienna Convention on the Law of Treaties, take place without greatly disrupting the Westphalian order. By this standard, constitutionalisation must be something more radical than simple law reform. In contrast to Klabbers, Peters argues that '[g]lobal constitutionalism is an academic and political agenda that identifies and advocates for the application of constitutionalist principles in the international legal sphere in order to improve the effectiveness and the fairness of the international legal order'.<sup>5</sup> Peters refers to this process as an 'academic artefact', a phrase borrowed from Weiler.<sup>6</sup> This seems to imply that the constitutionalisation debate is nothing more than an academic diversion that will not in reality affect the practice of international law. Yet, Peters' point could instead be viewed as an indictment of the lack of thoroughness within the constitutionalisation debate, a defect that could be rectified by a more methodical approach that ties the process to constitutionalism.

In this book, constitutional language is employed in specific fashions. First, in the case of global and international law, the former is used to describe international as well as other areas, such as regional, domestic or institutional law, which intersect within the world legal system. International law means the classical inter-state law that forms part of global law, though it is also, at times, used to refer to particular constitutionalisation theories. Constitutionalism describes a form of legal governance theory based upon particular norms, values and structures. Constitutionalisation is employed where a legal order is in a process, over a period of time, from a position not based upon constitutionalism to one taking upon itself its cloak. A constitutional order has already adopted the necessary elements of constitutionalism to make use of that title rightly.

'The earliest rules of international law can, I think, be attributed to the self-interest of states ... and recognition that there are some mischiefs which can only be effectively addressed if addressed by more states than

<sup>4</sup> Klabbers in Klabbers, Peters and Ulfstein, *Constitutionalisation*, pp. 1–3.

<sup>5</sup> A. Peters, 'The Merits of Global Constitutionalism' (2009) 16 *Indiana Journal of Global Legal Studies* 397.

<sup>6</sup> Peters and Armingeon, 'Interdisciplinary Perspective', 385; A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579, 605; and A. Peters, 'Global Constitutionalism Revisited' (2005) 11 *International Legal Theory* 39.

one.<sup>7</sup> The Westphalian legal order that sustained the international system over an extended period, is now, as Bingham recognises, giving way to a more differentiated legal system with goals beyond merely keeping states' interests in check. Habermas argues that '[a] world dominated by nation-states is ... in transition toward the post-national constellation of global society. States are losing their autonomy, in part, because they have become increasingly enmeshed in the horizontal networks of a global society.'<sup>8</sup> The boundaries between international and domestic law are no longer easy to maintain.<sup>9</sup> This is not to suggest that, for example, all domestic courts will, without prejudice, follow international law, but rather that international law's influence is more pronounced than it was in the past.<sup>10</sup> At such a juncture for international law, where models of multilateralism and supra-nationalism, and the establishment of doctrines such as *jus cogens*, have already established a network of laws that cannot be accurately depicted as purely consensual, international legal theorists seek to clarify the nature of contemporary international law. Amidst this change, constitutionalism is but one of the theories that aspire to explain the current and future character of international law.

When governance moves from a non-centralised force and beyond a simplex order of apparent equal subjects towards a more complex structure, new understandings of its rationales to settle the transition become necessary. In the global legal order how to approach the evolution from a consensual to a more intricate order has become the subject of much debate. Without wishing to make a dramatic claim, which would exaggerate the current position of international law, there is now a need to choose how to advance its development. The theories developing alongside constitutionalisation present alternate visions of how international law ought to be understood. Attempts to understand the global governance order are not new, and these alternates signpost the difficulties lying ahead for constitutionalisation while also outlining the context within which these debates emerged. Some theories, including global legal pluralism, fragmentation,

<sup>7</sup> T. Bingham, *The Rule of Law* (London: Allen Lane, 2010), p. 114; see also, for an earlier articulation of a similar account of moving beyond classical international law, Wolfgang Friedman, *The Changing Structure of International Law* (Columbia, OH: Columbia University Press, 1964).

<sup>8</sup> J. Habermas, *The Divided West* (trans. C. Cronin) (Cambridge: Polity Press, 2006), pp. 115–16.

<sup>9</sup> See, for example, the work within global administrative law, such as B. Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *European Journal of International Law* 23.

<sup>10</sup> Bingham, *Rule of Law*, chapter 10.

global administrative law and governance networks, present alternatives to constitutionalisation, while other accounts, such as New Haven and Verdross, capture international law's already snarled development.

Although not rejecting the significance of ascertaining whether constitutionalisation can truly be said to be occurring and the importance of the practical application of constitutionalism either to international law or global governance, this book focuses on the character of global constitutionalisation theories and their relationship with constitutionalism. As such, the various approaches to global constitutionalisation are compared and critiqued within a frame of constitutional norms to establish their present state and their relationship to constitutionalism, considering whether the purchase associated with constitutionalism has been absorbed into the global constitutionalisation debate.

