

# Chapter 1

## Introduction

Globalism is currently a buzzword explaining many phenomena as well as law and state. While some social facts, such as economics and politics are very frequently dealt with in the context of globalism, the law still evokes local meanings and is not at the core of globalization studies. On the other hand, it has not been immune to the impacts of globalization, and it has gained new meanings by increasing transnational relations.

It goes without saying that international law is currently understood by legal professionals quite differently than by their former colleagues that practiced law in the early twentieth century. In the age of increasing economic and political globalization, it is evident that we cannot interpret international law like de Vattel, Grotius, or lawyers involved in the Lotus ruling of the PCIJ. On the other hand, in the face of the turbulences of globalization and the end of the Cold War, attempts to identify the new world order have not yet come to an end. In this context, various candidate paradigms appear to vary in a broad range depending on different backgrounds of their proceeding fields to illuminate the transformation of international law.

One of these responses to paradigm inquiries in international law is global constitutionalism. It goes without saying that the idea of a global constitution is deemed to be utopia-like by many, since international relations are viewed as anarchic or as an arena for power struggles. Above all, the international legal order has not seen a formally promulgated constitution yet. Therefore, we could say that global constitutionalism is a discourse about a discursive constitution. In this case, we could ask, to what extent could this discourse have viability, given the recent developments in international law and constitutional law?

Global constitutionalism is currently represented by various ideas, or better to say, by various schools. I shall touch upon the most notable of them in this text. These ideas vary as a result of their distinct approaches to international law, the international community, and the idea of constitution. At this point, it is of note that

this research does not have an ambition to reflect in particular any of them, in other words, favour one of them. Moreover, this research does not proceed from any presumption that a constitutionalization process is ongoing in the global realm. Likewise, this research does not stick to any presumption that a constitutionalization in the global realm would be desirable. On the other side, as will be demonstrated below, due to the diverse ideas in this realm, global constitutionalism cannot be allocated to one of these ideas in particular. Instead, this research considers global constitutionalism an umbrella term to identify these integrationist approaches in international law that adhere to a constitutional language. In this sense, global constitutionalism should be regarded as a discourse containing various ideas that underpin and challenge themselves at the same time.

As done in this text, global constitutionalism is likely to be considered as akin to other global law approaches, global legal pluralism and global administrative law, on the ground that a base of a global legal order is common for these strands. With a view to understanding the very idea of global constitutionalism, it is a must to have a grasp of the evolution of international law and the making of international law; and the changing structures of relevant categories, such as statehood, international relations, and so on. While dealing with this transformation in international law, what comes to the fore is mostly the changing structure of the state practice in international law and new norm making processes in particular to the context of the aftermath processes of the WWII and globalization, from the second half of the twentieth century to this day.<sup>1</sup> Global constitutionalism, in this sense, is of an intimate relationship with the changing nature of international law.

However, a striking point in the global constitutionalism debate is the discursive structure of the constitution reflected in this discourse with diverse backgrounds. The idea of the contemporary constitution was also exposed to various impacts of globalization, and under these circumstances, the concept of the constitution came along with new issues regarding its identity. In this regard, the main strategic drive of this research will be finding an answer to what extent global constitutionalism deals with the contemporary idea of the constitution.

While examining the viability of the idea of the global constitution for the international legal order, I shall be pursuing an interdisciplinary methodology. Global constitutionalism has to do with public international law and constitutional law discourses. The intersection point of these two discourses also reflects a ground for societal discourses. This issue brings a dichotomy of norms and facts into play. That is to say, how far normative developments of international law find their factual correspondents in the society is another actual problem to be sorted out. This is a longstanding problem of the sociology of constitutions as well. This is so, because as Thornhill states, the question of “which internal forces cause societies to produce constitutions and constitutional rights” has still not been answered comprehensively, and furthermore, “the founding sociological attempt to enable modern

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<sup>1</sup> Paul Schiff Berman, “From International Law to Law and Globalization” (University of Connecticut School of Law Articles and Working Papers, Paper 23, 2005, [http://lsr.nellco.org/uconn\\_wps/23](http://lsr.nellco.org/uconn_wps/23)), last visit 11.07.2013.

societies internally to comprehend their articulated normative structure has not been concluded.”<sup>2</sup> At this point, global constitutionalism can be regarded as an output of the development of modern constitutionalism. As such, global constitutionalism is related to the societal dynamics of modern constitutionalism, and such a sociological perspective also needs to be developed to deal with the fundamental questions of global constitutionalism. To address this question evidently requires employing basic tools of a sociological perspective, such as “the social structure,” “the social stratification,” and “the social function.”<sup>3</sup> Against this background, Raymond Wacks argues that a sociological account of law relies on three fundamental claims:

that we cannot truly grasp the meaning of law except as a “social phenomenon,” that an analysis of legal concepts provides only a partial explanation of “law in action,” and that law is merely one form of social control.<sup>4</sup>

These all will help to construct the fundamental claims of this research. On the other hand, the weakness of normative tools in the global constitutionalism discourse brings discursive tools into prominence. As a consequence, global constitutionalism is viewed as a rather theoretical matter. Therefore, it is defined as an “academic artefact,”<sup>5</sup> a “forum,”<sup>6</sup> a “discourse”<sup>7</sup> or an “intellectual movement”<sup>8</sup> by some scholars.

