

Global Constitutionalism: Mapping an Emerging Field

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27 January 2011

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Background impulse paper prepared for the Conference *Constitutionalism in a New Key? Cosmopolitan, Pluralist and Public Reason-Oriented*, Berlin, WZB and Humboldt University, 28-29 January 2011.

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Abstract

This paper summarises the framework of a research project which focuses on *mapping* global constitutionalism as an emerging interdisciplinary research field and *shaping* global constitutionalism following insights from empirical social science research. The first three months of the project's research will be conducted during a Fellowship at the Hanse Institute for Advanced Studies, Delmenhorst in 2011. The ultimate goal of the larger project is to develop *global constitutionalism* as a theoretical approach in relation with world society and global governance approaches, respectively. All three approaches share the characteristics of being heuristic and offering a theoretic reaction to social phenomena. The project works with the concept of *triangulation* with an innovative twist: While *methodical* triangulation has become a leading method in qualitative social science, the method of *theoretic* triangulation, which is developed by this project, proceeds by situating approaches at the corner points of a triangle and elaborating a joint theoretical perspective from there. In this case, the interface consists of pluralist mid-range theorising. This interface reflects the more empirically focused insights advanced by new institutionalism, on the one hand, and the more normative leaning insights of cosmopolitanism on the other. It is suggested that theory formation which proceeds in this way allows for an active engagement with theories that share the interest in theorising *dynamics of institution-building* and *social practice* in relation with border crossing and community formation on a global scale.

Research Object

Global constitutionalism is a relatively recent phenomenon, both as an approach and as an observation of social change. And so far, it lacks a coherent theoretic framework and research programme (Dunoff 2005, Peters 2009). Therefore, and following Joseph Weiler's work on European – legal – integration (1999), for purposes of establishing a shared reference frame, constitutionalism is heuristically conceptualised as an “academic artefact” which reflects practices in jurisprudence and academic discourse. Accordingly, constitutionalism is neither understood as the study of a legal document (constitution) nor as the process of establishing a legal frame (constitutionalisation). Instead, it is defined as a reference frame for interdisciplinary research with a particular focus. Constitutionalism in a wide sense is associated with the study of the constitutive elements of legal and political practice that are central for the assessment of its legality or legitimacy. This has been called *small-c* constitutionalism. In turn, *large-C* constitutionalism reflects the study of constitutionalism in a narrower modern sense focusing on the basic ideas relating to justice (such as human rights), procedural fairness and participation (e.g. democracy) and the rule of law as they

relate to institutional practices and policies in and beyond the state (Dunoff and Trachtman 2009, Kumm 2009, Loughlin and Walker 2007, Halberstam and Stein 2008, Bogdandy 2008). In sum, constitutionalism does not presuppose the existence of a written constitution. It merely presupposes the interplay between social and institutional practices to which claims to legality, legitimacy and democracy are key.

As an approach that seeks to study, comprehend and shape constitutional change, constitutionalism analyses the role of fundamental norms, the type of actors, and the institutions and procedures through which legal and political decisions are made (Tully 2002, Maduro 2003, Kumm 2009). The spread of these practices, institutions and procedures across the borders of modern nation states, presents a challenge to constitutionalism as an approach which in the 1990s had just barely been adapted to provide a reference frame for studying constitutional change in processes of regional integration. To adapt the approach with a view to studying global organizations such as the United Nations (UN) as well, scholars from different disciplines have begun to talk about global constitutionalism. The most explicit move in this sense has been the recent foundation of the new interdisciplinary journal *Global Constitutionalism* which aims to provide a location for academic debate about the approach.¹

Research Questions and Timeframe

The project builds on the observation of an enhanced constitutional quality beyond the state and asks how it is possible that despite the existence of manifold liberal community formations and often overlapping membership in them, international encounters often revealed clashes about norms and the best way to implement them locally. In conclusion, the book suggests that scrutinising assumptions about the impact of norms, principles and world views that are held by members of communities with a given identity (Wiener 2008, esp. Chs. 1, 9). This critical view on liberal community assumptions is shared by normative approaches to international relations and international law (Reus-Smit 2001) as well as by practice-oriented studies on the community formation (Adler 1998, Pouliot 2008, 2010). Here, questions about the impact of constitutive practice in different contexts on both community

¹ The journal's founding meeting took place at the University of Hamburg's Centre for Globalisation and Governance in 2010. It will be published by *Cambridge University Press* with the first issue to appear in 12/2011. The editors are Mattias Kumm, Anthony F Lang Jr, Miguel P Maduro and Antje Wiener with James Tully as consulting editor.

formation and the normative structure of meaning-in-use need to be raised and discussed in an interdisciplinary research environment (Wiener 2009, Hansen-Magnusson and Wiener 2010).

