EMERGING GLOBAL CONSTITUTIONALISM: TOWARDS A THEORETICAL FRAMEWORK*

DRAFT VERSION

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ABSTRACT

Legal scholars argue that there is an emerging ‘global compensatory constitutionalism’, which denotes a set of compatible supra-national and national institutions that fulfil functions hitherto fulfilled by national constitutions, and which was brought about by forces like globalisation and denationalisation. However, the concept of the emerging global compensatory constitutionalism is often used unclearly. It still lacks a consistent and scientifically operationaliseable definition social scientists can cope with.

This paper provides a preliminary framework for the emerging global (compensatory) constitutionalism. Emanating from the nation-state setting, three fundamental constitutional elements - the formal aspect of legalisation, the material dimension bearing civil, political, social and economic effects and the time dimension allowing for a gradual emergence of a global constitutional order were identified. Following a two-step approach, I distinguish between six types of global constitutionalism: formal global constitutionalism, civil global constitutionalism, political global constitutionalism, liberal global constitutionalism, social global constitutionalism and encompassing constitutionalism. While the first three types originate from the integration of formal-legal aspects and substantive civil and political rights, the last three are subject to the negative and positive integration of economic and social rights.

Emerging global constitutionalism: towards a theoretical framework

1. Introduction

What is a constitution? Whether of political or legal background, researchers responding to this question would primarily address typical characteristics, which are mostly associated with constitutions in the nation-state setting. Depending on the research objective, most scholars would consider the issue of written versus unwritten constitutions (writtenness), flexible versus rigid constitutions (rigidity), political revolution (constitutional big bang) versus continuous evolution, the rule of law, division of powers, checks and balances, containment, the incorporated governmental structure, hierarchy of law and some basic political and civil rights as the fundamental features of a constitution (Gavision 2002a; Lijphart 1999; Peters 2006a; Sartori 1962).

But what is global constitutionalism? When the definition of ‘global constitutionalism’ is requested, no such straightforward pattern-fitting reply can be expected, and rightly so.

The idea of the emerging ‘global constitutionalism’ has been brought forward quite recently by legal scholars, challenging the up to now accepted position of domestic constitutional law as being superior in a globalised world. Though states are not considered to have vanished as primary actors in the international system, their role with respect to constitutional processes and objectives has changed dramatically (Cottier, Hertig 2003; Howse,
Nicolaidis 2003; Peters 2006a; Schloemann, Ohlhoff 1999; Schorkopf, Walter 2004; Trachtman 2005). So far nation states have been vested with the right to regulate the life of their citizens. The process of globalisation or denationalisation (Beisheim, Dreher et al. 2000; Gerstenberg 2001; Rodrik 1997; 1998; Rosenau 1997; Zürn 1998; Zürn, Walter et al. 2000) challenges this role of the nation states and requires compensation for the de-constitutionalisation of the previous national political order beyond the national setting.

A global (compensatory) constitution denotes a set of compatible supranational and national institutions that fulfil functions so far fulfilled by national constitutions. Thus, it is the process of constitutionalisation at the international level, by which de-constitutionalisation at the national level, brought about by forces such as denationalisation, is compensated for. 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 constrains governments (Peters 2006a). This paper basically deals with the emerging idea of global constitutionalism.

The concept of global constitutionalism gained in importance in the legal discipline and has become the subject of discourses among legal scholars at the outset of the 21st century. However, this has not so far been the case for the field of political science and international relations. Therefore, before
embarking on a discussion of global constitutionalism, I want to turn my attention to the question/reasons as to why global constitutionalism might be interesting from a political scientific point of view, and why international relations scholars or political scientists might want or need to deal with the idea of global constitutionalism. There are two responses to this question, both adding some analytical clarity to the emerging term of global constitutionalism.

