

Global Constitutionalism as a Grammar of Global Law?*

Summary

The article examines the viability and the desirability of the use of constitutional grammar on the global plane. It asks whether global constitutionalism is a viable and/or desirable concept that should be theoretically (and later practically) invested in to know and to understand better the phenomenon of global law as well as, potentially, to come up with normatively advantageous outcomes. The argument is broken down into three parts. The first conceptual part contains a study of the conventional meaning of constitutionalism and global law. This is followed by an examination of the descriptive, explanatory and normative fit between the two phenomena. The final part passes a verdict on the viability and desirability question. It is argued that constitutionalism is only a part of the grammar of global law, its morphology, while principled legal pluralism acts as its syntax.

Zusammenfassung

Der Artikel untersucht die Möglichkeit und die Zweckmäßigkeit der Verwendung von Verfassungsgrammatiken auf der globalen Ebene. Er fragt, ob der Konstitutionalismus jenseits des Staates eine tragfähiges und / oder wünschenswertes Konzept ist, in das theoretisch (und später praktisch) investiert werden sollte, um die Erscheinung des globalen Rechts besser zu verstehen und normativ besser bewerten zu können. Der Artikel gliedert sich in drei Teile. Der erste, konzeptionelle Teil versucht Verbindungen vom herkömmlichen Verständnis des Konstitutionalismus zum globalen Recht herzustellen. Daran schließt im zweiten Teil eine Untersuchung an, die Aussagen über darüber anstellt, ob diese beiden Phänomene deskriptiv und normativ zusammenpassen. Der abschließende Teil trifft ein Urteil über die Frage der Möglichkeit und der Zweckmäßigkeit eines solchen Transfers. Hier argumentiert der Artikel, dass Konstitutionalismus nur ein Teil der Grammatik des globalen Rechts ist, seine Morphologie, während ein prinzipienbasierter Pluralismus als seine Syntax wirkt.

Résumé

L'article examine la possibilité et l'opportunité d'utiliser des grammaires constitutionnelles au niveau mondial. Il demande si le constitutionnalisme au-delà de l'Etat est une approche viable et / ou souhaitable en théorie (et en pratique) afin de mieux com-

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prendre le phénomène du droit international et ses conséquences normatives. L'article est divisé en trois parties. La première partie conceptuelle tente d'établir un lien entre le droit global et la compréhension conventionnelle du constitutionnalisme. Elle est suivie d'une deuxième partie qui traite de la question de savoir si ces deux phénomènes vont descriptivement et normativement ensemble. La dernière partie contient une opinion sur de la possibilité et l'opportunité de ces transferts. Ici, l'article soutient que le constitutionnalisme est seulement une partie de la grammaire du droit international, sa morphologie, tandis qu'un pluralisme fondé sur des principes agit comme sa syntaxe.

I. The Transformation of Legal Discourse and the Quest for a Grammar of Global Law

After WWII, but especially over the last three decades, legal discourse has undergone a profound transformation. Law is being thought differently about. It is practiced differently. Hence, it has also acquired a different meaning. It has become a different social phenomenon, which, as a result, calls for a new meta-theory, a grammar to ensure the law's viability in epistemic, analytic and normative terms. The trajectory, the legal discourse has travelled, has by no means been linear and unidirectional. Initially, its focus was almost exclusively domestic. Legal scholarship was concentrated on the normative developments inside a nation state. This focus was gradually extended to the relationship between the nation states, which marked the rise of comparative law. Simultaneously, with the growth of international institutions and increasing engagement of the states on the international plane, international law scholarship took off and was becoming ever more extensive. The legal discourse was incrementally becoming more international, but its main preoccupation was still the state.¹

In the late 1980s and the early 1990s, we witnessed the decline of classical comparative law.² After its death was declared,³ the focus shifted to comparative constitutional law. This was directly connected to political developments in the late 1980s and the early 1990s, when the end of the *Cold War*, the fall of the *Berlin* wall and the emergence of newly independent states, set into motion a so-called new constitutionalism.⁴ This

1 For an overview, see *Fassbender/Peters* (eds.), *The Oxford Handbook of the History of International Law*, 2012.

2 For an overview, see: *Bermann/Glenn/Scheppelle/Shalakany/Snyder/Zoller*, Comparative Law: Problems and Prospects, *American University International Law Review* 26(4), 2011, 935-968.

3 *Siems*, The end of comparative law, *Journal of Comparative Law* Vol.2, 2007, 133-150; see already *Reimann*, The end of comparative law as an autonomous subject, *The Tulane European and Civil Law Forum* Vol.11, 1996, 49. For a critique, see, *Michaels*, Transnationalizing Comparative Law, *Maastricht Journal of European and Comparative Law* 2/2016.

4 See, for example *Hirschl*, The Political Origins of the New Constitutionalism, *Indiana Journal of Global Legal Studies* Vol. 11(1), 2004. Available at: <http://www.repository.law.indiana.edu/ijgls/vol11/iss1/4>.

movement resulted in the migration of ideas and concepts of liberal democratic constitutionalism, based on the rule of law, from the *West* to the *East*. Legal discourse in the 1990s was thus concerned with the analyses of what new constitutionalism resulted in and which directions and why the constitutional ideas travelled. As the constitutional courts, at least initially, played a major role in the constitutionalization of the newly emerged countries in the *East*, legal scholarship focused mainly on them.⁵ This court-based focus also prevailed in another, new and therefore at first relatively discrete field of study of supranational law of the *European Communities*, and later the *European Union*. Since the early 1970s new forms of legal scholarship have been consciously developed in order to construct an autonomous body of supranational law, which would be neither statist nor international.⁶ As such, it was in need of its own theoretical backing, which was developed around the jurisprudence of the *European Court of Justice*, both by the academics as well as the actual EU institutional stake-holders acting as academics.⁷

