

## Editorial

# Global constitutionalism: Human rights, democracy and the rule of law

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### Why a new journal on global constitutionalism?

When the European Court of Justice (ECJ) issued its judgment in *Kadi and Al Barakaat*<sup>2</sup> – better known now as the *Kadi case* – it highlighted the constitutional dimension that results from the interaction between different political and legal arenas in the global system. The ECJ challenged the hierarchic international legal order in which the United Nations Security Council (UNSC) was understood to have final normative authority. In so doing, the ECJ reiterated the centrality of the rule of law in the protection of human rights. In the process the case promoted the constitutionalisation of the global system. At the same time, the ECJ justified its judgment by the need to protect the constitutional order of the EU and the constitutional values of its member states. While scholars of European law have addressed the far-reaching implications of this case, there has been less attention paid to it by those working on wider issues in international relations theory, international law and political science more generally. This case demonstrates how the interaction between different political and legal orders impacts on the fundamental rights of individuals in ways that deserve much more attention. It is, therefore, a good example of how constitutional questions and claims are emerging beyond the state and how they require the input of different disciplines at the intersection of law and politics.

If we take the range of academic output on the case as an indicator, it clearly is influential far beyond the discipline of European or International Law, possibly marking a critical juncture for the field of international

<sup>1</sup> This order reflects the sequence rather than the substance of each submission; the resulting mission of the journal is shared by all editors.

<sup>2</sup> See *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML>.

relations theory as well. After all, this case addressed the way human rights, democracy and the rule of international law were disputed, upheld, defended and reconstituted through social practices beyond the boundaries of the national constitutional realm.

Nor is this the only issue or case that raises questions at the intersection of international law and politics. The invocation of the principle of the Responsibility to Protect as a justification for the intervention in Libya might seem far distant from the issues raised by the *Kadi case*, but, in fact, similar issues can be found here as well. Some have argued that the Responsibility to Protect (R2P) is merely rhetorical, while others have argued that since the 2005 General Assembly Summit it has become something closer to an international norm (Bellamy *et al.*, 2011; Seibel 2011). The intervention in Libya was framed by many in the policy making and scholarly communities as a manifestation of this norm (Pattison *et al.*, 2011). The debate surrounding R2P raises important questions about legality, legitimacy, and the constitutionality, issues parallel to, but certainly not the same as, those raised in the *Kadi case*.

While these are certainly not the only cases in the past few years, the judgment in the *Kadi case* and the intervention in Libya strongly suggest that more interdisciplinary exchange and serious engagement across a number of disciplinary boundaries is required to address the coming challenges to fundamental norms that are held as central constitutional principles in most contemporary societies around the globe. Constitutionalism as an idea sits precisely at the intersection of law and politics, and it is for this reason that when issues emerge at a global level in the interstices of law and politics, the idea of global constitutionalism becomes relevant. In order to address such issues, we have launched this new interdisciplinary journal, *Global Constitutionalism*.

### *The paradox: Constitutionalism unbound*

While in scholarly debate the concept of ‘global constitutionalism’ and its normative potential is viewed with some suspicion, a growing number of critical voices on decision-making procedures in the UNSC and global financial practices, in particular, stress the necessity to establish checks and balances in the global arena. Yet, this call is not uncontested. Thus, international relations in the 21st century reveals the paradoxical increase of things constitutional such as constitutionalisation, quasi-constitutional settings and practices, as opposed to contested compliance with international law, rules and procedures by powerful actors in the international system. The paradox rests on an imbalanced parallel development of a quantitative change on the terms of engagement, negotiation, bargaining and arbitration among a multiplicity of groups, organisations and actors, on the one hand,

and the lack of qualitative constitutional means to bind decisions and ground them in normative roots demonstrating their universal validity, on the other.

