



**Research Paper**

## **International Trade & Global Constitutionalism – A Mutually Symbiotic Relationship**

Sangya Ranjan

*Department of Economics, Satyawati College (Eve.), Delhi University*

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### **I. INTRODUCTION**

Constitutionalism in a formal sense, denotes the principle and practice under which a community is governed by a Constitution. In turn, it stands for a set of rules and practices, either codified or established by a long practice, which prescribes the structure and functions of the government, defining organs of the government, their powers and mutual relationships as also the limitations under which they are bound to function so that to ensure that the government or any organ thereof is not allowed to function arbitrarily. Constitutionalism therefore, postulates effective checks on the absolute powers of the government so that the liberties of citizens are not curtailed without adequate reason.<sup>1</sup> The origin of authority via the Constitution is responsible for safeguarding the tenets of democracy against establishment of analogous authorities. Constitutionalism is deep-seeded in the very framework of egalitarianism and fairness. The foundation of constitutionalism is the notion of regulated administration positioned under a superior law.

In the preceding times, Crowns and thrones retained unqualified control in the State, however, their consideration of authoritarian law was restricted to the point that the sovereign responses to God – thus, employing most potent non-entity as the supreme most authority of kinds. Constitutionalism streamlining from these particular Anglo-Saxon habits of opinions transforms to democracies and contemporary control. Autocracy and democracy are only distinct to the extent of the limit set on the powers of the authorities, through constitutionalization. The vigorous type of law combined and supplemented with the modern perception of constitutionalism is what motivates the need for a wider, more integrated development of a structure of governance.

In today's modernized era of globalization, a rather controversial debate has surfaced – A debate about an idea termed as Global Constitutionalism. Which is nothing but constitutionalism, as a set of rules and practices, not only governing a particular nation, but the whole world. From the point of view of law and its purposes, such as, regulation of citizens, dispute resolution, etc., the progressions towards a border-less world, and a surge in the jurisprudence of international laws seems to justify the desire of global constitutionalism.<sup>2</sup> There is an alliance in all fields of a regulatory framework on a universal gage, predominantly in terms of international trade activities, and also in broad-spectrum authority, thus, emphasizing on the basis and passing of a global constitutional regime in the upcoming years.

### **II. STATEMENT OF PROBLEM**

Constitutionalism represents a value which stipulates a mechanism for orderly change in society. With the advent of modern age when human relations ceased to be governed by a limited set of domestic laws, it became imperative that safeguards against arbitrary use must be more universal.

The concept of Global Constitutionalism, that has been in place for several decades, is the idea that endeavours to keep checks and balances over the activities of different nations and their governments around the world. However, till now, there has not been much development in that area, despite of the rapid advancement of international law. Global Constitutionalism seems to be a utopian ideal, even in today's surge in international trade and commercial activities.

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<sup>1</sup> O.P. Gauba, *Constitutionalism in a Changing Perspective*, 1 (1996)

<sup>2</sup> Anne Peters, *Global constitutionalism revisited*, Int'l Legal Theory, 11, (2005)

### **III. REVIEW OF LITERATURE**

A. **THE EVOLUTION AND IDEOLOGY OF GLOBAL CONSTITUTIONALISM: (DAVID S. LAW AND MILA VERSTEEG)**<sup>3</sup> This Article presents the earliest experimental report of the universal development of constitutionalism rights. The authors' examination of innovative figures, that extends the rights-related matter of all domestic constitutions throughout the preceding six decades checks the subsistence of numerous universal constitutional movements. These incorporate the occurrence of "rights creep," where constitutions manage to comprise a rise of rights over a period of time, and the progression of "basic rights constitutionalism," where a collective percentage of the Constitutions of the world possess a rising number of privileges in common. By means of these results, the authors map the conceptual advancement of global constitutionalism. It can be observed in the paper that world's constitutions are gradually separating themselves into two definite clusters—one permissive in nature, the one statist. Inside each band, similarities can be seen in each of the constitutions, but the clusters keep on getting divergent from each other. It concludes stating that the subtleties of constitutional growth, involve an amalgamation of sociopolitical conjunction and ideological polarity. This paper, however, fails to point the best approach to be adopted overcome these contradictions within the two clusters.