This legal scholarship at first built on the idea and narrative of supranationalism, but as the concept turned out not to be strong enough, to be too amorphous,⁸ the switch was made to the grammar of constitutionalism. As I have described in great detail elsewhere,⁹ constitutionalism soon became the dominant narrative of the *European Union*. It was used for all sorts of purposes: descriptive, explanatory as well as normative, sometimes already bordering on the almost political use intended to strengthen the increasingly deeper, wider and therefore also more complex European integration whose viability needed to be ensured. This fairly indiscriminate use of constitutionalism soon spilt over from EU law into other regulatory domains beyond the state. With the progress of the process of globalization, it has become increasingly clear that the state no longer holds a monopoly over the jurisgenerative activities. The attention was hence drawn to the law-making sites and bodies beyond the state.

The first thing that was noticed was that the EU is not the only semi-autonomous and therefore not really typical international organization. There have emerged many, several, if not the majority of them, outside the umbrella framework of the *United Nations*, being especially strong and present on the regional scale. This has, not unlike in the process of European integration, caused concerns for the viability of international law that seemed to be on the way of irreversible fragmentation.¹⁰ While some spoke already of international law being in its death throes,¹¹ other rushed for a remedy in the form of constitutionalization of international law.¹² However, the growth of jurisgenerative sources beyond the state has not been limited only to public actors.

5 *Slaughter, A New World Order*, 2004.

6 *Vauchez, Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity*, 2015.

7 *Ibid.*

8 *Weiler, The Dual Character of Supranationalism*, *Yearbook of European Law* Vol. 1, 1981, 268.

9 *Avbelj, Questioning EU Constitutionalisms*, *German Law Journal*, Vol. 9(1), 2008, 1-26.

10 International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, available at: http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.

11 *Domingo, The New Global Law*, 2010, 53.

12 *Klabbers/Peters/Ulfstein, The Constitutionalization of International Law*, 2009; see also *Kleinlein, Konstitutionalisierung im Völkerrecht*, 2012.

To the contrary, public legal entities started to share regulatory functions with private actors in the hybrid legal organizational structures and not infrequently private actors alone have taken up the regulatory tasks (or invented new ones) that previously belonged to the dominion of states. This process has led to the emergence of the so-called transnational law and its legal regimes, orders and orderings.¹³ Here too, the grammar of constitutionalism started to be employed.¹⁴ However, as these were non-statist, and even non-territorial regimes, a different type of constitutionalism, known as societal constitutionalism has been employed in the transnational domain.¹⁵ Finally, and as the process of globalization cut even deeper and wider, the legal scholarly attention has been extended to the globe as a whole. A new discipline of global law started to emerge,¹⁶ but this too has been suggested to be couched in the constitutional grammar.

The purpose of this contribution is to examine both the viability and the desirability of the use of constitutional grammar on the global plane. In other words, is global constitutionalism a viable and/or desirable concept that should be theoretically (and later practically) invested in to know and to understand better the phenomenon of global law as well as, potentially, to come up with normatively advantageous outcomes. The argument will be developed in the following way. In the first conceptual part, we will study the conventional meaning both of constitutionalism as well as of global law. This will be followed in the second part by studying a descriptive, explanatory and normative fit between the two phenomena. This shall enable us to pass a verdict on the viability and/or desirability of constitutionalism as a grammar of global law.

II. The Concept of Constitutionalism in and beyond the State

It follows from our introductory discussion that especially in the past 20 years constitutionalism has been an increasingly appealing grammar used to conceptualize the new and transforming legal realities in and beyond the state. What are the reasons for that and what difficulties, if any, does this spur? The most obvious reason to begin with is the fact that constitutionalism has been the dominant legal grammar in the statist realm.¹⁷ As the state was for decades a synonym for the law, in the 20th century with the emergence of the constitutional state the modern constitutionalism was closely bound to the state too. It carried its imprint.¹⁸ This was hence a paradigmatic grammar in which the exercise of any public authority and its relationship with private actors, their autonomy and freedom, was embedded; from the perspective of which it has been guided

13 Shaffer, Transnational Legal Ordering and State Change, in Shaffer (ed.), *Transnational Legal Ordering and State Change*, 2013, 1.

14 See, also, *Roth-Isigkeit*, Der Kampf des Rechts um seine Form: Drei Krisen des Globalen Verfassungsprojekts, 2015, in Bauerschmidt et al. (eds.), *Konstitutionalisierung in Zeiten globaler Krisen*, 2015, 45-70.

15 Teubner, Constitutional Fragments: Societal Constitutionalism and Globalization, 2012.

16 See, initially, Twining, *Globalisation and Legal Theory*, 2000.

17 For a classic perspective, see, Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, *Leiden Journal of International Law*, 19(3), 2006.

18 Walker, *EU Constitutionalism in the State Constitutional Tradition*, European University Institute Law Working Paper No. 21, 2006.

and against which it has been normatively measured for its propriety. Statist constitutionalism was not an exclusive grammar, but it was a prevailing one and the one that worked in practice. This explains the first of the reasons for the continuing currency of constitutional grammar even beyond the state: its well established character and the absence of a meaningful alternative.

