Compensatory constitutionalism in comparative perspective

Klaus Armingeon
Karolina Milewicz
University of Berne
Department of Political Science
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Summary
Law scholars argue that there is an emerging compensatory constitutionalism. This denotes a set of compatible supra-national and national institutions that fulfil functions that hitherto have been fulfilled by national constitutions. Thus, deconstitutionalisation at the national level, which as this strand of literature argues has been brought about by forces such as globalisation, is compensated for.

We test this hypothesis in a most different systems design. We distinguish between procedural and substantive constitutionalism. Procedural or formal constitutionalisation refers to the emergence of legal constitutional rules. Substantive constitutionalisation refers to the actual function of constitutions in protecting the individual. We show that there is considerable procedural but little substantive constitutionalisation. Further we argue that compensatory constitutionalism has to include elements of positive and negative integration. We do not find strong empirical evidence for such an enlarged compensatory constitutionalism. Hence there is a global constitutionalisation. However, it is mostly formal and uneven in nature.
1. Introduction

Democratic states attempt to guarantee security, freedom and equality to their citizens. Non-democratic states attempt at least to provide security for their citizens. This includes economic and social security. The basic framework within which these functions are performed are defined in the constitution. This is the sum of basic legal norms which comprehensively regulate the social and political life of a polity. Globalisation, or better denationalisation (Zürn, Walter et al. 2000; cf. Rodrik 1997; 1998; cf. Rosenau 1997), endangers these protective roles of the nation state, as the nation state is no longer able to provide security and protection for its citizens. There is however an emergence of a new constitution beyond the nation state, which may compensate for the de-constitutionalisation of the previous national political order. This phenomenon of constitutionalisation changes the character of the global order and brings about the idea of constitutionalism, i.e. the idea that there is a rule of law, human rights protection and democracy, that confines government.

This argument has been put forward by the law scholar Anne Peters (forthcoming). Similar points about an emerging global constitution have been also made by other researchers (Cottier, Hertig 2003; Howse, Nicolaidis 2003; Schloemann, Ohlhoff 1999; Schorkopf, Walter 2003; Trachtman 2005).

Against this background, we ask whether there is such a process of constitution building on the global level. Is there a development of effective basic norms beyond the nation state that compensate for the loss of state functions with regard to freedom and security? The underlying assumption of the compensatory constitutionalism is that political actors comply with the emerging global constitution. However, there is little reason to assume that political actors on all levels will comply in all instances, unless there are effective sanctions by supra- or international institutions. Research on the impact of international
organisations on national politics convincingly shows that compliance at the lower levels – states or regions – is very much dependent on the fit of interests, policy profiles, political power distributions, and the convergence of ideas and norms (Armingeon, Beyeler 2004; Cowles, Caporaso et al. 2001; Falkner, Treib et al. 2005; Senti 2001; Treib 2004). Hence, the question is whether the normative goals of a global constitution are reached in reality.

If there is a constitutionalisation on the global level, it should be evident everywhere, irrespective of economic, social and political characteristics. We show that this is true with regard to formal or procedural characteristics, but not with regard to substantive constitutional functions. There is evidence for the emergence of a global constitution, but this constitution is limited in effects. Putting it in stark terms, it resembles a paper tiger. It is not effective in guaranteeing security, protection and fairness everywhere on the globe. Furthermore we argue that a global constitution creates a level playing field for all people. However, this liberalisation may produce new insecurities, unfairness and need for protection (cf. Cameron 1978; Katzenstein 1985). In order to speak of a compensatory constitutionalism, there must be norms that guarantee fairness and security. At least there should be some basic norms of social security. The process of creating a level playing field has been termed ‘negative integration’, since the major required procedure is the demolition of rules that hamper the free economic exchange between individuals wherever they are. In contrast, ‘positive integration’ denotes the establishment of norms that set minimum standards of (social) security (cf. Scharpf 1999; Tinbergen 1965). Compensatory constitutionalism needs to contain both forms of negative and positive integration. We show that empirically, this is hardly the case. Rather, in some regions individuals enjoy more protection of freedoms and securities than others under the same constitutional order. It is a heterogeneous order.
2. Dimensions of constitutions

The assumption of compensatory constitutionalism juxtaposes the supra-national to the national level. In this view the global constitution fills a void that is created by the loss of functions by the nation state. Empirically, however, the nation state still exists and there may be conflicts of competence between the national and the global order. If there is to be a global constitution, it has to be compatible with the politics of the nation state accepting the global ruling in addition to the still existing national rules. Therefore, by an international or global constitutionalism, we mean a set of international basic rules which national political elites accept and support, although they limit the manoeuvring room of national political systems and effectively regulate the life of citizens of the nations. Hence, as long as nation states exist, and as long as the global constitutional order is not decided upon, implemented and adjudicated autonomously by global institutions, the crucial question is whether the nation state is willing to subordinate itself to the global order. This implies that global constitutionalisation assumes a legal compensatory jurisdiction of limited and conditional effects, performed by international institutions, and accepted on the national and individual level.

In order to operationalise constitutions we have to distinguish between measurable dimensions. We differentiate between a formal / procedural and material / substantive dimension, and between negative and positive integration (cf. Scharpf 1999; Tinbergen 1965).

Constitutionalisation refers to the process of building up a legal order based on basic norms of the polity (Schilling 2005). Therefore one dimension of constitutionalisation is legalisation, which is the imposition of international legal constraints on governments. Defining legalisation, we follow the conceptualisation by Goldstein, Kahler et al. 2000. They argue that the extent of legislation can be judged according to three criteria: obligation, precision and delegation (Abbott, Keohane et al. 2000; Goldstein, Kahler et al. 2000).
The first criterion implies that legal rules and commitments impose a particular type of binding obligation on states as well as international organisations, for instance via established norms, procedures, and forms of discourse of the international legal system. This also includes the integration of some accepted procedures and remedies for cases where legal rules and commitments were breached. The degree of legal obligation then covers a spectrum from high obligatory (unconditional obligations; fully legally bound; implicit conditions on obligations - political treaties) to middle obligatory (contingent obligations and escape clauses; hortatory obligations) to low obligatory (recommendation, guidelines, norms without law-making authority; explicit negotiations without being legally binding) (Abbott, Keohane et al. 2000: 408ff).