Taking account of the changing nature of the world order, two aspects of globalisation deserve to being stressed, namely the impact of globalisation on vertical and horizontal boundaries. Starting with the vertical boundaries, those between the level of nation states and the international sphere, the ongoing globalisation debate of the last two decades has created new research issues on ‘global governance’ or ‘multi-level governance’, arguing that globalisation has an enormous impact on the boundaries between the domestic and the international sphere and making the earlier distinction between national and international realms become blurred. In this sense, the process of globalisation or denationalisation (Beisheim, Dreher et al. 2000; Gerstenberg 2001; Rodrik 1997; 1998; Rosenau 1997; Zürn 1998; Zürn, Walter et al. 2000) challenges the so far accepted right of nation states to regulate the life of their citizens. Moreover, the regulation process not only affects the vertical distribution of powers, but also the horizontal distinction between the economic, political, social and legal spheres of a polity. Globalisation in
this sense has an impact on the horizontal boundaries, making the fields interlinking parts of the integral whole. These two substantial aspects of fuzzy vertical and horizontal boundaries are central to the idea of global constitutionalism.

Thus, scholars particularly interested in supranational bodies, their decision-making processes, their effects on nation states and conditions of the convergence towards a more harmonised world order might gain considerably from an emerging term of global constitutionalism, consolidating the post-national and national dimensions as well as the political and legal spheres.

From an analytical perspective, the emerging global tendencies even require an interdisciplinary attitude merging in particular legal normative thoughts and political-scientific expertise in analytical methods. Going further, one could argue for the necessity to study global constitutionalism from a political science perspective. Normative approaches alone, such as those finding expression in legal studies, are insufficient for the examination of conditions and effects of global constitutionalism. In addition, accurate empirical methods as are elementary in social sciences must be applied.

However, the conception of emerging global constitutionalism compensating for the loss of state functions with regard to freedom and security is often used in an ambiguous and non-uniform way. It still lacks a consistent, scientifically committed and settled operationaliseable definition.
that comparative-political scientists as well as international-relations and international-law scholars can cope with.

Therefore, this paper serves the purpose of providing a preliminary framework for so-called emerging global (compensatory) constitutionalism. The aim is not to prove the existence of a process of global constitution building or of global constitutionalism, nor is it to examine the national and/or international conditions that might favour or hinder the emergence of the global constitutional setting. Rather, I discuss a basic but essential issue, which allows for an encompassing and at the same time sophisticated typology of global constitutionalism, providing an operationalisable scaffold for political science and international relations scholars.

The underlying questions are ‘How can the emerging global constitutional order be captured?’; ‘What does the basic shape of a global constitutional order look like?’, and ‘What kind of institutional elements and arrangements does a global constitutional order consist of?’.

In view of the heterogeneity and diversity of the international order at the outset of the 21st century, I argue that there is not only one absolute type of global constitutionalism. Rather, a typology of global constitutionalism must be outlined which is able to embrace exactly the very same economic, political, social and cultural diversity.

In order to derive a typology of global constitutionalism, I reconsider the notion of the constitution, constitutionalism and constitutionalisation as
originally developed in the nation-state setting. If we are to speak of global (compensatory) constitutionalism, the typology must incorporate three fundamental constitutional elements. First, the emergence of a global constitution must be considered to be an ongoing and long-lasting process, rather than an ad hoc event. Second, there must be a formal dimension, which denotes some procedural and institutional norms, also labelled the rule of law. Third, a global constitution must have a substantive effect; it is the material dimension associated with the output side of a policy process guaranteeing fairness and security. Bringing these three elements together, I argue that the emergence of a global constitutional order can be subdivided into two temporal stages and into six subtypes of global constitutionalism. While the constitutionalisation of formal elements (legalisation) (Abbott, Keohane, et al. 2000) as well as civil and political integration are expected to become apparent at first instance, the process of creating a level playing field abolishing rules that hamper the free economic exchange between individuals - ‘negative integration’ - and ‘positive integration’ denoting the establishment of norms that set minimum standards of (social) security (cf. Scharpf 1999; Tinbergen 1965) become part of a global constitutional order only at the second stage. Finally, the most encompassing form of global (compensatory) constitutionalism contains both formal, civil and political integration as well as negative and positive integration.
2. Constitutionalism reconsidered

Before being able to provide a sophisticated typology of global constitutionalism, it is necessary to elaborate first a framework allowing for a conception of global constitutionalism. In so doing, I turn to the classic threefold distinction between the terms ‘constitution’, ‘constitutionalism’ and ‘constitutionalisation’ as originally defined in the nation-state setting. From it, the basic elements necessary to draw a typology of global constitutionalism can be derived.