The second reason can be explained by the fact that constitutionalism as a leading statist legal paradigm simply worked. Especially a post-WWII Western constitutional state was a success. It was copied after the fall of the *Berlin* wall not just in the *Central and Eastern Europe*, but indeed worldwide. This prompted *Fukuyama* to declare the end of the history on the basis of the overwhelming ideological prevalence of liberal democracy, based on the rule of law.¹⁹ As the leading constitutional paradigm was marked by success, this also explains the lack of a meaningful alternative. There was simply no reason to look for one. But why was constitutionalism such a success? For a simple reason: it was a civilizing achievement of modernity,²⁰ pregnant with promises:²¹ of a responsible self-rule, political emancipation, individual's freedom and well-being that not only reflected, but also strengthened the moral side of the human kind.²²

However, as constitutionalism appeared to be at its peak and the *Weltstunde des Verfassungstaates*²³ was declared, this simultaneously signalled the beginning of its decline. *Neil Walker* has identified five fatal critiques of the conventional account of constitutionalism: statism, fetishism, partiality, instrumentalism and conceptual debasement.²⁴ In short, as a statist concept, conventional constitutionalism was seen unfit to apply beyond the state. Its agency has been overstated and to the extent it has been merited, it was used as a proxy for strengthening, rather than constraining, the anyhow powerful social interests. All this taken together resulted in constitutionalism's conceptual disqualification as a universal legal grammar not just beyond the state, but increasingly also within the state itself. What was at first an exclusively theoretical problem, soon became a very material one, as the traditional nation state has come under a strong transformative impact of globalization.

Nevertheless, some still have not paid any attention, neither to the actual transformation of the state, nor to the critique of constitutionalism, and continued to dwell on it relatively simplistically and uncritically. They may have done so because they have striven for the re-emergence of the declining nation state on a higher echelon: either on the supranational, international or even global level.²⁵ These authors have been, however, in the minority. The proponents of constitutionalism beyond the state, and especially

19 *Fukuyama*, The End of History and the Last Man, 1992.

20 *Grimm*, The Constitution in the Process of Denationalization, *Constellations*, Vol. 12(4), 2005, 447, relying on *Luhmann*, Verfassung als evolutionäre Errungenschaft, *Rechtshistorisches Journal*, Vol. 9, 1990, 176.

21 See, *Tsagourias*, Introduction-Constitutionalism: A Theoretical Roadmap, in *Tsagourias* (ed.), *Transnational Constitutionalism*, 2007, 1.

22 See, *Preuss*, Constitutional Revolution, The Link Between Constitutionalism and Progress, 1995, 126.

23 *Häberle* cited in *Walker*, The Idea of Constitutional Pluralism, *Modern Law Review* Vol. 65, 2002, 317, fn. 1.

24 *Ibid.*, 319.

25 See, for example, *Shaw*, Theory of the Global State, 2000.

in the international realm, relied on the old constitutionalism as a means of re-creating unity out of the fragmenting international law.²⁶

Others, on the other hand, recognized the need to reform, to redefine or at least refine constitutionalism to preserve its ongoing currency in the state and beyond it, not to recreate the old, but to guide the emerging new. This refinement of the conventional constitutionalism was deemed necessary precisely since there had been no other alternative²⁷ and dropping constitutionalism meant giving up on political modernity and on all of its achievements.²⁸ There was something in the conventional constitutionalism, even if statist and even if it has historically been used for many ill purposes,²⁹ that ought to be preserved. This was an idea(l) of responsible self-government in the community of equals. Constitutionalism, now stripped of its statist character, has thus been advanced as a trans-contextual grammar for polity building, for equal respect of individuals, serving as the legitimating source of power-wielding institutions that ought to be procedurally and substantively constrained in their pursuit of the common good.³⁰

This revised and cut-down concept of constitutionalism has, of course, departed heavily from the conventional statist constitutionalism. The latter has traditionally stood on three pillars: the legal institutional, the socio-political and the philosophical. These have, in a nutshell,³¹ set up constitutionalism as a hierarchical legal framework, underpinned by a (more or less) socially homogeneous demos, being part and parcel of a constitutional unity devoted to uniformity. In the EU context I have voiced my reservations against the described transformation of constitutionalism in the process of its translation beyond the state.³²

I warned then that, as any social concept, constitutionalism too can be redefined, but changing it substantively beyond recognition, so that essentially just the etiquette is preserved, better requires creating a new concept.³³ In the opposite case, the redefinition might backfire in practice. This is so since the conventional, established meaning of social concepts, and that of constitutionalism *par excellence*, is sticky. Even if the language is changed, the normative baggage of the original understanding of a concept

26 See, for example, *Peters*, Constitutional Fragments – On the Interaction of Constitutionalization and Fragmentation in International Law, Centre for Global Constitutionalism, Working Paper No. 2, 2015.

27 In this vein, *Walker*, Not the European Constitution, Maastricht Journal of European and Comparative Law Vol.15, 2008, 140, who observes that constitutional skeptics are unable to correct or compensate for the absence of any adequate alternative 'public' narrative; also *Dani*, Constitutionalism and Dissonances – Has Europe Paid Off Its Debt to Functionalism?, Jean Monnet Working Paper 7, 2006, 5.

28 See, *Baquero Cruz*, The Legacy of the Maastricht-Urteil and the Pluralist Movement, European Law Journal Vol. 14, 2008, 389-422; *Allot*, Epilogue: Europe and the Dream of Reason, in *Weiler/Wind* (eds.), European Constitutionalism Beyond the State, 2003.

29 *Tully*, Strange Multiplicity – Constitutionalism in an Age of Diversity, 1995.

30 *Kumm*, The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State, in *Dunoff/Trachtman* (eds.), Ruling the World, Constitutionalism, International Law and Global Governance, 2009.