The criterion of precision refers to more or less obligatory rules, and defines the course of action required, authorised or proscribed. We can differentiate between high precision - providing specific and non-contradictory rules and strongly narrowing the scope of interpretation; medium precision - leaving space for interpretation on some issues; and vagueness - setting some general standards but leaving a lot of room for interpretation (Abbott, Keohane et al. 2000: 412ff).

Finally, delegation means the assignment of the functions of implementing the agreed rules, including their interpretation, dispute settlement or even further rule making to a neutral third party (Goldstein, Kahler et al. 2000: 387). The scope of delegation can be assessed by two aspects: dispute resolution, or judicialisation of the dispute settlement processes (cf. Zangl 2005), on the one hand, and rule making and implementation on the other. The dispute resolution mechanism covers the broad range from no delegation – traditional political decision-making, through institutionalised forms of bargaining, including mechanisms to facilitate agreement such as mediation and conciliation, nonbinding arbitration and binding arbitration - up to binding third-party decisions and jurisdiction (Abbott, Keohane et al. 2000: 415ff).
Summing up with the words of Cass, the formal dimension encompasses “a set of social practices defined as law (rules, principles, procedures, and institutions), generally associated with Western industrialized democracies” (2005: 29).

If these criteria are met, we speak of legalisation. But this does not necessarily imply that these laws have decisive impact. There may be legalisation that changes nothing for individuals. If, for example, a national rule is effective and the global constitution just reiterates these national standards, there is compliance, but the global rule has no effect. In addition, there may be situations where, despite a global norm meeting all three criteria, the global norm does not improve the situation of the individual. Countries may also evade a global norm by not adopting it. They may, for example, not implement it into national law, or evade the direct effects of international law. Therefore it does not suffice to ask whether there is legalization on the global level, we have in addition to ask whether there is a substantive impact. This is the case only where a global legal order makes a difference for the individual. Operationalising this idea of substantive constitutionalisation, we start from the notion of citizenship defined by Marshall (1950). He distinguished between civil citizenship (e.g. individual freedom and property rights), political citizenship (e.g. the right to vote and to stand for election to public offices), and social citizenship (cf. Dahrendorf 1974; 1995). Social citizenship denotes a range of rights ensuring a minimum of economic welfare and security.

Global political citizenship is not yet feasible. Therefore the idea of global constitutionalism relates only to the civil and social citizenship. Based on Marshall’s concept, the literature has pointed to economic rights, human rights and the rights of minorities as elements of an enlarged concept of civil rights (Barfield 2001; Bottomore 1992; Petersmann 2000; Rittberger, Schimmelfennig 2005; Schilling 2005; Walker 2003). In operational terms, social citizenship includes social security schemes covering the risks of loss of income after retirement, during periods of unemployment or sickness as well as the basic provision of affordable health care.
The notion of economic citizenship as one of the major elements of civil citizenship is central to the idea of a global constitution. Compensatory constitutionalisation aims at creating a level playing field for all citizens, attempting to redress inequality of chances in economic activity between citizens of different nations. Therefore the main types of constitutional activities in this field are market-enabling reforms. Frequently they aim for the demolition of protectionist rules. The creation of the Internal Market of the European Community or the WTO and its GATT, GATS, and TRIPS are major examples of such a ‘negative’ integration. Negative integration brought about by WTO can be seen as a major means of compensatory constitutionalisation.

If citizenship also includes social citizenship, compensatory constitutionalism has to provide social security too. In contrast to the negative integration in the case of creating civil citizenship by the liberalisation policies of the WTO, the creation of social security implies the setting of common standards. This has been called ‘positive integration’. Therefore a global constitution needs to have both elements of negative and positive integration. One could even argue that the constitutional negative integration not only protects individuals by creating a level playing field, but that it also hurts the principle of protection of the individual, since now individuals are exposed to international markets and are thus much more vulnerable than in a closed economy (Cameron 1978; Katzenstein 1985). Therefore under a compensatory constitutionalism, negative integration in the field of economic liberalization is only acceptable if there is simultaneously some sort of positive integration in the field of social security. An encompassing global constitutionalism has to be based on simultaneous positive and negative integration. A liberal global constitutionalism hurts the individual in its

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1 The creation of social citizenship is of outstanding importance for a democratic constitutional order. Political equality presupposes an extent of social differentiation that does not seriously hamper democratic participation of all social strata. For example, starving and illiterate people will not have the same chance to have their views represented in the political process as better-off group. But even if the goal is limited to compensatory constitutionalisation – in the sense of an effective institutionalisation of the rule of the law – without ambitions for a democratic order, social security is needed to protect individuals after the national welfare state has lost much of its effects or its sustainability.
rights for social security. A social global constitutionalism violates the individual right to economic freedom (figure 1).

<table>
<thead>
<tr>
<th>negative integration (market-producing measures) that establishes economic citizenship</th>
<th>yes</th>
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<tr>
<td>Social global constitutionalism</td>
<td>yes</td>
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<tr>
<td>formal constitutionalism</td>
<td>yes</td>
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<td>Encompassing compensatory constitutionalism</td>
<td>yes</td>
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<td>Liberal global constitutionalism</td>
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Figure 1: Types of constitutionalism

One of the major challenges for any global compensatory constitutionalism is the institutional separation of negative integration – the preoccupation of WTO – from positive integration. Arguably, the major international institution that is concerned with the setting of basic standards of social security is the International Labour Organization (ILO).

Summarising, we hold that global compensatory constitutionalism has a formal / procedural and a substantive aspect. There must be legalisation (formal aspect) and there must be an effect (substantive aspect). Substantive measures of constitutionalisation can be subdivided in positive and negative integration. Depending on normative and disciplinary preferences, compensatory constitutionalism could be seen in merely formal or procedural terms, as being confined to legalisation. There the major criterion is the formal aspect. In contrast, the encompassing compensatory constitutionalism includes both formal and substantive measures; whereby the substantive measures are based on both an effective negative and positive integration. In between there is the liberal global constitutionalism.

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2 Jurists may have an inclination to focus on this form of constitutionalism. Liberal economists usually concentrate on the liberal global constitutionalism, while many social scientists may have a tendency to look primarily to the social constitutionalism.
(which is ‘blind’ with regard to the violation of social citizenship rights) and the social global constitutionalism (which is ‘blind’ for the violation of economic citizenship rights).