With a view to elaborating on these leading questions, the proposed project builds on the main insights from this research and the proposed project seeks to further develop global constitutionalism as a theoretical approach. To that end, it will establish the starting ground for a larger research programme. Based on that framework, a study group will be formed so that follow-up research can be carried out by larger research project. This project shall involve an international study group that will engage in a two-step endeavour for a period of up to eight years. The first step focuses on *mapping global constitutionalism*; the second step turns to *shaping global constitutionalism*.

Theoretical Approach

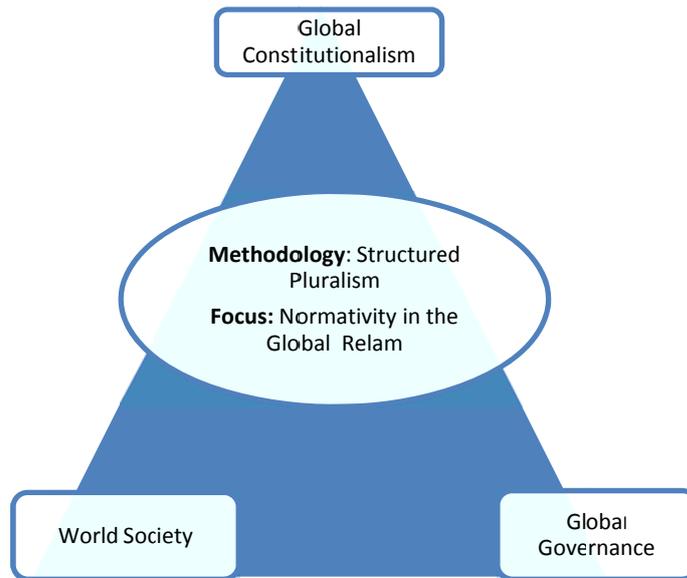
As a phenomenon that bears the imprint of stateness, yet which shapes late modern processes of governance that lead *beyond* the borders of modern states, global constitutionalism presents both a theoretical and a conceptual challenge. By moving processes which have been closely related with state-building and constitution-building into the realm of international relations, the implementation of principles, norms and practices that have constitutionally established the basis for democracy and justice, is called into question. Hence, the phenomenon of constitutional quality beyond modern statehood raises questions which are of both political as well as legal nature. They therefore require interdisciplinary attention. This is the intention of the proposed project of mapping and shaping global constitutionalism.

To conceptualise the phenomenon of constitutional quality beyond the state, the proposed project aims to develop global constitutionalism through theoretical engagement and deliberation with two other interdisciplinary approaches that extend across the boundaries of international relations theory *strictu sensu*: world society and global governance approaches, respectively. Both were conceived as interdisciplinary efforts to comprehend cross-border activities. The proposed research places these two approaches on the corners of a conceptual triangle, adding global constitutionalism as the third corner position. All three approaches share a hybrid existence between theoretical approach and social phenomenon. The project seeks to develop global constitutionalism as a theoretical approach that is situated on one of

the corner positions of a triangle between world society, global governance and global constitutionalism (see **Graph 1**), and which develops in close interrelation with the other two approaches. The methodological framework for this endeavour will be taken from the method of triangulation (Flick 2004, Hoffmann 2006). The project's leading assumption is that all three corner positions share an interest in pluralism (Walker 2002, Kennedy 2006, Teubner and Fischer-Lescano 2005, Bogdandy 2008, Halberstam and Stein 2009, Tully 2008, Beck and Grande 2009, Zürn 2010). All three approaches share the characteristics of being heuristic and offering a theoretic reaction to social phenomena.

The project works with the concept of *triangulation* with an innovative twist: While *methodical* triangulation has become a leading method in qualitative social science, the method of *theoretic* triangulation, which is developed by this project, proceeds by situating approaches at the corner points of a triangle and elaborating a joint theoretical perspective from there. In this case, the interface consists of pluralist mid-range theorising. This interface reflects the more empirically focused insights advanced by new institutionalism, on the one hand, and the more normative leaning insights of cosmopolitanism. Identifying the detailed theoretical potential from the interface remains to be explored through interdisciplinary discussion and empirical research targeting policy fields that reveal changes towards *enhanced constitutional quality* in the international order. Such fields involve among others human rights, security policy, environment and development policies, respectively. For now, the interface is taken to provide a shared – if contestable – reference frame. Through this frame, the theoretically refined approach to global constitutionalism stands to be developed.