31 For a more extensive discussion see *Avbelj*, Can European Integration be Constitutional and Pluralist – both at the Same Time?, in *Avbelj/Komárek* (eds.), Constitutional Pluralism in the European Union and Beyond, 2012, 381-410.

32 *Ibid.*

33 *Ibid.*

remains and influences, often in a negative way, the practices that the revised concept was anticipated to make more viable. The unfortunate episode with the EU *Constitutional Treaty* proved this point. The drafted EU *Constitution* was, despite its framers' best intentions and assurances that its object and purpose is not the pre-emption of the existing Member States' constitutions, perceived precisely in that way and consequently also rejected.

Notwithstanding the fact that the EU carries several similarities with the state, the extension of constitutionalism to the EU has so far proven very difficult. This suggests that the challenge of constitutionalism's extension to global law might be even bigger. Not only is global law much less statist than EU law – and therefore, presumably, much less constitutional; it is also, much more than EU law, a concept in the making. Can constitutionalism be made a grammar of global law, given the negative experiences in constitutionalizing the *European Union*? This is the question that this article shall ultimately respond to. Before doing so, however, we must turn to the conceptual analysis of global law first.

III. The Concept of Global Law

There is no established meaning of global law. To begin with, for many, especially those who stick to the old *Westphalian* paradigm, there is simply no such thing as global law. There is statist law and law between states: international law, *tertium non datur*. However, such views, while probably still in the majority, are in a persistent and steep decline. As a matter of an accurate description of the world, the state is no longer an exclusive source of the law, be it at home or abroad. There are other jurisgenerative entities, which are either a competitive or a complementary source of legal regulation to that of the state. These entities, which are not just public, but increasingly hybrid and private, are located on the subnational, international, supranational, transnational and global level.³⁴ They make up a plurality of legal orders and orderings,³⁵ which has been described as legal poly-centricity.³⁶

This legal poly-centricity has been coming about since the end of the cold war, but it got into full swing in particular since 2000 with the acceleration of the process of globalization. The latter has transformed our spatial experience. The space has simultaneously shrunk and widened. Global has become local and local has become global. The immediate consequence of this was a declining functional importance of national fron-

³⁴ The literature explaining the process of transformation of the state under the impact of globalization is burgeoning and there is no intent to do it justice here. For an overview, see, *Glenn, The Cosmopolitan State*, 2013, 181-186.

³⁵ The distinction is *Shaffer* (note 13), fn. 4-7. “*The concept of legal ordering is used to assess the construction, flow, and impact of transnational legal norms. The term transnational legal order is conceptualized as a collection of legal norms and associated institutions within a given domain that order behavior across national jurisdictions.*”.

³⁶ See *Tuori, Transnational Law: On Legal Hybrids and Legal Perspectivism*, in *Maduro/Tuori/ Sankari* (eds.), *Transnational Law, Rethinking European Law and Legal Thinking*, 2014, 24: “*‘Polycentricity’ connotes a multiplication of sources of law; the fact that new participants have been granted access to legal discourse, where the ever-changing content of the legal order is determined.*”.

tiers and hence of the nation states as their guardians. The states have been, more and more, economically and politically driven to form regional integrations. They have gradually lost the monopoly over their territories, but at the same time the role of territory has changed as well as, perhaps, its importance diminished.³⁷

As it has been stressed before, a number of non-territorial, functional entities has emerged with powers and competencies matching and sometimes surpassing those of states. We have witnessed, in short, regionalization, growing into de-nationalization and ultimately into de-territorialization. Others have sensed an even deeper change and have speculated about a paradigm shift from modernity to post-modernity.³⁸ In any case the old *Westphalian* statist order seems to be lost, and the perception of dis-order or even chaos has been on the rise.

It is in this context that global law has entered our conceptual map. In a response to a perceived chaos, *Larry Cata Baker* has defined global law as the systematization of anarchy.³⁹ According to him global law is the law of a non-state governance system.⁴⁰ It has four fundamental characteristics: fracture, fluidity, permeability and poly-centrality.⁴¹ Fracture is about the re-ordering of the pre-existing statist legal ordering, by taking on board a plethora of emerging non-statist self-constituting sites,⁴² making up the global law's poly-centrality.⁴³ In contrast with the (portrayed) *Westphalian* order, these sites are temporal, contingent, unstable and dynamic. As such, they make global law fluid as a concept, as a practice,⁴⁴ as well as a space of flows.⁴⁵ Thanks to its fluid character, global law is also the source of and a legitimating framework for permeability.⁴⁶

However, while *Baker's* definition fits well the anarchical legal context beyond and/or after the state, it is hardly distinguishable from the concept of transnational law. Already in 1956 Philip Jessup characterized transnational law as including:

*"all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as well as other rules which do not wholly fit into such standard categories."*⁴⁷

37 See, for example, *Sassen*, Neither Global nor National: Novel Assemblages of Territory, Authority and Rights, Ethics and Global Politics Vol.1 (1-2), 2008, 61-79; *Glenn*, Transnational Legal Thought: Plato, Europe and beyond, in *Maduro/Tuori/Sankari* (eds.), (note 36), 66 refers to the debate on 'despatialization', 'deterritorialising', 'a-territoriality'.

38 See, for example, *Avbelj*, Modernity, Post-Modernity and Transnational Law, Transnational Legal Theory Vol. 7(3), 2016 (forthcoming).

39 *Baker*, The Structure of Global Law: Future, Fluidity, Permeability and Polycentricity, Consortium for Peace and Ethics, Working Paper No. 2, 7/1, 2012, 105.

40 *Ibid.*

41 *Ibid.*, 106.