3. Research design

The guiding question of this paper concerns the emergence of compensatory constitutionalism. We argue that formal and substantive criteria have to be met; and that the latter criterion requires both negative and positive integration. We focus on WTO and ILO, which consider negative (WTO) and positive integration (ILO). We cannot study all the relevant activities of these organisations. Therefore, with regard to positive integration and ILO we focus on ILO conventions. ILO-conventions are the main source / basic instrument of international labour law. They are adopted by the International Labour Conference (ILC) with the intention of setting international social and labour standards. We selected four major dimensions of social security: maternity protection, unemployment protection, retirement provisions and provisions preventing child labour. Our analysis is based on the categorisation developed in the guidelines for *Social Security Programs Throughout the World* (Social Security Administration 2005).

For negative integration we concentrate on the GATS of WTO. We look at the progress of trade liberalisation in services by analysing the countries’ sector-specific ‘schedules of commitments’ (Article XX of the GATS), concerning market access (Article XVI:2 of GATS) and national treatment (Article XVII of the GATS) in specifically designated sectors. The commitments enable us to determine the range of activities in each

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3 Countries’ specific commitments guarantee minimum level of treatment, by giving no less favourable treatment to foreign services and service suppliers. However, including some limitations and exemptions to the general obligations, they can vary by scope. With respect to market access, limitations may be imposed on the number of service suppliers, service operations or employees in the sector, the value of transactions, the legal form of the service suppliers or the participation of foreign capital. A commitment to national treatment implies that the member state concerned does not operate discriminatory measures benefiting domestic services or service suppliers. The extension of national treatment in any particular sector may be made subject to conditions and qualifications (WTO, The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines). Furthermore, commitments are undertaken with respect to each of the four different modes of service supply: mode 1 – cross-border supply (market access), mode 2 – consumption abroad, mode 3 – commercial presence and mode 4 – presence of (foreign) national persons.
service sector, the limitations on market access and national treatment. In this respect, we limit our analysis to three service areas, namely tourism, construction, as well as health and social services. While tourism has proved the most attractive service area for inclusion into countries’ ‘schedules of commitments’ (commitments have been made by 125 member states), the construction sector represents the midfield with 71 member-state commitments, and the health and social security areas seem to be the tail-lights with 45 and 43 signed commitments respectively (Adlung 2000: 121f).

The notion of global compensatory constitutionalism implies that we find these tendencies to be effective in all parts of the world, irrespective of the particular economic and political structures of the nations under study. This leads us to a most different systems design (Caramani 2005). Therefore the countries selected vary strongly on other dimensions such as membership in other international organisations, economic development, and democracy. The selected nations are the United States of America, Switzerland, Germany, Romania, China, Chile, Gabon and Botswana.

Among the European countries we have one country being full member of the European Union (EU) (Germany), Romania as an EU-applicant country and Switzerland as a non-EU member. Three of these eight countries are OECD-members (US, Switzerland, Germany).

There is much variation with regard to democracy and freedom. According to the Freedom House World Survey, Chile, Botswana, United States, Switzerland, Germany and Romania rank among the countries with high scores for Political Rights and the Civil Liberties, thus own the status ‘free’. Gabon and China, on the other hand, are classified as ‘partly free’ and ‘not free’ countries, respectively, with low scores on the Political Rights and Civil Liberties dimensions (Freedom House 2005). Among the two African countries, Gabon ranks among the most authoritarian regimes (democracy score: 0 and autocracy score: 4), and
Botswana among the most democratic African countries for the year 2002. China is rated as non-democratic and ‘not free’ (Bächtiger 2005).

Also the economic performance varies between countries. While Switzerland, the United States, Germany and Chile belong to the group of high economic development for the year 2003, Romania, China, Gabon and Botswana cover the mid-field of medium human development with respect to economic performance measured by the human development index and GDP (United Nations Development Programme 2005; Central Intelligence Agency 2005).

4. Findings

4.1. The procedural dimension of constitutionalism

With regard to the formal or procedural dimension of constitutionalism, highly obligatory binding rules, a high degree of precision of these rules and a high level of delegation with regard to dispute resolution and rule making would indicate a developed constitutional system.

4.1.1. The ILO’s cooperative approach: dialogue before sanctions

The main source and instruments of international standards related to social and labour issues are ILO conventions, which play an important role in the elaboration of national laws, policies and judicial decisions (ILO 2004: 15; Senti 2001). They are set and adopted by the tripartite International Labour Conference (ILC), which is attended by four delegates from each member state, two from the government and one each representing the workers’ and the employers’ organisations. These delegates are free to vote independently and against each other (ILO 2004: 7). The adoption of the final text of a convention requires a two-third majority of the delegates present (Servais 2005: 66f).

As regards the concept of precision, this ‘objective’ enactment (adoption) of the conventions is subject to specific rules reflected by three elements: (1) a specific number of
ratifications (two), (2) timeframe of twelve months after the second ratification, (3) the status of the member state from whom ratification is required is sometimes stipulated (Servais 2005: 69).

Following the adoption, conventions are conditional on ratification by the member states, which are determined by equally precise provisions. However, with regard to the issue of obligation, the procedure of ratification represents an agreement to implement the international instrument. It is, in contrast to the adoption of conventions, a rather ‘subjective’ enactment that manifests itself in a purely voluntary and sovereign act (Servais 2005: 73) and makes the intensity of the ILO’s activities dependent on whether or not the member states have ratified the conventions on a specific subject.

Still, with regard to the issue of obligation, ILO conventions reflect on the whole the intent to create legally binding obligations governed by international law. Thereby, this obligatory character is not related to the obligation of ratification as such, but to the rather less conventional obligation, going beyond classic international law, to implement procedures that could culminate in ratification (Servais 2005: 71). Member states are obliged, according to Article 19(5) of the ILO Constitution, to bring the convention before the “authorities within whose competences the matter lies” in order to examine and decide either to turn it into law or to take other appropriate measures. However, although the member states are the treaty-making powers responsible for the ratification of the conventions, the decision to do so does not lie within the Executive alone, but must be brought forward for the constitutional interpretation to the legislative branch (parliamentary institutions in democratic states). Thus, the basic aim of the ILO is in this respect to stipulate debate with a view to a decision on ratification (Servais 2005: 70ff).