B. **THE MERITS OF GLOBAL CONSTITUTIONALISM: (ANNE PETERS)**<sup>4</sup>: This paper defines global constitutionalism as an outline that recognizes and supports the use of constitutionalist beliefs in the worldwide legal domain. Global constitutionalization is said to be the ongoing surfacing of constitutionalist qualities in universal law. According to the author, opponents of global constitutionalism distrust the pragmatic authenticity of constitutionalization, and, call in to inquiry the logical value of constitutionalism as a scholastic methodology, and are concerned that the discussion is risky as it opposes pluralism, falsely builds a deceitful legitimacy, and guarantees an improbable culmination of bureaucracy. This article addresses these objections. The author argues that global constitutionalization will prospectively compensate for globalization prompted constitutionalist shortfalls on the domestic level, that a constitutionalist interpretation of international law may operate as an elucidatory device, and the constitutionalist jargon reveals actual discrepancies in international law and proposes antidotes. Global constitutionalism, hence, has an answerable and vital dire potential. The author, however, in this paper, fails to consider the distinct and bureaucratic nature of most nations, the theory that he proposes cannot possibly be sustained.

C. **SITUATING THE DEBATE ON GLOBAL CONSTITUTIONALISM: (CHRISTINE E. J. SCHWÖBEL)**<sup>5</sup>The authors addresses the issue of if a global constitution is in place or is upcoming, and, if that's the case, what would be the structure, which remains a very controversial and intriguing topic of latest international legal discussion. The article endeavours to throw some light upon the debate from the point of view of public international law, situating the prominent opinions of global constitutionalism with respect to four facets that, when combined make up the majority of modern-day influences. He terms these four aspects: social, institutional, normative, and analogical constitutionalism. Below judicious scrutiny, it becomes obvious that, for all diversity and complexity, the current ideas of global constitutionalism are limited to the trajectories of laissez-faire democratic diplomatic thought. The author concludes that such restrictions gives impetus to questions related to the shortcomings of the ongoing debate about global constitutionalism. The author in this paper, however, gives no regard to the need of such a framework, especially in trade and commerce.

### **IV. RESEARCH QUESTION**

This research paper seeks to determine whether or not, Global Constitutionalism is a concept that can be considered in the fragmented existing legal frameworks of all the nations in the world, and can be smoothly adopted to complement international law, or, if it still remains a utopian ideal owing to the underdevelopment of a rigid international law structure.

### **V. RESEARCH OBJECTIVES**

The objectives of this paper are to:

- i. ANALYZE AND EXAMINE the concept of Constitutionalism and Global Constitutionalism.
- ii. DETERMINE AND COMMENT upon the sufficiency of international laws to promote such a practice.
- iii. COMMUNICATING the findings of the study and giving SUGGESTIONS as to the shortcomings, if any.

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<sup>3</sup>David S. Law And Mila Versteeg, The Evolution and Ideology of Global Constitutionalism, 5 California Law Review, Volume 99, (October 2011)

<sup>4</sup>Anne Peters, The Merits of Global Constitutionalism, 2 Indiana Journal of Global Legal Studies, Volume 16, (2009)

<sup>5</sup>Christine E. J. Schwöbel, Situating the Debate on Global Constitutionalism, Oxford University Press, (2010)

## VI. CRITICAL ANALYSIS

### A. CONSTITUTIONALISM IN GENERAL

Constitutionalism is a bit of a debated topic, as, some might believe that the authority it possesses can not regulate all aspects of government in practicality. Widespread application of the same seems to be a far-fetched idealistic concept. However, constitutionalism and the supreme authority of the Constitution of a State is what creates the necessary checks and balances in a nation, to prevent any arbitrariness. It is true, that with the passage of time and evolution, even constitutionalism needs to evolve. But, it cannot be said to be a flawed concept because all around the world, in democracies, constitutionalism is the chief part of the regulatory framework, and India is a prime example of the same. Our nation has an extensive and comprehensive Constitution, based on which, the rest of the legislature is found. Anything that is contrary to the Constitution, is deemed invalid because of its superior nature. The Constitution regulates all the three organs of the Government, namely, Executive, Legislature, and Judiciary and safeguards the rights of each of the citizens. Thus, it is clear, that on the domestic level, constitutionalism is a must to ensure an effective and efficient legal regime.

The Courts of our country have also been proactive in determining the role of constitutionalism in a civilized society. In *I.R. Coelho (Dead) by LRs. v. Tamil Nadu and Ors*<sup>6</sup>. The Supreme Court established constitutionalism as a basic legal doctrine which keeps a check on the power of the government, so as to prevent any misuse, as it encompasses the principles of “rule of law” as well as “separation of powers” in its basic structure. The Court in *Rameshwar Prasad and Ors. v. Union of India*<sup>7</sup> expressed that constitutionalism is embedded in the framework of modern-day democracy in India. In *Minerva Mills*<sup>8</sup>, constitutionalism was found to be inseparable from a democracy.