42 *Ibid.*, 109.

43 *Ibid.*, 117.

44 *Ibid.*, 113.

45 *Ibid.*, 114.

46 *Ibid.*, 117.

47 *Jessup*, Transnational Law, 1956, 3.

As I have argued elsewhere,⁴⁸ this definition of transnational law is over-inclusive. It encompasses any, not necessarily legal, rules beyond state. As such a broad concept transnational law is deprived of its distinctiveness as well as of its utility. In order to avoid this result, it has been common to divorce *Jessup*'s definition of transnational law *lato sensu* from transnational law *stricto sensu*. Pursuant to this narrower conception, transnational law has been identified as the law without a state,⁴⁹ which is indistinguishable from *Baker*'s understanding of global law. Since *Baker*'s approach to global law is, apparently, not really satisfactory, as it fails to distinguish itself from the older notion of transnational law, it merits looking at other approaches too.

One that deserves our attention, is the approach of *Neil Walker*. In his recent treatise,⁵⁰ he has tried to move beyond a mere rhetorical as well as a very thin usage of global law. In his view, global law is not just a label for one's (corporate) self-promotion across the globe. It is also more than a description of the activities of the institutions with a global span.⁵¹ Accordingly, for Walker law qualifies as global law due to its

*"practical endorsement of or commitment to the universal or otherwise global-in-general warrant of some laws or some dimensions of law."*⁵²

It is thus essential to global law to at least purport to cover all actors and activities relevant to its remit across the globe.⁵³

As such, global law is an adjectival rather than a nominal category. It does not specify any source or pedigree.⁵⁴ Following this criterion, *Walker* has mapped out seven species of global law, dividing them into two groups. One group makes claims towards convergence. These convergence-promoting types of global law endorse hierarchy and normative singularity,⁵⁵ and involve structural, formal and abstract-normative approaches. The other group contains examples of global law that make claim towards divergence and hence stress difference, heterarchy and plurality. These divergent approaches include laterally co-ordinate, functionally specific and hybrid forms of global law.⁵⁶ The historical-discursive approach to global law connects the two groups, which are anyhow not sealed categories, but often overlap, complement and even conflict with each other.⁵⁷

Walker's concept of global law is thus narrower in scope than *Baker*'s. Global law is the law with a (claim to) global, universal reach and not any law with transboundary application, which makes it different from transnational law. This means that, unlike *Baker*, *Walker* has succeeded at carving out an autonomous conceptual space for global

48 See, *Avbelj*, (note 38).

49 To paraphrase Teubner's global law without a state, see *Teubner*, Global Bukowina': Legal Pluralism in the World Society, in Teubner (ed.), Global Law Without a State, 1997.

50 *Walker*, Intimations of Global Law, 2015.

51 See *Walker* cited in *Avbelj*, The Concept and Conceptions of Transnational and Global Law, WZB Discussion Paper SP IV, 2016, 9.

52 *Walker*, (note 50), 19.

53 *Ibid*, 21.

54 *Ibid*, 21.

55 *Ibid*, 56.

56 *Ibid*, 58.

57 *Ibid*, 57.

law. The difficulty that his concept, however, faces is a highly abstract orientation, which makes one wonder whether global law is indeed positive law or just a discourse about global law or, eventually, both.

A relatively high level of abstraction also defines a take on global law adopted by *Rafael Domingo*. He has conceptualized global law as a legal order of seven primary principles.⁵⁸ The principles of justice, reasonableness and coercion define the global law's essence.⁵⁹ The remaining principles of universality, solidarity, subsidiarity and horizontality specify its nature.⁶⁰ These principles make global law a distinct concept, in particular by setting it apart from international law, which is, in *Domingo*'s eyes, built on the principles of totality, individuality, centralism and verticality.⁶¹

According to these thinkers of global law, the apparent vagueness and abstractness of global law is nothing to lament. For *Walker*, global law is and is bound to remain something deeply unrealised, in the process of becoming.⁶² Baker too, as we have seen above, has emphasised global law's permeability as part and parcel of its identity. What matters, is that global law finally makes a rupture with the old compartmentalized world, to reveal a fundamental interconnectedness⁶³ of the legal (as well as social, economic and political) sites across the world, on all levels of jurisgenerative activity. The challenge that emerges then for global law is what to make of and how to structure this interconnectedness.

Broadly two contrasting answers have been developed in a response to this challenge. One favours exclusivity, while the other stresses complementarity of global law. The former is championed by *Domingo*, who posits global law in a zero-sum relationship with pre-existing legal regimes, in particular that of the state and international law. He celebrates their withering away and presents global law as something that will not only complement, but replace and supplant them. The state and international community will be replaced by a global community and global legal order. This process has already been set in an irreversible motion.⁶⁴

Others have disagreed with this view and have stressed that the legal world consists of a multiplicity of normative orders, which interact through network-based governance structures in which law plays a prominent role as a medium of structuring expectations and norms.⁶⁵ The taking of sides in this disagreement is important because it bears directly on the question of the viability and desirability of constitutionalizing the globe, eg of making constitutionalism a grammar for global law. It is to this intricate point that we turn next.

58 *Domingo*, (note 11), 154.

59 *Ibid*, 157.

60 *Ibid*, 158.

61 *Ibid*, 182 ff.

62 *Walker* in Musa/de Welder (eds.), *Reflections on Global Law*, 2013, 9.

63 *Walker*, *ibid*.

64 *Domingo*, (note 11), 55, 102, 122.

65 *Kjaer*, *Constitutionalism in the Global Realm: A Sociological Approach*, 2014, 153.