Furthermore, the obligatory character of rules applies to supervision and promotion procedures. Firstly, governments are obliged to report about the measures taken to bring the

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4 General principles on procedures related to the adoption and ratification of ILO conventions are laid down in the ILO Constitution.
conventions adopted by the ILC before the national authorities, and about the actions being taken by those authorities in order to ratify conventions. Secondly, the practical effects of the ratified conventions must be similarity reported to the ILO. Thirdly, the ILO focuses even more strongly on promotion of the principles in the cases of non-ratification. Member states are obliged to report at the request of the Governing Body on the position of national law and practice in regard to conventions that have not been ratified. Every year the Governing Body chooses several conventions and expects the member countries to report on the conventions not yet ratified. This procedure particularly intends to promote the ratification and application of the instrument. Overall, reports and comments are examined by a committee of independent experts (Servais 2005: 289f).

Turning to the issue of judicial delegation, the ILO holds for cases where the usual methods of supervision have failed to solve problems, special procedures of dispute resolution and conciliation. Considering the submission of complaints, workers’ and employers’ associations have the same right as governments to complain about a violation of a ratified convention by the own government or by other states. In this respect, individual delegates to the ILC can also introduce a complaint. Following the overall procedure, the Governing Body may establish from among its members a tripartite committee that conducts an initial examination of the case given. On the proposal of the Director General, a commission of inquiry can also be established, consisting of three impartial and independent members. The tasks of the commission include the in depth examination of the case, holding hearings and conducting on-site visits, and the setting down of its observations and recommendation on the measures to be adopted in a report. The report is forwarded by the Director General to the Governing Body and the governments involved in the dispute, which must respond within the

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5 The Governing Body guides the work of the ILO, and comprises of 28 government members, each 14 workers’ and employers’ organisation members. Ten of the government seats are permanently held by states of chief industrial performance (Brazil, China, France, Germany, India, Italy, Japan, Russian Federation, United Kingdom, United States). Representatives of other member countries are elected by the government delegates at the Conference every three years, taking into account geographical distribution. Representatives of the employers and workers are elected in separate electoral colleges (ILO 2004: 7).
timeframe of three months whether they accept the recommendations or not, and whether they intend to refer the case to the International Court of Justice\(^6\). Besides detailed procedures for the case that a member state should fail to carry out the recommendation in the specified period of time, the Governing Body can recommend to the Conference expedient measures to be taken if the government does not change course (Servais 2005: 292f). Though the ILO prefers dialogue to sanctions, in cases where there have been serious violations of ratified conventions, the ILO can even adopt more dissuasive measures, such as moving out of the ILO duty station of the country concerned, refusing to conduct meetings in the country, or cancellation of the technical assistance provided to the country (Servais 2005: 300). The ILO further supports procedures for disputes concerning more than one state (Servais 2005: 307).\(^7\)

In this situation, the task of rule making is assigned, apart from the adoption procedure of conventions by the tripartite-structured ILC, to the tripartite committees\(^8\) of the Governing Body (cf. ILO 2000).

Summing up, we can state that the ILO indeed fulfils the formal criteria indicating a constitutional system. The ILO standards feature a rather high level of obligation, and both the language of regulations as well as the related procedures are characterized by a high level of precision. An independent governing structure and rule making, and well specified dispute settlement procedures and related sanctions indicate the existence of judicial delegation, thought not in the explicit form of a court.

4.1.2. The WTO dispute settlement procedures: the nexus of obligation and delegation

Concerning the formal aspects of constitutionalisation within the international trading system, particularly after the establishment of the WTO by the Marrakesh Agreement...
Establishing the World Trade Organisation (WTO Agreement) in 1995, international trade rules became more precise and binding (Goldstein, Martin 2000: 603). Thereby, the ‘WTO Agreements’ are considered to be the primarily source of law in the international trading system. They refer to the so-called ‘covered agreements’ – the WTO Agreement and its annexed additional agreements and legal instruments, dealing with trade in goods and services as well as intellectual property rights. In this context also the members-specific trade commitments and subsequent revisions are considered a formal part of the covered agreements (Cottier, Oesch 2005: 110; cf. Nordström 2005) and are characterised by a high degree of precision.

The two most fundamental constitutional principles of the international trading system, which constitute an obligatory character evenly in all three trade-related pillars of the WTO, are the most-favoured-nations (MFN) treatment and the national treatment. While the former provides for non-discriminatory action towards trading partners, the latter gives foreigners the same treatment as one’s own nationals. Both thus underline the idea of equality, equal treatment and non-discrimination and serve the purpose of reducing differential treatment and discrimination. In this context, the Ministerial Conference is according to Article IV:1, IX:2 and X of the WTO Agreement, the political executive authority of the WTO equipped with the right to adopt generally binding decisions and related amendments. Decisions are taken, depending on the matter, either by unanimity, 2/3 or 3/4 majority, following the principle of ‘one state – one vote’ as well as the principle of consensus, which means that a decision is made if no official objection is raised. At the end of negotiations, member states are responsible for the ratification of these rules and amendments. Therefore relevant ratification procedures are precisely specified in the Article X of the WTO Agreement.

Although in a legal sense trade rules are considered to be obligatory in character, their full effect is often restricted. Unlike in the case of the ILO, the WTO agreements - and above
all the GATT Agreement - provide for precisely defined escape clauses, which consequently lead towards an increased usage of these measures. Following these, member states are allowed under certain circumstances to renege on their commitments and escape temporarily from obligations under the GATT Agreement (e.g. antidumping and countervailing duties codes (Article VI), balance of payment exceptions (Article XVII and XII), infant industry protection (Article XVII) and tariff negotiation (Article XXVII)) (Rosendorff 2005: 396).

However with regards to the issue of precision, escape clauses and exemptions under the GATS and TRIPS Agreements are, unlike in the case of the GATT Agreement, not specified (Cottier, Oesch 2005: 1028).