Graph 1: Three theoretical perspectives on constitutional quality



The concept of theoretic triangulation allows for an interactive engagement with theories that share the interest in theorising dynamics of institution-building and social practice in relation with border crossing and community formation on a global scale and which are open to interdisciplinarity. Thus, the *world society approach* includes sociologists, lawyers and political science studies of international relations (Fischer-Lescano 2005, Albert and Stichweh 2007). Concepts of world society understand in a broad sense as relations among state and non-state actors including individuals. They range from the more normatively oriented English School to world society approaches including both Stanford School type structural approaches and Luhmanian concepts of functional differentiated world society (Bull 1977, see an overview e.g. in Albert 2002, Ch. 2). The *global governance approach* was originally coined by the observation of “governance without government” (Rosenau and Czempiel 1992). It was fuelled by concerns about how to re-establish the balance between civil society and the state, on the one hand, and how to regulate policy and politics in the absence of government (Zürn 2000, Joerges and Zürn 2006). Work that ensued from this observation has included lawyers and political scientists with an interest in establishing legitimacy through efficient steering and regulation mechanisms (Kohler-Koch 1998). In turn, *global constitutionalism* begins from the observation that global norms offer less political and legal stability than assumptions about liberal communities would suggest (Finnemore and Toope 2001, Brunnée and Toope 2010a, Wiener 2008). This brings the puzzle of contestation despite enhanced constitutional quality in international relations to the

fore. The proposed research project aims to summarise the latter and to propose a way for engaging the three approaches from a pluralist angle.

The shared common ground for interdisciplinary collaboration lies in the shared interest in mapping constitutional quality beyond the state. The exercise of mapping constitutional change is based on a shared interest among lawyers and political scientists in establishing the role and impact of quality beyond the state. The mapping exercise will provide a literature review so as to situate global constitutionalism in the interdisciplinary field of the social sciences. Follow-up research within the frame of the planned study group will then fine-tune the mapping exercise based on empirical observation that draws on media research, documents and expert interviews and produces a research log. The mapping exercise is expected to lay the ground for the second step of shaping constitutional change. This step includes targeting the definition of normative criteria which matter in the process of shaping international organisations in the 21st century. In sum, this research design is geared to develop global constitutionalism as a pluralist interdisciplinary approach. The approach is placed within the intellectual environment of a normative turn in theories of international relations (Barnett and Sikkink 2008) and, as such, it also reflects the call to bring back the normative roots of international law (Reus-Smit 2001). The following will detail the context in which the phenomenon of enhanced constitutional quality can be observed.

Constitutional Quality

Global constitutional quality typically clusters around international organisations and consists of hard institutions (international organisations) and soft institutions (norms, rules and principles) which are interlocked through various legal instruments, policy practices and mechanisms (Hall and Taylor 1996, Pierson 1996, Pollack 1996). It is constituted through processes of international interaction and lies “in between” conceptions of political entities such as for example national states or international organisations (Curtin 1993). It is distinctive since its organisational roots and normative substance cannot be derived from either the modern nation-state or from that of an international organisation (Tully 1995). Change of this quality may be initiated by intergovernmental negotiations or by international interaction including non-state actors. It is measured according to substantive changes of formal and informal institutions, and triggered by social practices that develop in relation with the former (Puetter 2006, Curtin 2008). For example, when actors use international law as a

framework of reference to demonstrate the legitimacy of their action, even when circumventing fundamental norms, the practice of enacting meaning-in-use (Weldes and Saco 1996, Milliken 1999) sustains or contests the quality of norms. Discursive interventions are therefore empirically accessible indicators for normative substance.

Enhanced constitutional quality in international relations represents a shift from treaty-based towards constitution-based international organisations. It places non-state actors near stateness and raises the question of how to deal with derivatives of statehood outside modern national states. Despite optimistic assessments of processes of politicisation and legalisation which would sustain the view that with increased internationalisation global politics will eventually contribute to the diffusion of shared universal norms, principles and world views, there are indicators to the contrary. Following empirical research on diversity and international encounters, this proposal argues that diversity – understood as dissimilar patterns of globalisation which are constitutive for unequal conditions of access to negotiating conditions of global governance – is likely to stay. It is therefore a condition from which to elaborate proposals for democratic legitimacy on a global scale. It is argued that, part of the solution of the accountability problem lies in addressing international relations as relations between all types of actors. The fundamental protection of individual rights is a constitutive element of modern statehood. As sovereignty is disaggregated and non-state actors directly affect individuals this fundamental norm is increasingly undermined.

