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ARTICLE

Arguing Global Environmental Constitutionalism

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Abstract
The current global environmental law and governance regime has been designed primarily to attend to the worsening ecological crisis. Evidence, however, suggests that the regime is far from achieving its goal and it is failing in its efforts to solve what people perceive to be pervasive global environmental problems. There is little doubt that this regime is in need of urgent reforms and/or re-situation in a decidedly different paradigm. This article proposes that global constitutionalism, while no panacea, could contribute to these paradigm-shifting reforms by providing a new perspective through which to view the current deficient global environmental law and governance regime and, in real terms, ameliorating some of the deficiencies of the regime through a normative process of constitutionalization.

Keywords: Global Environmental Law and Governance, Sustainability, Globalization, Global Environmental Constitutionalism

1. INTRODUCTION

The global ecological crisis is severe and is continuously deepening to the extent that it is threatening life on earth.[1] The current global environmental law and governance regime has been designed mainly to attend to and ameliorate this crisis; yet, evidence suggests that the regime is far from achieving its goal and, while there are some minor successes, it is failing in its efforts to solve what people perceive to be pervasive global

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[1] Current studies on rapid and continuing environmental degradation abound. See, e.g., the Millennium Ecosystem Assessment Report, available at: http://www.maweb.org/en/Index.aspx.

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environmental problems.[2] There is little doubt that this regime is in need of urgent reforms and/or re-situation in a decidedly different paradigm. This article proposes that global constitutionalism, while no panacea,[3] could contribute to these paradigm-shifting reforms by providing a new perspective through which to view the current deficient global environmental law and governance regime and, in real terms, by ameliorating some of the deficiencies of the regime by way of a normative process of constitutionalization.

As a point of departure, this article reflects on the state of global environmental law and governance. It revisits the theory of constitutionalism and then applies constitutionalism in an environmental legal context with a view to establishing the general parameters, content and nature of environmental constitutionalism. It then briefly maps the burgeoning field of global constitutionalism and situates it in the global environmental law and governance paradigm by interrogating the notion of 'global' as it is used in the context of global environmental law and governance. In conclusion, the article identifies and elaborates on a limited number of areas in global environmental law and governance which it considers to be particularly receptive to the idea of global environmental constitutionalism. It also foresees and formulates criticism and a range of conceptual and pragmatic difficulties which could derail the global environmental constitutionalism project. It concludes with preliminary and tentative pragmatic observations with respect to the future of global environmental constitutionalism.

The reader should be aware of a few self-imposed caveats that apply. Because of the sheer scope and theoretical complexity of the issues at hand, the article cannot deal in detail with all of the issues that global environmental constitutionalism raises. The observations in this article are rather preliminary and could provide the foundational impetus for future research. This survey therefore raises many questions and endeavours to answer only a few. While it attempts neither to formulate a theory of, nor to comprehensively describe, global environmental constitutionalism or the transition of the global environmental law and governance regime to a constitutional one, this article does seek to make a case for expanding the environmental constitutionalism debate that is raging nationally to the global context. Essentially, in highlighting the potential of constitutionalism in this respect, this article also hopes to steer the maturing debate on global constitutionalism into the environmental domain

[2] These successes would be difficult to determine since 'success' is relative, it is difficult to quantify, and ultimately a determination of 'success' depends on a value judgment. Nevertheless, one possible example of a global environmental governance regime that is often considered a success is the international ozone layer protection regime. It is perceived to be successful because it has secured a good level of global adherence; it operates in a dynamic and flexible way; the level of compliance in developed states is apparently very high; and there has been a measurable reduction in ozone-depleting substances: P. Birnie, A. Boyle & C. Redgwell, *International Law and the Environment* (3rd edn., Oxford University Press, 2009), at pp. 354–5.

[3] Constitutionalism can be no panacea because there is a range of other functional and theoretical approaches to attend to law and governance woes, and, as Douglas Kysar states in his latest book and elsewhere in this volume, constitutionalism is 'a work in progress, asymptomatically striving towards an unattainable but undeniable goal of universal recognition and respect': A.D. Kysar, *Regulating from Nowhere: Environmental Law and the Search for Objectivity* (Yale University Press, 2010), at p. 245.

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or, conversely, to invite hitherto conspicuously absent environmental considerations into the global constitutionalist arena.

2. THE STATE OF GLOBAL ENVIRONMENTAL LAW AND GOVERNANCE

Today one would be hard pressed to find a domestic jurisdiction which does not provide environmental protection through laws and concomitant governance arrangements. This is also true for the global regulatory scene, where a comprehensive environmental law and governance regime aims to regulate environmental matters within and beyond state boundaries at the supranational level. Global environmental governance has recently emerged as a collective descriptive term and normative construct that encapsulates the countless (and growing) political, legal and institutional arrangements at the international, regional, sub-regional, national and sub-national levels that seek to respond to environmental problems.[4] Generally speaking, all of these arrangements aim to influence human behaviour vis-à-vis the environment. They consist of complex political and diplomatic processes; a plethora of legal arrangements such as international multilateral environmental agreement (MEA) regimes; regional, sub-regional, national and sub-national laws; state actors, various public- and private-sector organizations and other non-state actors; numerous private- and public-sector arrangements and networks; and a host of monitoring, research, information sharing, enforcement and dispute resolution mechanisms.[5] The burgeoning body of international environmental law and accompanying governance institutions is testimony to the importance and growth of global environmental law and governance. So, too, is the network-like emergence of multiple non-state actors and less formal legal rules as part of the increasingly disaggregating mass of multilevel, private–public regulatory arrangements that pertain to the global environment.[6]

Despite its incremental growth, the performance of global environmental law and governance unfortunately leaves much to be desired, and the success of the global environmental law and governance effort seems to be disproportionately small when compared to its growth. While it is difficult to appraise global environmental governance, questions concerning its effectiveness could be formulated in three different ways, namely: 'have anthropogenic environmental stresses been reduced, is environmental quality better, [and] do governments comply with their international

[4] See generally U. Beyerlin & T. Marauhn, *International Environmental Law* (Hart, 2011), at pp. 241–64; N. Gunningham, 'Environmental Law, Regulation and Governance: Shifting Architectures' (2009) 21(2) *Journal of Environmental Law*, pp. 179–212.

[5] See generally A. Hurrell & B. Kingsbury (eds.), *The International Politics of the Environment* (Clarendon Press, 1992).

[6] A selection of literature on global environmental governance includes: B.W. Chambers & J.F. Green (eds.), *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms* (United Nations University Press, 2005); E.R. DeSombre, *Global Environmental Institutions* (Routledge, 2006); D.C. Esty, 'Global Environmental Governance', in C.I. Bradford & J.F. Linn (eds.), *Global Governance Reform: Breaking the Stalemate* (Brookings Institution Press, 2007), pp. 108–14; N. Kanie & P.M. Haas (eds.), *Emerging Forces in Environmental Governance* (United Nations University Press, 2004).

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obligations to protect the environment?'[7] It is generally accepted that the regime is ineffective because anthropogenic stresses have not been reduced, environmental quality is continuously deteriorating, and states remain hesitant to subject themselves to binding environmental obligations and to comply with those to which they have subjected themselves.

Evidently, global environmental law and governance suffers from the same ills as other societal (governance) institutions (used in their broadest sense):[8]

> the dominant institutions of contemporary societies – international law regimes, state governments, the global financial system and the corporate organization of economic life, educational and cultural institutions of all kinds – have lost their capacity to govern the spheres of human activity for which they are deemed responsible in such a way as to maintain the common good.[9]

The ills of global environmental law and governance are not so much a product of the lack of an existing global environmental law and governance order. Its deficiencies are rather a result of the character of the existing order which is made up of states who enjoy sovereignty in almost all circumstances and whose behaviour is directed by non-binding environmental principles and, in some limited areas, by harder treaty rules which some states have not accepted and which are difficult to enforce. As Perez[10] suggests, some believe that:

> the current ecological crisis is, in fact, a reflection of a deeper *political* [or governance] *crisis*: our multiple environmental problems are seen as the inevitable result of, on the one hand, the failure of the political institutions of the modern democratic state to create mechanisms for fair deliberation, which could give voice to the *different constituents* of the polity (including its non-human members), and, on the other, the uncontrollable rise of an expert-technocratic administrative culture.[11]

Elaborating on these issues, the majority of commentators situate the failures of global environmental law and governance among various causes and consequences, which include:

- the fragmentary growth of international laws and their concomitant governance structures;

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7 P.M. Haas, 'Global Environmental Governance', in Commission on Global Governance, *Issues in Global Governance* (Kluwer Law International, 1995), pp. 333–70, at 351.

8 Young's broad view of institutions suggests that they are 'sets of rules of the game or codes of conduct that serve to define social practices, assign roles to the participants in these practices, and guide the interactions among occupants of these roles ... all institutions are social artifacts created by human beings – consciously or unconsciously – to cope with problems of coordination and cooperation that arise as a result of interdependencies among the activities of distinct individuals or social groups': O.R. Young, *International Governance: Protecting the Environment in a Stateless Society* (Cornell University Press, 1994), at p. 3.

9 R.J. Engel, 'Introduction', in R.J. Engel, L. Westra & K. Bosselmann (eds.), *Democracy, Ecological Integrity and International Law* (Cambridge Scholars Publishing, 2010), pp. 2–7, at 2.

10 O. Perez, 'The Many Faces of the Trade–Environment Conflict: Some Lessons for the Constitutionalisation Project', in C. Joerges, I. Sand & G. Teubner (eds.), *Transnational Governance and Constitutionalism* (Hart, 2004), pp. 233–56.

11 Ibid., at pp. 236–7.

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- the lack of compliance with and enforcement of environmental laws, norms and standards;
- the lack of, or the inadequate participation of civil society in, governance and law-making processes;
- a general lack of good governance practices;
- the continued prevalence of environmental injustice and the lack of access to justice;
- the lack of legitimacy of the actors and the democratic deficits in decision-making structures;
- the obstacles presented by state sovereignty, unilateral decision-making, abuse of authority and the serving of self-interests by states;
- the difficulties of holding private entities such as transnational corporations to account for their environmental wrongs;
- the lack of core ecological and ethical values; and
- the non-existence, and/or lack of adherence to and enforceability of universal, fundamental environmental rights.[12]

The foregoing suggests that global environmental governance is ineffective to the extent that it does not answer to the dictates of what is perceived to be an effective governance system: '[A]n effective governance system is one that channels behavior in such a way as to eliminate or substantially to ameliorate the problem that led to its creation. A governance system that has little behavioral impact, by contrast, is ineffective.'[13] While reforms of the regime could be accomplished through various strategies and approaches – such as the integration of environmental laws and treaty regimes and better compliance and enforcement mechanisms – constitutionalism could be another strategy to foster reforms and initiate the much needed paradigm shift. Moreover, constitutionalism could provide a structured approach to resituate some of the foregoing reform strategies in the 'higher', well-established constitutionalist paradigm.