With view to excessive usage of safeguards and exemptions, the dispute-resolution mechanism of the WTO, unlike the former GATT regime which allowed member states to veto retaliations, gained judicial rights under the new WTO system by shifting the power of judicial control from member states towards the WTO (Goldstein, Martin 2000: 626). The strengthened dispute-resolution mechanism of the WTO, which represents at the same time a great deal of judicial delegation, has an essential impact on the issue of legal obligations. The dispute settlement procedures of the WTO, as conducted by the Dispute Settlement Body and specified under the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding - DSU), permits member states to file a complaint regarding a perceived violation of treaty on the part of another member. In the case that bilateral consultations are unproductive (negotiated resolution), the complainant may request a judicial examination of the case by a panel of independent experts. After detailed examination, the panel can recommend, in case of identified violation, to terminate the violating measures and to bring its practice back into conformity with its obligations. In the event that those recommendations are not implemented within a reasonable amount of time, the DSU permits possible compensation or retaliation in order to restore the balance of negotiated concessions disturbed by the non-complying measure (Rosendorff 2005: 391).
The dispute settlement procedure serves two purposes. On the one hand, it reduces the ability of governments to opt out of their liberal commitments and thus binds them to their legal obligations (Goldstein, Martin 2000: 604). On the other hand, dispute settlement procedures might for some member states, particularly in periods of unexpected heightened domestic political pressure, be perceived as a window of opportunity, enabling them to temporarily suspend their obligations in favour of national protectionist measures. Thus, to some extent the dispute settlement procedure also displays a negative effect encouraging states to violate treaty obligations (Rosendorff 2005: 389). However, overall the dispute settlement procedure of the WTO can be considered to be a flexible mechanism with a broader institutional international trading framework, contributing significantly to the maintenance of legal obligations signed by members, and meeting at the same time the constitutional condition of judicial delegation.

As was the case with the ILO, the WTO also displays with regard to the formal dimension constitutional elements. A distinctive difference between the two international organisations consists in their instruments. While the ILO relies heavily on rather dialogue-based cooperative mechanisms in order to achieve compliance, the WTO rests upon a strong dispute settlement mechanism.

4.2. *The substantive dimension of constitutionalism*

With the intention of verifying the findings provided for the formal or procedural dimension of constitutionalism, we turn now towards the substantive aspects (the material dimension of constitutionalism).

4.2.1. *The ILO and its substantive functions*

In order to find evidence for the process of constitutionalism within the ILO, we look at several social protection issues (maternity, unemployment, retirement) as well as the fundamental issue of child labour. In so doing, we particularly focus on the principle of
compliance with ILO standards, which finds expression in the conventions, and the national law as well as in the corresponding issue of efficiency (table 1).

Maternity

With regard to maternity protection, there are three decisive conventions - the Maternity Protection Convention No. 3 of 1919, the Maternity Protection Convention No. 103 of 1952 and the Maternity Protection Convention No. C183 of 2000, revising Convention No. 103 of 1952, all three similarly referring in a broader sense to the protection of women workers, and in a more narrow sense to the right of working women to maternity leave and the corresponding prohibition of dismissal (cf. Servais 2005: 276f). However, some basic differences are visible in respect to coverage, level of benefit and duration of payment, particularly when comparing Convention No.3 and Convention No.183. While under Convention No. 3 the scope of coverage is rather small (women employed in industrial and commercial undertakings), the duration of maternity leave totals to 12 weeks (6 weeks before and 6 weeks after the confinement) and termination of employment of a woman during pregnancy or absence on leave is not allowed. The provisions under Convention No.183 are much more generous, in terms of setting higher standards for the member states, and in terms of attempting to provide better protection to women on maternity leave⁹. Thus it is not surprisingly, facing the more stringent provisions under Convention No. 183 that among the countries studied only one member state (Romania) ratified the latter. Broadening the picture of the ratifications, only Chile, Gabon, Germany and Romania ratified at least one convention related to maternity protection. However, legislative compliance between these conventions and national maternity legislations does not necessarily mean that countries which have not ratified conventions indeed display lower standards than would be consistent with the

⁹ All employed women, including atypical forms of dependent work are covered; the level of minimum benefit must be not less than 2/3 of previous earnings or if not eligible to maternity benefit women must be granted social assistance; the duration of payment is extended to 14 weeks (thereby 6 weeks compulsory after childbirth); and the prohibition to terminate of employment was extended also to the period following her return to work (including the right of women to return to the same or equivalent position).
conventions (counter-examples are Botswana, China or Switzerland). On the other hand, member-states which ratified conventions do not necessarily provide the level of legal provisions, as required by the conventions - this particularity applies to Gabon. Nevertheless, some compliance is visible for the cases of United States, Romania, Germany and Chile. However, overall no clear pattern can be unveiled with regard to the assumption on the encompassing compensatory constitutionalism.

**Unemployment**

Regarding the issue of unemployment protection, Part IV of the Social Security (Minimum Standards) Convention No. 102 of 1952 and the Employment Promotion and Protection against Unemployment Convention No. 168 of 1988 are relevant. Provisions under Convention No. 102 are rather general, referring to the scope of coverage (at least 50% of total employed labour), the level of benefits (45% of total wage within the labour class or of previous earnings) and the duration of benefits (between 13 and 26 weeks). By contrast, Convention No. 168 is more detailed and sets higher standards. Among the countries studied conventions dealing with unemployment provisions have been ratified by Germany (Convention No. 102), Romania (Convention No.168) and Switzerland (both conventions), and indeed their national legislations operate in consistence with these international standards. However, this is not sufficient as an indicatory example for the emerging encompassing compensatory constitutionalism. Looking at the cases of non-ratification, the constitutionalism assumption cannot be necessarily confirmed. Cases in point are the United States, China and Chile, demonstrating that despite their non-ratification of the conventions, 

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10 Accordingly, coverage was extended to employees, constituting not less than 85% (50% in industrial workplaces employing at least 20 persons; in exceptional cases of ratification) of all employees, including apprentices and public employees (the later might be excluded if special protection is offered by national law). Benefits, providing a partial or transitional wage replacement, can be guaranteed within a contributory or non-contributory scheme, or within a combined system. In the case of a contributory system, payments must be not less than 50% (45% in exceptional cases of ratification) of previous earnings (benefit ceilings related to individual wage or national average wage might be included); in the case of a non-contributory system, benefits should amount to no less than 50% of the statutory minimum wage. Benefits must be paid for at least 26 weeks (also in cases where benefits vary in accordance to the length of qualifying period) for each spell of unemployment or for 39 weeks within 2 years. Some assistance must be provided beyond the initial period of benefit and should guarantee healthy and reasonable living conditions to individuals.
their national provisions still guarantee unemployment protection standards equal to the prescriptions in the conventions. As already argued before for the issue of maternity protection, the matter of unemployment rather confirms this discrepancy between national and international law. Thus, it does not support the assumption of the convergence towards uniform constitutional compliance.