The striking point is that global constitutionalism concerns transnational relations, instead of those which are traditionally regarded as subjects of general international law or domestic laws. Transnational level embraces these levels, but it goes further. We are most likely to call this approach a “global socio-legal perspective.” In Darian-Smith’s words, a global socio-legal perspective means “adopting a ‘global imaginary’ that destabilizes our modern and linear understandings of what law is, where law appears, and how law works.”<sup>9</sup> This standpoint unveils a holistic

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<sup>2</sup> Christopher J. A. Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-sociological Perspective* (Cambridge: Cambridge University Press, 2011), 6.

<sup>3</sup> Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (Oxford: Oxford University Press, 2009), 163.

<sup>4</sup> *Ibid.*, 162.

<sup>5</sup> Antje Wiener, “Global Constitutionalism: Mapping an Emerging Field” (Paper presented at the Conference “Constitutionalism in a New Key? Cosmopolitan, Pluralist and Public Reason-Oriented,” WZB and Humboldt University, Berlin, 28-29 January 2011, [http://cosmopolis.wzb.eu/content/programs/conkey\\_Wiener\\_Mapping-Field.pdf](http://cosmopolis.wzb.eu/content/programs/conkey_Wiener_Mapping-Field.pdf)), last visit 10.01.2014.

<sup>6</sup> Christine E.J. Schwöbel, *Global Constitutionalism in International Legal Perspective* (Leiden: Nijhoff, 2011), 148.

<sup>7</sup> Anne Peters, “The Merits of Global Constitutionalism,” *Indiana Journal of Global Legal Studies* 16, no. 2 (2009): 397.

<sup>8</sup> Anne Peters, “Fragmentation and Constitutionalization,” in *The Oxford Handbook of the Theory of International Law*, ed. Anne Orford and Florian Hoffmann (Oxford: Oxford University Press, 2016), 1015.

<sup>9</sup> Eve Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches* (Cambridge: Cambridge University Press, 2013), 13.

approach toward law that deals with global phenomena in view of broader links of law to societal facts. In other words, I shall not adhere to mere normative processes of international law and constitutional law, but I shall seek a way to blend these two discourses by drawing on newly emerging socio-legal discourses regarding global matters and constitution.

For this purpose, in the first chapter, I shall unveil the new conditions in the international legal order led by globalization. The main claim is that these new conditions set the ground for the global constitutionalism discourse, and as a matter of fact, this discourse appears to fill a gap to identify a new rationality of the contemporary world. In other words, global constitutionalism is an attempt to establish a new paradigm in international law that is led by the great global turmoils and burgeoning complex relations which came to light beginning from the aftermath of the World War II.

However, this discourse hosts some different views on international law and international relations. In the second chapter, the global constitutionalism discourse will be considered in two respects. First, this discourse will be mapped, and contributions to this discourse will be categorized regarding their understanding of constitutionalization. The prominent contributions from the legal scholarship will be introduced. Following that, the issue of the viability of this discourse will come to the fore, and I shall examine the viability of the idea of global constitutionalism regarding some parameters. The idea of global constitutionalism has been responded in various ways within the legal scholarship, and we will take a glance at the challenges to this idea first. The meaning of contemporary constitutionalism will be central to this interrogation. In other words, to what extent the global constitutionalism discourse can reflect the contemporary constitutionalism will be viewed as the key issue in the interrogation of the viability of this discourse.

From this point forth, the third chapter will aim at unfolding the meaning of the contemporary constitution. For this purpose, I shall deal with contemporary discursive facts regarding constitutions besides historical developments and the traditional idea of constitution. Further on, we will proceed from the fact that constitutional law, like international law, has undergone serious transformations led by globalization, and this gave rise to a number of implications. Against this background, the text will set forth that contemporary constitutionalism requires these implications to be taken into consideration in order to depict the whole framework.

In parallel with the search for a socio-legal inquiry of contemporary constitutionalism, I shall draw on the cultural paradigm to understand contemporary constitutionalism, and the fourth chapter will be dedicated to this purpose. The cultural paradigm is still underdeveloped in constitutional law. However some significant academic works have appeared in this field recently, and they will also guide this research to an understanding of the truth of contemporary constitutionalism.

As I aim at drawing a framework for contemporary constitutionalism through conventional sources of the constitutional theory and the cultural paradigm, I shall utilize this framework in the fifth chapter in order to interrogate the viability and the truth of global constitutionalism. In other words, the global constitutionalist

discourse will be examined through the contemporary idea of constitution; and its compliance with the truth of contemporary constitutionalism will be viewed as crucial for the viability of this discourse. I shall also propose a reconstruction of the discourse of global constitutionalism in accordance with the main findings from the unveiled facts of contemporary constitutionalism.



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