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Global Constitutionalism from European and East Asian Perspectives

An Introduction

ANNE PETERS, TAKAO SUAMI, DIMITRI VANOVERBEKE AND MATTIAS KUMM

1 Current challenges

In the past decade, international crises have triggered fundamental questions about the current sociopolitical and economic order in all regions of the world. The worldwide financial crisis of 2007–2008 stimulated questions about monetary policies and more fundamentally about the existing economic model. The Euro-crisis caused in 2010 by the Greek public deficit and the mass influx of refugees into Europe since 2015 have been challenging the political leaders in the EU, which is the prime model for regional cooperation. How can we find a solution to the problems that Greece has been facing and – more important maybe – how can we prevent the crisis from spreading to other parts of Europe? The list of crises continues: Europe is the stage for numerous terrorist attacks, and Russia poses a mounting threat at Europe's eastern borders. These lead some to doubt the viability of the European strategy for peace building and peace preservation. Facing the new challenges, some EU member states such as Hungary and Poland seem to drift away from the rule of law, human rights and democracy and are thus shaking the very foundation of the EU.

East Asia has not been spared similar afflictions. The monetary and financial crisis of 1997–1998 and then the global financial crisis of 2007–2008 raised the question of how the region could establish or reform institutional structures in order to prevent similar problems from occurring in the future. More recently, several disputes about maritime boundaries, sovereignty, exploitation of resources and

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navigation in the seas of this region have destabilised the peaceful relationship among nations in East Asia. Above all and most recently, the nuclear threat by North Korea presents a major challenge in the region.

In a row of states in Europe and in East Asia, the rule of law is undermined by populist governments. In their foreign relations, some nation states seem to try to develop a more 'realist' discourse in which they notably question the role of international organisations. Alternatives to international organisations such as the UN and the EU have been ventilated by assertive nations or by subnational regions seeking to restore their past grandeur. These alternatives emphasise self-rule and are sceptical about transnational modes of decision making.

The year 2016 was crucial, a turning point. In Europe, after a referendum, the United Kingdom decided to leave the EU – an unprecedented move. In the United States, the least expected outcome of the presidential elections became a reality. Donald Trump, a businessman-turned politician, had only one short message: 'America first'. That message runs against cooperation between nations and joining forces to face global challenges. It appears as if we have moved from an inclusive world to an exclusive world, from internationalism to nationalism. The Doha Round negotiations on international trade law, which began in 2001, have not produced any fruitful result yet and are today almost forgotten. Moreover, the US administration decided in 2017 to pull out of the negotiations for a Transatlantic Trade and Investment Partnership (TTIP) agreement and to shelve the recently negotiated text of a Transpacific Partnership (TPP) agreement.

All these events reflect the apparent rise of the BRICSAM (Brazil, Russia, India, China, South Africa and Mexico) states and a concomitant decline of the United States and Europe. It has been pointed out that the political and economic shift has also brought about 'power shifts *in* international law'.[1] This cannot leave untouched the process of constitutionalisation which has arguably been transforming the structure and essence of international law.[2] So was this transformative momentum

[1] William W. Burke-White, 'Power shifts in international law: structural realignment and substantive pluralism' (2015) 56 *Harvard International Law Journal* 1–80 (emphasis added).

[2] Jerzy Zajadło and Tomasz Widłak, 'Constitutionalisation: a new philosophy of international law?', in Andrzej Jakubowski and Karolina Wierczyńska (eds.), *Fragmentation vs the Constitutionalisation of International Law: A Practical Inquiry* (London: Routledge, 2016), pp. 15–31, p. 30.

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only 'a hallmark of the period of U.S. leadership'[3] whose phasing out is accompanied by a reassertion of state sovereignty – against constitutionalist aspirations? This seems to be the thrust of the Chinese scholar and judge at the International Court of Justice Hanquin Xue, who insists on the centrality of the state for the functioning of international law: 'States are the crucial actors at both national and international level. . . . Any weakening of the status and role of the State, as demonstrated in many a case, could only mean more misery and sufferings for individuals'.[4] In a different context and with regard to Chinese courts, another author pointed out that the courts' 'involvement in foreign affairs is likely to remain limited by China's desire to maintain its authoritarian regime'.[5] Although 'China is increasingly applying international law granting rights to individuals in relation to public authorities, the Chinese judicial policy toward these rights appears rather conservative. . . . China's rise has produced a judicial policy that is open to the application of international law, but only when it poses little threat to executive authority.'[6]

The (re)emphasis on the importance of states may have been aided in part by the violation of basic Westphalian principles such as territorial integrity and the prohibition on the use of force by leading powers (e.g. the intervention in Iraq by the United States in 2003 and the annexation of Crimea by Russia in 2014). Similarly, the humanitarian intervention in Kosovo in 1999 is widely seen to have overstretched international law, and the application of the doctrine of the responsibility to protect in Libya in 2011 has not improved the situation of the population but has contributed to a profound destabilisation of the region.