Retirement

Also the third fundamental issue of social rights – retirement, including old-age, survivor and disability provisions for elderly persons and dependants - makes the compensatory constitutionalism assumption unsustainable. Compliance with the relevant Part V of Social Security (Minimum Standards) Convention No.102 of 1952 and particularly the Invalidity, Old-Age and Survivors’ Benefits Convention No.128 of 1967\(^\text{11}\) is only achieved by Germany and Switzerland. Though most of the countries selected fulfil the provisions of Convention No.128 fully, like Romania and China, or partly, like the United States. In China and Gabon, no ratifications have been made.

Child labour

Finally, the issue of child labour should be taken into account when talking about the fundamental individual rights. The effective abolition of child labour is one of the four

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\(^{11}\) According to Convention No.128, member states are required to cover by the old-age and invalidity pension schemes either all employees or residents, or prescribed classes of employees of not less than 75% (25% in exceptional cases of low economic performance) of the total economically active population. In the case of the survivor pension scheme wives, children and other dependents of the breadwinners/employees as defined above must be covered. Also the qualifying conditions for each of these branches are prescribed by the convention. Following this, the invalidity benefit should be guaranteed for any case of (temporary or permanent) incapacity to work with a qualifying period of 15 years of contributions or employment or 10 years of residence. Where the benefit is conditional upon a minimum period of contribution, employment or residence, a reduced benefit must be secured to persons who have completed a qualifying period of five years of contributions, employment or residence. Qualifying conditions in the case of old-age benefits include the age of 65 or if prescribed a lower age, which must be secured at least to persons with 30 years of contribution or employment, or 20 years of residence; if conditioned on a minimum period of contribution or employment (reduced benefit) provided to persons with 15 years of contribution (in exceptional cases 10 years of contributions or employment for employed classes, or 5 years of residence). In the case of survivor pensions, benefits must be granted to dependants of persons who fulfilled 15 years of contribution or employment, or 10 years of residence; if conditioned on a minimum period of contribution or employment, 5 years of contribution are required. Invalidity benefit should amount to 50%, the old-age benefit to 45%, and the survivor benefit to 45% of previous earnings or the average wage of the class. For all benefits a maximum limit is possible.
fundamental principles in the ILO’s 1998 Declaration of Fundamental Principles and Rights at Work. The principle is further laid down in two conventions, the Minimum Age Convention No. 138 of 1973 and the Convention No. 182 on the Worst Forms of Child Labour of 1999; the latter giving a new impetus.\textsuperscript{12}

Unlike the issues formerly discussed, child labour affects mainly transitional and less-developed countries. Among the countries investigated, Gabon, China, Romania, Botswana\textsuperscript{13} and Chile are of particular concern. Germany, Switzerland and the United States rather act as donors, supporting project-specific child labour prevention and elimination efforts.\textsuperscript{14} With regard to the group affected by child labour, and despite the fact that both conventions have been ratified by almost all countries, the issue of legal efficiency varies enormously when compared with the mere ratification.

In the case of Chile a process is definitely visible within the legal framework. Due to the ratification of the two mentioned conventions, Chilean authorities adapted the national legislation to be consistent with international standards and thus raised the legal age for entrance into employment from 14 to 15 years (ILO/ IPEC 2004: 7). Also a good process is in place for area-based and regional projects on the reduction of commercial sexual exploitation of children and child domestic labour and projects addressing the eradication of child labour (ILO/ IPEC 2006: 33; 2002a: 28).

Gabon adopted the basic provisions of Convention No. 182 in its Constitution and Labour Code, as well as in some Decrees (including provisions in the Criminal Code) (ILO\textsuperscript{15})

\textsuperscript{12} In addition, the ILO runs since 1992 the International Programme on the Elimination of Child Labour (IPEC). The primary aim of IPEC is the progressive elimination of child labour, giving priority to its worst forms. Thereby, the basis for its action is to strengthen the political will and commitment of individual governments to address child labour – in cooperation with employers’ and workers’ organizations, non-governmental organizations and other relevant parties in society. Member states confirm this commitment by signing a Memorandum of Understanding (MOU) with the ILO to initiate action within the framework of IPEC. Among the countries studied, Chile, Romania and Gabon signed the MOU, while China and Botswana were acquired the status of associated participating countries, provided with support for various activities to prevent and eliminate child labour (ILO/ IPEC 2003b).

\textsuperscript{13} No detailed information are available for Botswana.

\textsuperscript{14} The United States (USAID; US-DOL and US-DOS) are with 161,922,224$ total (between 1992 and 2005) the dominating financial supporter of the ILO/ IPEC, followed by Germany (64,707,031$ total) and Switzerland (2,585,266$ total) (ILO/ IPEC 2006: 100f).
2001: 273f). With regard to Convention No. 138, which is not yet ratified, some provision concerning the minimum age are included into the Gabonese Law. However, as confirmed by the Gabonese Government, child labour provisions are well respected in the formal sector, but not in the informal sector. Since the informal sector, which escapes the control of the State, is basically dominated by foreigners, the exploitation of child workers (particularly in form of slavery and trafficking) can be only eliminated effectively if concerted efforts are made by States in this subregion (ILO 2001: 274ff). Though some efforts have been made in order to deal with these obstacles, the IPEC arrived in its most recent implementation report to the conclusion that Gabon’s implementation policy towards the elimination of the worst forms of child labour is rather poor performing, relative to its endeavours to reach a legal framework complying with international legal standards (ILO/ IPEC 2006: 40; ILO 2003: 74).

The situation looks similar in the People’s Republic of China. While a multitude of specific provisions with regards to Conventions No. 138 and 182 have been adapted in the Constitution, the Labour Law, the Criminal Law as well as the Compulsory Education Law with respect to the minimum employment age as well as the prohibition and elimination of child labour, the Government still faces problems of child labour, particularly in foreign-funded enterprises and private companies. Following the self-assessment of the government, up to now “no specific measures have been undertaken in China that can be regarded as successful examples in the abolition of child labour” (ILO 2002: 316).

