GLOBAL CONSTITUTIONALISM AND THE IDEA OF PROGRESS

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ABSTRACT

The article explores universal pertinence of global constitutionalism as a theory of international law in terms of its relation to progress. Whilst it is acknowledged that the language of progress may conceal imperial politics and idealistic assumptions, it is an inevitable element of any theory of international law seeking to resolve legal challenges of the twenty-first-century international legal order. Global constitutionalism is built on the idea of progress. By depicting international law as in the process of transition from decentralised and ad hoc system to a comprehensive 'blueprint for social life', global constitutionalism implies international law's progressive nature with respect to the 'pre-constitutionalised' order. Yet, its narrative of progress is premised on assumptions that minimise exclusion, which makes international law truly universal.

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1. INTRODUCTION

It is a widely-accepted axiom that international law emerged as an exclusively practical tool to orchestrate inter-state relations. According to the conventional periodisation, it is marked by two principal historical epochs: "classical international law" and "modern international law".[2] The 1648 Peace of Westphalia, which brought to an end the German phase of the Thirty Years War, is commonly designated as the beginning of modern international law. Whereas in the Middle Ages, sovereigns, hierarchically organized beneath the sway of the Pope, and the Holy Roman Empire were the focus of international law, the Westphalia Treaty introduced a new world order – an epoch of nation-states, each sovereign within its *domaine réservé*. International law of this period can be characterised as an exclusive product of state consent exhibited either expressly in the form of treaties or tacitly by means of custom.[3] It was primitive and modest, as it did not require much from a law-abiding actor. Due to its horizontal nature knowing no common interest beyond the sum of interests of individual states and the lack of any normative hierarchy, classical international law has been dubbed as a "well ordered-anarchy".[4] Since the mid-1990s, international law has experienced a shift from state consent as a basis for legitimation toward international consensus, which is in the contemporary literature designated as a "constitutionalisation process" – "a process where a legal system goes from an *ad hoc*, decentralized, and consent-based order to a system where the law regulates the exercise of power and governance".[5] In this sense, global constitutionalism is viewed as a superior phase of legal development, where the international legal system has evolved into more hierarchical, normative and structured in comparison with the "primitive" state-centred Westphalian order.

Whilst such a division of historical time into periods is indispensable for any historiographical research, it conveys a teleological reading of international law with global constitutionalism situating at the apex of universal history or, in terms of Fukyama, "end of history" as such.[6] Such narrative of progress is at least unconsciously endorsed by almost every international lawyer and is now conceived as "the default mode of thinking about law, politics and economics".[7] In fact, it has been acknowledged that international legal scholarship cannot escape the question of progress as the latter constructs the very identity of international law as a discipline.[8] However, there are dark sides of the progressive discourse. It may legitimise imperial politics and shift alternative narratives to the periphery. There is a danger of complacency with regard to the dominant idea and the attendant risk of this idea remaining unaltered irrespective of its efficiency and legitimacy.

This paper sets out to examine the ostensibly universal pertinence of global constitutionalism as a theory of international law in terms of its relation to progress. It will first trace the intellectual history of global constitutionalism in order to better grasp its nature and content. Thereafter the criticisms of the progress discourse will be weighed against a need to develop an operational theory of international law accommodating modern exigencies. In the end, it will be concluded that global constitutionalism is not a progress narrative in the conventional sense since it does not put aside alternative discourses neither does it obscure realities on the ground. Rather, it is a theory of international law that takes the idea of progress to the fore and seeks to make it universal.

2. GLOBAL CONSTITUTIONALISM: DEFINITION AND THEORETICAL FOUNDATIONS

As international legal order is clearly becoming more refined, complex and less dependent on individual state will, the orthodox Westphalian paradigm resting on such fundamental principles as state jurisdiction, sovereignty and non-intervention into the matters of domestic interest is increasingly recognized as anachronistic.[9] To remedy the conceptual inadequacy and practical inefficiency of the conventional paradigm, a new generation of legal scholarship has emerged, including *inter alia* the New Haven School,[10] liberal international relations theory,[11] neo-Kantianism,[12] Fukuyama's liberal triumphalism,[13] Grotian tradition[14] and global constitutionalism.[15] Each of these approaches is premised on progressive reading of legal history where the international legal order has allegedly moved beyond the classical accounts of inter-state relations to encompass global values, including a more prominent role of individual in international legal processes. Because global constitutionalism has been widely designated as a positive (descriptive), as opposed to normative (prescriptive), theory of international law, as it is predominantly concerned with the actual transformations occurring at the heart of international law without seeking (or to be more precise, seeking to a very limited extent) to

