



“Global Constitutionalism: The Social Dimension”

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Abstract

The presentation takes the UN Agenda 2030 (adopted in 2015) as a marker for a new era of international law, an era of globalisation fatigue. I identify **five trends** which point towards the emergence of a “more social” international law. The common feature of these new or strengthened legal concepts, legal subfields, and procedures is the acknowledgment of a **cross-border social responsibility for individuals**.

It is possible to assess these trends through the lens of global constitutionalism. By absorbing the social question, global constitutionalism can mitigate its neo-liberal tilt, and would be rescued from being reduced to a project to deepen the power of capital and to extend a market civilization in which the transnational investor is the principal political subject.

Outline

I. Statement of the problem and key concepts

- Example of China and corona virus today: The interconnection of the social (material) and political condition — in a globalised environment.
- “Social” in a narrow sense: *an attribute of laws, policies, and institutions which seek to improve the material living conditions of humans and mitigate poverty and inequality of wealth and income.*
- Traditional social aspects of international law: Inter-state focus.
- The “groundswell of discontent with globalisation” (Christine Lagarde)

II. Five trends in the direction of a “more social” international law

1. The international law against poverty

- Sustainable Development Goal (SDG) No. 1 (of Agenda 2030 (2015)) and its critique.

2. The international law against inequality

- The elephant graph (World Bank economist Branko Milanovic).
- Agenda 2030 Decl. of 2015, para. 3: “combat inequalities *within* and among countries”.
- Agenda 2030 Goal 10.4 on “fiscal, wage, and social protection policies”.

3. The extension of international social rights

ICECSR 1966 with optional protocol No. 1 (2013); European Social Charter; other.

a) Extension *ratione materiae*: Radiation into all international law

Human rights-based approach (HRBA) to the international law of development, labour, trade, investment, finance, refugees, anti-corruption, and so on.

b) Extension *ratione loci*: Extraterritorial application

- Maastricht Principles of 2011.
- Threshold problem (“jurisdiction” or other concept).

c) Extension *ratione personae* (duty-bearers):

- IOs, notably international financial institutions.
 - World Bank’s Environmental and Social Framework Setting of 2016: “due diligence on social impacts”.
 - Independent expert’s *Guiding Principles on Foreign Debt and Human Rights* of 2011/ UN HRC 2012: obligation of IOs to respect human rights.
- Business: No direct (social) human rights obligations so far.
 - ICSID, *Urbaser v. Argentina* 2016: obligation to respect right to water.

- Revised draft of the UN HRC intergovernmental working group (July 2019).
- Way forward: State obligations to protect and regulate.

4. The enforcement of social rights

- National constitutional case-law (South Africa; India).
Transnationalisation of social rights through judicial dialogue.
- Social "loading" of the ECHR by an activist ECtHR
- European Social Charter with European Social Committee.
- EU Charter of Fundamental Rights with strong social dimension.
- Inter-American Court of Human Rights, *Lagos del Campo vs. Peru*, Case No. 12.795, Judgment of 31 August 2017 on Art. 26 IACHR (job security) "in relation to" Art. 1.1, 13, 8, 16.

5. Social impact assessment and due diligence

- By states, IOs, and business.
 - a) Impact Assessments: Especially before the conclusion of trade and investment agreements (cf. 26 and 30 VCLT).
 - b) Due diligence: Ruggie Principles (2011), principles 17-21.
- Open questions: When (threshold)? How far (intensity)? Owed to whom?

Interim conclusion: The emerging cross-border social responsibility for human beings.

Two seemingly contrary features which can co-exist:

- The social rights' functions as entitlement are sharpened.
- On the other hand, international social rights are diluted to mere background noise.

III. The global social question from a constitutionalist perspective

1. Socialising compensatory constitutionalism
2. Facilitating interdisciplinary debate
3. Overcoming regime fragmentation
4. Acknowledging the social principle as a shared constitutional heritage
5. Mitigating Eurocentrism
6. Mitigating a measure-mentality
7. Feedback loops between the social condition and constitutional institutions

Both the social question and the constitutional question have gone global.

→ A global *social* constitutionalism is needed, with three qualifications:

1. No centralised welfare bureaucracy.
2. Recognising the backlash in core areas of international law (containing resort to military force, protecting territory and sovereignty).
3. Recognising the pros and cons of "individualising" social problems.

→ Reformist as opposed to revolutionary strategy to combat global social injustice.

References

- Anne Peters, "Global Constitutionalism: The Social Dimension", in: Takao Suami/Anne Peters/Dimitri Vanoverbeke/Mattias Kumm (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge: Cambridge University Press 2018), 277-350.
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