



## **The deconstitutionalisation of international law in times of populism and pandemic**

University of Nottingham, 19<sup>th</sup> March 2021

### **I. Introduction**

- Russian President Vladimir Putin: Liberalism is obsolete.
- Has the trinity of rule of law, human rights, and democracy been replaced by the ideals of (populist) sovereignty, security, and prosperity?

### **II. The current global context**

#### ***1. Change of material circumstances***

- Shift of power away from Western world.
- Fruits of globalisation unevenly distributed.
- Digitalisation.

#### ***2. Change of the ideational climate***

Populism, post-colonialism, post-humanism, post-liberalism.

#### ***3. Attitudes towards international law***

- Disillusionment with IL (unfulfilled promises).
- Tainted history; one-sided content; repulse against double standards and hypocrisy.
- Inconsistencies in the institutions of global governance.
- Tainted law making procedures: Undemocratic and intransparent.
- Pandemic highlights typical structural weaknesses of international law.

### **III. Global constitutionalism as a description**

- Specific features, procedures, and institutions in IL reflect constitutionalist values of rule of law, human rights, democracy, solidarity.
- Constitutionalisation as a multi-level phenomenon.
- Concomitant internationalisation of state constitutions.

### **IV. Deconstitutionalisation**

1. Erosion of the international rule of law: Critique against investor state arbitration system as too neoliberal; selective sanction practice displays double standards.
2. Broad gamut of critiques against international human rights.
3. Attack on the ICC as the capstone of humanism with a constitutional function.
4. Decline of democracy.  
Democratic deficit of international law-making weakly assuaged.  
Alternative IOs such as Asian Bank less transparent and accountable.

## V. Where we stand now

1. **Norms:** Constitutionalist fragments in IL are resilient.
  - Rule of law/judicial dispute settlement.
  - People continue to protest for human rights.
  - Democracy: e.g. Civil Society Mechanism in the Committee on Food Security in FAO.
  - Various initiatives on the “responsibility not to veto” (Rn2V).
2. **Facts:** “Slowbalisation” (mobility of capital and persons, transnational supply-chains → resulting interdependence + rise of corporate power) is an ongoing condition.

## VI. Addressing some problems of global constitutionalism

1. The colonial legacy: critical review needed.
2. Eurocentrism.  
Acknowledging contributions from outside Europe and seeking overlapping consensus, e.g. Bandung principle of 1955.
3. Cultural pluralism – but no blank cheque for abuse.
4. Stop hypocrisy and double standards – but also distinguish properly.
5. Rectify neoliberal tilt.

## VII. Prospects for a more social Global Constitutionalism fit for 2030

1. Investor obligations
2. Legally binding instrument on business and human rights
3. Operationalise social rights
4. Operationalise international legal principle of solidarity
5. Acknowledge the rule of law — development nexus (sub-goal 16.3 of Agenda 2030).

## Reading

- Anne Peters, “Covid-19 as a Catalyst for the (Re-)Constitutionalisation of International Law: One Health – One Welfare”, *MPIL Research Paper Series No. 2020-44*, 12 November 2020. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3729488](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3729488).
- Anne Peters, “Constitutionalization”, in: Sahib Singh/Jean d’Aspremont (eds), *Concepts for International Law – Contributions to Disciplinary Thought* (Edward Elgar 2019), 141-153, DOI: 10.4337/9781783474684.
- 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* (CUP 2018), 277-350.

## Additional Reading

- Tarik Kochi, “The End of Global Constitutionalism and Rise of Antidemocratic Politics”, *Global Society* 34 (2020), 487-506. • Cheryl Saunders, Global Constitutionalism — Myth and Reality, in: Jason N.E. Varuhas/Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart Publishing 2019), 19-40. • Stephen Gill/A. Claire Cutler (eds), *New Constitutionalism and World Order* (CUP 2014).