2 The period of classical international law is coterminous with the middle ages, which are in turn divided into the early middle ages (400-800), the mid middle ages (800-1300) and the late middle ages (1300-1500). See eg Grewe 1984; Steiger 2001, p. 181; Diggelmann 2014.
3 Falk 1969, p. 44.
4 Bryde 2005, p. 106.
5 O'Donoghue 2013, p. 1028; See also Fassbender 2009; Klabbers, Peters & Ulfstein 2009.
6 Fukuyama 1992.
7 Rech 2017, p. 58.
8 Altwicker & Diggelmann 2014, p. 426. See also Koskenniemi 2002, p. 516 ('[H]istory has put the international lawyer in a tradition that has thought of itself as the "organ of the legal conscience of the civilized world").

9 For a detailed account of this debate, see Simpson 2001.
10 While the NHS does not explicitly refer to the process of constitutionalisation of international law, it advances anti-statist and post-Westphalian thesis by reconceptualising subjects of international law and placing lesser emphasis on state consent as a legitimating factor of international law-making. See eg McDougal & Reisman 1983; Lasswell & McDougal 1992.
11 Slaughter 1995; Moravcsik 1997.
12 Teson 1992.
13 Fukuyama 1992.
14 Lesaffer 2002.
15 Dunoff & Trachtman 2009; Klabbers, Peters & Ulfstein 2009; Dobner & Loughlin 2010; Schwöbel 2011; Bhandari 2016; Lang 2017.

lay down normative requirements as to the desired course of development of the international legal system,[16] it is one of the most consistent and sophisticated theoretical alternatives to the declining Westphalian legal positivism.

There is no single recognised understanding of global constitutionalism. Rather there are many overlapping conceptualisations relating to its objectives, nuances and constituting elements,[17] what has been designated by one scholar as a "constitutional cacophony".[18] On a theoretical level, the debate on global constitutionalism may be situated, according to Kleinlein, within two generic groups: on the one hand, scholars may conceptualize developments in international law as an evidence of on-going constitutionalisation. On the other hand, they may transpose the themes of the domestic constitutionalism onto the international plane.[19] On a more specific level, Schwöbel suggested four dimensions of constitutionalism in public international law: social constitutionalism (focusing on coexistence), institutional constitutionalism (focusing on governance through institutions); normative constitutionalism (emphasizing specific fundamental norms) and analogical constitutionalism (focusing on analogies to domestic and regional constitutionalisms).[20] Significantly, there are other approaches to classification of various academic traditions on global constitutionalism, whose detailed overview is beyond the scope of this article.[21]

While Schwöbel's four dimensions of global constitutionalism are overlapping in many respects and some of them fall into the both generic camps sketched by Kleinlein, it is social constitutitonalism that is the most relevant for the purposes of this enquiry. A central theme of social constitutionalism is the notion of "international community" – an idea that international legal system has undergone a transformation from a sovereignty-centred system to a value-oriented or individual-oriented system.[22] This transition is well-captured in the judgments

16 See eg Werner 2007, p. 340 ("International constitutionalism seeks to explain certain developments in international law in terms that deviate from a purely consensualist understanding of the international legal order"); Bhandari 2016, p. 6 (Positing that "global constitutionalism operates at the positive rather than normative level, being distinguished by the formative features [legitimacy, authority and validity] and operational aspects [unity, harmony, legalisation, convergence and supremacy]").

17 For a recent analysis of global constitutionalism's variations, see Diggelmann & Altwicker 2008, p. 623; Weller 2009, pp. 179-94; Moral 2010, p. 81; Schwöbel 2010, p. 611; Schwöbel 2011, p. 13; Kleinlein 2012, p. 81; Kleinlein 2012 (II), ch. 1; O'Donoghue 2014, p. 140ff.

18 Amhlaigh 2016, p. 173.

19 Kleinlein 2012, p. 81.

20 Schwöbel 2011, p. 13.

21 See eg Dunoff & Trachtman 2009, p. 9ff (Categorising global constitutionalism into three functional descriptions depending on the purposes of international constitutional norms, which are enabling constitutionalism, constraining constitutionalism and supplemental constitutionalism); Wiener et al 2012, pp. 1-5 (Conceptualising global constitutionalism by reference to the idea of three C's: constitution, constitutionalisation and constitutionalism); Bhandari 2016, pp. 4-5 (Examining the operation of global constitutionalism from normative (concepts and theories) and positive (formative standards and modus operandi) benchmarks).