While the global realm harbours more constitutionalised international organisations and an increasingly diverse range of actors (Zürn *et al.* 2007; Binder 2008), compliance with international law, even with European law, is contested (Wiener 2004). This observation notwithstanding, states and representatives of government do show a clear urge to demonstrate that their actions are legitimate, as numerous references to fundamental norms such as human rights, democracy and the rule of law, as well as organising principles and standards such as the principle of shared but differentiated responsibility, sustainable fisheries, environmental standards and so forth show (Risse, Ropp and Sikkink 1999; Wiener and Puetter 2009; Brunnée and Toope 2010 among others). This context suggests a shift from globalised towards constitutionalised relations in the global realm, creating a situation where constitutionalism appears to be spreading, while remaining ‘unbound’ at the same time.<sup>3</sup>

The resulting changes in the management of international affairs raise deeper questions about the normative underpinning of international relations concerning justice, democracy, fairness and legitimacy (Rawls 2002; Benhabib 2007; Pogge 2009; Sen 2009). In addition, these changes challenge long-held assumptions about agency within the global realm. Thus, are states still the main keepers of normative principles, and do they still carry the sole responsibility to protect (their) citizens’ fundamental rights? And, if that is not the case, who fills the gaps, and to what effect? These issues push approaches that have specifically focused on changing politics and law in light of globalising international relations, namely global governance, world society, interactive international law and global constitutionalism to their conceptual limits. They offer a good starting point to address normativity based on problem-oriented theorising. As heuristic approaches to international relations they may therefore be of interest to international and comparative public lawyers as well. The public debate about theoretical challenges and possibilities is of interest to the editors. In light of this, one more specific and related challenge that we would hope contributions to *Global Constitutionalism* might address is how normativity is possible outside the limited territory of modern liberal democracies (Tully 2002; Forst 2007; Tully 2008a, 2008b)?

### *Definitions*

While a degree of constitutional quality in the global realm has been building political momentum over the past decade, scholars remain hard-pressed to

<sup>3</sup> For this argument, see Wiener and Oeter (2011) *Constitutionalism Unbound: Introducing Theoretical Triangulation for International Relations*, unpublished research proposal, University of Hamburg, on file with the authors.

identify the detailed practices that are conjured up by the term ‘constitutional quality’. The purposes and practices of global constitutionalism are not altogether straightforward and, so far, the phenomenon has received little attention from the academic fields of politics and international relations theory (IR), even though not only the EU but also the World Trade Organisation (WTO) and, perhaps most importantly, the UN and their various bodies have made decisive moves towards constitutionalising their inter-national operations. The literature in the field of international and/or European law which has addressed these constitutionalising moves defines constitutionalisation as ‘the gradual emergence of constitutionalist features in international law’ which are expected to ‘compensate for globalization-induced constitutionalist deficits on the national level’ (Peters 2009: 397).

Much has been written about the various micro-processes of constitutionalisation and their input on these international organisations (Cass 2001; Dunoff and Trachtman 2009), but the normative debate about the dimensions of what constitutional quality in the global realm ‘ought’ to look like, on the one hand, and which range of constitutional practices that might be ‘possible’ given the global diversity of constitutional practice, on the other, has only recently emerged. It is important to prevent any discipline from dominating the debate about these developments. To be sure, a ‘constitution’ is traditionally put into place to regulate or keep politics in check by rules that have been put into place by the *pouvoir constituant*, i.e. members of a community as its constituent power. For some, such a concept may have a higher currency with lawyers and political philosophers than with political scientists and sociologists but there is nothing in the issues that requires that to be the case. On the contrary, as we have noted, the nature of constitutionalism as being at the intersection of law and politics, makes a particularly strong argument for multi-disciplinary engagement. As this is understood by a growing number of scholars from different disciplines we can expect a vigorous debate about global constitutionalism. The academic literature alone (notwithstanding media reports which often add yet another altogether different set of meanings) diverges widely in their respective interests and understandings of global constitutionalism. In this context it is crucial to agree on common definitions and concepts or, at least, to provide a common platform to debate them. One of the journal’s purposes is to offer a space for just such a debate.