This study begins by discussing the nature of constitutionalism itself, identifying its norms and assessing the rationales for seeking to transplant it beyond the state. Ensuring an understanding of constitutionalism before tackling global constitutionalisation allows us to approach the latter not from a base within public international law but rather from a constitutional footing. Such a method emphasises constitutionalism rather than public international law and in doing so captures the notion of constitutional purchase. Starting in constitutionalism eschews the partialities of the public international lawyer seeking to proselytise its worth or indeed its purchase. Peters points out that the constitutionalist approach helps to overcome 'the deniers of international law as law'.<sup>11</sup> Yet, arguing that constitutionalisation is the culmination of international law's evolution, thus proving it is, in fact, law, surely lacks credibility if the leap required is from a non-legal to a constitutionalised order. Taking a constitutional footing inevitably adopts the preconceptions of the constitutional lawyer. But in recognising it is constitutionalism at the centre of the debate, this book seeks to reorientate questions surrounding global constitutionalisation onto governance and the form it should take within the global legal order.

Arguing that constitutionalism operates in the global legal order suggests that it coalesces into a *constitutional* legal order. Munro identifies two different, though not conclusive, definitions of a constitution: the first, a collection of laws in a state, which are collectively identified as public law; the second, a single purposely written document establishing the

<sup>11</sup> Peters, 'Merits', 405.

basis of a legal order and known, since the French Revolution, as a constitution.<sup>12</sup> Tomuschat dismisses arguments, based on clarity and rationality, in favour of a written constitution, as peculiarities of an era of law in which they were created.<sup>13</sup> As several undocumented constitutions such as New Zealand or the UK prove, a written document is unnecessary for a system to be constitutional; yet, other aspects of constitutionalism, such as the rule of law or divisions of power, are not as easily dismissed. This book begins with a discussion of the shape in which these core norms appear if an order is to be described as constitutional. In examining these norms and their consistency it becomes possible to determine their potential presence within both the global constitutionalisation debate and broader international law.

Domestic orders possess some of the longest and most entrenched forms of constitutionalism. Further, with the exception of states in conflict and transition, domestic constitutions have completed the process of constitutionalisation and are thus a model on which to understand what the end of that process demands. Discussions on the transplantation of constitutionalism from the domestic to the global plane necessitate the detection of the norms that must be present to depict accurately a legal order as such. This will not entail an empirical study of these constitutional orders but rather a discussion of the common theoretical frameworks by which domestic constitutionalism is understood. In examining this literature, several different ever-present norms are discussed, and three (the rule of law, divisions of power and democratic legitimacy) are considered in detail, as each is closely connected to the exercise of constituent and constituted power. While the rule of law, divisions of power and democratic legitimacy are discussed as modes of constitutionalism and not as inevitably linked to domestic legal orders, it will largely be within the domestic realm that they are initially considered, as it is in this forum that they developed their basic constitutional meanings.

Starting here also enables a broader conversation on the development of constitutionalism as a legal order and the arguments against utilising it beyond the domestic realm. Opposition to the extension of constitutionalism and constitutional norms to the global legal order are based on the merits of the domestic monopoly over constitutionalism. Questions

<sup>12</sup> C. R. Munro, *Studies in Constitutional Law*, 2nd edn (London: Butterworths, 1999), p. 1.

<sup>13</sup> C. Tomuschat, 'Obligations Arising for States Without or Against Their Will' (1993–IV) 241 *Rec. Des Cours* 195, 217; the UK is a prime example of a state's ability to operate without one formal written document.

regarding the legitimacy and suitability of the global legal order becoming entrenched in constitutionalism, and whether the international legal order is of such a character that the norms of constitutionalism can never be successfully transposed, are considered in depth.

The perpetual link to a group or a body forms a core aspect of constitutionalism. Within states that body comprises the persons living within the constitutional jurisdiction. The constitution and ultimately constitutionalism itself serve the interests of such a body and, as mentioned earlier, this body is also the beneficiary of constitutional purchase. The implication that follows from such an assertion of linkage is that global constitutionalisation theories must consider what body its constitution serves. The identification of the subjects of constitutionalism sets the parameters within which the holders of both constituent and constituted power act, their relational structures and thus too the application of a constitutional governance order to that body.

Constituted power is the legal basis on which authority is exercised within a legal framework, whereas constituent power is the exercise of political power and the ultimate source of legitimate authority. Identifying constituent power holders aids in establishing the interests that an order should serve and thus ought to be an a priori action in considering the terms of a governance order. In order to understand to whom constitutional purchase will accrue within these developing governance orders, and the identification of constituent and constituted power holders, this book will focus upon community and constituency. The identification of constituent and constituted power holders forms part of the panoply of constitutional debate and substantiates the application of a normative order. Several theories are chosen that illustrate the historical development of community and constituency and their relationship with constitutionalism, and constituent and constituted power.

Having long been an aspect of political and legal debate, though perhaps not without controversy as to its exact parameters, community seems a ready-made solution to the identification of the body global constitutionalisation serves. This examination aims not to settle on an exact definition of community but rather to appreciate the implications of invoking community within global constitutionalisation and to understand the terms of its appeal. Naturally, this necessitates the consideration of theories of community's development domestically alongside constitutionalism as well as globally alongside international law. This book focuses on particular points of community's development to the exclusion of other potential