In the case of Romania the issue of working street children was identified as the major problem (ILO/ IPEC 2003a). However, conditions in Romania have shown positive progression when compared with other countries affected by child labour and participating in IPEC. While in March 2002 the legislative changes following the ratification of Convention No. 182 were regarded as missing, in February 2006 the country did much better with reference to the legal framework (ILO/ IPEC 2002b: 62; 2006: 41). Besides, Romanian

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15 For certain poverty-stricken areas, children between age 13 and 15 are allowed to work in limited sectors and to a limited extent (ILO 2002: 312).
authorities turned out to be quite active in terms of practical and administrative undertakings. The major achievements include the establishment of institutions addressing the problem of child labour, the successful accomplishment of several training programmes on investigating and monitoring child labour as well as the realisation of action programmes for the elimination of the worst forms of child labour (ILO/IPEC 2002b: 5f).

Similarly, as with the other three social issues, the aspect of child labour reveals the same unclear picture with regard to the encompassing compensatory constitutionalism. Despite the fact that almost all countries ratified the related conventions, full compliance between international standards and the nationally effective law can be considered true only in the case of Romania and Chile. Rather little effect is visible in the cases of Gabon and China.

Thus, summing up for the substantive social dimension of global constitutionalism, we can conclude that the assumption on encompassing compensatory constitutionalism does not hold true. Irrespective of whether countries ratified a convention or not, the national effectiveness of law in the most cases differs dramatically from the standards set by conventions. There are cases of ratification where no national equivalent can be found, and there are cases of non-ratification, where the same or even higher standards as those of the relevant conventions characterise the national conditions. Thus, rather than international organisation, the nation-states are still the dominant policy- and law-makers.
### Table 1: Ratification of ILO conventions and national compliance

<table>
<thead>
<tr>
<th>Countries</th>
<th>Maternity</th>
<th>Compliance</th>
<th>Unemployment</th>
<th>Compliance</th>
<th>Retirement</th>
<th>Compliance</th>
<th>Child Labour</th>
<th>Compliance</th>
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<tbody>
<tr>
<td></td>
<td>No. 3</td>
<td>No. 103</td>
<td>No. 183</td>
<td>No. 102</td>
<td>No. 168</td>
<td>No. 102</td>
<td>No. 128</td>
<td>No. 182</td>
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<td>X</td>
<td>X (15)</td>
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<tr>
<td>China</td>
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<td>X</td>
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<td>X</td>
<td>O</td>
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<tr>
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<td>X</td>
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<td>O</td>
<td>—</td>
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<td>—</td>
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<td>X</td>
<td>—</td>
<td>—</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>O</td>
<td>X (15)</td>
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<tr>
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<td>—</td>
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<td>X</td>
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<td>X (15)</td>
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<td>X</td>
<td>X</td>
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<td>X</td>
<td>X (15)</td>
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<tr>
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<td>—</td>
<td>X</td>
<td>O</td>
</tr>
</tbody>
</table>

—: non-ratification; no compliance between national law and ILO conventions

X: ratification; compliance between national law and ILO conventions

O: partly compliance between national law and ILO conventions

?: no information available

n.a.: issue of child labour is rather not applicable to these three countries

—: no n-ratification; no compliance between national law and ILO conventions

n.a.: issue of child labour is rather not applicable to these three countries

Table 1: Ratification of ILO conventions and national compliance
4.2.2. The WTO and its substantive functions

In order to grasp the individual countries’ range of activities in the area of trade in services and corresponding restrictions on market access and national treatment, we study the ‘schedules of commitments’ with a view on the three selected service sectors under the GATS/ WTO. These are the construction sector, the tourism sector and the health and social services sector. Although the overriding objective of the GATS is the promotion of transparency, stability and liberalisation, GATS achieved rather little in terms of liberalisation of services trade during the Uruguay Round (Stephenson 2002: 9; cf. Mattoo, Wunsch-Vincent 2004).

This discrepancy is reflected by the range of services included in the ‘schedules of commitments’, as quantified by the number of included sectors. In fact, our investigation suggests that the three service sectors are not included to the same extent into the ‘schedules of commitments’. This reflects the observations made by Adlung (2000). While all countries included the tourism sector into their schedules of commitments, all but two (Botswana and Chile) incorporated the construction sector into their schedules and only the United States and Germany integrated the health-related and social services.

Going into detail, even more divergence, rather than convergence on this substantive dimension are visible for each service sector. Following a classification of the level of commitment as defined for the Background Notes by the Secretariat / Council for Trade in Services of the WTO, we can distinguish between full commitments (no limitations, implying total liberalisation), partial commitments (those made with certain limitations) and no commitments (unbound) (table 2).
Tourism sector

Tourism is the world’s largest and one of the fastest-growing industries, accounting for over one third of the value of total world-wide services trade. It is considered to be a highly labour-intensive sector with importance to rural and remote areas.

The tourism and travel-related sector reveals a quite clear pattern of country specific commitments. Concerning limitations on market access, all countries under study claim the status ‘unbound’ with reference to mode 4. In other words, member states remain non-compliant with the General Agreement on Trade in Services by limiting market access for foreign individuals. Thus, they reserve access to the tourism sector to own nationals. Similarly, almost all countries, except for the United States and Romania, do not concede national treatment - giving foreigners the same treatment as one’s own nationals - to foreign individuals (WTO 1998c).

Switzerland is even more prohibitive; with regard to mode 3 - commercial presence, allowing foreign service suppliers to establish and operate a commercial presence on the Swiss territory, market access and national treatment are limited first by cantonal licences granted for restaurants based on economic need and cantonal requirements of residency of the supplier, and second with respect to national treatment, examinations of foreign mountain guides and ski instructors is required. Botswana also provides for limitation on market access with regard to mode 2 - consumption abroad. The Bank of Botswana limits the amount of local and foreign currency entitled to Botswana’s permanent residents for each trip abroad and for the whole year.

Summing up, with regard to the countries investigated, the tourism sector cannot be assessed as showing full commitment, but rather a partial commitment providing for some minor limitations, particularly visible with regard to the presence of natural persons.
Construction

Being one of the oldest industries and one of the largest industry sectors - share of construction in total GDP is around 5 to 7 percent - the area of construction, much like the tourism sector, is of vital economic importance. The construction sector has close links to public works and has always been considered a strategically important industry for creating employment and sustaining economic growth. Alone in the United States 7.5 million people and in the EU around 9 million people are employed by the construction industry. In addition, it carries particular importance for developing countries due to its tie to the progress of basic infrastructure, transfer of technologies and improved access to information channels (WTO 1998b).