### Three ‘C’s in global constitutionalism

#### *C1: Constitution*

A constitution is traditionally established in order to keep politics in check (Snyder 1990; Preuss 1990; Rosenfeld 1994). The constitutional norms,

principles and procedures provide a reference frame that operates, in the best case, as a third party between two contracting parties and a dispute solver according to the principle of ‘triadic dispute resolution’ (Stone Sweet 1999: 147). The constitutional rules are considered as commonly agreed and constitutional legitimacy follows from the – albeit hypothetical – assumption that it has been put into place by the *pouvoir constituant*, i.e. members of a community that are conceptualised as the constituent power of a constitution (Galloway 1998).

### *C2: Constitutionalisation*

Typically the phenomenon of constitutionalisation on a global scale has been observed in the environment of supranational or international organisations. It reflects the need to put innovative regulatory or principled practices into place. The European Union (EU) is the most successful example of constitutionalisation, with constitutional law now providing the hermeneutics for the interpretation and application of EU law and constitutionalism becoming the dominant language of its politics (de Búrca and Weiler 2011; Maduro 2012). But international organisations such as the World Trade Organisation (WTO) and the UN are also increasingly subject to a constitutional discourse with the intention to check, regulate and assess the legitimacy of the politics of world trade policy, environmental policy, human rights policy and post-conflict policy (Dunoff and Trachtman 2009; Tomuschat 2009; von Bogdandy *et al.* 2010). All these changes reflect the shift from globalised towards constitutionalised international relations. This shift towards constitutionalisation defines the process by which institutional arrangements in the non-constitutional global realm have taken on a constitutional quality. However, constitutionalisation is frequently documented as occurring in a relatively spontaneous, little coordinated and even elusive manner (Cass 2001, 2005). Therefore, the extent and quality of constitutionalisation remain to be established by further research. Politically, this development brings with it potential conflict following contested constitutional norms, principles and procedures. This situation raises the question whether the familiar – modern – constitutional reference frame is suitable for assessing and understanding constitutionalism beyond the state.

### *C3: Constitutionalism*

As a novel concept, global constitutionalism, has evolved from more familiar observations of ‘modern constitutionalism’, ‘constitutionalism beyond the state’, ‘postnational constitutionalism’ or ‘European constitutionalism’ (Tully 1995; Shaw 1999; Weiler 1999; Walker 2000; Weiler and Wind 2003; Walker and Loughlin 2007; Krisch 2011). Similar

to political scientists' attempts to theorise 'governance without government' in the 1990s (Rosenau and Czempiel 1992) global constitutionalism grapples with the consequences of globalisation as a process that transgresses and perforates national or state borders, undermining familiar roots of legitimacy and calling for new forms of checks and balance as a result. The concept of global constitutionalism has only become a regular if often critically applied reference in international law during the past decade. To political scientists and especially international relations theorists, the concept's application is unfamiliar and arguably suspicious. After a decade into first observations about global constitutionalism a literature review still shows the recurring efforts to provide definitions, thus sustaining the observation that the field is still unwieldy and in-the-making. As a concept that remains confusing to some, raises scepticism among many and inspires constructive debate among others, global constitutionalism has become an interdisciplinary academic research field. It is therefore an 'academic artefact' (Weiler 1999) rather than an actual constitution.

### *Three schools: Functionalist, normative, pluralist*

Contributions to the debate might be organized in terms of three schools which we identify here as functionalist, normative or pluralist.<sup>4</sup> While all schools share the observation of a qualitative shift from globalised towards constitutionalised relations, and take a historically sensitive approach to constitutionalism, the concept of global constitutionalism as applied and developed by the contributors to each school reflects different expectations (Wiener 2011). A notable feature of global constitutionalism as a new concept in the Social Sciences and Law is that the distinctive perspectives are not predominantly informed by any single disciplinary approach. Instead, the distinctive characteristic of each school is based on the way in which the concept is approached and applied. The primary difference among the three schools is pragmatic rather than philosophical. It is practice-based, in so far as their defining features have developed according to a choice of mapping the global realm according to constitutional standards. This distinction is thus derived from the main standpoints, interests, and principles that situate each school within the broader field of global constitutionalism. Leading questions address the purpose and possibilities of constitutionalism in order to develop the most feasible approach to justice and legitimacy in the global realm.<sup>5</sup>

<sup>4</sup> For a different assessment compare Anne Peters' distinction of three 'strands' (Klabbers, Peters and Ulfstein 2011).