2.1. Constitution

First and foremost, the term constitution is associated with the nation state. However this notion is far from having a clear and decisive definition. According to national traditions, the understanding of this term differs (cf. Beaud 2003; Gavison 2002a; Mohnhaupt, Grimm 2002; Preuss 2001). Also Sartori (1962) named the very term ‘constitution’ a vague term not allowing for simplification. However, many state constitutions follow comparable western templates, which have some basic principles (2.1.1.) and functions (2.1.2.) in common.

2.1.1. Constitutional principles

First of all state constitutions are linked to some formal characteristics. Constitutions emerged either through a constitutional big bang, which aimed to close political or social revolutions (as in France) or they were created in order to avert a revolution and restore certain pre-revolutionary
conditions (e.g. in Germany). Others again evolved over centuries, like the predominant case of the British constitution (Peters 2006a: 584-585, Sajó 1999: 14-16). A further essential element of a constitution is it writtenness. Although most state constitutions are written legal charters, unwritten constitutions also exist, like the British, Israeli or New Zealand constitutions. However, although the majority of modern states have written constitutional laws, the notion of constitution cannot be only bound to its writtenness (Lijphart 1999: 217-218; Rousseau 1990; Sajó 1999: 14-15). In addition, a constitution is characterised by its precedence over ordinary law, ensuring a special amending procedure of constitutional provisions and safeguarding it against modification through ordinary legislation via judicial reviews (Bryce 1901: 150-151, 217-218). In this sense constitutions can have a different degree of rigidity. With respect to constitutional amendments they can be constructed as rigid constitutions or rather flexible constitutions, depending on the required approval by the (ordinary or special) majority of the state or by a referendum (Lijphart 1999: 218-223).

2.1.2. Constitutional functions
Second, formal elements of a constitution imply that constitutions have to fulfil related procedural functions. Generally speaking, constitutions refer to the bulk of basic legal norms organising and institutionalising a polity and therefore concern the regulation of the basic institutions of a polity, which hold the centre of the community’s life (Gavison 2002a; Peters 2006a: 581,
Following Jellinek (1914: 505), constitutions set in place political institutions and define their competences; they lay down the terms of membership, the relation between the members and the community, and regulate the institutions’ core functions of law-making, conflict resolution and law enforcement. In other words, constitutions are to constitute a political entity as a legal entity, to organise it, to limit political power, to offer political and moral guidelines, to justify governance, and finally to contribute to integration (Peters 2001: 38-92).

2.1.3. Rule of law

The link between constitutions and political institutions can also be grasped by the concept of the ‘rule of law’, as legally employed in the Anglo-American context. The rough equivalent used on the European continent is in German Rechtsstaat or in French état de droit. The rule of law reflects a common idea in the various concepts of constitution and means “that the state’s bodies act according to the prescriptions of law, and law is structured according to principles restricting arbitrariness” (Sajó 1999: 205). In a rule of law system the special relationship between the branches of power is guaranteed. Simply put, the set of formal rules which constitute law must be obeyed, implying that a political community lives under the rule of law and not under the rule of men, a restriction of the will of authorities (Maravall, Przeworski 2003: 1; Sajó 1999: 206). According to a standard formulation by Fuller (1964: 33-94), the list of formal requirements for this legal-constituent
set of rules which constitute law are norms that are general, publicly
promulgated, not retroactive, clear and understandable, logically consistent,
feasible, and stable over time.

Knowing that a constitution’s prime function within the nation-state setting
is to equip a community with basic formal arrangements which organise and
institutionalise its life, constitutions in modern states provide for
governmental procedures and limitations of political power. Thus, they deal
with the guarantee of a legitimate government and so also with the
regulation of the input side of a polity. Constitutions are therefore concerned
with the input-orientated legitimacy emphasising the ‘government by the
people’ and meaning that political decisions taken by the government are
legitimate since they reflect the will of the people (Scharpf 1970; Scharpf
1999:6).