It may well be that for a host of international legal rules and regimes seeking to advance constitutional objectives, such as the protection of human rights, 'the return of the state will likely have pronounced negative consequences. Over time these regimes may be ratcheted back as international law returns closer to its Westphalian origins as a system of

[3] Burke-White (n. 1), p. 77.
[4] Hanquin Xue, 'Comments on Hurrell', in James Crawford and Sarah Nouwen (eds.), *Select Proceedings of the European Society of International Law 3* (Oxford: Hart, 2012), pp. 27–29, p. 28. Likewise, in post-Soviet Russian international legal scholarship, a 'statist' school now seems to be dominant in the intellectual centres, and this fits with the political climate under President Putin (Lauri Mälksoo, *Russian Approaches to International Law* (Oxford: Oxford University Press, 2015), p. 99).
[5] Congyan Cai, 'International law in Chinese courts during the rise of China' (2016) 110 *American Journal of International Law* 269–288, at 288.
[6] Ibid.

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sovereignty, among sovereigns.'[7] Ingrid Wuerth has even argued that the international legal system needs to be recalibrated to fit our 'post-human rights era'. Her observation is that the doctrinal and theoretical expansion of international human rights norms, coupled with a weak to non-functioning implementation machinery and with selective, politicised enforcement, has fuelled resentment against Western double standards and – importantly – undermines the normative power of international law as a whole, in analogy to the broken windows theory in criminology.[8]

At first sight, all these developments are unfavourable to global constitutionalism. However, international law remains indispensable for resolving coordination problems among interdependent nation states and societies and for facilitating cooperation. Networks of both states and other actors continue to contribute to economic and social wealth. Multinational enterprises, civil society and individuals (both natural and legal persons) crossing borders influence the functioning of international society and domestic societies. Despite a 'souring' of the political and media discourse on globalisation,[9] the economic, social and political interconnectedness of states and societies is a persistent fact.[10]

In the face of strong bottom-up currents that are not restricted to one nation, states cannot simply reverse the trends by mere state-induced policies. Even the major powers of the world such as the United States and China seem incapable of turning the tide. For example, US President Trump declared that the United States intends to exercise its right to withdraw from the Paris Agreement on Climate Change as soon as the

[7] Burke-White (n. 1), at 77.

[8] Ingrid Wuerth, 'International law in the post-human rights era' (2017) 96 *Texas Law Review* 279–349.

[9] See for an excellent account of the current globalisation-sceptical political and media discourse: Nikil Saval, 'Globalisation: the rise and fall of an idea that swept the world', *The Guardian*, 14 July 2017.

[10] See the KOF Swiss Economic Institute's measurements of globalisation in its economic, social and political dimensions. According to that institute's indicators, globalisation is ongoing. See for the methodology (indices and variables) of the KOF Index of Globalization: http://globalization.kof.ethz.ch/media/filer_public/2017/04/19/variables_2017.pdf based on Axel Dreher, Noel Gaston and Pim Martens, *Measuring Globalization: Gauging Its Consequences* (New York: Springer, 2008). See for nuanced assessment of the depth and breadth of *economic* globalisation (measured in terms of the mobility of goods and persons and financial flows): Pankaj Ghemawat, *Globalization in the Age of Trump* (Boston, MA: Harvard Business Review, 2017). Ghemawat identifies 'semiglobalization': international (economic) interactions are significantly fewer than domestic interactions.

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state is eligible to do so[11] 'unless the United States identifies suitable terms for reengagement'.[12] This phrase might indicate that the United States seeks to avoid abandoning the international climate regime completely. The Japan–EU economic partnership on which agreement in principle was reached in July 2017 and the decision in November 2017 of eleven nations to move ahead with the TPP, without the United States, demonstrate that new alliances can be forged. Both moves aim at keeping the option open for the United States to rejoin the negotiation table on the TPP initiative. Path dependent choices of the past cannot easily be undone. International cooperation in the fields of security, development, trade and investment, environment, fair competition and technology seems necessary and cannot be simply abandoned, because all nations face these issues. A coherent and common approach appears to be the only way to tackle the problems. In other words, global problems can be effectively solved only by global responses. Before discussing the specific contribution of global constitutionalism to problem solving, the challenges of coordination and the need for a European–East Asian dialogue in this context, we need to clarify some key concepts, which will also inform the discussions in the following chapters.