<sup>5</sup> We envision these three schools as only one possible way to organize the literature on global constitutionalism. Contributors should not feel bound by these categories in their own literature reviews.

The following details each school's respective distinctive focus as well as the areas where interfaces exist between the schools.

The **normative school** sees global constitutionalism as a legal or moral conceptual framework that guides the interpretation, progressive development or political reform of legal and political practices beyond the state to reflect a commitment to constitutional standards. This may be required because constitutionalism at the national level is inherently deficient for the effective institutionalization of constitutional normative commitments, given the negative externalities it inevitably generates, and thus needs to be complemented by international institutions and legal practices that reflect constitutional standards (Kumm 2009; Maduro 2009). Or it may be required because purposeful constitutionalisation in the global realm compensates for constitutional loss at the national or subnational level (Peters 2009). Some argue that a constitution properly so called already exists in the form of the UN Charter or the European Union's Treaty framework, thus mobilising Kantian regulative ideas with a view to enhancing the constitutional quality of international conventions (Fassbender 1998; Held 2005; Eriksen and Fossum 2006; Habermas 2011). While agreeing on the preference for shaping the world order according to modern principles of constitutional law and justice, the normative school differs sharply between supporters and opponents of a global constitution (Eriksen 2005; Fassbender 2007; Kumm 2009). Others hold that a constitution without a state as the context of the people as the constituent power of any constitution is neither desirable nor possible (Grimm 1995; Loughlin 2010).

The **functionalist school** typically studies processes of constitutionalisation which are revealed through bargaining and negotiations in the environment of international organisations such as the WTO (Fischer-Lescano and Teubner 2004; Kingsbury, Krisch, and Stewart 2005; Dunoff 2009; Trachtman 2009) and the EU (Rittberger and Schimmelfennig 2006). This school focuses on the impact of constitutionalism on mapping the global terrain according to new standardised procedures and regulatory agreements. As Dunoff and Trachtman emphasize, this 'approach is largely taxonomic, rather than normative'. Accordingly, studies applying this framework will be interested in examining 'the extent to which law-making authority is granted (or denied) to a centralized authority' as the 'distinguishing feature of international constitutionalization.' To that end they 'focus on the extent to which international constitutions enable or constrain the production of international law' (Dunoff and Trachtman 2009: 4).

Arguably among the most contested of the three schools, the **pluralist school** includes scholars who consider mapping and shaping constitutional

quality beyond the state as of equal importance. Unsurprisingly, therefore, this school involves a fair share of universalists. Generally pluralists emphasise the importance of distinct ancient, modern and post-modern eras of constitutionalism (see most explicitly Tully 1995, 2002; Walker 2002, 2006 [2003], 2009, 2011). Some take a critical approach to universalist assumptions and theorise constitutional change as contextualised, contingent and constitutive but others attempt to reconcile the new constitutional forms with more traditional universal constitutional ideals. Its authors would typically question the uncritical reference to the regulative ideal of neo-Kantian federalism, or the liberal community ideal often referred to in IR theory (Wiener 2012) as stable regulative frames for constitutional change in the global realm. Much of the cutting-edge contributions to this school draw on studies of regional or subnational processes of constitutionalisation beyond the state such as for example the work of Neil Walker (2000), James Tully (1995), Wind and Weiler (2003) and Türküler Isiksel (2010). Other contributions build more specifically on legal pluralism (see e.g. Halberstam and Stein 2009), Krisch (2010) and Stone Sweet (2002), von Bogdandy (2004, 2006), Kumm (1999, 2005) and Maduro (1999, 2003a, 2008, 2012).