IV. Constitutionalizing the Globe

It has been suggested that constitutionalism in a global realm could come in one of the three forms: as singularity, as commonality and as plurality.⁶⁶ As mapped out by *Walker*, global constitutionalism as singularity is about constitutionalizing international law, by translating and adapting the hierarchical state-centred constitutional law in form of the top-down governing structure of the *United Nations* to rule the globe.⁶⁷ Global constitutionalism as commonality is, in contrast, about internationalizing constitutionalism by elevating bottom-up the national constitutional theories and practices in horizontal and vertical networks of co-operation across the globe.⁶⁸ To a certain extent, global constitutionalism as commonality could be thus seen as an advanced version of the new constitutionalism, combined with comparative (constitutional) law and multi-level governance.⁶⁹

In both of these cases the conventional constitutionalism, described above, remains intact. It is either applied top down from the premises of the *United Nations* across the globe; or it is spread over the globe mostly horizontally through the influential western networks. In either case, however, it is clear that this type of top-down or bottom-up global, but essentially conventional statist constitutionalism, cannot be squared with global law that is fractured, fluid, permeable and poly-centric. It is, on the other hand, compatible with *Walker's* convergence-promoting account of global law, which global constitutionalism as plurality fails to capture. The latter comes (at least) in two distinct versions: the legal and the sociological.

The sociological form of global constitutionalism has been defended by *Teubner* under the label of societal constitutionalism.⁷⁰ It starts off from the premise that

“contemporary societies have an informal constitutionality that is neither normatively nor directly centred on states.”⁷¹

This enables the defenders of societal constitutionalism not only to move beyond the state, but also to capture the widespread plurality of the entire range of functional sectors of the global society as well as to cast their autonomous forms and activities into a constitutional grammar.⁷² These autonomous, self-referential functional systems with their informal constitutions represent the constitutional fragments. They make up a thoroughly non-unitary global constitutionalism, which is subject to a double fragmentation and marked by constitutional conflicts that are an inherent feature of the sociological global constitutionalism.⁷³ As a result, the latter's main quest is to concentrate on the

66 *Walker*, above (note 50), 91-100.

67 *Ibid*, 91-94.

68 *Ibid*, 94-97.

69 *Hooghe/Marks*, Multi-level Governance and European Integration, 2001.

70 *Teubner*, (note 15).

71 *Thornhill*, Constitutional Law from the Perspective of Power, 2011, 244, cited in *Teubner*, (note 15), 4.

72 *Ibid*, *Teubner*, (note 15), 4.

73 *Ibid*, 13.

mediation of these constitutional conflicts through a global constitutional conflict of laws.⁷⁴

Societal constitutionalism fits rather well the global law as described by *Cata Baker* as well as *Walker's* divergence-accommodating leg of global law. Nevertheless, and not unlike the conventional global constitutional take presented above, its remit appears to be partial. As already indicated, it leaves out the convergence-fostering leg of global law and privileges private constitutional fragments over the public authorities. The sociological emancipation of the many functional partial constitutions,⁷⁵ divorced from the state, is thus both a strength and a weakness of societal constitutionalism. The same is true of its focus on the informal constitutionalism. By taking constitutionalism so far from the conventional meaning, it raises the question of the appropriateness of the continuous use of the constitutional tag. Societal constitutionalism is so categorically different from the conventional constitutionalism that it effectively represents a different, indeed a new concept, which also deserves a different name. In short, societal constitutionalism can serve as a grammar of several sectors or fragments of global law, but this grammar is neither holistic nor constitutional in the ordinary meaning of the term. Last but not least, that might not even be its purpose.

The case is, however, different with the legal version of constitutionalism as plurality. Promoted as cosmopolitan constitutionalism by *Mattias Kumm*, this version of constitutionalism provides a cognitive frame for the holistic construction of legitimate public authority.⁷⁶ It acts as

*“a universally applicable conceptual framework for the analyses and assessment of the institutions, procedures, and decisions of public authorities.”*⁷⁷

To do so, however, constitutionalism needs a more correct conceptualization,⁷⁸ falling nothing short of the *Copernican turn*.⁷⁹ The order of things has to be inverted. Now, contrary to what we have long believed, constitutionalism is no longer dependent on the statist framework, rather it is the latter – as so many other spaces of the political – that is contingent on constitutionalism.⁸⁰ What constitutionalism thus actually stands for is not a statist or any other particular institutional solution. It is the transcontextual principles: formal, jurisdictional, procedural and substantive,⁸¹ which encompass legality, subsidiarity, due process, democracy and human rights protection. They are considered universal, embedded and derived from public reason.⁸² While they refurbish constitutionalism with the universalist perspective,⁸³ they do not turn it into a hierarchical – monist paradigm. Cosmopolitan constitutionalism does not impose hierarchy between different spheres of legality, rather it allows them to coexist in a coherent way by pro-

74 Ibid, 13.

75 Ibid, 171.

76 Ibid, 322.

77 Ibid.

78 Kumm, (note 30), 261-262.

79 Ibid, 263.

80 Ibid, 263-264.

81 Ibid, 268.

82 Ibid, 310, 315.

83 Ibid, 322.

viding the means for a principled resolution of conflicts that might arise between them.⁸⁴