3. CONSTITUTIONALISM

What does constitutionalism entail and why is it relevant to the present debate? A helpful way to discern the conceptual contours and meaning of constitutionalism is to investigate it as it manifests in the domestic/national context. Considered from a domestic perspective, constitutionalization is 'a shorthand term for the emergence of constitutional law within a given legal order' and implies 'that a constitution (or constitutional law) can come into being in a process extended through time', or that 'a legal text (or various legal texts) can acquire (or eventually lose) constitutional properties in a positive feed-back process'.[14] This process is based on 'constitutionalism',

[12] See, among others, the authorities listed in nn. 4 and 6 above.

[13] Young, n. 8 above, at p. 30.

[14] A. Peters, *The Constitutionalist Reconstruction of International Law: Pros and Cons* (NCCR International Trade Working Paper No. 11(07–2006), at p. 3.

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which is vague and difficult to cast accurately in a clear descriptive mould.[15] Constitutionalism derives from the term 'constitution' which, at its most basic, refers to the constitution of a state that sets out the order and organization of the state and of political life:[16] 'it establishes, defines and organizes the main organs of government, their constitution and power'[17] (this is usually expressed as being a constitution in the 'thin' sense of the word). While it cannot be disconnected from the constitutive functions of a constitution in the 'thin' sense, constitutionalism is, however, closer to the manifestation of a constitution in the 'thick' sense, in that it describes the 'constitutional features of being constitutive, stable, [mostly] written [or codified] superior law, justiciable, entrenched and expressing a common ideology'.[18] 'Thick' constitutions are therefore conceived of as being self-confident assertions of the collective will;[19] they are value-laden and exude numerous characteristics that could legitimize, dignify and improve a legal order.[20]

The terms 'constitution', 'constitutionalism' and 'constitutionalization' are all '"evaluative-descriptive terms" that [appear] inevitably [to] evaluate whatever they are employed to describe'.[21] As an evaluative-descriptive term, constitutionalism arguably refers not only to 'a constitution', but importantly also to a specific type of constitution – that is, a legitimate one universally accepted by society.[22] This is not to say, however, that constitutionalism is always associated only with a constitution in the sense of a codified document or source. Constitutionalism can also manifest as being reflected and/or embodied in the general laws and conventions of a particular country. The United Kingdom (UK), for example, famously does not have a codified constitution, but its laws entrench numerous constitutional principles and reflect the characteristics of constitutionalism.[23] Having a codified or discretely identifiable

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15 Kirchhof points out that, even today, the constitutional concept is still not used uniformly: '[D]er Verfassungsbegriff wird auch heute noch immer nicht einheitlich verwendent': P. Kirchhof, 'Verfassunggebung jenseits des Verfassungsstaates?', in H. Trute *et al.* (eds.), *Allgemeines Verwaltungsrecht: zur Tragfähigkeit eines Konzepts* (Mohr Siebeck, 2008), pp. 769–93, at 770.

16 M.H. Allen, 'Globalization and Peremptory Norms in International Law: From Westphalian to Global Constitutionalism' (2004) (41) *International Politics*, pp. 341–53, at p. 342.

17 A. Wiener, 'Editorial: Evolving Norms of Constitutionalism' (2003) 9(1) *European Law Journal*, pp. 1–13, at pp. 1–2, 5.

18 Wiener, ibid., at p. 5. Bodansky proposes that constitutions set the fundamental rules of a polity: D. Bodansky, 'Is There an International Environmental Constitution?' (2009) 16(2) *Indiana Journal of Global Legal Studies*, pp. 565–84, at p. 570.

19 B. Bryde, 'International Democratic Constitutionalism', in R. Macdonald & D.M. Johnston, (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Martinus Nijhoff, 2005), pp. 103–25, at 105.

20 Peters, n. 14 above, at p. 5.

21 A. Peters & K. Armingeon, 'Introduction: Global Constitutionalism from an Interdisciplinary Perspective' (2009) 16(2) *Indiana Journal of Global Legal Studies*, pp. 385–95, at p. 387.

22 Ibid., at p. 389.

23 As Ackerman states: 'The English had never indulged the Enlightenment conceit that a formal constitution was necessary for modern government. It was their culture of self-government, their common sense and decency, that distinguished their evolving commitment to democratic principles – not paper constitutions and institutional gimmicks like judicial review': B. Ackerman, 'The Rise of World Constitutionalism' (1996) *Yale Law School: Occasional Papers*, Paper 4, available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1005&context=ylsop_papers&sei-redir=1#search=%22yale%20law%20school%20occasional%20papers%20ackerman%22.

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constitution is thus no prerequisite for a legal order to embody constitutionalism and it would be possible to have 'either constitutions without constitutionalism ... or constitutionalism without a constitution'.[24] In sum, constitutionalism describes and evaluates a legal order and measures it against universally accepted conceptions of what it ideally might or should be.

In addition to its evaluative and descriptive functions, constitutionalism performs a more important functional or prescriptive role – in other words, constitutionalism fulfils a specific function to the extent that it prescribes, proscribes and limits conduct and authority. Maduro[25] lists three basic prescriptive functions of constitutionalism as including: (a) a set of legal and political instruments that limit power; (b) an expression of polity or an instrument for organizing power in pursuit of a common good; and (c) 'creating a deliberative framework in which competing notions of the common good can be made compatible or arbitrated in a manner acceptable to all'. In this sense, constitutionalism is often associated with, among other things:

- the idea of a law that transcends all other law, or the idea of a supreme norm;
- the notion of a fundamental law that is onerous to amend or to repeal;
- law that curtails political power and state authority;
- law that reflects the living law of the people, deriving its legitimacy from a social contract and its authority from the sovereignty of the people;
- law that exudes an ethical core in the form of universal fundamental rights and 'higher' values;
- a legal and state order which respects the separation of powers; and
- the existence of judicial review and checks and balances on power and other legislative and executive governance functions.[26]

In Summers' view [27] these constitutional characteristics and elements are considered 'second-order' law, which implies that there is a 'first-order' law that is subject to these 'higher', 'second-order' laws. While 'first-order' (or 'ordinary') law applies to legal relations between immediate addressees of this type of law, 'second-order' law:

> [is] *about* first order law, including not only its principles, but also its rules, decrees, and other law. Principles of the rule of law are about first order law in the sense that they are general norms that direct and constrain how first order law is to be created and implemented ... they specify and shape its general shape or configuration.[28]

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24 Bodansky, n. 18 above, at p. 569.

25 M.P. Maduro, 'The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism' (2005) 3(2/3) *International Journal of Constitutional Law*, pp. 332–56, at p. 333.

26 D.M. Johnston, 'World Constitutionalism in the Theory of International Law' in R. St. John Macdonald & D.M. Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Martinus Nijhoff, 2005), pp. 3–29, at 17–18; F. Venter, 'Die Staat, Staatsreg en Globalisering' (2008) 3 *Tydskrif vir die Suid-Afrikaanse Reg*, pp. 412–24, at 416.

27 R.S. Summers, 'The Principles of the Rule of Law' (1999) 74(5) *Notre Dame Law Review*, pp. 1691–712, at 1692.

28 Ibid.

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In other words, constitutional principles such as the rule of law are about 'ordinary' law and must inform how 'ordinary' law is made and how it is implemented. Constitutionalism as expressed in terms of constitutional principles therefore embodies, whether codified or not, superior law which, because of its universality, is respected and revered by society as such.

Another feature of constitutionalism is that it provides (most usually by means of a codified constitution) the highest possible level and means in law to demonstrate the shared values and guiding principles of a social order to which most people consent.[29] Constitutionalism thus entails conceptions of fairness, justice and legitimacy and it strives to improve legal stability and predictability which, in conjunction with the other features of constitutionalism described above, aim to improve the effectiveness of law to the extent that 'constitutional rules make a difference for individuals and are not just cheap talk by politicians'.[30] It does so mainly through constitutional principles and constructs such as the rule of law, the limitation of power, the institutionalization of power and the proper control of this power, universal fundamental rights and values, the opportunity for civil society participation and representation in governance; and legality in the context of the *Rechtsstaat* notion.[31]

The foregoing has the cumulative effect that numerous obligations are created for the state and that, conversely, the citizen has the opportunity and means by which to claim entitlements (usually formulated as rights) from the state, which the state must recognize, respect, protect, promote and fulfil.[32] In this way, constitutionalism holds the state to account in terms of a higher standard, specifically with respect to its performance, conduct and the degree to which it observes basic human rights and other (constitutional) values and norms universally endorsed by society. Conversely, it also empowers society to engage in deliberate participative governance. Constitutionalism is thus a construct which operates between the state and the individual in the sense that it regulates vertically the relationship between the state and the individual. As a result, constitutional standards and obligations are usually applied almost exclusively to the state. In certain jurisdictions, however, such as South Africa and Germany, some

[29] In the words of Bosselmann: 'Unbestritten ist die Verfassungsebene das zentrale Feld der Auseinandersetzung um gesellschaftliche Wertorientierungen. Nirgendwo sonst bietet sich eine vergleichbare Ebene, auf der sich Werte und Leitprinzipien einer Gesellschaftsordung so deutlich zeigen wie auf der Ebene der Verfassung. Dies liegt vorallem daran, daß die Verfassung den größtmöglichen Konsens einer pluralistischen Gesellschaft verkörpern soll': K. Bosselmann, *Im Namen der Natur: Der Weg zum ökologischen Rechtsstaat* (Scherz, 1992), at p. 190. Bosselmann explains that a constitution provides the clearest manifestation and evidence of a social order's values and guiding principles. This is because a constitution most comprehensively embodies the shared consensus of a pluralistic society.

[30] Peters & Armingeon, n. 21 above, at p. 385.

[31] *Rechtsstaat* refers to 'the authenticity of the polity, the formal legality of the power of the state to act, and the conformity of the actions of the state (legislature, executive, and courts) to the requirements of law (protection against arbitrary action)': L.C. Backer, 'Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering' (2009) 16(1) *Indiana Journal of Global Legal Studies*, pp. 85–172, at 86–7.

[32] The duties to respect, protect, promote and fulfil were first articulated and universally accepted in the context of the International Covenant on Civil and Political Rights, UN GA Resolution 2200A (XXI) of 16 Dec. 1966, in force 23 Mar. 1976, available at: http://www2.ohchr.org/english/law/ccpr.htm; the International Covenant on Economic, Social and Cultural Rights, UN GA Resolution 2200A (XXI) of 16 Dec. 1966, in force 3 Jan. 1976, available at: http://www2.ohchr.org/english/law/cescr.htm; and the General Comments to these, details of which are available at: http://www2.ohchr.org/english/bodies/cescr/comments.htm.