22 Tomuschat 1999, p. 237.

of the World Court which in its 1986 dictum reaffirmed the conventional position, namely that "[i]n international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise",[23] and in a ten-year time span subscribed to the constitutionalist vision by declaring that "[r]esolutely positivist, voluntarist approach of international law still current at the beginning of the [twentieth] century [had] been replaced by an objective conception of international law, a law more readily seeking to reflect a collective conscience and respond to the social necessities of states organized as a community".[24]

The most comprehensive academic account of the international community school and its impact on the legal doctrine was given by Buchan in *International Law and the Construction of the Liberal Peace*. His key point is that following the end of the Cold War, the world order comprises two forms of state association: the *international society* based on unqualified membership criteria and ruled by the traditional Westphalian principles of state sovereignty and inviolability of domestic constitutional settings, and *international community* – an exclusive club of liberal constitutional democracies.[25] Whilst this framework has been characterised by some as overly "bold", "premature" and "reductionist",[26] as there are many instances in the post-Cold War era where liberal states have failed to dismiss illiberal states as illegitimate and have even maintained close relationships with them, it neatly captures the *central* patterns of transformations (as opposed to every micro-aspect of international social reality) occurring in international relations since 1990.[27]

These transformations include, for example, relocation of authority to international and regional organisations; vertical differentiation (or hierarchisation) between different norms and principles of international law; increasing legalisation and juridification of international dispute settlement; ever-frequent adoption of multilateral treaties with third-party effects; reduced threshold for the emergence of international custom and changes in the concept of statehood entailing the shift from the principle of effectiveness to standards of legitimacy in the question of recognition of states and governments. That said, "the meaning of global constitutionalism" can be summarized

23 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para. 269.

24 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, p. 268, Declaration of President Bedjaoui, para. 13.

25 Buchan 2013, p. 19. See also Buchan 2008. For a similar division of international social intercourse, see Simma & Paulus 1998, pp. 269-71; Villalpando 2010, pp. 391-92.

26 Roth, "International Law's Enemy Within: Buchan's "International Community" as Rival to the Positive Legal Order' *EJIL: Talk!* (17 November 2014) <https://www.ejiltalk.org/international-laws-enemy-within-buchans-international-community-as-rival-to-the-positive-legal-order/> accessed 28.3.2017; Fox, 'A Comment on Russell Buchan's "International Law and the Construction of the Liberal Peace"' *EJIL: Talk!* (18 November 2014) <https://www.ejiltalk.org/a-comment-on-russell-buchans-international-law-and-the-construction-of-the-liberal-peace/> accessed 28.03.2017. For a general criticism of the international community thesis, see Hassner 2015.

27 Buchan 2015, p. 325.

as "the continuing, but not linear, process of the gradual emergence and deliberate creation of constitutionalist elements in the international legal order [...] bolstered by academic discourse in which these elements are identified and further developed".[28]

Global constitutionalism as a theoretical approach did not emerge overnight. Its foundations were laid down by numerous neoliberal scholars who viewed the end of the Cold War as an opportunity to build a new world order by means of a more progressive international law. To this end, a new theoretical framework for international law was constructed which came to be known as "new liberalism".[29] It was first developed by Moravscik in the field of international relations as a self-standing anti-realist thesis.[30] Moravscik's central argument is that liberalism has made a transition from a normative (prescriptive) theory instructing states as to how they should conduct their foreign policies with other states to a positive (explanatory) theory that accounts for how states do interact with one another.[31]

Moravscik's novel approach to liberalism, or what he called liberal international relations (IR) theory, was subsequently transposed by Slaughter to international law.[32] She suggested that Westphalian international law was based on classical liberal assumptions. It did not distinguish among sovereign states: "Democracies, theocracies and all manner of autocracies are deemed identical under the all-purpose label of sovereignty".[33] Any distinction on the basis of political regime was strictly forbidden. However, with the Cold War approaching its end, a number of political scientists, undertaking thorough empirical analysis, pioneered the need to distinguish between liberal and illiberal states on the basis of their external behavioural patterns, which came to be known as a "democratic peace theory".[34]

According to this theory, liberal states created a separate zone of peace and did not wage wars with one another. Illiberal states, conversely, remained in the "zone of politics" virtually unrestrained in their actions in the global realm. Slaughter's liberal IR theory moved beyond this correlation between liberal democracy and peace and interrogated what other characteristics liberal states have that distinguish them from their illiberal counterparts. It is founded on three core assumptions. First, individuals and private groups are primary actors in domestic and international politics informing state's preferences on the international scene. Second, state is not an autonomous and monolithic entity as propagated by realists, but a representative institution whose foreign policies are determined by preferences of individuals and groups enfranchised by domestic institutions and practices. Third, the accumulation of these individual and group preferences determines the outcome of state interactions.[35] On this view, "states bear no resemblance to billiard balls but rather to atoms of varying composition, whose relations with one another, either cooperative or conflictual, depend on their internal structure".[36]