The point to ponder here, however, is whether or not constitutionalism can have a more wide-spread, more general application, not just to a particular country, but around the globe. This concept of global constitutionalism has arisen concurrently, as the world moves more and more towards streamlined communication and trade activities. There have been innumerable developments, both technological and social, which gave way to the need of an international framework of law. On that note, global constitutionalism suggests a comprehensive international framework including all aspects of law. Development of the recent international laws seem to be an obvious outcome of increased international transactions, but, global constitutionalism suggests taking it up a notch to create a similar kind of system of checks and balances on those as well.

### B. GLOBAL CONSTITUTIONALISM

The availability of a limited governance when it comes to international law gives rise to multiplicity of cases and contradictory precedents in the same subject matter itself. All the countries in the world have a set of laws which are specifically drafted for their own needs, depending on their customs and beliefs. On the other hand, public international law comprises of a set of treaties and conventions entered into and ratified by a specific set of nations. In foresight, it seems practically impossible to have all countries to ratify to all such conventions, which is what leads to an obvious discrepancy in international commercial law, human rights law, environmental law, and even criminal law.<sup>9</sup> International institutions like the United Nations endeavours to take positive steps in the direction of a wholesome development of international law and incorporation of global constitutionalism, however, there is still a long way to go with no definite framework in place, which makes one believe the global constitutionalism is not but a utopian ideal.

There are several preordained phenomena that warrant the need of international constitutionalism, such as globalization and fragmentation. Globalization, as we all know, is the word used to define the universal mammoth upsurge in the cross-border flow of goods, services, resources- both material and human, ideas, and basically encompassing all universalization of businesses and relations between different countries. Fragmentation, which basically means disintegration, occurs in the worldwide legal order, with time, as while the basic premise of enacting laws such as criminal, human rights, etc., in all countries might be common, but, they obviously have the certain discernable characteristics which are developed because of the difference in customs, values, and interest of different legal regimes. This phenomenon, in the period of globalization, gradually leads to various inconsistencies which may result in failure of a favourable outcome.

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<sup>6</sup> *I.R. Coelho (Dead) By Lrs vs State Of Tamil Nadu*, (1999) 7 SCC 580

<sup>7</sup> *Rameshwar Prasad and Ors. v. Union of India*, AIR 1965 Kerala 229

<sup>8</sup> *Minerva Mills Ltd. & Ors vs Union Of India*, 1980 AIR 1789

<sup>9</sup> *Supra*, note 5

**1) Globalization**

To elaborate on the point, globalization invariably has an impact on the framework of international law, be it commercial, or criminal. But the effect is two-pronged, on one hand, rapid globalization demands the need of an unambiguous international legal regime to deal with the trade activities, or disputes that may come up on the course of the same, and on the other hand, existence of such a framework in the first place also facilitates a smooth flow of the said trade activities, and provides guidelines and procedure. If we talk about laws other than commercial and economic, such as human rights and environmental law, while on the face of it, it may seem that globalization might not have a similar effect on them per se, however, it is a fact that all regulatory frameworks in cooperation is what facilitates a stable and comprehensive legal regime. Therefore, the world could in fact benefit from such laws which are more internationally suited, because while they may not be directly affected by globalization, other, more internationally inclined laws, may be indirectly affected by them. Such laws should be considered as either ordinary international laws, or inter-constitutional laws.<sup>10</sup>

Hence globalisation lays the ground-work for building general cooperative arrangements around it, and, consequently, increased interaction between parties internationally also increases the possibility of retail or bureaucratic failure because of the very lack of a holistic constitutional approach.

Thereby, there could be a polemical relationship between constitutionalism and globalization, as per the above. The dynamic social and technological world calls for global constitutionalism. Its value has increased and its benefits are getting acknowledged. The surge of international commercial transactions in various industries, especially those belonging to the tertiary sector demand for the draft of an extensive international constitutional regime.

**2) Fragmentation**

As one may suspect, such a framework may only be seen as somewhat of a utopian dream, because of the fragmentation. Despite of the existence of international dispute resolution institutions, their multiplicity can be a cause for conflicts. For instance, the two contradictory interpretations of the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Court of Justice (ICJ) in the subject matter of State Responsibility in the *Nicaragua Case*.<sup>11</sup> There was a string of conflict between the two forums regarding the particular topic, whereby the ICTY found the ICJ's ruling to be irregular<sup>12</sup>, followed by the ICJ reaffirming its stance again, expressing ICTY's interpretation to be unsuitable and unpersuasive. A disparity between the decisions of international and domestic tribunals has been observed as well<sup>13</sup>, which sets antithetical precedents in place.