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constitutional provisions could be applied horizontally (*Drittwirkung*) to non-state parties.[33] This creates the additional opportunity to impose 'horizontally' the obligations deriving from constitutionalism on, for example, corporations and banks, and between other non-public authority bearing individuals and entities.[34]

To summarize, the benefits of law that is deemed to be constitutional over law that is not (and is deemed therefore to be 'ordinary', 'first-order' law) include that it trumps other values and functions as a higher standard for 'ordinary' law; it informs 'ordinary' law; it provides a considerably higher degree of state accountability; and its application – and therefore the related effects of constitutionalism – could be broadened beyond the orthodox confines of public authority. By providing basic human rights, values and moral principles, it creates the foundation that legitimizes and guides governance, be it private or public; it sets out those basic universal values which a legal community is deemed to hold dear and which the legal order seeks to protect; and it provides checks and balances for the exercise of executive, legislative and judicial authority in the day-to-day task of governing. Constitutionalism is therefore a powerful paradigm which has the potential to improve 'ordinary' law and governance by facilitating procedural changes to boost transparency, participation and accountability; and by providing substantive principles and norms that address, for example, fundamental human rights, constitutional standards and other entitlements. While the worth of constitutionalism or a constitutionalized legal order should not be overstressed by suggesting that it is a magic cure for the ills of law and governance generally, the argument that a constitutionalized legal order is preferable, 'better', or more acceptable than one that is not constitutionalized carries with it considerable weight.

4. EXTENDING CONSTITUTIONALISM TO THE ENVIRONMENTAL CONTEXT: DOMESTIC PERSPECTIVES

Few would disagree today with the statement that environmental degradation is one of the most pressing concerns in modern times. Environmental care has become the centre of public debate and permeates virtually all discourse in a trans- and multi-disciplinary sense. As a result, in the domestic context, environmental care has recently been 'elevated' from the 'ordinary' legal level to the 'higher', more enduring, constitutional level, as it were.[35] To

[33] See, e.g., s. 24 of the Constitution of the Republic of South Africa, 1996, and L.J. Kotzé, 'The Judiciary, the Environmental Right and the Quest for Sustainability in South Africa: A Critical Reflection' (2007) 16(3) *Review of European Community and International Environmental Law*, pp. 298–311; and R. Brinktrine, 'The Horizontal Effect of Human Rights in German Constitutional Law: The British Debate on Horizontality and the Possible Role Model of the German Doctrine of '*mittelbare Drittwirkung der Grundrechte*' (2001) 4 *European Human Rights Law Review*, pp. 421–32.

[34] A. Emmerich-Fritsche, 'Zur Verbindlichkeit der Menschenrechte für transnationale Unternehmen' (2007) 45 *Archiv des Völkerrechts*, pp. 541–65.

[35] As Bosselmann states: '[n]iemand würde heute bezweifeln, daß dem Umweltschutz Verfassungsrang gebührt und in den Katalog moderner Staatsziele und Staatsaufgaben gehört': K. Bosselmann, *Ökologische Grundrechte: Zum Verhältnis zwischen individueller Freiheit und Natur* (Nomos Verlaggesellschaft, 1998), at p. 49. Bosselmann states that there is little doubt today that environmental protection demands protection at the constitutional level and that environmental protection resorts under the range of modern state objectives and state tasks.

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be sure, constitutional environmental care is now commonplace, as is evidenced by numerous domestic constitutions.[36] This means that domestic environmental concerns and protective measures have gradually become *constitutionalized*. Where environmental care is couched in constitutionalist language, as it is here, it is termed 'environmental constitutionalism'. There is a dearth of literature dealing with environmental constitutionalism *as a concept* in a systematic way and, conceptually at least, it remains ambiguous.[37] As a result, the exact theoretical content and extent of environmental constitutionalism remains insufficiently determined.

Nevertheless, popular means by which to constitutionalize environmental care at the domestic level currently include one or more of the following: (i) entrenching one or more environmental or related rights as justiciable political or socio-economic fundamental rights (of a substantive and/or procedural nature) within a constitution; (ii) providing for and safeguarding 'sustainable development' and its associated principles in a constitution as guiding principles, peremptory obligations or ideals;[38] and/or (iii) by delineating specific state and non-state functions and duties with respect to environmental protection (in the 'thin' sense the constitution assigns duties and in the 'thick' sense it ensures that governance actors comply with these duties). These duties could include, among others:

- to ensure intra- and intergenerational equity;
- to conserve resources, and ensure equitable access to and use of resources;
- to avoid adverse environmental impacts;
- to prevent environmental disasters, minimize damage and provide emergency assistance;
- to compensate for environmental harm;
- to ensure environmental justice, access to justice, and sufficient civil society representation and participation.[39]

Constitutions and laws of countries will often also prescribe the manner in which these duties must be performed by government and its agencies, with the minimum threshold usually being the dictates of good governance (transparent, inclusive, participative, ethical, non-corrupt governance).[40] In other words, environmental constitutionalism is not only about the duty to realize environmental obligations, but also about the manner in which these obligations are fulfilled, because its sets a standard for, and could even be used to enforce, good environmental governance.

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[36] For a survey of these, generally, see D.R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press, 2011).

[37] Some authors have dealt conceptually with environmental constitutionalism. See, among others, A. Kiss, 'The Legal Ordering of Environmental Protection', in St. John Macdonald & Johnston, above n. 26, at pp. 567–84; Kysar, n. 3 above, at pp. 229–54; Boyd, ibid.

[38] In the context of the EU, see T. Becker, 'Die zukünftige EU-Verfassung: Ein Chance für die Umwelt?' (2004) 5 *Ökologisches Wirtschaften*, pp. 6–7, at 6.

[39] E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony; and Intergenerational Equity* (Transnational, 1989), at pp. 50–86.

[40] E.g., s. 195 of the Constitution of the Republic of South Africa (n. 33 above) states that public administration must be governed by the democratic values and principles enshrined in the Constitution.

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Domestic environmental constitutionalism also occurs, as it were, through the work of courts and their interpretation and application of environmental laws and constitutional obligations.[41] The judicial review function of courts – mostly of administrative decisions made by executive authorities and determination of the constitutionality of environmental laws – is itself a constitutional function and a manifestation of environmental constitutionalism. So too is the manner in which domestic courts contribute to the enforcement of private and public environmental law obligations, the resolution of disputes and the provision of access to justice. Moreover, courts give 'independent and authoritative recognition to concerns of a community character',[42] inclusive of the environmental context.

Environmental constitutionalism could further be observed at the domestic level, where constitutional procedures are laid down that prescribe the manner in which (environmental) legislation is adopted, and it could prescribe to a certain extent broad parameters and minimum constitutional requirements to which the substantive content of environmental laws must adhere. These constitutional prescriptions would then aim to ensure both participation and representation in terms of the manner in which laws are created and hopefully ensure substantively 'good' constitutional environmental laws.[43]

While no comprehensive theory of environmental constitutionalism has yet been developed, the general features of domestic constitutionalism discussed above suggest that environmental constitutionalism could include various elements and characteristics. These include, among others:

- environmental rights;
- environmental justice;
- intra- and intergenerational equity;
- ecological integrity;
- sustainability and its associated principles (functioning here as universal environmental moral and ethical ideals or values);
- an extended vision of the environmental obligations of the state and the private sector;
- judicial control of executive and legislative environmental governance functions; and
- an expansive notion of private and public accountability.

Environmental constitutionalism could also be used to formulate thresholds and criteria to which environmental laws must adhere; in other words, it could facilitate the creation of good environmental laws. These elements are mostly of a substantive nature and they seek to address fundamental ecological standards, rights, duties and other entitlements. In addition, procedural elements of environmental constitutionalism could include, inter

41 L.J. Kotzé & A.R. Paterson (eds.), *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* (Kluwer Law International, 2009).

42 T. Stephens, *International Courts and Environmental Protection* (Cambridge University Press, 2009), at p. 8.

43 E.g., s. 2 of the Constitution of the Republic of South Africa, (n. 33 above) states that '[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

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alia, access to information; transparency; participative and representative environmental governance; access to justice; and ways to better enforce environmental laws.[44]

Up to this point, this section has painted a rosy picture of environmental constitutionalism. It must also be acknowledged, however, that environmental constitutionalism has its critics who (justifiably so) view the concept and its practical value with some scepticism. A frequently encountered criticism is one that is also often levelled against constitutionalism more generally – namely that it has little practical value, it remains symbolic, and is often nothing more than a paper tiger:

> On the whole ... efforts to constitutionalize environmental law remain largely symbolic exercises even under the socially and environmentally progressive constitutions that have been adopted during the past half century. The situation is comparably dim at the supranational level.[45]

Environmental constitutionalism, especially insofar as it manifests as environmental rights, has also been described *passim* as being vague, absolute, redundant, ineffective, and merely an exercise in window dressing that generates false hopes.[46]

Despite these (mostly valid) criticisms, espousing environmental constitutionalism could be thought to hold out various benefits not offered by 'ordinary', non-constitutional statutory protection, for several reasons. These include, among others, the fact that it:

- provides the opportunity, and to some extent the means, by which to reform governance, the state, laws and society with respect to the environment;
- prioritizes environmental care by equating it at the higher constitutional level to fundamental rights, ethics and universal moral values (or constitutional principles);
- boosts procedural aspects of environmental governance and therefore also private actor participation and state accountability;
- provides a legitimate foundation and means for creating and enforcing environmental rights, values and other sources of ecological obligation upon private and public actors;
- provides checks and balances for the creation of legislation and the exercise of executive environmental governance functions;
- provides the means to dictate the content of laws; and
- establishes moral and ethical obligations with respect to the environment and a concomitant public and private, intra- and interstate justificatory basis for, and authority to require, proper performance of these duties.

In short, constitutionalism is important for environmental protection because it provides the means to defend (environmental) rights and interests, to restrict authority

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44 These issues are provided for by many national constitutions and internationally (albeit mostly in the EU) by the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), Aarhus (Denmark), 25 June 1998, in force 30 Oct. 2001, available at: http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention.html.

45 Kysar, n. 3 above, at p. 231.

46 Boyd, n. 36 above, at pp. 33–43.

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and private encroachment on these rights and interests, and to compel the state and even non-state actors to act affirmatively (collectively referred to as the duties to respect, protect, promote and fulfil).[47]

Therefore, while the concept itself is somewhat vague, environmental constitutionalism remains a serious contender in the environmental reformist's arsenal and convincing arguments have yet to be made for discarding it as an approach to reforming environmental law and governance. To be sure, while there is a dearth of empirical evidence to this effect, some studies have recently established that environmental constitutionalism has improved a number of domestic environmental governance regimes and that it has made a positive contribution to both the quality of environmental law and governance on the one hand, and to the results that environmental law and governance seek to achieve on the other: '[w]hile no nation has yet achieved the holy grail of ecological sustainability ... evidence ... indicates that constitutional protection of the environment can be a powerful and potentially transformative step toward that elusive goal'.[48]

5. GLOBAL CONSTITUTIONALISM

5.1. *A Global Progression*

The point was made above that 'constitution', 'constitutionalism', and 'constitutionalization' are all terms frequently encountered in domestic jurisdictional contexts. Recently, however, these terms have spilled over into the supranational arena mostly because of the pervasiveness of globalization and the many conceptual challenges globalization raises for international lawyers:[49]

> Today, the notional link between constitution and state has further been loosened in everyday language and in the legal discourse (and thereby the meaning of 'constitution' may have been broadened). It is therefore not *per definitionem* impossible to conceptualize constitutional law beyond the nation or the state. Global constitutionalism advocates non-state constitutional law, and tends to demystify the state and the state constitution.[50]

As a result, constitutionalism in the domestic context has gradually metamorphosed into what is now commonly referred to as global constitutionalism.[51] In fact, in the

47 C. Bruch, W. Coker & C. Van Arsdale, 'Breathing Life into Fundamental Principles: Implementing Constitutional Environmental Protections in Africa', World Resources Institute, Working Paper Series, WP No. 2, Apr. 2001, available at: http://pdf.wri.org/eaa_bruch.pdf.