While all three schools generally share the observation of enhanced constitutional quality beyond the nation/state as a result of processes which can be summarised as a major shift from globalised towards constitutionalised inter-national relations, and hence agree that global constitutionalism is a new social phenomenon, the consequences derived from this observation could hardly be more opposed. The primary dividing line between the groups emerges according to their respective answer to the question of whether they consider mapping or shaping the central activity of global constitutionalism. ‘Mapping’ here means identifying and explaining the processes of constitutionalism at the global level, while ‘shaping’ means contributing to the actual processes of constitutionalism through concrete proposals for legal or political innovation.

Accordingly, the *normative* school engages in the project of shaping the global order according to specific normative principles. The key conceptual approach of this group thus rests on the extension of principles, norms and rules of modern constitutionalism beyond the modern state with the goal of constructing a global order. The *functionalist* school focuses on the impact of constitutionalism on mapping the global terrain according to new practices. The key concept for this group is therefore that of constitutionalisation. And, the *pluralist* school combines mapping and shaping, taking a reflexive approach that relates the process of structured observation (mapping) with that of normative construction (shaping).



That is, it takes account of the social practices of constitutionalism as they extend beyond modern state boundaries and with the intention to identify the variety of possible and desired principles, norms and rules of constitutionalism that are considered appropriate by a plurality of global actors. Accordingly, this group involves mostly, but not only, pluralists, pragmatists and critical scholars.

Despite these distinct standpoints on how to use global constitutionalism, it is important to acknowledge that the boundaries between the schools are fuzzy. Often a scholarly perspective is developed from a two-tiered perspective which comfortably combines two schools. Examples for this approach are Anne Peters' or Miguel Maduro's calls for purposeful constitutionalisation to compensate for normative deficits following globalisation (Maduro 2003b, Peters 2009); Mattias Kumm's functionalist distinction between small and large c constitutionalism on the one hand, and his cosmopolitan claim for constitutionalism 'as a jurisprudential account claiming to describe the deep structure of public law' (Kumm 2009: 262); Jo Shaw's postnational approach to European constitutionalism which advances a normative argument for responsibility while discarding the modern constitutional architecture favoured by the normative school's main protagonists (Shaw 1999); or Nico Krisch combination of the functionalist and pluralist schools when writing with Kingsbury and Stewart on Global Administrative Law (Kingsbury *et al.* 2005), on the one hand, and when he is developing the concept of postnational constitutionalism (Krisch 2010), on the other. Another way in which two schools combine is the shared focus of some members of both the normative and pluralist schools on the way that non-state actors are able to exercise agency to shape the development and modification of constitutional norms (Wiener 2008; Forst 2011). As these would argue, the shift from globalised towards constitutionalised international relations comes with enhanced institutionalisation and diffuse normative reference, a scenario of 'constitutionalism unbound' (Wiener and Oeter 2011). This global situation is expected to generate contested compliance as individuals – politicians, civil servants, parliamentarians or lawyers – who have been trained in different legal traditions and socialised in different day-to-day circumstances seek to interpret them. To assess probable scenarios of norm recognition or contestation, it is therefore important to recover the interrelation between the social practices that generate meaning, on the one hand, and public performance that interprets the norm for political and legal use, on the other (Kratowchwil 1989).

Notably, the distinctive perspectives are not predominantly informed by disciplinary approaches, e.g. as lawyers or political scientists, but

follow the way in which the concept is used. The main distinctive features reflect the scholars' conceptions of the shift from globalised towards constitutionalised international relations by either *mapping* or *shaping* the global realm according to constitutional standards. A key issue of contention is the contested meaning of things 'constitutional'. According to some constitutional lawyers, we can speak of the constitutional validity of a principle, norm or procedure once it can be considered as a value reflecting the concerns of all humankind, such as was the case with the United Nations Convention of the Law of the Sea (UNCLOS), (Preuss 2011). Whether or not the changes observed in the environment of international organisations such as the EU, the WTO and the UN and which have been 'constitutionalised' (compare, e.g. Cass 2001, Rittberger and Schimmelfennig 2006, Dunoff 2009, Trachtman 2009) do live up to that condition of constitutionality, remains to be demonstrated on a case by case basis.

