



**New Zealand Centre
for Global Studies**
Te Pokapū Akoranga Aorere o Aotearoa
GORTAEAOA O ATEAOA AKORANGA AORERE

“We the Peoples: Global Citizenship & Constitutionalism”

Friday 22 July 2016
Victoria University, Rutherford House

“Global Constitutionalism: *a challenging concept*”

Dr Kennedy Graham, Director, NZCGS

Two over-riding Questions:

1. How is humanity to be politically structured at the global level?
2. What might be the necessary conditions / defining features?

Question 1

How is human society to be structured at the global level?

- Association (confederation) of sub-component parts;
however strictly self-regulating
 - Entity (federation) of the whole;
however loose the centralised authority
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- Association = 1st & 2nd generation 20th c international organisations
(LoN / UN)
= ‘global governance’; strengthened version of LoN/UN
 - Entity = global political body; standard features of govt.
= 3 branches: legislature; executive; judiciary =
[structure of this conference]
Underlying, unifying constitutional basis (= ‘global constitution’)

Association (confederation) v Entity (federation)

Confederation:

“group of states, more or less permanently united for common purposes”
or
“a league or alliance of states”.

Federation:

“political unity, with a central government, by a number of separate states,
each of which retains control of its own internal affairs”;
“centralised governing entity with sub-component constituents”

Confederation: principal power resides with constituents

Federation: principal power resides with centralised entity

‘Sovereignty’ = distinguishing feature:

United Nations Charter (art 2.1):

“Organization based on the principle of the sovereign equality of all its Members”

UN features short of Federation

Legislature:

- Statement of supreme sovereignty to sub-component constituents (art. 2.1). No sovereign entity.
- Binding powers through shared collective decision-making: confined to narrow focus (IPS) + veto.

Judiciary:

- Referral to jud. settlement optional; acceptance of judgement optional; universal jurisdiction optional

Executive:

- No single enforcement capacity (contracted out to national armed forces; inadequate planning)

Question 2

What might be the necessary conditions / defining features of a ‘global entity’?

- | | |
|---------------------------|--------------------------------------------------------|
| (i) Global scale | Subsidiarity principle |
| (ii) Global citizenship | Identity / loyalty /representation
= legitimacy |
| (iii) Global constitution | Legitimacy: 3 institutions
= making / enforcing law |

2 (i) Global Scale

Subsidiarity

Def: Social / political issues managed at the lowest scale consistent with their resolution

1985	CoE	Exercise of public responsibilities should be decentralised (Charter art. 4.3)
1992	EU	May only 'act' (make law) where action of individual states = insufficient Maastrict Treaty European Treaties – Protocol 2 Lisbon Treaty 2009 (art. 5.3)
	EU-COJ	jurisdiction on whether EC regul. / EP law within EU exclusive competence 1997 FRG v European Parliament
1999	UNDP	System of co-responsibility for jurisdictional competencies

Subsidiarity:

- Focus is on legitimising jurisdictional competence at lowest appropriate level
- This does not preclude appropriate competence at the highest level, if appropriate

21st c global problems:

1. Climate change /resource stress
2. nuclear weapons
3. global ‘military’ conflict 21st c style (not inter-state)
4. mass migration

‘Vital national interest’

“... when highest policy-makers in the sovereign state conclude – issues at stake so fundamental to political, economic, social well-being of their country that not compromised further, even if results in military force’

Nuechterlein: *Concept of ‘national interest’; a time for new approaches* (Orbis, 23(1))

‘Vital global interest’

Survival / viability of humanity, contingent on maintenance of physical integrity of Earth, & protection of its ecological systems & biosphere from major anthropogenic change’.

Global solution

Legitimate national interest

Legitimate global power

The Planetary Interest: A New Concept for the Global Age; Kennedy Graham, Ed., (Routledge; 1999)

Global Citizenship

Definition of 'citizenship'

1. State of being, vested with the rights & privileges of a citizen;
2. Character of an individual viewed as a member of society;
Behaviour in terms of duties, obligations & functions of a citizen.

Note distinction in 2nd definition

- 2(a) character viewed a member of society
- 2(b) citizen-like behaviour

Thus:

behavioural characteristics may be independent of a particular state of being
(which may be inchoate)

So question of global citizenship = empirical, not theoretical

Thus:

can be a member of global community without existence of global polity;
i.e. a 'global citizen'

Logical progression:

‘global citizenship’ to ‘global constitutionalism’ to global institutions

1. Understand ‘global citizenship’ = definitional / conceptual clarity
2. Facilitates exploration philosophical foundations (including global values)
3. Informs socio-psychological dimension of new sense of identity / loyalty
4. Lays foundation for juridical concepts relevant to ‘global citizenship’
5. Bestows it a constitutional status
6. Underpins institutional expression.

Philosophical:

global values = UNGA res 60/1, para 4.