48 Boyd, n. 36 above, at p. 3.

49 M. Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (2007) 8(1) *Theoretical Inquiries in Law*, pp. 9–36.

50 Peters, n. 14 above, at p. 6. Kirchhof adds that the constitutional concept has been manifestly grounded in the idea of the singular nation state, but that this is changing: see Kirchhof, n. 15 above, at p. 770.

51 Also termed 'transnational constitutionalism', 'international constitutionalism' and 'world constitutionalism'. See, e.g., Backer, n. 31 above, at p. 91; C. Joerges, I. Sand & G. Teubner (eds.), *Transnational Governance and Constitutionalism* (Hart, 2004); St. John Macdonald & Johnston, above n. 26.

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current globalized age, '[g]lobal constitutionalism is the international legal term *du jour*',[52] and it is now well-trodden scholarly ground.[53]

That the constitutional debate is increasingly detaching itself from its historical national and state-centred roots is also evidenced by the recognition in certain states of sub-national constitutions at the federal level (for example, in Germany); the constitutionalization process in the European Union (EU);[54] the constitutionalization of supranational intergovernmental organizations and treaty regimes (notably the World Trade Organization (WTO) and the United Nations (UN));[55] and the constitutionalization of treaty regimes in the 'thin' sense which are centred around certain issues within broader areas of global concern (of which the climate change, oceans and biodiversity regimes provide apt examples).[56] The roots of global constitutionalism can also be found in debates and developments concerning the moralization and humanization of international law; and the horizontal and vertical differentiation, expansion and diffusion of international law (that is, the expansion to include new subject matters in international law and the creation of a hierarchy).[57] These developments indicate the emergence of various supranational 'constitutions' which refer to constitutionalism in the 'thin' sense at the global level. They do, however, also involve constitutionalism in the 'thick' sense as we shall see below, and these developments and their general trajectory suggest a gradual denationalization or globalization of constitutionalism.[58]

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52 C.E.J. Schwöbel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff, 2011), at p. 1.

53 In addition to those already listed elsewhere in this article, some authorities include, among others, G. De Búrca & O. Gerstenberg, 'The Denationalization of Constitutional Law' (2006) 47(1) *Harvard International Law Journal*, pp. 243–62; P. Dobner & M. Loughlin, *The Twilight of Constitutionalism?* (Oxford University Press, 2010); P. Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited' (1997) 1 *Max Planck Yearbook of United Nations Law*, pp. 1–33; A. Fischer-Lescano, *Globalverfassung: Die Geltungsbegründung der Menschenrechte* (Velbrück Wissenschaft, 2005); J. Habermas, 'Eine politische Verfassung für die pluralistische Weltgesellschaft?' (2005) 38(3) *Kritische Justiz*, pp. 222–47; J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, 2009); A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer, 1926); A. Von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47(1) *Harvard International Law Journal*, pp. 223–42.

54 The EU is a clear, and arguably the only, example of an instance where a regional treaty has been transformed into a constitution-like document. See, among the many authorities on EU constitutionalism, N. Walker, 'Reframing EU Constitutionalism', in J.L. Dunoff & J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009), pp. 149–76.

55 E. De Wet, 'The International Constitutional Order' (2006) *55 International and Comparative Law Quarterly*, pp. 51–76, at 52–3; M.W. Doyle, 'The UN Charter – A Global Constitution?', in Dunoff & Trachtman, ibid., pp. 113–32; B. Fassbender, *The United Nations Charter as Constitution of the International Community* (Martinus Nijhoff, 2009); J.L. Dunoff, 'The Politics of International Constitutions: The Curious Case of the World Trade Organization', in Dunoff & Trachtman, ibid., pp. 178–205.

56 Bodansky, n. 18 above. These are also called 'parallel' constitutions: O. Diggelmann & T. Altwicker, 'Is there Something like a Constitution of International Law: A Critical Analysis of the Debate on World Constitutionalism' (2008) 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, pp. 623–50.

57 Diggelmann & Altwicker, ibid., at pp. 625–8.

58 See generally on this issue F. Venter, *Global Features of Constitutional Law* (Wolf Legal, 2010).

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5.2. *Mapping Global Constitutionalism*

It would be impossible comprehensively to present here all of the extant views on global constitutionalism, given the extent of the debate and the burgeoning literature. What follows instead is a succinct synopsis of some prevalent scholarly perspectives. Venter[59] posits that global constitutionalism is a process which aims to enrich public international law with elements of constitutionalism (*Rechtsstaatlichkeit*). Schwöbel[60] recently described constitutionalism as 'the theory and practice pertaining to something that is "constitutional"', which she then extrapolates globally, thus suggesting the existence of a worldwide universalism. She concludes that global constitutionalism could broadly be described as 'a universal system of certain social, political, cultural, economic and legal ideas'. For Peters and Armingeon,[61] global constitutionalization is 'a catchword for the continuing, but not linear, process of the gradual emergence and deliberate creation of constitutionalist elements in the international legal order by political and judicial actors, bolstered by an academic discourse in which these elements are identified and further developed'. In their view, global constitutionalism thus could either function as a normative mode of governance – a process of constitutionalization that leads to global constitutionalism – or as an analytical framework that could act as a lens through which to view, understand, and explain contemporary global problems and social realities.[62] Mostly, though, global constitutionalism is considered as a normative political and legal mode of governance or programme which pertains to law and governance.

Schwöbel[63] further helpfully captures the central tenet of global constitutionalism, which she summarizes from four different, yet mostly overlapping and related, perspectives or classifications; these include the social, institutionalist, normative and analogical perspectives.[64] The social perspective on global constitutionalism suggests that it has to do with the development of an international social community; it includes fundamental rights and rights-based values and is thus rights-oriented; it provides for an international legal order which is based on peremptory norms; it aims to limit state power at the international and domestic levels; it concerns the institutionalization of self-restraint mechanisms; it seeks to improve the participation of global civil society in

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59 F. Venter, 'Die Staat, Staatsreg en Globalisering' (2008) 3 *Tydskrif vir die Suid-Afrikaanse* Reg, pp. 412–24, at 419.

60 Schwöbel, n. 52 above, at pp. 1–2.

61 Peters & Armingeon, n. 21 above, at p. 390.

62 The simile of global constitutionalism as a lens is reminiscent of Pease's like simile, in which she sees political theory frameworks as 'a pair of glasses whose different lenses allow us to view the distinct political, economic, and social characteristics and processes that shape world politics': K.S. Pease, *International Organizations: Perspectives on Governance in the Twenty-First Century* (3rd edn, Pearson Prentice Hall, 2008), at pp. 1–2.

63 Schwöbel, n. 52 above, at pp. 11–49. Her synthesis is based on the views of some of the leading authorities on global constitutionalism cited throughout this article.

64 Other authors use different perspectives or classifications to unpack global constitutionalism. Diggelmann and Altwicker, for example, identify and critique the semantic strategy, the correspondence strategy, the ethical-pragmatic strategy and the social-constructivist perspective. While they may be termed differently, these strategies are not dramatically different from those formulated by Schwöbel: Diggelmann & Altwicker, n. 56 above, at pp. 632–50.

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global governance processes as a means by which to limit the single locus of power and to improve accountability; and it captures the idealistic notion of improving society for the future through a legitimate constitutional agenda.

An institutionalist perspective suggests that global constitutionalism relates to the legitimization of international decision-making and the reform of global administrative law; democratic notions of representation and accountability in governance processes; the existence of a network of transnational democratic structures; a community governed by rules and principles and not by absolute power; the existence of dynamic, flexible principles and universal values that guide global governance; the existence of a multilayered world organization (possibly the UN) that pursues the goals of international relations; the legitimization of global power in constitutional terms; the maximization of the constitutional ideals of freedom, participation and representation applied to any private or public institution that exercises power; viewing the UN Charter as a global constitution; the constitutionalization of international organizations and their foundational treaties (such as the WTO);[65] and viewing treaty regimes either as constitutions themselves, or as containing normative constitutional values and principles.

Normative global constitutionalism identifies various norms as being global and constitutional in character, presuming that they derive their legitimacy from their inherent moral value: globally they set basic minimum moral standards. These norms are different from 'others' because they have a special inherent value to society and they could derive from fundamental rights. They could also espouse a value-based and hierarchical order. Universal human rights are an example of global constitutional norms which are recognized as *jus cogens* norms setting out *erga omnes* obligations; they have a strong ethical underpinning and hierarchical standing.[66] Scholarly proponents of the normative perspective argue, for instance, for world law founded on the supremacy of the rule of law over principles of sovereignty, reciprocity and efficiency; and for the acceptance of the notion that mankind has common interests (such as an interest in environmental protection) and the need for all states to submit to the supremacy of these common interests. They also advocate the existence of global norms and values which determine the quality and manner of global law-making and governance.

Analogical global constitutionalism is a fourth global constitutionalist perspective which proposes that certain constitutional elements or characteristics of domestic and regional constitutions (such as the EU and the Southern African Development Community) could be transplanted globally. It places significant emphasis on constitutional standard setting and law as a system as opposed to law existing as a collection of various individual regimes.

In summary, key themes that permeate all four perspectives, and thus the more general idea of global constitutionalism, include:

65 In the sense of making 'thin' constitutions 'thick'.

66 De Wet, n. 55 above, at pp. 51–76.

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- the limitation of a single locus of power;
- increased participation and greater representation in global governance;
- the creation of one or more global constitutions and corresponding institutions;
- legitimization of global governance;
- effective governance through the institutionalization of power;
- the existence of one or more higher laws or constitutional norms which place restrictions on states and which create accountability;
- the existence of a common universal value system based on fundamental rights, among others;
- the acceptance of the existence of, and the pursuit of, the common interests of mankind; and
- constitutional standard setting.[67]

Notably, these features suggest that the central tenet of global constitutionalism corresponds largely with that of constitutionalism in the domestic context.