Societal constitutionalism and cosmopolitan constitutionalism share the departure from the exclusively statist constitutional framework. They also both focus on the plurality, rather than unity or commonality,⁸⁵ but this pluralist orientation is much more pronounced in societal constitutionalism than in its cosmopolitan counterpart. Cosmopolitan constitutionalism preserves many traits of the conventional constitutionalism, but divorces them from the state, so to make them fit the environment and realities beyond the state. Unlike the societal constitutionalism, which focuses on the private exercise of informal, functional authority, cosmopolitan constitutionalism is concerned with framing the public authorities to ensure their legitimate functioning and operation. This legitimacy is not, as in the state, exclusively based on the fit with the in-put legitimacy of the “we the people”, but stems from the right balance of the underlying constitutional principles. These serve the resolution of constitutional conflicts, which, interestingly, the legal and sociological constitutional approaches alike try to resolve in a principled manner.⁸⁶

Despite several similarities, the two pluralist constitutional approaches differ fundamentally in terms of their focus and ambition. Cosmopolitan constitutionalism is explicitly holistic, paradigm-building and all-encompassing, even exclusionary. *Kumm* has made this clear in his discussion of the relationship between constitutionalism and international law, as he argued that once constitutionalism and international law are properly understood, they remain two discourses, because they are employed on different planes, but ultimately they are of one and the same kind.

“*There is only constitutionalism [but] in different institutional contexts*”.⁸⁷

Societal constitutionalism makes no such claim. The latter is after all about constitutional fragments, whereas cosmopolitan constitutionalism is regarded as a principled framework for legal pluralism.⁸⁸ This, again, makes it despite its proclaimed principled orientation more compatible with *Walker*’s convergence-promoting global law as well as, perhaps, also with *Domingo*’s principled global law. The compatibility between cosmopolitan constitutionalism and *Domingo*’s approach to global law is, however, questionable because of the latter’s explicit rejection of individuality that is a part and parcel of the liberal credo on which cosmopolitan constitutionalism builds.

Finally, not unlike the societal constitutionalism, the cosmopolitan constitutionalism too raises questions about the propriety of a continuous use of the constitutional title, about its relationship with the conventional statist constitutionalism and about the merits of the alleged *Copernican* turn. Cosmopolitan constitutionalism turns the conventional constitutionalism inside out. Essentially, it too creates a new concept, but keeps the old label. Especially, it does away with the popular dimension of the constitution, which has been a landmark of the constitutionalism inside the state. Through this conceptual

⁸⁴ *Ibid.*

⁸⁵ *Walker*, (note 50), 97-100.

⁸⁶ *Teubner*, (note 15), 172, stressing the justice principled in the form of »sustainability« as a leading principle of conflicts resolutions between the regimes.

⁸⁷ *Kumm*, (note 30), 263.

⁸⁸ *Ibid*, 274.

transformation, the cosmopolitan constitutionalism can be extended beyond the state to the supranational and international plane, including the globe, but again it runs short of turning itself into a grammar of global law *in toto*.

In a nutshell, our study of constitutional attempts to frame the globe reveals that no single version of global constitutionalism matches the global law in its entirety or in all of its versions. There is a partial fit. Certain types of global constitutionalism match convergence-promoting others again divergence-accommodating types of global law. In these attempts at constitutionalizing the globe, the concept of constitutionalism itself has been transformed. Sometimes only marginally, especially when the statist constitutionalism has simply been imposed top down or exported bottom-up to the globe. In other cases, again, the transformation has been radical, so that nothing, other than the name, has been left of the conventional concept.

In the attempts of turning constitutionalism into a grammar of global law, there have apparently emerged many conceptions of constitutionalism that, as such, do not, for they cannot, provide for a single grammar of global law. We can observe many types of global law, several conceptions of global constitutionalism that make up many partial grammars of global law. In approaching global law, which aims towards or indeed is about universality, we have to be cognizant of the fragmentation of the theoretical or epistemic lenses through which global law is perceived, conceived and normatively influenced. This fact of epistemic fragmentation, *a priori*, disqualifies any attempts at turning any single constitutional account of global law in its allegedly exclusive and comprehensive theoretical container. What is needed instead, if you are a proponent of constitutionalization of the globe, is a great degree of modesty and complementarity.

V. A Call for Modesty and Complementarity

Despite the fact that the preceding discussion has demonstrated an imperfect fit between global constitutionalism(s) and global law(s), this article concludes on a positive, but simultaneously cautionary note. To do so, I would like to call, by way of answering the question of the constitutionalism's conceptual capacity and normative desirability to frame the globe, for modesty and complementarity. There is, of course, nothing in the nature of constitutionalism itself, after all it is an amenable social concept, that would *ab initio* disqualify it as a grammar of global law. Attempts at constitutionalizing the globe are therefore not futile and can be, if persuasively argued for, not just compelling but also legitimate. Nevertheless, and simultaneously, in the process of translation of constitutionalism to the globe one must also be aware of several pitfalls, which call for an aforementioned modesty.

This is necessary since constitutionalism is an extremely ambitious and, above all, normatively overloaded concept. It is not just any social concept. It is a *political* social concept *par excellence*, which has been shaped by and has emerged out of very tangible historical struggles. Most of these struggles are closely connected to the idea and practice of statehood. It is thus a truism to repeat once more that constitutionalism conventionally understood is a statist concept. Irrespectively whether one likes this or not, this fact needs to be repeated, acknowledged and factored in before starting any debate on global

constitutionalism. In the opposite case, we risk pre-emptying the very debate which was yet to begin.

A modest approach to global constitutionalism, however, should not lead us to excessively thin conceptual choices. In our desire to strip constitutionalism of its statist characteristics to make it fit the globe – assuming that we are not creating some sort of a global state, which is as utopian as it is normatively harmful – we cannot go as far as changing the concept beyond recognition or to detract from its substance so much that what is left is just a label – a formal shell of constitutionalism. That would take us to an extreme reduction *ad absurdum*, which ought to be avoided. Again, as in all things, we shall be pursuing the right balance between the positive normative values traditionally associated with constitutionalism, which ought to be preserved or extended to the globe, and those conceptual, institutional, normative features of the concept that simply cannot or should not be translated to the global realm.