2.2. Constitutionalism

Nevertheless, global constitutionalism should in normative terms account
for more than simple formal (procedural) input-orientated elements
regulating relationships among nation states as well as between nation states
and international organisations. Although constitutions and the rule of law
restrict the will of authorities and hamper them from misusing power,
neither a constitution nor the embedded idea of the rule of law are absolute
categories. The very same idea of restriction and containment implies that
citizens are at the disposal of the government’s impersonal and formal legal
input-orientated procedures. Strictly applied, a constitution and the rule of law, as defined above, allow no consideration of equity or the human condition (Sajó 1999: 207-211).

Therefore, it is important to address the term of constitutionalism itself (cf. Casper 1986; Preuss 1998). Originally, constitutionalism was a political movement and an intellectual trend in the quest for a written constitution of the 17th/18th century. It aimed at making the political power (monarchy) subject to law and at creating a government of laws and not of men. Nowadays constitutionalism is a value-laden concept and refers to the inclusion of basic material principles (Peters 2006b: 3; Sajó 1999: 9-16).

In this manner, constitutionalism, is not merely restricted to the rule of law, and so to the input-orientated legitimacy. The concept of constitutionalism goes beyond the idea of simply having a constitution; it refers to the legitimacy of political power through the output side and so to human dignity and the guarantee of fundamental rights to individuals. It expresses the idea of ‘government for the people’, meaning that political decisions are legitimate if and because they promote in an effective manner the public well-being of a polity (Scharpf 1970; Scharpf 1999: 6). According to Weiler and Wind, constitutionalism “embodies the values, often non-stated, which underlie the material and institutional provisions in a specific constitution” (2003: 3).
By decoupling the term constitutionalism from the notion of constitution, it is possible to capture constitutionalism as a term connecting and accounting for a discrete vindication of neo-Kantian values and the idea of Rechtsstaat (Weiler & Wind 2003: 3). On the one hand there is the rule of law. It is the institutionalisation of procedures which refer to the concept of legality or legal authorisation. On the other hand, there is the value-laden conception of fundamental rights which should be guaranteed in a classic constitution. Therefore, the principle of constitutionalism comprises, unlike the notion of constitution, both the requirement of legal certainty and the protection of acquired rights and legitimate expectations (Sajó 1999: 217). In addition, by including material elements, constitutionalism can partly diminish the rule of law’s one-sided inflexibility and its alienation from life, because it uses not only the legal means of restricting power but also carries substantive values. It allows us to see both the means and procedures as well as the objectives and outcomes in a political system of a polity. The idea of constitutionalism contains formal (procedural) and material (substantive) elements, which in combination account for the equality in the rule of law and the realisation of equality both in form and content (Sajó 1999: 208).

2.3. Constitutionalisation

As already stated above, most written constitutions emanated from the outset of revolution or from fear of revolutionary movements in quest of a constitution. However, the accomplishment and refinement of a constitution
was and is, in contrast, a long-lasting project taking into account the experience of constitutional violation, restriction of freedom and oppression, as well as the conditions of given practice by unsuccessful and despotic governments (Sajó 1999: 12). Precisely this requirement for process or a time dimension can be derived from the principle of constitutionalisation. Unlike the static language of the formal and material characteristics which form the basis of constitutionalism, constitutionalisation indicates an underlying process. It embeds a time dimension, which implies that a constitution or constitutional law can come into being in a process extended through time (Peters 2006a: 582).

Constitutionalisation implies that a legal text can acquire or eventually also lose constitutional properties in a feedback process and can thus be a long-lasting development. It is a catchword for the continuing process of the emergence, creation and identification of constitution-like elements, denoting a constitution-in-the-making (Peters 2006a: 582).

2.4. Bringing it together

Starting from the nation-state perspective, I have relied on the threefold distinction of constitution, constitutionalism and constitutionalisation. Out of it, it was possible to extract three elements which should be considered for the conceptualisation of a typology of global constitutionalism. First, it is quite immanent that a constitutional system cannot exist without the rule of law; therefore the concept of global constitutionalism should comprise some
formal (procedural) input-orientated elements ensuring legitimate governance. Second, it became quite apparent that the rigidity of the rule of law system must be countervailed by material (substantive) output-orientated values, which facilitate the effective endorsement of public well-being of a political community. Finally, a typology of the ‘emerging’ global constitutionalism must be tied to the idea of process, and must not be restricted to the thought of attaining an exclusive final good, which resembles a completed constitutional system. A global constitutional system is not an ad hoc event, but rather an ongoing development.