6. THE 'GLOBALNESS' OF GLOBAL ENVIRONMENTAL CONSTITUTIONALISM

The analysis up to this point raises several pertinent and related questions: is global environmental constitutionalism merely domestic constitutionalism as described above when it is applied to the global context, or is it a distinctly separate constitutionalist reform programme or perspective that stands independently from domestic environmental constitutionalism as a subspecies of global constitutionalism? More specifically in this context, what would the scale be of global environmental constitutionalism?[68] While the answers to these questions may lie in several areas, this article argues that the scale of global environmental constitutionalism would be determined by what one understands under the 'globalness' of global environmental law and governance.[69] There are many ways to interpret 'global', the use of which:

> ranges from the use of 'global' in lieu of international ... through to the use of 'global' to mean deterritorialized ... These differences reflect a range of uses more general in academic and popular usages of the term, where global is variously taken simply as a synonym for international (the sum of things which occur across state borders), or as a description for those things which occur everywhere, through to more coherent conceptualizations of global as a distinct phase of capitalist development, or a spatial reorganization of politics involving a decline in the relevance of territory.[70]

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67 Schwöbel, n. 52 above, at p. 49.

68 Biermann *et al.* define 'scale' to include 'the spatial, temporal, quantitative or analytical dimensions used to measure or rank any phenomenon': F. Biermann *et al.*, 'Earth System Governance: A Research Framework' (2010) 10(4) *International Environmental Agreements: Politics, Law and Economics*, pp. 277–98, at p. 290.

69 This is so because global environmental law and governance would be the central concern of global environmental constitutionalism.

70 M. Paterson, D. Humphreys & L. Pettiford, 'Conceptualizing Global Environmental Governance: From Interstate Regimes to Counter-hegemonic Struggles' (2003) 3(2) *Global Environmental Politics*, pp. 1–10, at p. 4.

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The Anthropocene provides a useful point of departure for an analysis of the term 'global' in the context of the global environmental governance paradigm because it relates to the ways in which to change and impact upon human behaviour in the broad and holistically perceived Anthropocene. The current Anthropocene era is increasingly considered as part of the geological time scale and it emphasizes the fact that humans dominate and severely influence the earth to the extent that the dynamics and functioning of the earth are being changed.[71] Viewing the global environmental *problématique* through the lens of the Anthropocene is a new approach that contributes to our 'understanding of nature and society as a governable domain'; it provides an integrated and holistic opportunity for the 'reinvention of the boundaries between nature and society and the political space for government intervention'.[72] Most importantly, it seeks to understand 'the planetary life-support system as an integrated whole',[73] with the result that the holistic character of the Anthropocene is considered by some to be 'one of the most essential semantic preconditions of the WEC [world environment constitution] idea'.[74] As a system of thought, it is mediated by the new scientific movement, Earth System Science, which calls for a comprehensive study of global life support systems, and it is thus conceived as a type of 'holistic superdiscipline that aims to capture all processes in nature and human societies as one interlinked system'.[75]

Pioneered by Biermann,[76] 'Earth System Governance' has recently emerged as a conceptual strategy to translate Earth System Science and the Anthropocene (which have been studied mostly from a natural science perspective) into social science language, most notably to apply it in the global environmental governance paradigm.[77] Earth System Governance is defined as:

> *the sum of the formal and informal rule systems and actor-networks at all levels of human society that are set up in order to influence the co-evolution of human and natural systems in a way that secures the sustainable development of human society* ... earth system governance covers more than problems of the 'global commons' ... [it] ... requires the integration of governance research at all levels. It must bridge scales from global to local.[78]

In this way, Earth System Governance forces us to rethink the meaning and implications of 'global' as it is used in both *global* environmental law and governance and *global* environmental constitutionalism. 'Global' in this sense is used less in terms of its

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71 For a more elaborate survey of the Anthropocene, see J. Zalasiewicz *et al.*, 'The Anthropocene: A New Epoch of Geological Time?' (2011) 369 *Philosophical Transactions of the Royal Society*, pp. 835–41.

72 E. Lövbrand, J. Stripple & B. Wiman, 'Earth System Governmentality Reflections on Science in the Anthropocene' (2009) (19) *Global Environmental Change*, pp. 7–13, at 7, 8.

73 Ibid., at p. 7.

74 E.P. Semenyuk, 'The Concept of the World Environmental Constitution and Information Science' (2011) 38(1) *Scientific and Technical Information Processing*, pp. 1–12, at 4.

75 Lövbrand, Stripple & Wiman, n. 72 above, at p. 12.

76 Biermann *et al.*, n. 68 above; F. Biermann '"Earth System Governance" as a Crosscutting Theme of Global Change Research' (2007) (17) *Global Environmental Change*, pp. 326–37.

77 Zalasiewicz *et al.*, n. 71 above, at p. 838.

78 Biermann, n. 76 above, at p. 329.

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spatial characteristics and more as a causal and temporal category which applies in the globalization context.[79] In other words, global must be understood in terms of what Hempel calls the 'political ecosystem':

> Organized within this political ecosystem can be found more than 180 nation-states, approximately two thousand inter-governmental organizations, the United Nations system, and nearly eighteen thousand transnational NGOs operating at the intersections of state power.[80]

Because of globalization, these institutions are all gradually transforming toward 'glocal [global and local] forms of governance that portend greater interdependence between local, national, and supranational forms of authority' to the extent that 'the earth's political geography bears no resemblance to its appearance from space'.[81] This description suggests that 'global' is a heavily loaded term with spatial, temporal and causal characteristics.[82] It is simultaneously sub-national, national, regional and international, but rarely only one of these, and it applies to the past, present and future. Global environmental law and governance thus describes law and governance that address regulatory problems that could occur everywhere and have an impact everywhere, now and in future:

> The global order can be illustrated by the well-known metaphor of the marble cake, as there are no clear dividing lines between layers (national and global) and (global) sectoral regimes; rather, the two worlds are linked both vertically and horizontally through a complex array of relations and networks.[83]

Importantly then, global environmental governance is not only about governing shared supranational environmental problems in those areas where the nation state cannot govern. It is also about the extent to which the global community (consisting of state and non-state actors) is able to influence domestic environmental governance through global institutional means and vice versa.[84] This is a clear expression of the reciprocal and causal interconnectivity of global environmental governance and it illustrates that global environmental governance also has a decidedly localized impact and domestic dimension; in other words, in a global environmental context 'the

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79 This is, however, not to say that increased spatial interdependence is not occurring and is as a result less important: 'the anthropogenic transformation of the earth system creates new forms and degrees of (global) *spatial interdependence*. This relates to both natural (direct) and social (indirect) interdependencies': Biermann, n. 76 above, at p. 330.

80 L.C. Hempel, *Environmental Governance: The Global Challenge* (Island Press, 1996), at p. 154.

81 Ibid., at pp. 154–55.

82 The now well-established concepts of 'future generations' and 'intergenerational equity' embody the temporal aspects of the global environmental governance effort. See the standard work in this respect, Brown Weiss, n. 39 above, and more recently, L.M. Collins, 'Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance' (2007) 30(2) *Dalhousie Law Journal*, pp. 79–140.

83 S. Cassese, 'Is There a Global Administrative Law?', in A. Von Bogdandy *et al.* (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer, 2009), pp. 761–76, at 768.

84 This reciprocity is further illustrated by the dualism of norm creation and norm transplantation: A.P. Cortell & J.W. Davis, 'When Norms Clash: International Norms, Domestic Practices, and Japan's Internalisation of the GATT/WTO' (2005) (31) *Review of International Studies*, pp. 3–25, at 3.

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boundary between what is national and what is international quickly becomes blurred',[85] especially insofar as 'national actions are guided by international institutional pressures'.[86] Global governance reciprocity, however, also works the other way around – namely, from the sub-national and national to the supranational: '[g]lobal environmental protection begins at the community and bioregional level – the level where complex living systems are most interdependent and vulnerable'.[87]

To be 'global' also involves some degree of 'multicontinentalness'.[88] Ivanova[89] explains that 'governing human relations has become a complicated endeavor that has transcended the national and interstate scale and moved to a global level involving multiple actors across national borders and multiple levels of regulatory authority – from sub-national to supranational'. 'Global' in this context refers to deterritorialization; it indicates, among other things, that governance can occur at all levels simultaneously through the means of a complicated mass of regulatory arrangements. By implication, then, deterritorialization means that governments and states will not always be the sole actors involved in governance. 'Global' therefore also implies multilevel and multi-actor governance, where the state and government are often omitted as the predominant role players and where the focus is shifted to the important contribution of non-state actors that operate at levels other than those where the nation state traditionally operates. In fact today, 'the word "global" is used as much for its geographical connotation as it is used for its omission of the state'.[90]

What does the foregoing mean for global environmental constitutionalism? First, the broader context of the Anthropocene, and specifically Earth System Governance, highlights the urgent need for a holistic strategy to address the most critical *global* environmental governance challenge of all times, namely:

> how to create a global and effective architecture for earth system governance that is adaptive to changing circumstances, participatory through involving civil society at all levels, accountable and legitimate as part of a new democratic governance beyond the nation state, and at the same time fair for all participants.[91]

Given the (constitutional) nature of this challenge, while there may be others, global environmental constitutionalism could be a strategy to achieve a solidly constituted, integrated, adaptive, participatory, accountable, legitimate and democratic global environmental law and governance order. Importantly, in its attempts to do so,

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85 M.F. Strong, 'One Year after Stockholm: An Ecological Approach to Management' (1973) 51(4) *Foreign Affairs*, pp. 690–707, at 699–700.

86 R.O. Keohane, P.M. Haas & M.A. Levy, 'The Effectiveness of International Environmental Institutions', in P.M. Haas, R.O. Keohane & M.A. Levy, *Institutions for the Earth: Sources of Effective International Environmental Protection* (MIT Press, 1993), pp. 3–25, at 7.

87 Hempel, n. 80 above, at p. 6.

88 R.O. Keohane & J.S. Nye, 'Governance in a Globalizing World', in R.O. Keohane (ed.), *Power and Governance in a Partially Globalized World* (Routledge, 2002), pp. 193–218, at 194.

89 M.H. Ivanova, *Partnerships, International Organizations, and Global Environmental Governance*, available at http://www.gppi.net/fileadmin/gppi/Ivanova_Article.pdf, at p. 9.

90 H. Shams, 'Law in the Context of 'Globalisation': a Framework of Analysis' (2001) 35(4) *The International Lawyer*, pp. 1589–626, at 1626.

91 Biermann, n. 76 above, at p. 335.

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global environmental constitutionalism cannot only be supranational; it must also include domestic environmental constitutionalism to the extent that environmental constitutionalism applies to the global environmental governance regime (sub-national, national and supranational).[92] It must occur in the Anthropocene with due regard to the characteristics of Earth System Governance. This would mean that domestic environmental constitutionalism would be part of the global environmental constitutional effort and would inform this effort. Any constitutionalization project of supranational environmental law and governance would, however, also have a pertinent effect on domestic arrangements.[93] In its most extreme form this top-down approach is called 'compensatory constitutionalism', which denotes a situation whereby supranational constitutionalism could compensate for 'hollowed out' de-constitutionalized domestic constitutions.[94] These insights collectively suggest that the spatial scale of global environmental constitutionalism is global to the extent that it ranges from the sub-national to the supranational. It is also globally causal to the extent that domestic environmental constitutionalism will influence supranational environmental law and governance and vice versa.

