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Global Constitutionalism

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1. Distinction between international law (as it stands and its evolution) and speaking about the law (as scholars)

1.1. Constitutionalisation of international law as a process

- Constitutionalisation = the emergence of international constitutional law as a specific subset of international law within the international legal order.
- Constitutional law: a body of fundamental principles/rules with constitutional functions (not necessarily codified within one single document).
- Origin of the debate: the constitutionalisation of the EU and the WTO (as “sectorial” constitutionalisation).

1.2. Global constitutionalism as a discourse

Elements: rule of law, checks and balances; human rights; possibly democracy. A constitution may contain constitutionalist elements or not.

- Descriptive (“diagnosis”).
- Normative/prescriptive/evaluative/“policy agenda”.
- Both description and normative assessment: “Compensatory Constitutionalism”.

2. Elements of the Constitutionalisation of international law

- **Modification of constitutionalist principles needed.**
- Not one single document called ‘World Constitution’.

2.1. Sovereignty and humanity

International system of human rights protection:

- Modification of the principle of state sovereignty.
- Human rights covenants fulfil the constitutionalist core function of constraining states and preserving a space of liberty for natural persons.
- Responsibility to protect (R2P) as a hard norm? Double standards?

2.2. The constitutionalisation of the international legal subjects

States: The traditional core element of statehood, the principle of effectiveness, which is in itself a legal, not merely a ‘factual’ requirement, has been supplemented and even substituted by international legal standards of self-determination, non-use of force, protection of human rights, minority rights and even democracy.

Individuals (both natural and moral persons under domestic law): have acquired more and more **international rights and obligations**, far **beyond** human rights.

International organisations and institutions:

Relative power gain – problem of accountability.

2.3. The constitutionalisation of sources: *ius cogens* and *erga omnes* norms

2.4. The constitutionalisation of legal processes: participation and transparency

- Transparency of the international (quasi-)judiciary.
- International law-making?

2.5. Constitutional goods and principles

An important factor of the constitutionalisation of the international legal order is the emergence of **new** principles inspired by constitutionalist ideas and the ascription of constitutional functions to **older** principles, such as non-use of force.

Rule of law, also at the *international level*, and in the United Nations itself.

Democracy: viewed by the United Nations itself as an implicit principle of the UN, and the democratisation of member states is one of the organisation's objectives. World summit outcome document of 2005.

2.6. The constitutionalisation of dispute settlement

Legal and judicial as opposed to political and diplomatic dispute settlement means a strengthening of the rule of law, because it is more formalised, offers procedural guarantees and applies legal (not political) standards.

3. Problems of constitutionalisation

- *Weak democratic legitimacy* of the international legal process.
- The international legal order is overall *minimalist and soft*.
- *Enforcement* of international law is deficient and handled unevenly.
- Increasing *refusal* of states, acting through their supreme courts, to accord *supremacy to all international law*.

4. Constitutionalist proposals de lege ferenda

4.1. Subjects

The constitutionalist approach offers a new foundation for the view that the ultimate international legal subjects are *individuals*.

States are no ends in themselves, but merely instrumental for the rights and needs of individuals.

International organisations and other institutions must be made more effective *and* more legitimate, possibly with help from the constitutionalist toolbox.

Private resources by *charitable individuals* should be tapped.

The irregular international status of *transnational corporations* (TNCs), and also of *NGOs* is pernicious because it leaves space for the exploitation of their power for self-interested goals to the detriment of the public good and of affected individuals.

4.2. Sovereign responsibility

From a constitutional perspective, participants in the legal process and observers should insist on the **responsibility** pertaining to sovereignty. The focus should no longer be on third states' duty to refrain from action and intervention, but inversely on a possible **duty** to act internationally ('from non-intervention to non-indifference').

4.3. Other constitutionalist principles

Global constitutionalism crucially demands that constitutionalist principles must be applied not only within states *but also to the relations between states and to international organisations*.

- Human rights and obligations.
- Separation of powers/checks and balances.
- Common heritage of mankind.
- Solidarity: in the law as it stands, an international principle of solidarity is arguably inherent in some regimes.
- Democracy as well must apply not only within states but also on the international level, i.e. within international organisations and in the non-institutionalised relations between states.

4.4. Procedures

Constitutionalism asks for inclusiveness and empowerment.

Seen through the lens of constitutionalism, the transnational activities of NGOs and also of TNCs are manifestations of an emerging global civil society. However, NGOs and TNCs should not participate in an equal footing with states. More attention must be given to *the disproportionate influence of 'northern' NGOs*. Non-state actors should only obtain 'voice', not 'vote', because they are on average less representative and accountable than states.

In order to improve the *effectiveness of rule- and decision-making* of some organisations, a practice of *majoritarian decision-making* should be introduced or revived, for example in the WTO.

The *transparency* of the international legal process should be improved in order to assume the very constitutional and in particular democratic functions transparency performs in domestic law. One aspect of transparency is the *obligation to give reasons* for legal acts.

4.5. Monitoring, adjudication, and enforcement

5. Criticisms

- Epistemic critique: Constitutionalisation as a fact does not exist, is a “false” description?

- Normative critique: Eurocentric, hegemonic, anti-pluralist?

Too European and too ‘liberal’? A fundamental pluralist critique is that the political, economic, intellectual, and moral diversity of the world population makes Constitutionalisation and constitutionalism *unachievable and illegitimate*. Any constitutional arrangement would be imposed by one group on the other, and would thus be perceived as an imperial tool rather than an expression of common self-government.

6. Response and Conclusion

Constitutionalisation 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 to allow for a novel understanding of existing legal practice (both international and national, especially in their interplay), and to open a normative horizon for reform aspirations.

It is important, however, that constitutionalists do not give up attempting to explain and understand, through a creative re-reading, 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, global constitutionalism will be apt to uncover structural (‘constitutional’) deficiencies of international law (such as the democratic deficit of the international legal process), will allow assessing those deficiencies in a new light, and will 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 recognised 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.

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