3. Constitutionalism beyond the state

Despite a discussion primarily rooted in the national setting, the terms constitution, constitutionalism or constitutionalisation are not at all exclusively reserved for the nation state context (cf. Walker 2002). Though, hitherto it was the effort of nation states to guarantee security, freedom and equality to their citizens, it should be possible following the three headwords derived (1. formal dimension, 2. substantive dimension and 3. time dimension) to transfer them to a setting beyond the nation state. Since globalisation, or better denationalisation (Beisheim, Dreher et al. 2000; Gerstenberg 2001; Rodrik 1997; 1998; Rosenau 1997; Zürn 1998; Zürn, Walter et al. 2000) endangers these protective roles of nation states, an emerging constitutional order beyond the nation state may compensate for the deconstitutionalisation 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 constrain government. This is the assumption about the emergence of the compensatory global constitutionalism, as put forward by Peters (2006a).

The assumption of compensatory constitutionalism juxtaposes the supra-national and the national level. From this viewpoint the global constitution fills a void 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 laws. Therefore, international or global constitutionalism refers to a set of basic international rules which national political elites accept and support, although they limit the room for manoeuvre of national political systems and effectively regulate the life of citizens. This implies that global constitutionalisation assumes a legal compensatory jurisdiction of limited and conditional effects, accomplished by international institutions, and accepted on the national and individual level.

The most recent and prominent example of an emerging constitutional system beyond the nation state is the attempt to set up a European constitutional order for the European Community (EC)/ European Union
(EU)\(^1\) (cf. Gerstenberg 2001; Grimm 1995; Lacroix 2002; Peters 2001; Rittberger, Schimmelfennig 2005, 2006; Weiler, Wind 2003). In addition, arguments in favour of an emerging global constitutional order have been put forward with respect to global trade and the related establishment of the World Trade Organization (WTO) (Allee, Huth 2006; Cass 2005; Cottier, Hertig 2003; Howse, Nicolaidis 2003; Joerges & Petersmann 2006; Petersmann 2006; Schloemann, Ohlhoff 1999; Schorkopf, Walter 2004; Trachtman 2005).

However, so far only little attempt has been made in support of a comprehensive framework of the global (compensatory) constitutionalism. Depending on normative and disciplinary preferences, scholars focus instead on single components of global constitutionalism (cf. Walker 2002). Jurists may be inclined to see constitutionalism in merely formal or procedural terms, as being confined to legalisation (formal dimension). Liberal economists usually concentrate on the liberal aspects related to constitutionalism, while many social scientists have a tendency to look primarily at the social and political instances of constitutionalism (material dimension).

\(^1\) Although the constitutionalisation of the EC/EU is hardly suitable as a model for world-wide constitutionalism, the discussion on the democratic deficiency of European governance (Scharpf 1999) may give impulses for the conceptualisation of the typology of constitutionalism on a global scale.
In order to counteract this tendency of segregating constitutional aspects and to find a comprehensive typology of global constitutionalism which captures the diversity, plurality and heterogeneity of the international order at the outset of the 21st century, it is necessary to include both the formal/procedural and the material/substantive dimension. At the same time it is indispensable to take account of the underlying time dimension in a single framework. Referring to emerging global constitutionalism as a process of building up a legal order based on basic norms of a polity, it is not only an encompassing and completed global constitutional system that deserves to be labelled global constitutionalism. Likewise, the intermediate steps representing the process of constitutionalisation must be considered to be of equal importance.

In the following I redraw the constitutional elements for the international setting, beginning with the formal dimension, also called legalisation, and followed by the material dimension, covering the divergent fundamental rights of citizens, such as civil, political, economic and social rights. In so doing, the two dimensions form the borders of a time frame, which can be grasped in a two-step approach.