2 Key concepts[13]

Global constitutionalism, as an '-ism', is a set of ideas (or an ideology) which encourages various types and directions of legal analysis. It first reads and reconstructs some features and functions of international law (in the interplay with domestic law) as forming constitutional bits and pieces and as fulfilling a constitutionalist programme (positive analysis). Second, global constitutionalism seeks to provide arguments for the further development of institutions and procedures in a specific direction (normative analysis). The positive analysis lies in

[11] Under Art. 28 of the Paris Agreement, this is possible three years after the entry into force of the agreement for the United States, and that will be on 4 November 2019.

[12] United Nations, Depositary Notification, Communication of the United States, 4 August 2017, UN Doc. C.N.464.2017.TREATIES-XXVII.7.d, https://treaties.un.org/doc/Publication/CN/2017/CN.464.2017-Eng.pdf.

[13] See for an overview of the literature on global constitutionalism, global (or international) constitutional law and constitutionalisation: Thomas Kleinlein and Anne Peters, 'International constitutional law', in Anthony Carty (ed.), *Oxford Bibliographies in International Law*, 2nd ed. (Oxford: Oxford University Press, 2017). See most recently Anthony F. Lang and Antje Wiener (eds.), *Handbook on Global Constitutionalism* (London: Elgar, 2017).

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(re-)describing parts of international law – in their interplay with domestic law – as reflecting complementary constitutionalist principles, notably the rule of law, human rights and democracy (the constitutionalist 'trinity'[14]). The normative contribution lies in the employment of these constitutionalist principles as a benchmark for the critique of international law as it stands and in the vision that the international legal order (its institutions and procedures) can and should be interpreted and progressively developed in the direction of greater respect for and realisation of those principles. Thus, global constitutionalism serves as a heuristic tool, as a vocabulary of critique and as a carrier of a normative agenda.[15]

Global constitutionalism has roots in the historic political movement of 'constitutionalism', which, in eighteenth- and nineteenth-century Europe and America, called for written constitutions for nation states. The basic purpose of the constitution then was to subdue political power to the law, hence to create a government of laws, not of men. In order to reach that objective, the constitution was to embody certain material principles, most importantly the separation of powers or checks and balances. Article 16 of the French Declaration of the Rights of Man and Citizens of 26 August 1789 views the protection of human rights and separation of powers as the necessary contents of a constitution ('Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution').

Constitutionalism of the twenty-first century seeks to realise a political space governed by constitutional law, which would functionally correspond to the 'thick' conception of a constitution.[16] So constitutionalism is wedded to the foundational idea of free and equals governing

[14] Mattias Kumm, Anthony Lang, James Tully and Antje Wiener, 'How large is the world of global constitutionalism?' (2014) 3 *Global Constitutionalism* 1–8, at 3.

[15] See for a quest for a more normatively conscious employment of 'constitutionalisation theory' with a moral compass: Garrett Wallace Brown, 'The constitutionalization of what?' (2012) 1 *Global Constitutionalism* 201–227.

[16] Some authors prefer a still 'thicker' (or 'narrower') conception of a constitution which would call a given legal text a constitution only if it has been made by a *pouvoir constituant* in a kind of constitutional big bang (as a manifestation of popular sovereignty); see, e.g., Dieter Grimm, 'The achievement of constitutionalism and its prospects in a changed world', in Petra Dobner and Martin Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford: Oxford University Press, 2010), pp. 3–22. Such a constitution is not present on the international realm, and it is doubtful whether this conception fits to the global sphere.

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themselves through law, both within the state and beyond it.[17] This idea is translated into a commitment to human rights, democracy and the rule of law, as mentioned. Different conceptions of constitutionalism then reflect different accounts of how these principles are spelt out in more concrete terms (e.g. with regard to the idea of a demos or demoi and a constituent power as points of reference and origin, the role of the international community, the formality of the law in its relationship to background principles and so on). The endorsement of constitutionalism beyond the state may require novel and modified institutions and procedures to implement the mentioned foundational idea of free and equals governing themselves through law. For example, the mechanisms of democratic governance as exercised in some nation states might be unworkable in the international realm or in some regions of the world. Proxies might be other forms of inclusive, deliberative and participatory governance, if based on transparent institutions and procedures. Finally, a (domestic, regional or global) society of free and equal individual human beings seems to require a minimum of social security and solidarity mechanisms to allow for 'social citizenship' in the various nested and overlapping polities we live in.