Similarly, there can be conflicts between customary international law and international tribunals' decisions. For instance, the *Belilos Case*<sup>14</sup>, wherein, the European Court of Human Rights had not applied the customs in place for treaty reservations, on the basis of its own explanations. Thereafter, it was justified by the Court that the flouting of those particular rules is permissible under the Human Rights Convention of Europe.<sup>15</sup> Multiplicity of international cases being dealt by different tribunals, with similar facts, also causes inefficiency and ambiguity. Such as the cases of *Lauder v. Czech Republic*<sup>16</sup>, and *CME Czech Republic B.V. v. Czech Republic*<sup>17</sup>, wherein, the London Arbitral Tribunal and the Stockholm Tribunal found different answers in the subject matter of investor protection and security. There are numerous other examples of such incidents which are controversial and suggest towards the need of a universal code. Which is why it's a common belief that fragmentation hampers the stability and adds to the inconsistency of international law, hence posing as a hindrance to it's achievable comprehensive nature.<sup>18</sup>

As can be seen from above, both the phenomena, although unrelated, but do have a combined effect on the scope as well as need international constitutionalism. Globalization causes for creation of rules and regulations to cater to the needs of international transactions, and the ongoing fragmentation of laws, since time immemorial, poses a threat to the development of international Constitutionalism.

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<sup>10</sup> JL Dunoff, JP Trachtman, [A Functional Approach to Global Constitutionalism](#), Legal Studies Research Paper Series, (2008)

<sup>11</sup> [Bosnia and Herzegovina v. Serbia and Montenegro](#), 2007 I.C.J. 91

<sup>12</sup> [Prosecutor v. Tadic](#), Case No. IT-94-1-A

<sup>13</sup> [Sanchez-Llamas v. Oregon](#), 548 U.S. 331, 356 (2006)

<sup>14</sup> [Belilos v. Switzerland](#), 132 Eur. Ct. H.R. (ser. A) (1988)

<sup>15</sup> [Loizidou v. Turkey](#), 310 Eur. Ct. H.R. (ser. A)

<sup>16</sup> [Lauder v. Czech Republic](#), UNCITRAL, Final Award (Sept. 3, 2001)

<sup>17</sup> [CME Czech Republic B.V. v. Czech Republic](#), UNCITRAL, Final Award (Mar. 14, 2003)

<sup>18</sup> Int'l Law Comm'n, Report of the International Law Commission on the work of its fifty-second session, Annex, at 144, U.N. Doc. A/55/10 (2000)

Therefore, the upcoming section analyses those dimensions of international constitutionalism which covers those aspects which that need to be considered while arguing for the development of International Constitutionalism.

### 3) ***Functional Dimensions of International Constitutionalism***

The dimensions of international constitutionalism are as follows:

- i. **Enabling Constitutionalization:** Enabling Constitutionalization refers to those norms in place, which enable a more international, universal development of Constitutionalism. For instance, a Treaty that would authorize international tribunals and bodies with a power to lay down international law, such as the UN Charter. Furthermore, even landmark decisions of international tribunals may also count as enabling constitutionalism, for instance, *Costa v. ENEL*<sup>19</sup>, etc.

Enabling Constitutionalization basically allocates authority aggregately, over numerous rules and decisions, to generalize the rules of a particular subject matter, say, institutional economics. The nature of such constitutionalizing would be combined, which is why it is difficult to be able to predict the outcome of the same. It remains unknown to us. But, addition of the same to international law, and proper institutionalisation of this allocated authority could increase the efficiency and ease of trade by facilitating reduction of overall costs, be it the cost of material, services rendered, or the cost of entering into specific cooperative contracts in the first place.

- ii. **Constraining Constitutionalization:** Constraining Constitutionalising refers to norms which constrain the development of ordinary international law. For instance, the European Court of Human Rights has time and again made it very clear then that the European Convention on Human Rights<sup>20</sup> is superior to any other treaty that a State may have ratified. In this manner, this authority constraints the change of any inconsistency that may arise. Constraining and Enabling Constitutionalization goes hand in hand. For this matter, the example of UN Charter may be used. Article 24(1)<sup>21</sup> endows the Security Council of UN with certain powers, whereas, Article 24(2)<sup>22</sup> states that for that purpose, the Security Council needs to take into accounts the Principles and Purposed of United Nations. The former, being enabling constitutionalizing, and latter being constraining constitutionalizing.