3.1. Formal aspects of global constitutionalism: legalisation

Just as on the nation-state level, international law undergoes a process of some organisation and institutionalisation. Therefore formal elements allowing for the construction of a legal order must be expected to comprise
one element in the international community in order to speak of global constitutionalism. One dimension of constitutionalisation is legalisation, which is the imposition of international legal constraints on governments. In defining legalisation, I follow the conceptualisation by Goldstein, Kahler et al. (2000), which is at present the best available conception depicting the legal order. 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 by means of 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 have been breached. The degree of legal obligation then covers a spectrum from highly obligatory (unconditional obligations; fully legally bound; implicit conditions on obligations – political treaties) to intermediate 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 severely narrowing the scope of interpretation; medium precision – leaving space for interpretation on some issues; and vagueness – setting some general standards but leaving plenty 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 in two aspects: dispute resolution, or judicialisation, of the dispute settlement processes (cf. Zangl 2005a; Zangl 2005b), 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 in 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, one can speak of legalisation or formal integration establishing a legal order - the formal global constitutionalism (I. type in figure 3.2.1.). But this does not necessarily imply that these laws have any impact at all. Some legalisation may change nothing for individuals. If, for example, a national rule is effective and the global constitution simply reiterates these national standards, there is compliance, but the global rule has no effect. In addition, there may be situations where, despite meeting all three criteria, a 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 convert it into national law, or evade the direct effects of international law. Therefore it does not suffice to ask whether there is legalisation on the global level, but also whether there is a substantive impact. This is the case only where a global legal order makes a difference to the individual, and therefore it is essential to ‘integrate’ the substantial dimension into the concept of global constitutionalism.

3.2. Substantive aspects of constitutionalism

Conceptualising this idea of the substantive constitutionalisation, I 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 office) and social citizenship denoting a range of rights ensuring a basic minimum of economic welfare and security (cf. Dahrendorf 1974, 1995).
According to Marshall the institutionalisation of those citizenry rights can be attributed to a temporal sequence. Following this, citizenship in its earliest version conceived civil rights, which were next supplemented by political rights and lastly by social rights (Marshall 1950; cf. Parsons 1969: 258-259). Based on Marshall’s concept, the more recent literature has also pointed to economic rights as elements of an enlarged concept of civil rights, indicating the right to trade, the right to market access, as well as the protection of civil liberties and properties (Barfield 2001; Bottomore 1992; Petersmann 2000; Rittberger, Schimmelfennig 2005; Walker 2003).

In analogy to Marshall and with regard to the global scale, the international law scholar Vasak (1978) makes a similar distinction. Deriving his notions from the idea of the French Revolution, he differentiates between three generations of international human rights - liberté (civil and political rights - first generation), égalité (economic, social, and cultural rights – second generation) and fraternité (solidarity rights – third generation). These rights also find expression in the Universal Declaration of Human Rights.

Thus, expecting global constitutionalism to have substantive aspects, it is necessary to ‘integrate’ civil, political as well as social and economic rights as parts of an all encompassing typology of global compensatory constitutionalism. I argue that due to the historic evolution of rights, one can view the development of a global encompassing constitutionalism and capture it with a two-step approach.
3.2.1. *Civil and political global constitutionalism*

The institutionalisation of fundamental rights as material attributes of a global substantive constitutionalism is expected according to Marshall (1950) and Vasak (1978) to follow a temporal sequence (time dimension). Most contemporary scholars view civil and political rights as being prior and primary, compared with social and economic rights (cf. Gavison 2002b). They are considered to be the first-generation of rights dealing exclusively with the concern of liberty as expressed in freedom of speech, the right to a fair trial and freedom of religion. Also from a historic national perspective, citizenship in its earliest version included civil rights, which comprised the rights necessary for the individual freedom-liberty of the person, thought and faith, the right to own property and to conclude valid contracts, and the right to justice. Therefore, with civil rights taken to be essential to the concept of constitutionalism, it must be possible to detect at the first stage of an emerging substantive constitutional order, in addition to the formal aspect of legalisation, some civil-rights elements indicating a civil global constitutionalism (II. type in figure 3.2.1.).