The idea of global constitutionalism does not necessarily comprise the claim that there is an international 'Constitution' with a capital C. Obviously, international constitutional law lacks the typical (albeit not indispensable) formal features of constitutional law, namely the quality of 'higher law' (trumping ordinary law and being more difficult to amend than ordinary laws) and its codification in one single document called Constitution. However, we find institutions, processes and principles within the international legal order (e.g. in the UN Charter[18] but arguably also in non-state-made or hybrid regimes[19]) which fulfil typical

[17] See on the continuities and similarities of 'nation-state constitutionalism' and 'global constitutionalism', seeking to avoid a mere 'expansion' to the global realm: Michel Rosenfeld, 'Is global constitutionalism meaningful or desirable?' (2014) 25 *European Journal of International Law* 177–199, at 192 and 199.

[18] See for a reading of the UN Charter as 'the constitution of the international community' Bardo Fassbender, 'International constitutional law: written or unwritten?' (2016) 15 *Chinese Journal of International Law* 489–515, at 513, with further references also to his prior seminal work. Julian Arato, 'Constitutionality and constitutionalism beyond the state: two perspectives on the material constitution of the United Nations' (2012) 10 *International Journal of Constitutional Law* 627–659 usefully distinguishes between a juridical and a political notion of the UN Charter as a constitution.

[19] The idea of 'societal constitutionalism' stemming from reflexive or autopoietic processes of norm creation by societal transnational actors has been most elaborated by Gunther Teubner. See Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and*

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constitutional functions. These functions are to found, to organise, to integrate and to stabilise a political community, to contain political power, to provide normative guidance and to regulate the governance activities of law-making, law application and law enforcement.

In this context, the concept of 'constitutionalisation' denotes both legal processes in the real world of law and the accompanying discourses (mostly among academics, less among judges and even less among political law-making actors).[20] The evolution from an international order based on some organising principles such as state sovereignty, territorial integrity and consensualism to an international legal order which acknowledges and has creatively appropriated and – importantly – modified principles, institutions and procedures of constitutionalism may be qualified as a kind of constitutionalisation 'within' international law (and even within particular international organisations[21]) and discourse. This evolution necessarily presupposes some intertwinement of international law with domestic law, but it is by no means irreversible.

Globalization (Oxford: Oxford University Press, 2012). See along this line of thought, e.g., Kolja Möller, 'Formwandel des Konstitutionalismus: Zum Verhältnis von Postdemokratie und Verfassungsbildung jenseits des Staates' (2015) 101 *Archiv für Rechts- und Sozialphilosophie* 270–289.

[20] The idea of constitutionalisation implies that a constitution (or constitutional law) can come into being in a process extended through time. It also implies that a legal text (or various legal texts) can acquire (or eventually lose) constitutional (and constitutionalist) properties in a positive feedback process. A text can therefore be more (or less) constitution-like and more or less satisfy principles of constitutionalism. Garrett Wallace Brown usefully distinguishes between 'constitutionalisation' understood as a mapping exercise and 'global constitutionalism' as a more critical and normative shaping activity (Brown (n. 15), at 227).

[21] See on two waves of 'organisational' constitutionalism underscoring first the constitutive and enabling function of constitutional law and later its constraining and checking function: Anne Peters, 'International organizations and international law', in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds.), *The Oxford Handbook of International Organizations* (Oxford: Oxford University Press, 2016), pp. 33–59. See also Viljam Engström, *Constructing the Powers of International Institutions* (Leiden: Martinus Nijhoff, 2012), pp. 145–183 (chapter 6 on 'Constitutionalism as a framework for debating powers'). See on the WTO recently Joanna Langille, 'Neither constitution nor contract: understanding the WTO by examining the legal limits on contracting out through regional trade agreements' (2011) 86 *New York University Law Review* 1482–1518. Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, 'From public international to international public law: translating world public opinion into international public authority' (2017) 28 *European Journal of International Law* 115–145 ask for a legal framework for pursuing the quest for the effectiveness and legitimacy of international institutional law and are sceptical of global constitutionalism because they find it too focussed on human rights (ibid. at 128–130).