Socio-psychological:

narratives; symbols; oaths; curricula; leadership
proprietorship; rights, criminal liability

Juridical:

UN for Academic Impact (UNAI): UNSG ‘Let’s work together - foster educ. for global citizenship,’
Routledge Handbook of Global Citizenship Studies (Ed. Isin & Nyers; 2014)
‘Global Citizenship’ [Ch. 10 in ‘For the Sake of Present & Future Generations’ 2015]

Global Constitutionalism

Definition: 'constitutionalism'

"a complex of ideas, attitudes, and patterns of behaviour elaborating the principle that the authority of government derives from and is limited by a body of fundamental law".

UN Charter: not a constitution; a pact.

Can a pact evolve into a constitution?

Or does it have to be discarded & replaced?

Evolution or Replacement? Classical response

Hammarskjöld

Evolutionary stages of human thought; natural progression: national to global

1. UN = dynamic organization; inherent capacity to adapt; “int. constitutional law still embryonic”
2. Charter: ‘teleological instrument; “implied powers to facilitate / legitimate a constitutional framework”
3. Humanity: self-consciousness as a species

International community: ‘has come to political self-consciousness’ with the UN; ‘can use it in a meaningful way to influence circumstances of which it is a creation’

Allott

‘self-constituting of international society’, from international community into global community

From: ‘international security’
To: ‘international public order’

diplomatic concept
constitutional concept

Contemporary response

'The Unravelling'

- = incapacity of the UN Charter to handle problems of global scale
- = major powers/radical groups both disregarding UN norms / methods

'The Disruption'

- = disruption to established norms/institutions from stress of dangerous CC

Al Gore: 'The Future': 1. 'Earth Inc.'
 2. 'Global Mind'

Macdonald & Johnston

"...purposes/principles UN Charter no longer being served sufficiently"
"timely to reconsider case for strengthening constitutional framework"
"depiction of organized world community as 'constitutional order'"

= beyond UN

'Towards World Constitutionalism'; Martinus Nijhoff (2005)

The Three Branches of Global Constitution

Global Legislature?

- | | | | |
|----------|---------------------------------------------------------------------------------------------------------------------|--------------------------|------|
| 1. UNGA? | Int. customary law
Millennium Declaration (2000) | World Summit Outcome Doc | 2005 |
| 2. UNSC? | Binding resolutions
<i>The Security Council as Global Legislator</i> ; V. Popovsky & T. Fraser (Routledge; 2014) | Res. 1373, 1540, 2278 | |
| 3. IPU? | Resolutions
Agreement | UN-IPU Partnership | |
| 4. UNPA? | | Movement for UNPA | |

Global Executive?

- | | | | |
|------------------|------------------------|----|---------------------|
| 1. UN System | UN Secretariat | NY | Executive Committee |
| 2. Bretton Woods | IMF / World Bank / WTO | | Geneva/Washington |

Global Judiciary?

- | | | | |
|----------------|-------------------------|----------------------------------------------------|------------------------|
| 1. States ICJ: | compulsory jurisdiction | / | universal jurisdiction |
| 2. Individuals | ICC | 124 parties (not US, China, Russia, India, Brazil) | |
| | | Aggression as a crime | |

Global Scenarios 2020-50

1. Rational, positive

Westphalian success:

Climate 2°C (Paris I '20-30; II '30-50);

Sustainab NWC ('25-'50);

Outer Space demilitarised

UoF (Aggression as crime; CT Strat. Effective)

Cyber-stability; Social media maturity

2. Unstable, positive

Westphalian failure:

Climate 3+°C (Paris NDC overshoot)

NW proliferation Terrorism intensification (incl. n.w.)

Cyber-warfare; social media incitement

3. Cataclysmic, rebuild

Global governance: Legitimate global power on global problems

4. Cataclysmic, chaos

Post-Westphalian anarchy



Global Constitutionalism: a challenging concept

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Authoritative Studies

International Law, International Relations and Global Governance; Charlotte Ku (2012)

The Idea of World Government: From Ancient Times to the 21st Century; Charlotte Ku (2011)

Ruling the World? Constitutionalism, International Law and Global Governance;

J. L. Dunoff & J. P. Trachtman (CUP, 2009)

Towards an International Legal Community? The Sovereignty of States and the Sovereignty of International Law; C. Warbrick & S. Tierney (Eds.) British Institute of International and Comparative Law (2006)

Towards World Constitutionalism; R Macdonald & D Johnston (Eds.). (OUP; 2005)

Constitutionalism in Global Constitutionalization, A. O'Donnaghue (2004)



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Authoritative Studies

'Towards World Constitutionalism: Issues in the Legal Ordering of the World Community'

R MacDonald & DM Johnston (Martinus Nijhoff; Leiden, 2005)

Chapters

1. World Constitutionalism in the Theory of International Law (Johnston)
5. The Globalisation of Philosophy and the Philosophy of Globalization (Allott)
10. Universalism, regionalism and Localism in the Age of Globalization (Czaplinski)
23. Forging a Multi-layered System of Global Governance (Ku)
31. The Meaning of International Constitutional Law (Fassbender)
32. The International Community as a Legal Community (Macdonald)