Second, by virtue of the concept of sustainability, global environmental law and governance relates and applies to present *and* future generations. Its temporal scale is thus determined by inter and intra-generationality, which means that it reaches well beyond the traditionally required confines of the present. Similarly, the temporal scale and purpose of global environmental constitutionalism must, in addition to catering for the needs of the present generation, also include the needs of future generations, which could be satisfied by means of a range of constitutional constructs such as rights and universal values and principles couched in sustainability language, among others.

Third, the structure and effectiveness of the architecture of global environmental governance, seen from the Anthropocene and Earth System Governance perspectives, raise pertinent constitutional questions in the 'thin' and 'thick' sense insofar as environmental constitutionalism may be required in respect of the following:

- to restrict state sovereignty;
- to spell out various universally accepted constitutional norms that must support and improve the architecture of global environmental law and governance;
- to provide mechanisms that will demarcate authority and create global vertical and horizontal integration; and
- to provide ways to improve the inclusion and participation by state and non-state actors in global environmental law and governance reform.[95]

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92 E.g., constitutionalizing environmental rights and sustainable development in the Constitution of the Republic of South Africa (n. 33 above) might have global repercussions because it could contribute to provide the moral and ethical justification for the constitutionalization of similar rights and core environmental concepts in other countries or supranational legal instruments.

93 An example is where directives of the EU must be translated into domestic legislation by its Member States, or where a multilateral environmental agreement requires domestic legislative and executive action in terms of the obligations it sets out for states.

94 A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) (19) *Leiden Journal of International Law*, pp. 579–610.

95 Biermann, n. 76 above, at p. 332.

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Global environmental constitutionalism will thus apply to the *entire* architecture of global environmental law and governance and it will have to interrogate the 'thin' and 'thick' constitutional issues of the global environmental governance architecture.

Fourth, global environmental law and governance implies and requires the increased involvement of non-state actors. This raises complex questions related to legitimacy, demarcation of authority and democracy, among others. In this sense global environmental constitutionalism should also imply some form of non state-centred constitutional law, processes, elements, concepts and features, which are to a greater or lesser extent supranational, but which are not entirely detached from the domestic context, especially insofar as the state remains the primary international actor in a globalized context.[96] Additionally, global environmental constitutionalism must propagate appropriate constitutional constructs that would address those pertinent issues usually associated with the involvement of non-state actors in global environmental law and governance. Global environmental constitutionalism must thus be sufficiently 'global' to apply to state and non-state actors. Whatever strategy is followed to include non-state actors, for it to be truly global in light of the private–public (or hybrid) character of global environmental law and governance, global environmental constitutionalism will have to depart from the orthodox public state-centred locus of authority to include other non-state and private forms of authority.

7. POSSIBLE AREAS OF APPLICATION

While it is beyond the scope of this article to formulate a comprehensive theory of global environmental constitutionalism, it does attempt to identify and briefly elaborate several areas where it sees global environmental constitutionalism being applied. Despite the lack of a theory of global environmental constitutionalism, or probably because of it, in identifying and briefly explaining these areas, this section endeavours to emphasize the possible conceptual and practical worth of global environmental constitutionalism for the deficient global environmental law and governance regime. It also serves to indicate possible future research themes.

Cooperation in a globalized world

It was argued earlier that, just as constitutionalism has been and continues to detach from its historical domestic roots to increasingly assume global properties, so too has environmental law and governance 'become global', as it were. In an increasingly disparate and globalized world which brings with it its own unique challenges, the foci of law and governance will necessarily also shift to the global domain and the emphasis will be on how to govern the shared global community interests elaborated upon above in a cooperative, mutually beneficial and, above all, effective way. The need to cooperate

[96] T. Marauhn, 'Changing Role of the State', in D. Bodansky, J. Brunnée & E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007), pp. 728–48, at 728–9.

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with a view to solving environmental problems that are of common interest to the global community emphasizes the need for a cooperative and coordinated global response to these problems. There is little doubt that this response, expressed as global environmental governance, must be effective to the extent that it actually solves the problems it was designed to address.

Moreover, the response must be legitimate and it must legitimize; it must embody shared values and norms; it must be representative and inclusive; it must foster accountability and restrict the arbitrary use of power and exercise of authority; and, ultimately, it must ensure that all of the obligations that state and non-state actors have in terms of global environmental law and governance are fulfilled in a manner that answers to a standard of governance universally acceptable to the global community. In this way global constitutionalism can reform, resituate, and even reinvigorate global environmental law and governance:

> The greater capacity of constitutionalized systems of cooperation to accommodate such operational evolution [of global governance institutions] is the reason why keen observers of global governance insist on the 'constitutionalization paradigm' ... Constitutions, in contrast to lesser arrangements for ongoing cooperation, contain elements of checks and balances intended to operate autonomously to prevent abuses of power by the institution ... Constitutionalized systems ensure that the power of organic growth [of global governance institutions] does not go institutionally unchecked and unbalanced.[97]

Extended accountability and liability

Global environmental governance today is an aggregated mass consisting of multiple levels and multiple private and public actors. To date, much of the attention has been focused on the role of states in this effort, whether they act on their own or through intergovernmental organizations and other actors. Increasingly, however, the prevalence of non-state actors in global environmental governance will require new, innovative ways to view them as regulated entities and/or entities that are involved as regulators alongside states in the global environmental law and governance effort. While it is trite that constitutionalism traditionally applies to the state and public authorities, constitutionalism could also be applicable to private non-state actors such as banks and transnational corporations in terms of its horizontal application (*Drittwirkung*).[98] The usefulness of constitutionalism applied globally then is that it is not necessarily restricted to public authority and power only, but could usefully be extended to bring non-state private parties under its remit in a decidedly unorthodox

[97] T.M. Franck, 'Preface: International Institutions: Why Constitutionalize?', in Dunoff & Trachtman, n. 54 above, at p. xii.

[98] By extending the application of constitutionalism 'horizontally' to these corporations, it would be possible to impose on them directly the restrictions and dictates of constitutionalism in the same way that these would apply to a public authority or actor. See further, J. Dine, 'Multinational Enterprises: International Codes and the Challenge of "Sustainable Development"' (2001) 1 *Non-state Actors and International Law*, pp. 81–106; Emmerich-Fritsche, n. 34 above.

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way. This would also extend the force and effect of constitutionalism to global non-state actors acting in the global environmental law and governance arena.

Legitimacy in and of global environmental law and governance

Closely related to the issue of increased private actor involvement in global environmental law and governance is the issue of legitimacy, or rather the lack thereof. Because of globalization, numerous non-state actors – especially intergovernmental organizations – are increasingly playing a crucial role in global environmental governance, and they are fundamentally changing its nature and architecture. This is leading to a resurgence of the debate about legitimacy in global environmental law and governance.[99] The increasingly popular field of global administrative and institutional law attests to this increased focus.[100] Concerns about legitimacy, it is suggested, will only deepen as the global environmental governance regime further disaggregates into a plural multi-actor and multilayered network of governance.[101] Commentators have proposed some solutions to this legitimacy crisis, including democratization, the integration of fragmented regimes, and the creation of a world environment organization.[102] But these solutions are not without their own difficulties and they seem to have had little success to date. Considering that the issue of legitimacy is a central concern of global constitutionalism, it could also provide solutions to the legitimacy crisis of global environmental law and governance. This, in turn, could lead to an improved global environmental law and governance order because 'accountability and legitimacy are important factors that influence the eventual performance of governance mechanisms. In general, institutions and governance can be expected to be more effective when their rules and representatives are perceived as accountable and legitimate'.[103]

Improvement and reforms in real terms

It was argued above that constitutionalism cannot be a panacea for global environmental law and governance; yet, it has the potential to improve domestic environmental law and governance through the entrenchment of environmental rights, the constitutionalization of sustainability, the delineation of environmental governance mandates and the creation of obligations to enforce these mandates, among others. It is true that while the global environmental law and governance regime presents its own unique problems, many of the problems and characteristics of

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99 A. Alkoby, 'Non-state Actors and the Legitimacy of International Environmental Law' (2003) 3 *Non-state Actors and International Law*, pp. 23–98.

100 C. Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17(1) *European Journal of International Law*, pp. 187–214; B. Kingsbury, 'Global Governance as Administration: National and Transnational Approaches to Global Administrative Law' (2005) 68 *Law and Contemporary Problems*, pp. 1–13.

101 See further, Perez, n. 10 above, at p. 241.

102 L. Swart & E. Perry (eds.), *Global Environmental Governance: Perspectives on the Current Debate* (Centre for UN Reform Education, 2007).

103 Biermann *et al.*, n. 68 above, at p. 287.

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domestic environmental law and governance regimes also feature globally. Examples are the lack of compliance and enforcement, exclusionary and unrepresentative governance, the lack of legitimacy, and improper control of executive and legislative authority. In the same way that constitutionalism has been applied in the domestic context, it is possible to apply the generic features of constitutionalism to these global problems, especially where nuanced extrapolation is permissible and possible. This should go some way in achieving reforms and the improvement of the global environmental law and governance regime in real terms by, for instance, (i) ensuring that good governance practices prevail globally in institutions and their processes, especially with respect to the manner in which global environmental laws and standards are developed, applied and enforced; (ii) ensuring that the content of these standards and laws are adequate; (iii) creating better means of compliance and enforcement; (iv) fostering the legitimacy of governance institutions, actors and processes; and (v) ensuring the recognition and enforcement of environmental rights.

Challenging orthodox conceptions of the state

While it is true that globally the world is moving towards 'governance without government',[104] states remain the primary actors within the global governance arena. It would therefore primarily be up to states to devise better environmental laws, norms and standards, to provide better environmental enforcement and compliance, and to fulfil the myriad duties they have towards people and the environment. They will have the further responsibility to provide the opportunities and means conducive to facilitating and promoting the representation and participation of civil society, access to justice, the safeguarding of environmental rights, and the promotion of environmental justice. States would thus be the principal instigators and drivers of effective global environmental law and governance. Would this, however, be possible in a world where the current conception of state sovereignty prevails and where the primary concern seems to be state-centred and state-driven global environmental governance interests and lethargic governance efforts which are far from effective?[105]

This reality raises global constitutional issues because they impact upon the universal and common environmental interests and concerns of the international community, and they amply reveal state reticence and the limits of the current conception and role of national state sovereignty and, in particular, state sovereignty's intimate relationship with competing nation-state economic interests in the context of neoliberal globalization. They also reveal the vagaries of absolute state power (and its abuse), and the role that constitutionalism could play in this respect to the extent that it is a 'response to a perennial problem in human existence – that of creating power to coordinate collective action to secure essential public goods while

104 J.N. Rosenau & E. Czempiel (eds.), *Governance without Government: Order and Change in World Politics* (Cambridge University Press, 1992).