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3 A European–East Asian dialogue

Our book confronts global constitutionalism, which is considered to be Eurocentric, with East Asian critiques. The perception of Eurocentrism flows from the fact that until now, global constitutionalism in its various forms has been defined, defended and discussed primarily by European (and to a lesser extent by US) scholars. Scholars in many other parts of the world have not been fully implicated in this discussion. It is therefore unsurprising that notably Asian scholars have mentioned 'Western bias and hegemony' as one of the major challenges to global constitutionalism.[22] The Nepalese scholar Surendra Bhandari stresses that 'the emergence of constitutionalism in international law . . . is neither Eurocentric in its concept and nature nor typically American, Latin American, African, or Asian. It is rather fashioned by the common and universal aspirations of humankind. Nevertheless, the practical realm of designing concepts and transmuting them into the construct of international rules has overwhelmingly been westernized, which is one of the reasons for the global disenchantment and backlash to global constitutionalism.'[23]

Without the engagement of scholars from other parts of the world, the universalist claims underlying global constitutionalism ring hollow. One region not sufficiently represented in the discussion on global constitutionalism is East Asia where nearly half the world's population and a growing share of global economic and military capacities are located. This region is important not only because of the increasing coherence through many integrative economic, political and sociocultural processes but also because of the intensity of the discussion on the role of law in the development of this region and because of important dissident voices.

We are aware that caution is warranted when using the concept of East Asia and juxtaposing it to Europe. In Christopher Dent's words: 'East Asia is probably the most diverse region in the world in terms of economic development asymmetry, mixed political regimes and socio-religious traditions and characteristics.'[24] The impact of history on the region is important as well and must not be neglected in the discussion on global constitutionalism in East Asia. Dent stresses that East Asia 'is

[22] Surendra Bhandari, *Global Constitutionalism and the Path of International Law: Transformation of Law and State in the Globalized World* (Leiden: Brill, 2016), pp. 41–44.
[23] Ibid., pp. 266–267.
[24] Christopher M. Dent, *East Asian Regionalism* (London: Routledge, 2016) (originally published in 2008), p. 3.

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a region marked by historic animosity between rival nations, where conflicts still persist between old and new states alike, and where nationalism remains a potent force in many countries of the region'.[25]

The title of this book does not intend to imply that 'East Asia' is one coherent and delimited entity. We are critical of such a point of view. On the other hand, we need to realise, with Peter Katzenstein, that 'the absence of full agreement on the boundaries of "Europe" and "Asia" has not stopped political actors from invoking and politically exploiting regional terminology'.[26] How then to conceptualise East Asia? Katzenstein explains that 'in the case of Asia, for example, the definition of the region that includes Southeast and Northeast Asia – essentially the Association of Southeast Asian Nations (ASEAN) plus China, North and South Korea, and Japan – and that excludes North America, Australia and New Zealand, and South Asia – that is, the lands of British colonial settlement and imperial control – has both been contested and proved durable in most political initiatives for bringing about Asian or East Asian regionalism'.[27] Our employment of the concept 'East Asia' will mostly refer to developments of East Asia as a region including the aforementioned South-East and North-East Asian nations. The book contains the viewpoints of mostly North-East Asian scholars who do not reflect a common view of East Asia.

False essentialism needs to be avoided not only with regard to Asia or East Asia as regions but also with regard to purported regional approaches to international law. The Indian scholar Bhupinder S. Chimni rightly points out that 'both an essentialist cultural/civilizational explanation and a crude materialist understanding of an Asian approach to international law need to be rejected. There are no pure western or non-western ideas, cultures and civilizations. The "Asian Civilization" or rather "Asian Civilizations", like all other civilizations, is a complex configuration of diverse and multiple cultures and innumerable interpretations of it.'[28]

[25] Ibid.
[26] Peter J. Katzenstein, *A World of Regions: Asia and Europe in the American Imperium* (Ithaca, NY: Cornell University Press, 2015), p. 11.
[27] Ibid.
[28] Bhupinder S. Chimni, 'Is there an Asian approach to international law? Questions, thesis, and reflections' (2008) 14 *Asian Yearbook of International Law* 249–264, at 250. He also points out that 'an Asian approach to international law must distinguish between the civilizational values embedded in the life, world and struggles of Asian peoples and the practices of Asian States' (ibid., p. 251).

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