However, the commitments signed by the member states (Botswana and Chile excepted) for the construction sector are subject to even more stringent limitations. The market access of natural persons is limited in all countries, and regarding the national treatment restrictions are provided by China, Gabon, Germany, and Switzerland. Thus, in the same way as in the tourism sector, in the field of construction the presence of foreign individuals seems to remain a striking issue for commitments, not assuring equal economic rights to individuals. Apart from this, Gabon, with regard to the two spheres of limitation does not accept general GATS obligation in order to support cross-border supply and consumption abroad. Some exemptions related to commercial presence for installation works in the area of heating, water, energy, communication and elevators are also present in the case of Switzerland. Thus, the construction sector can be classified as only ‘partially committing’ sector.

Health and social sector

The health and social sector covers services of immediate and direct relevance to human welfare, including hospital and human health services as well as social (care) services. Therefore, particularly developing countries, where the material availability of basic health
and social services to large population segments is not present, would profit most from increasing liberalisation of this sector (WTO 1998a). However, the specific schedules of commitments reveal only partial - or even non-existing - commitments towards the health and social service sector, regarding the low number of signed national commitments.

Commitments for health and social service sector have been undertaken out of the countries investigated only by the United States and Germany. Still, even in these two cases, limitations concerning market access as well as national treatment persist for mode 1 - cross-border supply and mode 4 - presence of natural persons in Germany; the United States take the freedom to remain unbound for mode 4. In light of the low number of commitments signed, which in turn were signed with certain limitation, our review indicates that the multilateral cooperation among countries with different level of development under the GATS has no real material significance on public health and social security issues (cf. Yeates 2005: 21). On the whole, the trade-related consideration of this sector has not proved to be a dominant policy concern. Even in the most economically advanced countries, like the United States and Germany, the health and social service sector has remained a minor contributor to trade.

Overall we witness for the service sector that limitations on market access and national treatment are far more frequent under mode 4 – presence of natural persons. In contrast, members’ scheduling practices under mode 1-3 reflect only technical and economic specification of the activities covered. On the whole it is impossible to speak of the tendency towards liberal constitutionalisation under the GATS. National differences are significant and very visible.
<table>
<thead>
<tr>
<th>Countries</th>
<th>Limitation on market access</th>
<th>Limitation on national treatment</th>
<th>Limitation on market access</th>
<th>Limitation on national treatment</th>
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<th>Limitation on national treatment</th>
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<tr>
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<td>4) unbound</td>
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</tbody>
</table>

1: According to the services sectoral classification list, tourism and travel-related services include hotel and other lodging services (641), food serving services (642), beverage serving services for consumption on the premises (643), travel agencies and tour operators services (7471, and tourist guide services (7472).

2: Constriction work and constructions include general construction work for buildings (512), for civil engineering (513), installation and assembly work (514+516), building completion and finishing work (517), pre-erection work at construction sites (511), special trade construction work (515) and renting services related to equipment for construction or demolition of buildings or civil engineering works, with operator.

3: Health-related and social services include hospital services (9311), other human health services (9319) and social services (933).

4: Information on Germany are based on the schedule of commitments of the European Community of 12 member-states.

Empty fields: no limitation on market access or national treatment.
Unbound: member state wishes to remain inconsistent with market access or national treatment.

The commitments and limitations are in every case entered with respect to each of the four modes of supply:
1) cross-border supply: the possibility for non-resident service suppliers to supply services cross-border into the member’s territory;
2) consumption abroad: the freedom for the member’s residents to purchase services in the territory of another member;
3) commercial presence: the opportunity for foreign service suppliers to establish, operate or expand a commercial presence in the member’s territory;
4) presence of natural persons: the possibility offered to foreign individuals to enter or to stay temporarily in the member’s territory in order to supply a service.

Table 2: Scope of sector-specific GATS schedule of commitments by countries

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5. Conclusion

Is there global constitutionalism that compensates for the loss of constitutional functions of the nation state? This was our guiding question. We distinguished between four types of constitutionalism. Much evidence can be mobilised for the thesis of a formal compensatory constitutionalisation. However, considering substantive issues, we found neither strong empirical evidence for a social, nor for a liberal constitutionalism. This implies that there is no encompassing constitutionalism. Constitutionalisation is a very uneven process whereby dimensions (formal, substantive-positive, substantive-negative) as well as regions and countries are covered to a very different extent, creating an heterogeneous global constitutional order.

This paper provokes two objections. We base our conclusion on eight selected countries, on two international organisations, and on seven policy fields. One could argue that the image changes if more countries are included. We doubt whether an inclusion of more countries would alter the conclusion. Comparative research that has focused on the economically and politically most developed nations – i.e. the countries that are most likely to meet minimum standards of economic freedom and social security and hence have least difficulties in accepting far-reaching global standards – found a very muted impact of international institutions (Armingeon, Beyeler 2004; Cowles, Caporaso et al. 2001; Senti 2001).

We fully support a second objection though. We show that there is little constitutionalism. But we do not say anything about the likelihood that a nation supports and implements the constitutional order. This is the more important question. But before dealing with this question we needed to answer the question of whether
there is a homogeneous global compensatory constitutionalism. In this paper we found no strong evidence for such an encompassing constitutionalism.

6. References


Treib, Oliver (2004): Die Bedeutung der nationalen Parteipolitik für die Umsetzung europäischer Sozialrichtlinien. Frankfurt am Main: Campus.


Further documents


http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT.

ILO Conventions, http://www.ilo.org/ilolex/english/convdisp1.htm:

ILO, C3 Maternity Protection Convention, adopted on 28.11.1919.
ILO, C102 Social Security (Minimum Standards) Convention, adopted on 28.06.1952.
ILO, C103 Maternity Protection Convention (Revised), adopted on 28.06.1952.
ILO, C128 Invalidity, Old-Age and Survivors’ Benefits Convention, adopted on 29.06.1967.
ILO, C183 Maternity Protection Convention, adopted on 15.06.2000.

WTO, General Agreement on Tariffs and Trade 1994.


WTO, General Agreement on Trade in Services.


WTO Service Database Output, Sector-specific Commitments:
Botswana