105 See Hempel, n. 80 above, at p. 66.

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restraining the repositories of power from abusing it'.[106] Arguably, it is precisely such issues as state sovereignty, abuse of power and unilateralism, and a restrictive view of public trust environmental obligations and duties that are derailing, in part, the global environmental law and governance effort.[107] If global environmental law and governance are to succeed, then clearly what is required is a different approach, one that signals a paradigm shift which fundamentally challenges the sacred and orthodox state-centred approach to global environmental law and governance as it is currently constituted: 'Such ideas [on neo-liberal economic state interests] seek radical transformation in the structures, practices, and norms of international politics to emphasize social justice, equity and obligations that transcend borders.'[108] Considering that some of the central concerns of constitutionalism are public authority (in the vertical sense), the control of state power and the protection of the common good, it could be particularly well suited to provide new perspectives on reconceptualizing and recasting the state in global environmental law and governance.[109]

A new global constitutionalist world order could provide the transformative and transformed setting for a less-pronounced role of the state. It could be one 'that makes possible the collective realization of five basic goals or values: peace, ecological balance, social justice, economic well-being, and positive personal identity';[110] in other words, it could be a new world order where the foregoing sustainability considerations are more likely to be achieved.

Sustainability constraints

In general terms, the global environmental law and governance regime operates within the dictates of sustainability and it aims to realize the sustainability ethos. This ethos, esoteric and abstract as it may be, primarily entails limitations and constraints with respect to current resource use with a view to ensuring intra- and intergenerational equity.[111] It was argued earlier that constitutionalism happens to be rather familiar with imposing limitations and creating constraints. It might thus very well be that constitutionalism could be employed as a means to recast sustainability in constitutionalist language with a view to endowing sustainability with the higher order and supreme status of constitutional principles, values, norms, and standards. Sustainability could possibly be strengthened and reprioritized as a result, and at a pragmatic level constitutionalism

106 S. Ratnapala, 'Environmentalism versus Constitutionalism: A Contest without Winners' (2007) University of Queensland Law Research Series 2; (2007) Resource Management Theory and Practice, pp. 110–64; available at: http://www.austlii.edu.au/au/journals/UQLRS/2007/2.html. This duality of constitutionalism is evident in it both constituting and constraining power: Bodansky, n. 18 above, at p. 572.

107 B. Brunette, 'States, Global Environmental Governance and the Earth Charter', in K. Bosselmann & R.J. Engel (eds.), *The Earth Charter: A Framework for Global Governance* (KIT Publishers, 2010), pp. 117–42, at 119.

108 Ibid.

109 Such new perspectives of public authority have already been investigated by some authors. See, e.g., E. Hey, 'Global Environmental Law: Common Interests and the (Re)Constitution of Public Space' (2009) (1) *Iustum Aequum Salutare*, pp. 41–57.

110 Hempel, n. 80 above, at p. 160.

111 Collins, n. 82 above.

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could assist the global environmental law and governance regime to achieve limitations on resource use (sustainability) through constitutional constraints:

> Constitutional constraints placed upon resource use – such as a requirement that renewable resources only be used at their replacement rate and that nonrenewable resources only be exploited at the rate of development of new alternatives – would provide much of the foundationalist reordering necessary for welfare economics to become less misleading in the environmental law and policy context.[112]

Apart from providing the means to impose restrictions on resource use, global constitutionalism, because it is particularly adept at rights discourse, could also go a long way towards furthering the sustainability ethos by recognizing and protecting the environmental rights and interests of future generations and could assist us 'to better hear the diachronic expressions of future generations'.[113] By attending to the future needs in terms of its temporal scale, global environmental constitutionalism could provide a viable alternative and achieve foundationalist reordering with respect to the manner in and extent to which the rights of future generations are safeguarded in the present.

8. CRITICISM AND PRAGMATIC AND CONCEPTUAL DIFFICULTIES

In addition to its fervent proponents with their widespread support and myriad arguments in its favour, like constitutionalism itself, global constitutionalism has just as many critics and sceptics. Some of the most frequently cited criticisms are that global constitutionalism lacks constitutional methodology; it creates unjustified expectations; it is an unrealistic ideal in a realist globalized world; it is perceived to be unpolitical and, as such, suggests an end of politics globally; it has the potential to prevent revolutionary social change; it suffers from oversell and vagueness; it is decidedly Western or Eurocentric; and it would be difficult, if not impossible, for constitutionalism to achieve democracy globally.[114] These points of criticism could arguably also be extended to global environmental constitutionalism in a generic sense. In addition, global constitutionalism creates various conceptual problems and raises a host of pragmatic questions in the context of global environmental law and governance. This section foresees and formulates criticism and a range of conceptual and pragmatic difficulties which could derail, or at least inhibit, global environmental constitutionalism and the formulation of a systematic theoretical treatise on the concept.

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112 Kysar, n. 3 above, at p. 241.

113 Ibid., at p. 243. Kysar bases this statement on Ackerman's idea that a constitution is essentially a conversation between generations: B. Ackerman, 'The Living Constitution: 2006 Oliver Wendell Holmes Lectures' (2007) 120(7) *Harvard Law Review*, pp. 1793–812, at 1805.

114 Peters, n. 14 above, at pp. 4–9. See also, generally, N. Krisch, *Beyond Constitutionalism: The Pluralistic Structure of Post-national Law* (Oxford University Press, 2010).

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Global environmental constitutionalism's conceptual architecture

What is the conceptual architecture and theoretical content of global environmental constitutionalism? Does it have a special unique identity and, if so, what is it that makes global environmental constitutionalism different from global constitutionalism and 'unconstitutionalized' global environmental law and governance? What are the principal and ancillary objectives of global environmental constitutionalism? How should it go about fulfilling these objectives and make a real difference to global environmental law and governance (also with a view to disproving those who accuse it of being vague, idealistic and symbolic)? Should global environmental constitutionalism aim mainly to fulfil the objectives of constitutionalism in the 'thin' sense by *constituting* the global environmental law and governance framework, and/or perhaps more idealistically also in the 'thick' sense by recasting it in the superior constitutionalist paradigm? Moreover, would global environmental constitutionalism entail a single document (a global environmental constitution) and/or an aggregated mass of constitutional characteristics, principles, values and features; and, in the case of the latter, what would these be?[115]

Assuming that there could be a global (environmental) government (or other form of central global authority) that adopts a global environmental constitution, would this government or authority necessarily have the constitutional power to adopt such a global constitution?[116] Where does it derive this power from and is it legitimate? What potential is there for environmental treaties, treaty regimes, and the 'constitutions' of intergovernmental environmental organizations to determine the architecture of global environmental constitutionalism? Do the EU, other regional organizations and intergovernmental organizations such as the WTO, with their experiences in global constitutionalism, offer solutions for the design of a global environmental constitutionalist model? What guides and shapes the immanent normativity of the growth of global environmental governance, and how legitimate and coherent are the suppositions forming the emergent patterns of global environmental law and governance?

Actors

If constitutionalism creates obligations and accountability for the state in the sense that it is an entity exercising public authority, who or what will be considered public authorities in the global environmental context and who are the counterparts of these entities? In other words, who are the main actors in the global environmental constitutionalist paradigm? What is the legal relationship between state and non-state actors, between non-state actors *inter se* and between non-state actors and individuals? What are the checks and balances for the actions and decisions of state and non-state actors; and what are the limits of their authority?

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115 Bodansky, n. 18 above.

116 Maduro (n. 25 above) asks similar questions with relation to the EU and its constitutionalization processes.

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Compliance and enforcement

Constitutionalism entails the separation of powers and relies on judicial review to control the executive and legislative functions of governments. Would it be possible to draw a clear distinction between the executive, judicial and legislative authorities and their functions in terms of the global environmental law and governance regime? Even if this were possible, how would the separation of powers doctrine apply in this global context and how will it be upheld? Moreover, if a central feature of constitutionalism is judicial review and if one accepts that 'when an institution is constitutionally based, the jurisdictional boundaries are usually policed and supervised by a tribunal',[117] then how should one view a global environmental judiciary?[118] Would it entail establishing one or more global environmental courts or extending the functions of existing global tribunals to the environmental domain?[119] Related to the latter is the issue of enforcement. Global constitutionalism advocates some form of superior universal control or policing. Who will perform this function in the global milieu; in other words, who or what will be the global watchdog, and who will watch the global watchdog?

9. SOME PRAGMATIC SUGGESTIONS

The manner in and extent to which the constitutionalization of global environmental law and governance will occur remains an open, but critically important, question. Some pragmatic considerations and difficulties with regard to this process have been highlighted in the previous section. Yet, as is the case with similar esoteric and abstract phenomenological processes, it remains unclear how this process should proceed henceforth and two overarching questions (there may be more) arise in this respect:

1. What would be the preconditions to make the transition to a constitutionalized global environmental law and governance order and, more specifically, would this be a 'constitutional moment' or rather a gradually phased process?
2. What should be done now to allow a global environmental constitutional transition in future?

The following section proposes some tentative and speculative answers to these questions; they are tentative because they go to the very heart of the yet conceptually unclear and ongoing global environmental constitutionalism project and they are speculative because they cannot sufficiently be supported by experience or empirical

117 Franck, n. 97 above, at p. xiii.

118 See generally Stephens, n. 42 above.

119 These could include, e.g., the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the Permanent Court of Arbitration (PCA), and dispute settlement mechanisms under the WTO.

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evidence in the global domain. Because they are tentative and speculative, they necessarily require further elaboration and research.

9.1. *Preconditions for Global Environmental Constitutionalism*

In answering the first question, Ratnapala[120] usefully identifies various interdependent preconditions that must exist to establish, maintain and secure domestic constitutional governance, including, among others: (i) recognition by society and prevalence of the philosophical conception of constitutionalism as a dominant prevailing ideology (in abstract terms); (ii) an official constitution, codified or uncodified, that adopts and entrenches the foregoing philosophical conception of constitutionalism (in concrete terms); and (iii) an 'institutional matrix that sustains the official constitution and translates it into the experience of the people' (in operational terms).

It is possible that global environmental constitutionalism can come about, as it were, based on similar preconditions – namely: (i) it must be recognized globally as the prevailing and dominant ideology by the majority of states and people on earth; (ii) there must be some form of official environmental constitution; and (iii) there must be a sufficiently appropriate institutional response, including global governance structures, laws, organizational arrangements and the like, that must apply and make environmental constitutionalism work (in other words 'governance').[121] In the global environmental context, one could add the need for an ecological crisis to exist or the need for perceptions about an impending ecological crisis as a fourth precondition that could mobilize appropriate action for the constitutional reform of global environmental law and governance.[122]

Views on whether such a crisis already exists, whether it is pending, or whether it will ever come about is, of course, a subjective value judgment and there is widespread disagreement. Nevertheless, if the constitutionalization of the global environmental law and governance regime endeavours to bring about reforms of this regime in the context of the Anthropocene and Earth System Governance, one must also assume that the likelihood of it actually taking place will directly depend on the perceptions of the majority of people on earth of the existence of an ecological crisis. The deeper the crisis, or the more severe the perceptions thereof, the more likely it is that the world will be persuaded to embark on the global environmental constitutionalization project.