The notion of new liberalism was further developed by Simpson. He contended that orthodox international law is founded on classical liberalism, whose main distinctive features are tolerance, diversity and agnosticism about moral truth. He designated this as "Charter liberalism" because the underlying premises of this approach are explicitly enshrined in the UN Charter. The gist of this approach is the assumption that all States are equal akin to individuals in a liberal society.[37] Such fundamental principles of international law as domestic jurisdiction, sovereignty, territorial integrity and non-intervention are classical liberal principles. Respect of these principles has become the touchstone of the classical international liberal theory.[38] Similarly to Simpson, Sorensen pointed out that classical liberalism essentially embodies a "Liberalism of Restraint" with its key emphasis on one's own sphere of liberty which can only be infringed by preventing harm to others.[39]

However, there is also another understanding of what it means to be liberal. This is, according to Simpson, "liberal anti-pluralism",[40] sometimes characterised as "liberal internationalism",[41] "new liberalism", "neo-liberalism", "liberal universalism",[42] "liberal millenarianism"[43] or "Liberalism of Imposition".[44] This "new" type of liberalism is endowed with a sort of moralistic fervour as it conceptualises equality as a condition of fulfilling certain "neo-liberal" criteria and is intolerant of the illiberal.[45] The central point of liberal anti-pluralism is to differentiate between states on the basis of their internal characteristics. Such a distinction between the two liberalisms is more straightforward in promoting neoliberal agenda than Moravscik's "positive" theory. It marks a return to normative (or prescriptive) liberalism in the sense that it does not only explain why liberal states behave differently than illiberal ones but also seeks to challenge the over-

28 Peters 2009, pp. 397-98.
29 The concept of 'new liberalism' was coined by Simpson 2001.
30 See Moravscik, 'Liberalism and International Relations Theory' (1992) Center for International Affairs, Harvard University, Working Paper No 92-6 < *https://www.princeton.edu/~amoravcs/library/liberalism_working.pdf* > accessed 4.7.2016.
31 Moravscik 1997. A number of other political scientists too have showed an interest in developing core foundations of liberalism as a rival theory to realism. See Nye 1988; Zacher & Matthew 1995; Powell 1994.
32 Burley [now Slaughter] 1992; Slaughter 1993
33 Slaughter 1992, p. 1909.
34 Philosophical roots of this theory go back to Kantian assumption that people are rational and prefer peace to war. See Kant 1983. The empirical foundation of 'liberal peace' is based on studies illustrating the absence of war between liberal democracies. See eg Russett 1993.
35 Slaughter 1995, p. 508; Moravscik 1997, pp. 516-20; Moravscik 2011, pp. 711-14.
36 Slaughter 2000, p. 241.
37 Simpson 2001, p. 541.
38 See Doyle 1983, p. 213
39 Sorensen 2006, p. 259. Berlin calls this liberty a 'negative liberty' as it is fulfilled whenever there is no unjustified interference. See Berlin 1969, p. 122.
40 Simpson 2001, p. 537.
41 Jahn 2013.
42 Charvet & Kaczynska-Nay 2008, p. 60.
43 Marks 1997.
44 Sorensen 2006, p. 259
45 Simpson 2001, p. 539; Simpson 2004, p. 78.

inclusive orientation of international legal order by substituting it with the one in which status of states is defined by their degree of acceptance of certain individual rights, including the so-called "right to democracy".[46] By virtue of its value orientation and individual-centeredness, global constitutionalism is a variation of this new type of liberalism. Yet, due to the central role of functionalist dimensions (mapping, identifying and constructing) within the global constitutional rationale, it rather reflects Moravscik's positive approach to liberalism than Simpson's normative schemata.

3. GLOBAL CONSTITUTIONALISM AS A PROGRESS NARRATIVE

In intellectual history, the idea of progress implies that constant improvement in technology, science and social organization can generate an improvement in the human condition. It is a linear and irreversible movement from "poverty, barbarism, despotism and ignorance to riches, civilization, democracy, and rationality".[47] It consists of three elements: (1) comparative, which means that progress can only be identified by way of comparison with a more inferior state; (2) evaluative, in that it necessarily scrutinizes the past on the presence of the signs of progress (or, more precisely, on the absence thereof); and (3) reformative, that is by equating itself to anything but goodness progress inevitably assumes a reformist "punch".