However, since civil rights are bound to remain empty promises for those who lack not only the economic means to make use of these fundamental civil rights, but also the political rights to make sure that the rule of law or legalisation is not systematically turned to the advantage of some groups over others, political citizenship emerged in historical development for the
supplement of civil citizenship. This political element stands for the right to participate in the exercise of political power and the guarantee of political freedom, including the right to vote and to be elected, to form political groups and to voice political views freely (Dahrendorf 1974: 680-681).

These political rights are important additive elements which enrich the global constitutional order. Unlike the two juxtaposing types of formal global constitutionalism and civil global constitutionalism, political rights provide a linking element which integrates formal governing procedures and individual liberties in a single concept, which I call the political global constitutionalism (III. type in figure 3.2.1.).

Political global constitutionalism indicates the simultaneous emergence of civil and political rights and legal procedures, or the emergence of governance structures which at the same time allow for civil-political integration. However political global constitutionalism does not imply that a global political citizenship is feasible, equipped with the right to vote international governing bodies. This type of constitutionalism rather indicates the opportunity for individuals to claim their personal freedoms, like the right to seek redress if injured by another, the right of peaceful protest, the right to a fair investigation and trial if suspected of a crime. More generally, this concept also refers to equal treatment of all citizens irrespective of race, sex or class. In other words civil-political integration means that individuals are protected from the coercive power of governing
authorities and are granted the liberty to participate in international politics by expressing themselves and engaging in a peaceful protest.

The international institution most concerned with the basic standards of personal liberties is the Human Rights Committee, a United Nations entity which is a body of independent experts that monitors implementation of the international Covenant of Civil and Political Rights by the state parties.

Table 3.2.1.: Types of global constitutionalism – 1st stage

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3.2.2. *Social and liberal global constitutionalism*

Substantive global constitutionalism cannot be limited to civil and political rights. Although, this category of rights is awarded primacy since it is concerned with individual freedoms (Gavison 2002b: 36), they too are bound to remain insufficient so long as economic and social differences prevent people from acquiring the means to exercise their rights.

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2 The United Nations Commission on Human Rights (UNCHR) was replaced as of March, 15 2006 by the newly created United Nations Human Rights Council.
At the outset of the 21st century increasing global transactions call for the consideration of redistributive aspects addressing the ‘new global risks’ of social and economic integration. These risks are related to the principle of equality, namely economic and social rights, and comprise the second generation3 of human rights (cg. Alston 2001). Therefore economic and social rights must be considered to enter the global constitutional debate in a second stage.

The first aspect is economic citizenship. The notion of economic citizenship as one of the major elements of civil citizenship is central to the idea of a global constitution. Global compensatory constitutionalisation aims at creating a level playing field for all citizens, attempting to redress inequality of opportunities for economic activity between citizens of different nations. The main types of constitutional activities in this field are market-enabling measures and reforms. Frequently they aim at the abolition of protectionist rules. The creation of the Internal Market of the European Community or the World Trade Organization (WTO) and its General Agreement on Tariffs and Trade (GATT), General Agreement on Trade in Services (GATS), and the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) are major examples of such a ‘negative integration’. Negative integration

3 In addition there is the third generation of human rights, which represents international concerns like the rights to a healthy environment, to natural resources, or to self-determination, but which have not yet reached the formal status of ‘hard law’. These concerns remain because of their conflicting nature subjects to ‘soft law’ arrangements and will not be considered here.
brought about by WTO can be seen as an important means of global compensatory constitutionalisation. The aspect of negative (economic) integration is represented by liberal global constitutionalism (IV. type in figure 3.2.2.). However, liberal global constitutionalism damages the individual’s social rights. One could even argue that negative integration in constitutional term not only protects individuals by creating a level playing field, but that it simultaneously damages the principle of protection of the individual, since individuals are now exposed to international markets and are thus much more vulnerable than in a closed economy (Cameron 1978; Katzenstein 1985). Therefore, under global (compensatory) constitutionalism, negative integration in the field of economic liberalisation is acceptable only if there is concomitantly some sort of positive integration in the field of labour and social security.