The pursuit of this right balance, which is anything but an easy task, could be facilitated by resorting to complementarity. That is: (very) different forms of constitutionalism could be preserved (or developed) for different ‘environments’, taking into account their disparate historical, social and overall political characters. Rather than looking for a special universal all-contexts-embracing theory of constitutionalism: a kind of minimum global constitutionalism fitting the globe as well as all the other more particular environments, we should be, as in a mosaic of concentric circles, collecting different conceptual and practical expressions of constitutionalism to build a complementary framework.

This should consist of constitutionalism in the state, beyond the state, in transnational realm and on the globe. These different environments have or call for different forms of constitutionalism, whereby the emergence of one form does not detract or even negate the former. In other words, constitutionalism beyond the state, does not (and should not) mean the demise of the statist constitutionalism; transnational “constitutionalism” does not take away from constitutionalism beyond the state, etc. Simultaneously, these different forms of constitutionalism do not exist in a mutual isolation. Instead, they form highly dynamic and self-transforming relationships, marked by a constant interaction between different environments: national, supranational, international, transnational and global.

Of course, such a theoretical construction needs a meta-theory to connect the different expressions of constitutionalism across the plurality of legal environments. As it is already dubious whether all environments deserve and/or even require the constitutional title, it is even more questionable whether the required meta-theory should be itself constitutional in character. The many constitutional approaches surveyed in this article are, of course, of this opinion. However, I remain skeptical. As I have argued in greater detail elsewhere, all these emanations of legal regulations across different regimes might be better described and explained if embedded in the language of principled legal pluralism.⁸⁹

This is a version of legal pluralism, which is not only descriptive and explanatory, as most of the legally pluralist approaches have been, but it is also normative in a thick

89 See, *Avbelj*, European Union under Transnational Law: A Pluralist Appraisal, forthcoming 2017.

way. Principled legal pluralism begins with legal plurality. That is with the recognition of many, not just statist, jurisgenerative sites which have succeeded at making plausible claims to their own legal autonomy. In this manner, principled legal pluralism captures global law in all of its fragmentation, fluidity and polycentricity. In so doing, it comes close to the societal constitutionalism, which allows for and recognizes many sociological jurisgenerative sites. However, legal pluralism insists on their legal quality, which is achieved by passing a certain threshold of mutual-intelligibility between the sites that have been (plausibly) recognized as legal sites.⁹⁰

Once this legal plurality is recognized, it must get connected to form legal pluralism. This connection ought to take place in a principled way, so that different legal orders, first, mutually recognize each other and then, secondly, commit to the non-unitary common whole. The prerequisite of meeting such a principled legal solution is the development of a normative spirit of pluralism, based on a high degree of reflexivity, which is, of course, not unlimited. Its limit is the episteme of any single legal order involved. In this way, we get a grammar for global law, which has an ambition, a commitment to the universal whole, while simultaneously recognizing the inherent limits of this universality posed by the many fragmented, more or less encompassing, pieces of the global whole.

The just sketched principled legally pluralist approach to global law is thus obviously the reverse side of cosmopolitan constitutionalism. Rather than advancing constitutionalism as a principled framework for legal pluralism, what is promoted here is legal pluralism as a principled framework for different types of constitutionalisms: statist and non-statist; formal and informal; national, transnational or global etc. Principled legal pluralism, hence conceived of, can meet the same normative objectives as the variety of constitutional attempts to frame the globe. However, its chief advantage is that it does so in a way that eschews the conceptual, normative and political controversies that the invocation of the *c-word* has too often produced. In other words, principled legal pluralism appears to be a more appropriate, more suitable means for the development of the grammar of global law as constitutionalism has been.

Nevertheless, this does not mean that principled legal pluralism now becomes an exclusive epistemic resource to legally frame the globe. Not only is this conceptually impossible, it is even more normatively undesirable and incompatible with the modest and complementary approach advocated for here. Global law, to reiterate the point made by *Walker*, is something deeply unrealized and in the process of becoming.⁹¹ As such, it necessarily prompts and invites divergent points of view and theories, which try to make sense of many of its fragments, layers as well as of the whole. All of these theories, including the constitutional ones, as this article has tried to demonstrate, do justice to the phenomenon of global law at least in a limited way.

Eventually, however, global law is more than a sum of many constitutionalisms. This can be illustrated by pushing the grammar metaphor a little bit further. Accordingly, constitutionalism could be viewed as a morphology of global law, while principled legal pluralism is its syntax. Many constitutionalisms frame the many sites of global law, while principled legal pluralism provides the glue and the matrix for the expression of

90 *Muniz-Fraticelli*, The Structure of Pluralism – On the Authority of Associations, 2014, 50.

91 *Walker*, (note 62).

the whole. The same as in linguistics, in legal grammar too, morphology and syntax are not sealed categories, but often form a morphosyntax.⁹² The meaning of the words is formed not only through syntax, by way the words are combined into sentences, but also by the form(ation) of the words itself. In a similar way, the present grammar of global law can be portrayed as a mutual interference by many constitutionalisms, drawn together by principled legal pluralism, whose structure is equally under a strong constitutional impact, avoiding, however, the legacy of the statist big C constitutionalism.⁹³

92 Payne, Exploring Language Structure, 2012, 9.

93 Walker, Big »C« or small »c«?, European Law Journal Vol. 12, 2006, 12.