Constraining constitutionalizing may set a limit on the scope of international law to an extent, as it constrains a particular state from application of international law at times. It can be said that the autonomy of State, or of an individual, is preserved by it.

In today's day, the demand of this form of constitutionalising is becoming higher, in light of the increase in the need of law for miscellaneous purposes. Consequently, there will be an increase seen in the demand for unanimity of all States. Additionally, with time, as more forums of international adjudication would be established, constraining constitutionalising would become a prerequisite. Present-day deliberations over the requirement of an established appellate body to rectify legal discrepancies and bring soundness to this framework of law can be seen as a call for a way of constraining constitutionalization.<sup>23</sup>

- iii. **Supplemental Constitutionalization:** Supplemental Constitutionalization is that category of norms that seems to promote global constitutionalization. Some scholars debate that an international constitutional regime which would have predominance over domestic constitutions, reduces the significance of the latter. Therefore, there is a third dimension, which applies to situations wherein there is a dearth of domestic rules and regulation. It mostly applies to the areas of law that have not been fully developed because of the simultaneous effect of globalization and fragmentation.<sup>24</sup>

Supplemental constitutionalization stands out, as opposed to enabling and constraining as it caters to a specific constitutional subsidiary, i.e., it comes into the picture when due to advancement in social or technological advancement, there arises a need for alteration of some individual constitutional principles. At times when there exists a grey area in a situation where its unsure if a particular matter is within the scope of domestic law, or, not exactly distinctively recognizable as international law, or if there's a scope of possible conflict between the Constitution of two States, supplementary constitutionalism comes into the picture. In other words, application of supplemental constitutionalization bridges the gap between international and domestic law for certain subject matter.

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<sup>19</sup> *Costa v. Enel*, (1964) ECR 585

<sup>20</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, (1950)

<sup>21</sup> U.N. Charter art. 24 § 1

<sup>22</sup> U.N. Charter art. 24 § 2

<sup>23</sup> Edward T. Swaine, *Subsidiarity and Self-Interest: Federalism at the European Court of Justice*, 41 HARV. INT'L L.J. 1, 4-6 (2000)

<sup>24</sup> Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LEIDEN J. INT'L L. 579, (2006).

Supplemental constitutionalization is the dimension that has come closest to international constitutionalism. Additionally, this dimension can also be utilized when due to a rigid framework of constraining constitutionalization, there seems to be a lack of framework.

Thus, according to the analysis above it can be seen that international constitutionalism may ensue in a three-pronged manner, firstly, to enable or standardize the procedure for laying down commonplace international law, in situations where law needs to be efficiently produced, secondly, to constrain the fabrication of international law, upholding a domain of sovereignty, and thirdly, to supplement domestic constitutional safeguards.

## VII. CONCLUSION AND RECOMMENDATION

It can be seen in the above analysis, that global constitutionalism is something that is ought to be achieved, and the much debated topic keeps on revolving around the fact of lack of such a framework to facilitate the same. Although, the idea of supplementary constitutionalization seems promising, but even that involves many factors such as rigidity of domestic laws to incorporate such ideas. For instance, around the world, there are a lot of nations which require legislations of their own to give effect to any international treaty as well, including India. Article 253<sup>25</sup> of the Constitution requires the Parliament to legitimatise any international treaty, or convention, etc., entered into by our country via a legislation. Even if it were not for that, the application of the principle of jus cogens is only persuasive, because, no institutionalized body has the express power to enforce upon a country, a law, that they have not ratified to.<sup>26</sup>

Having said that, it is apparent that in the evolving times, there have been instances of global-constitutionalism, which have been inevitable in the light of globalization and fragmentation. But, the belief that is being put forth in this paper is that achievement of global constitutionalism that encompasses every single aspect of a complete constitutional legal framework, is actually a utopian ideal and could not possibly be established in today's environment of fierce competition and bureaucracy under the garb of State sovereignty.

Several global regulatory frameworks have been drafted from a very general perspective, wherein, it was absolutely necessary for the existence of the same, for instance, for the matter of Alternative Dispute Resolution, such as, the New York Convention<sup>27</sup>, which has been ratified by a great deal of nations. However, to expect the worlds' decades old Constitutional frameworks to be broken down, and being able to establish an ideal Constitutional framework from scratch, is far too visionary, for at least the upcoming few generations.

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<sup>25</sup> India Const. art 253.

<sup>26</sup> Ernest A. Young, *The Trouble with Global Constitutionalism*, Tex. Int'l LJ 38, 527, (2003)

<sup>27</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nations General Assembly Resolution A/40/72 (1958)

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