### *Methodology*

The journal has no specific methodological agenda, other than rigorous scholarship which focuses on the issues raised above. So, for instance, we are open to historical studies that address constitutionalism at a global level, empirical investigations of current practices, legal analyses of court judgments, or normative critiques of political practices, to name only a few. The very nature of an interdisciplinary journal such as this is to be as methodologically pluralist as possible. Even within the various disciplinary perspectives (law, politics, sociology), we have no single preferred approach. Our intention is that the journal will be defined not by a methodological approach but by a substantive interest in and engagement with the themes of constitutionalism at the global level. The distinction between mapping and shaping identified in the previous section should also signal that we are interested in works that both fall within the traditional scholarly roles of explaining and understanding and also those that advance the political and legal agenda of global constitutionalism. We invite contributions from all scholars covering this range. Our only criterion is that every contribution will be subject to rigorous interdisciplinary anonymous peer review and assessment as befits an academic journal.

As politics, policy making and jurisprudence move across nation-state borders into the realm of international relations, the constitutional basis of democratic governance is threatened (Zürn 2000). Current regional and universal institutional arrangements have been characterised as 'small-c' constitutional settings. That is, while bearing constitutional quality, they are not fully compatible with modern constitutional democracy, i.e. a 'large-C' constitutional setting (Dunoff and Trachtman 2009; Kumm

2009). Are these sufficient to maintain democratic governance despite moving core processes and procedures across the boundaries of the liberal state (Kohler-Koch 1998; Jachtenfuchs and Kohler-Koch 2003)? Do international organisations require further constitutionalisation akin to the EU's example (Habermas 1995; Grimm 1995; von Bogdandy and Bast 2006; von Bogdandy *et al.* 2010)? Do functional changes such as disaggregated sovereignty, policy networks, epistemic communities or other communities of practice offer the institutional setting for the required normative underpinning to reflect the shift from globalised to constitutionalised international relations (compare Slaughter 2003, 2004; Adler 2008; Adler and Pouliot 2011)? Despite a wide-ranging academic and public interest in 'fixing' the problem of a global democratic deficit (e.g. Cohen 2011), there is little agreement on which way to move in order to maintain the standards of good governance that are expected in contexts of large-C constitutionalism (Kumm 2009). Global constitutionalism offers a two-tiered perspective on this problem: On the one hand, it is a political option that is cautioned against; on the other hand it is a normative option requiring substance and precision.

### *Outlook and purpose of the journal*

As a novel phenomenon in the global realm, global constitutionalism has evolved from more familiar observations of 'constitutionalism beyond the state', 'post-national constitutionalism' or 'European constitutionalism' (Shaw 1999; Weiler and Wind 2003; Walker and Loughlin 2007). Similar to political scientists' attempts to theorise 'governance without government' (Rosenau and Czempiel 1992) global constitutionalism grapples with the consequences of globalisation as a process that perforates national/state borders, thus undermining familiar roots of legitimacy and calling for new forms of checks and balance. The challenge for scholarship contributing to the interdisciplinary field of global constitutionalism lies in developing approaches that keep its two distinctive dimensions of mapping (describing the shift from globalised to constitutionalised relations and identifying their constitutional substance) and shaping (improving the conditions and substance of this shift according to normative standards) analytically apart. From this background it will be possible to identify the critical juncture in the relational process of mapping and shaping constitutional development with global reach. Our hope is that this journal will provide the space for scholars who are interested in both these agendas, and others that perhaps we have not identified here. We look forward to contributions from a variety of perspectives, disciplines and locations in the hopes of understanding, explaining and evaluating the ideas and practices of global constitutionalism.

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