This scenario raises the issue of fundamental rights protection in international relations (Wheeler 2002). While the emerging norm of the responsibility to protect defined as “the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states”² was originally intended to fill that gap, the accountability problem suggests scrutinising the practices related to this emergent norm. In the process, calls for qualitative sovereignty control (Slaughter 2005) have raised suspicion among states from the global South that are concerned about unwanted intervention from powerful northern states. In light of the fundamental concern that develop from the interplay between individual rights protection and sovereignty, the proposed project argues that norms research in international relations needs to correct for omitting normativity when analysing the impact of norms (Reus-Smit 2001,

² See ICISS, p. VIII, for an assessment of the norm’s emergence over a decade compare Brunnée and Toope (2010b), for a critical assessment of R2P as a norm see Bellamy (2010).

Benhabib 2007, Cohen 2008, Peters 2009). The innovative reference to constitutional theory allows for more substantiated discussion of the dialectic between threat and possibility of global constitutionalism.

Context of Constitutional Change

Traditionally, international relations theory (hereafter: IR) addresses politics conducted by diplomats and states (Waltz 1979) mediated by international organisations and regimes (Ruggie and Kratochwil 1986). In the past decades the concept of actorship expanded towards non-state actors such as international organisations and advocacy groups (Keck and Sikkink 1998). International organisations have developed a notably more powerful role in the post-cold war context. By actively partaking in international decisions, like other actors, their actions matter for the re/constitution of global order. For example, the European Union (EU) and the UN now have the power to directly affect individuals with their decisions such as e.g. with the UN Security Council's (SC) decisions about sanctions against individuals in the fight against terrorism (so-called 'black-listing') and the responsibility to protect with the International Commission on Intervention and State Sovereignty³. Such links correspond with political necessity and legal rule. They are, therefore, functional for steering purposes of global governance in the absence of a global political community (Albert 2007). However, are they also democratic?

Increasing concerns with the lack of accountability of these governance practices challenge their constitutional quality. The range of contestations including states (especially from the global South who fear Northern intervention in their domestic affairs with reference to the emerging norm of the responsibility to protect), international organisations (consider the European Court of Justice's concern with the UNSC's sanctioning individuals) as well as individuals demonstrates political urgency. In light of this development, it is notable that the academic debate is dominated by lawyers rather than political scientists.⁴ The accountability problem represents the tip of the iceberg indicating global constitutional change. It is therefore taken as an empirical kick-off point to explore global constitutionalism, both as a threat based on a 'creeping' process that is likely to develop outside constitutional control

³ Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty (ICISS), Ottawa, Canada 2001, see: <http://www.iciss.ca/pdf/Commission-Report.pdf> <accessed 31 March 2010>

⁴ An example is the ECJ's 2008 judgment in the *Kadi case* which has triggered considerable debate among lawyers about the pros and cons of constitutionalism beyond the state (De Burca 2009, Bogdandy 2008, Dunoff and Trachtman 2009, Brunnée and Toope 2010, Kumm 2009, Posch 2009, Cremona et al. 2009).

(Pollack 1994) and an opportunity to enhance democratic legitimacy according to the equiprimordiality of democracy and constitutionalism (Tully 2008). The project contends that the imbalance between an increasing variety of institutions with ascribed legal quality on the one hand, and the absence of constitutional regulations to control their actions, on the other, represents a theoretical challenge for students of international relations. Currently, IR is hardly equipped to appropriately handle questions such as whether the UN needs a constitution to counter the accountability problem (Grimm 1995, Habermas 1995, Fassbender 1998, 2009), or whether we can safely note that the European neo-Kantian moment has come and gone (Koskenniemi 2007). To overcome the theoretical gap, the project builds on a fairly fragmented multi-disciplinary range of work⁵ to link an empirical micro perspective with a normative theoretical approach.