Therefore the aspect of social citizenship must also be considered. In conceptional 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 and education. In contrast to the negative integration in the case of creating economic 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’. In the international sphere this social citizenship takes the shape of social global constitutionalism (V. type in figure
3.2.2.). Arguably, the international institutions that are most concerned with the setting of basic social standards are the International Labour Organization (ILO) and the World Health Organization (WHO).

Going even further, an encompassing global compensatory constitutionalism (VI. type in figure 3.2.2.) has to be based, in addition to elements integrated in the first stage, on simultaneous positive and negative integration. Since liberal global constitutionalism damages the individual’s rights to social security, and social global constitutionalism violates the individual’s right to economic freedom, the encompassing global (compensatory) constitutionalism can best be achieved by a reciprocal compensation between individual and collective rights, between procedural mechanisms and substantive effects as well as between positive and negative integration.

In summary, I hold that global constitutionalism has a formal/procedural and a substantive aspect. There must be legalisation (formal aspect) and there must be an effect (substantive aspect). Since global constitutionalisation is not an ad hoc event, but rather a long-lasting process consisting of intermediate stages, its substantive measures can be subdivided into two stages. At the first stage, I argued, the emergence of the formal aspect should become visible (I. formal constitutionalism) as well as the emergence of first-generation substantive civil liberties (II. civil constitutionalism). Adding basic political freedoms, the constitutional subtypes of formal and civil constitutionalism meet in the most
encompassing form of first-stage constitutionalism (III. political constitutionalism). Only at the second stage of global constitutionalisation do the second-generation aspects of economic (negative integration) and social rights (positive integration) enter the field. Liberal constitutionalism (IV), which is ‘blind’ with regard to the violation of social citizenship rights, and social constitutionalism (V), which is ‘blind’ to the violation of economic citizenship rights, compensate for economic and social differences which prohibit people from acquiring the means to exercise their civil and political rights. Finally, encompassing compensatory constitutionalism (VI) is the most advanced type of global constitutionalisation and includes both formal and substantive measures, whereby the substantive measures are based on the effective first-stage civil and political integration as well as on effective negative and positive integration.

Table 3.2.2.: Types of global constitutionalism – 2nd step

| Negative Integration | Positive Integration |  |
|----------------------|----------------------|--
| market-producing measures establish economic citizenship |  |
| no                   | Positive Integration | yes |
| no                   | I-III. Formal/ civil/ political global constitutionalism |  |
| yes                  | IV. Liberal global constitutionalism | VI. Encompassing compensatory constitutionalism |
4. Conclusion

The purpose of the paper was to explore a typology of global compensatory constitutionalism which allows for the diversity of the global order and at the same time does not reduce its meaning to an overly exclusive definition. Starting from the nation-state setting three fundamental constitutional elements have been identified - the formal aspect of legalisation, the material dimension bearing civil, political, social and economic effects and the time factor allowing for a gradual emergence of a global constitutional order. On this basis, I distinguished between 6 types of global constitutionalism emerging in two stages: I. formal global constitutionalism, II. civil global constitutionalism, III. political global constitutionalism, IV. liberal global constitutionalism, V. social global constitutionalism and VI. encompassing compensatory constitutionalism. While the first three types originate from the integration of formal-legal aspects and substantive civil and political rights, the last three are subject to the negative and positive integration of economic and social rights.

Considering the substantive elements of a constitution and bringing in the time dimension, the paper goes beyond a mere static legal discussion of formal (procedural) aspects of constitutionalism and addresses an issue of international relations as yet neglected by political scientists.

However there are several limitations to this paper. First of all, it does not prove the actual existence of global constitutionalisation, nor does it examine
which national and/or international conditions might favour or hinder the emergence of the global constitutional setting. Addressing this issue in future research also requires dealing with operational issues. I do not consider the possibility of measurement of the concept of global constitutionalism, nor whether there is corresponding data available. In addition, we must be aware of the fact that the real world exhibits ‘limited diversity’ (Ragin 1987; 2000), which may prevent us from detecting all instances of global compensatory constitutionalism. Therefore the preliminary typology of the global constitutionalism remains a theoretical claim which still demands for its empirical verification.
5. Literature


Constitutionalism Beyond the State. Cambridge: Cambridge University Press, 27-54.