The extent and depth of the worldwide reaction and resultant response to the recent global economic crisis suggest that global reformative mobilization with respect to an ecological crisis is possible if the world considers the gravity of the ecological crisis to be on par with the global economic crisis. The latter has resulted in

120 Ratnapala, n. 106 above.

121 This institutional response must not only endeavour to operationalize global environmental constitutionalism, it must also be perceived to be constitutional itself; in other words, it must be legitimate.

122 Semenyuk (n. 74 above, at p. 3) agrees: 'Whether the WEC [world environment constitution] concept will be implemented in the foreseeable future depends ... on the level [sic] of ... ecological consciousness of the world community and on whether it wants to save itself.'

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a rethink of the global political and financial system, it has led to the demise and restructuring of governments, and it has allowed regional organizations such as the EU to come dangerously close to encroaching on the sacred boundaries of state sovereignty through the prescription by some countries (notably France and Germany) of austerity measures as conditions for financial assistance (Greece being the most recent example). The fact, however, that governments cannot even agree or be moved to agree by their citizens on one of the most critical issues in the global environmental law and governance domain – namely, binding targets for carbon emissions – suggests that the ecological crisis is not (yet) perceived to be sufficiently severe to mobilize dramatic global environmental constitutional changes. Nevertheless, while it is unlikely that an ecological crisis would be able to achieve what a global economic crisis has in terms of governance reform, it is arguably not impossible.

Can constitutionalism be considered to be a globally dominant and prevailing ideology, and when will it come about? While constitutionalism is a revered concept in many societies and an increasingly popular term in the supranational domain, it is doubtful whether it has achieved sufficient prominence for it to be recognized by global society as a universal and dominant prevailing ideology. At most, only some of its elements, such as universal human rights, are recognized as *jus cogens* norms setting out *erga omnes* obligations – a point which has been made above. It will take considerably more work and time to popularize constitutionalism as a conceptual whole in the global context to the extent that it could be said to be a dominant prevailing *global* ideology. Another challenge is that, compared with the domestic scenario, it would be much more difficult to establish global environmental constitutionalism as a prevailing global ideology because of the plurality and complexity of global society (that is, those people who must endorse it). One could nevertheless reasonably expect that, because of the causal reciprocity and interlinkages between domestic and supranational law and governance regimes, a gradually increased process of domestic constitutionalization of law and governance generally, and environmental law and governance specifically, could contribute in a bottom-up way to establish global environmental constitutionalism as a dominant prevailing ideology.[123] So too could the expansion of established global constitutionalist elements such as universal human rights contribute to its global ideological growth and entrenchment.

What is clear is that the process of constitutionalizing global environmental law and governance is evidently not going to be a sudden event that would be driven by a strong centralized supranational response; it is unlikely that it will come about by means of a 'constitutional moment'.[124] Referring to constitutionalization in terms of the global trade-environment conflict, Perez states that:

123 In this way, domestic environmental constitutionalism could 'level the playing field' as it were and be driven primarily by nation-states which would arguably regard a bottom-up approach less threatening to their sovereignty than a once-off top-down approach.

124 The 'constitutional moment' – or, as Peters puts it, 'a *pouvoir constituent* in a kind of constitutional big bang' – is a specific characteristic of domestic constitutions: Peters, n. 94 above, at pp. 584–5.

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> [t]he trade and environment conflict emerges as a multiple challenge, taking place in multifarious institutional and discursive universes ... This simple realization creates a challenge to the constitutionalization dream (in its universal version). It questions the logic of erecting a unitary institutional structure as *the* solution to global dilemmas, and looks, instead, for a more modest constitutional vision.[125]

Considering its own complex, multifarious and multi-dimensional character, there is no reason to believe that the situation would be any different in the global environmental law and governance domain. Because of all the foregoing reasons and considerations, constitutionalization of global environmental law and governance would occur rather in terms of a modest, more functionalist and gradual approach which would involve reforms mostly stemming from the domestic domain and working their way through the global order.

Does a codified global environmental constitution already exist or is there a reasonable prospect for one to come about in the future to entrench global environmental constitutionalism as a prevailing and dominant global ideology? Bodansky[126] confronted this question in a seminal work in 2009 and concluded that, while numerous multilateral environmental agreements have elements of constitutions in the 'thin' sense – namely, that they perform the constitutive functions of global environmental law and governance – to date, there is no single codified or uncodified global environmental constitution. Neither can it be said that a global environmental constitution exists in the 'thick' sense: 'International environmental agreements are better at constituting than they are at constraining.'[127] The only likely candidates to fulfil the role of a 'thick' global environmental constitution would be environmental principles such as sustainability, polluter pays, precaution and prevention, among others, but they remain weak and vague and incapable of comprehensively fulfilling all the functions of 'thick' constitutions.[128] Clearly, nothing in the current global environmental law and governance regime suggests that a distinct codified global environmental constitution exists that is both 'thick' and 'thin' or that one will come about soon. It is also not entirely clear whether a codified global environmental constitution is in fact preferable, especially if one considers that global constitutionalism 'in no way implies the quest for a world state. The idea is not to create a global, centralized government, but to constitutionalize global (polyarchic and multi-level) *governance*'.[129]

A more modest venture would arguably also be required in this instance and, again, the answer may lie in domestic environmental constitutionalism. It would be unrealistic, impossible even, merely to scale up a typical state constitution to the supranational level in an effort to serve as a global environmental constitution,

125 Perez, n. 10 above, at p. 234.
126 Bodansky, n. 18 above.
127 Ibid., at p. 578.
128 Ibid., at p. 579–80.
129 Peters, n. 94 above, at p. 610.

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especially in the light of the obvious problems presented by translation.[130] This does not mean, however, that it would be impossible to translate and transpose certain principles, elements and characteristics of domestic constitutionalism to the global environmental context to the extent that they cumulatively form an uncodified global environmental constitution (as per the UK example).[131] Such an approach would not require a 'constitutional moment' since it would occur pursuant to the idea that 'constitutions are living instruments which are more or less silently modified and transformed through judicial and political practice'.[132] The latter approach could also helpfully circumvent or substantially reduce the necessity for the intervention of a global environmental organization. Together with the constitutive functions of multilateral environmental agreements, and the constraining functions of environmental principles, this translation could in time lead either to the establishment of a single codified, or to a comprehensively expansive uncodified, global environmental constitution.

The final precondition requires there to be a sufficient and appropriate global institutional response to implement, support and 'operationalize' global environmental constitutionalism. This article has argued throughout that such an institutional response or 'institutional matrix' already exists in the form of all the global environmental law and governance arrangements collectively viewed. In fact, there are too many of these (fragmented) arrangements. One concern is whether the current fragmented architecture would be sufficient to instil and support global environmental constitutionalism and whether a global environmental organization would not be preferable to provide the requisite institutional backbone in this respect. While a single global organization may be the obvious choice, its establishment is probably still a long way off, if it is to happen at all. It will thus be up to the current fragmented and haphazard regime consisting of states and non-state actors to provide the 'institutional matrix' for global environmental constitutionalism. Considering their dominant role in global environmental governance, states (including those institutions through which states act globally such as intergovernmental organizations, treaty regimes and treaty bodies) will no doubt play the primary role in initiating and 'governing' global environmental constitutionalism.

However, the realities of disaggregated hybrid, multi-actor and multilevel global environmental governance in a globalized age mean that non-state actors cannot be ignored in this endeavour. Global civil society which consists of, inter alia, non-governmental and community organizations, global networks and epistemic communities, must be allowed to provide expert inputs, to actively take part in the constitutionalization process, to continuously monitor progress of the process and, generally speaking, to represent the interests of all members of global civil society

130 Peters & Armingeon, n. 21 above, at p. 387. It is doubtful that a single global constitution exists despite the arguments of some influential scholars to the contrary (especially insofar as they argue that the UN Charter is a global constitution): see, among others, Dupuy, n. 53 above; and Fassbender, n. 55 above.

131 From a methodological-analytical point of view, in fact, this seems to be the more acceptable approach and to hold out considerable promise.

132 Peters, n. 94 above, at p. 585.

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throughout this process.[133] While a major challenge would be to clothe these actors with sufficient legitimacy to enable them to act in the constitutionalization process (especially as law and decision makers), the upside of their involvement is that it would 'contribute to constitutionalization, because it integrates the transnational civil society into the fabric of international law and thereby arguably promotes the constitutional principles of broad deliberation, transparency, and public accountability'.[134]

9.2. *Preparatory Arrangements and Research Agenda*

Domestic environmental constitutionalism provides the discourse and analytical and normative basis to conceptualize global environmental constitutionalism. It was shown above that 'global' implies the inclusion of domestic environmental constitutionalism into the realm of global environmental constitutionalism. This could make the global environmental constitutionalism exercise 'easier' insofar as existing domestic environmental constitutional norms, principles and approaches could be used to inform the content, extent and application of global environmental constitutionalism. As a preparatory first step to the grander project of global environmental constitutionalism, it would thus be crucial to comprehensively map environmental constitutionalism as it manifests in domestic jurisdictions and to fully interrogate domestic environmental constitutionalism with the view to understanding its content, nature, objectives and conceptual architecture. A further step would be to formulate a comprehensive theory of environmental constitutionalism and then to investigate the concept's individual components by also describing the role that each could play in the grander global environmental constitutionalism paradigm.

A second step would be to revisit the concept of global constitutionalism and to consider the way in which and extent to which each of the components of environmental constitutionalism could realistically be translated into the global domain. The identification and elaboration of existing global constitutional elements that could be useful for the global environmental constitutionalism project (such as universal human rights) would also be important.

Finally, a strong political case must be made for constitutionalizing global environmental law and governance and it must assume greater importance in the agendas of state actors and their global institutions, as well as non-state actors. The foregoing conceptual interrogation of environmental constitutionalism will play an important role in putting forward convincing arguments in support of making it a political priority for all the actors in global environmental governance. Ultimately, it is only through deliberate political support, dedication and action that global environmental constitutionalism will become a reality.

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133 See, further, B.K. Woodward, *Global Civil Society in International Lawmaking and Global Governance* (Martinus Nijhoff, 2010).

134 Peters, n. 94 above, at p. 593.

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10. CONCLUSION

This article has posed many questions, most of which it has not answered. For the moment, global environmental constitutionalism similarly raises more questions than it provides answers. But herein lies its strength: it forces us to critically review and rethink global environmental law and governance, to go back to the basics and attempt to seek and formulate solutions that could be recast in the familiar language of constitutionalism.

Constitutionalism, despite its critics, has much going for it and this article has sought to argue in favour of extending the constitutionalist paradigm to the global environmental law and governance domain. Its central hypothesis has been that the application of constitutionalism in a global context (global constitutionalism) is already common practice and a popular theme among international and constitutional lawyers. Constitutionalism is also a popular approach for improving environmental law and governance in many domestic jurisdictions. Mindful of the conceptual problems and constraints, as well as the pragmatic difficulties of global environmental constitutionalism, when read with the various justifications that the article has proposed in the previous sections, these considerations arguably provide sufficient motivation for the global environmental constitutionalism cause.

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