As long as state membership was conditional for signing international treaties, the concept of the state was of primary concern to IR theory. During the second half of the 20th century this view was consolidated as international relations developed in relation with the UN and as a subordinated aspect of statehood and domestic law constitutionalism enjoyed little theoretical presence in IR. In the 21st century multipolar world this scenario has dramatically changed. Now the enhanced political clout of non-state actors sustains fears of creeping global constitutionalism, as states lose constitutional power. This loss does not occur akin to principles of cooperation or enhanced collaboration suggested by neoliberal regime theory or intergovernmentalism (Moravcsik 2002) but forged by processes of legalisation, politicisation and constitutionalisation. While all literatures are working with increasingly interdisciplinary focus, especially linking politics, law and sociology, the constitutionalisation literature has benefitted notably from the emerging field of European constitutionalism (De Burca 2009, Weiler and Wind 2003, Bogdandy 2009). The former two borrow from organisation theory and sociological institutionalism (Powell and DiMaggio 1991, March and Olsen 1989); the latter most importantly includes reference to normative political theory (Benhabib 2007, Forst 2007). Together they offer insights on the enmeshed processes of constitutional quality beyond the state that offer key insights into understanding global constitutionalism. They are conceptualised as the triangle of global constitutionalism (see **Graph 1**).

⁵ Among a growing yet quite diffuse see e.g. for functional approaches Dunoff and Trachtman 2009, for normative approaches see a range of Habermas inspired contributions e.g. Benhabib 2007, Forst 2007, Maduro 2003 and others, for systems theoretical views see Teubner and Fischer-Lescano 2004, for pluralist perspectives see Curtin 2008, Walker 2008 and Tully 2008.

Compared with global governance and world society studies global constitutionalism is underresearched in international relations theory. The former two have placed the study of cross-border activities firmly in IR through interdisciplinary imports from institutionalism, public administration and sociology. In turn, the latter is predominantly studied by lawyers or political theorists elsewhere. Subsequently, students of international relations often struggle with agreeing on a research framework fit to address changing constitutional quality in contexts beyond the modern state.⁶ The constitutional dimension is crucial to assess the democratic quality of international order. As non-state actors such as international institutions gain political clout by actively partaking in world politics the blind spot known as the “accountability problem” needs to be addressed (Bovens 2007, Curtin 2008, De Burca 2009, Zürn et al. 2007, Halberstam and Stein 2008). As international institutions exert direct influence on individuals, functional assessments of global governance need to be matched by substantive studies of constitutional quality. To this end, the main objective is to examine and frame global constitutionalism as an interdisciplinary approach to studying constitutional quality beyond the state. The intention is to study global constitutionalism both as a threat to international order (‘creeping’ in without control) and as a possibility for enhanced legitimacy in international relations (offering principled legitimacy). To this end, its *major objective* is to examine and frame global constitutionalism as an interdisciplinary approach.

Table 2: Constitutional Quality and the International Order

Time / Type of Order	20th Century		21st Century	
Actors / Activity	Anarchic Society of States	(Enhanced) Constitutional Quality		Pluralist International Relations
		Formal	Informal	
		International treaties; Regional treaties; Case law; Constitutional law	Social practices of International interaction; Interest group advocacy; Legal cross-referencing Blogging	

⁶ This struggle for conceptual clarity and interdisciplinary understanding has become apparent at a range of international – and often interdisciplinary – workshops, conferences and symposia in the 21st century, consider e.g. workshops at Princeton/NYU, Columbia, Florence, Heidelberg, Edinburgh, Berlin, Belfast, Trento and Birmingham (see the PI’s CV) to name but a few.

In sum, constitutional quality beyond the state is indicated by formal and informal institutional change in international relations. It is reflected by a series of institutional changes as well as a change of actorship in international relations (see **Table 2**). The former includes the reform of established institutional settings such as the UN, the EU and the WTO; the emergence of new institutions such as the G20, the Eurogroup or the UN Security Council's Sanctions Committee; and the routinisation of policy practices such as peace-making, 'black-listing' or humanitarian intervention. The latter involves enhanced political input of non-state actors' interest politics outside domestic politics.⁷ While, in the absence of a global political community, powerful international institutions may be functional to global governance in the short term, the lack of adequate constitutional protection of fundamental rights creates a pressing accountability problem on the long run.

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⁷ The literature in IR theory and International Law, respectively, have observed this change as a process of 'legalisation' indicating dense institutionalisation with legal quality (Abbott et al. 2000), or 'politicisation', indicating the spread of classic interest group politics from domestic into international politics (Zürn et al. 2007).

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