New liberalism has been roundly criticized for its linear and progressive reading of history. By dividing the world into zones, it brings back the nineteenth-century division between civilized and uncivilized. Moreover, by positioning liberal constitutional democracy as one of the principle pillars of legitimacy, it fails to consider the diversity of values, beliefs and cultural settings. Another criticism centres on its hopelessly idealistic depiction of the world which obscures the fact that "never have violence, inequality, exclusion and famine, and thus economic oppression affected as many human beings in the history of the Earth and humanity".[48] A further flaw of new liberalism is its simplistic interpretation of historical change. It overstates the predictability of history and fails to appreciate the contingency of events.[49]

Similar observations apply to global constitutionalism. By depicting the present state of international law as being in the "process of constitutionalisation" it automatically implies its progressive nature with respect to the "pre-constitutionalised" order. Indeed, the promise of progress lies at the very centre of the constitutionalist epistemology. From the vantage point of global constitutionalism, the world is growing irreversibly more interdependent and evolving from the framework of co-existence to the framework of cooperation to a comprehensive "blueprint for social life" and ultimately to international law of the international community.[50]

46 See eg Franck 1992.
47 Shanin 1997, p. 65.
48 Derrida 2006, p. 106.
49 Huntington 1989, p. 10; Held 1993, pp. 296-97; Marks 1997, p. 458.
50 Tomuschat 1999, pp. 56-88.

Importantly, the idea of progress is not an exclusive feature of global constitutionalism. It also animates mainstream legal scholarship. Almost every book on general international law in its introductory chapters presents historical events that are situated at specific coordinates in space and in time as a coherent story of progress: "[F]rom Westphalia in 1648 through Bretton Woods and San Francisco conferences of 1944 and 1945 to the present day and beyond to a more just world".[51] The idea that international law is constantly moving towards a more perfected state has ancient roots. In the Christian tradition, history was viewed as following a linear and directional path to some ideal future. Such progress narrative stood in stark contrast with pagan cyclical histories of natural birth, development, decline and regeneration.[52] In the modern times marked by fast scientific, technological and social change, this teleological approach to history took on the secular form and became a dominant paradigm of the philosophical history of international law. It is clearly discernible in the works of one of the prominent Enlightenment scholars who contended that

> *"The history of the human race as a whole can be regarded as a realization of a hidden plan of nature to bring about an internally — and for this purpose also externally — perfect political constitution as the only possible state within which all natural capabilities of mankind can be developed completely."*[53]

The naturalist appeal to universal moral principles as a common strategy of many Enlightenment scholars to reform international law was subsequently attacked for its subjectivity and fuzziness and supplanted by an ostensibly objective discourse of the progressive development partially based on thin empirical evidence.[54] Hudson's work *Progress in International Organization*, which treats the growth of international organizations as an embodiment of progress, is one of the most cited in this respect.[55] For him as well as for the succeeding generations of international lawyers, "the notion that international law serves as the ordained mechanism for the achievement of 'progress' was an accepted tenet of the faith".[56]

This said, modern progress narratives are constructed, *à la* Altwicker and Diggleman, by means of four 'techniques': ascending periodization, proving increased value-orientation of international law, detection of positive trends and paradigm shift-talk.[57] From this perspective, global constitutionalism is a second technique: by suggesting that international law is evolving from Westphalian, decentralized and consent-based model of international relations to a new constitutional world order based on three pillars of limited government, human rights and the rule of law, it asserts the progress by pointing to the growing value-orientation of international law.

51 Koller 2012, p. 98.
52 See Rotenstreich 1971, p. 200; Burrow 2009, pp. 68-69.
53 Kant 1990, pp. 41, 50.
54 Koller 2012, p. 102.
55 Hudson 1932.
56 Miller & Bratspies 2008, pp. 21-22.
57 Altwicker & Diggelmann 2014, pp. 432-37.

As asserted previously, traditional international law too may (and it actually does) employ this technique to convey the message of progress but in a less pronounced manner. In fact, the idea of progress is so imminent to international law's self-perception as a science and a discipline that it became a dominant narrative of the field. The difference that global constitutionalism has introduced is that it brought this discourse into light, made it explicit, whereas orthodox international theory attempts to contain the progress narrative underground, behind a veil of objective reasoning and impartial argumentative techniques.

The question, thus, arises whether the progress narrative is inherently fallacious. Is it avoidable? Should it be avoided? Thinking in terms of progress is not intrinsically erroneous. It is when one constructs a progress narrative and uncritically assembles historical facts to match the plot in order to design a particular future that one enters dangerous waters of subjectivism, idealism and politics of alienation. As Skouteris observed, the language of progress is a language of authority which can legitimise but also de-legitimise;[58] it evaluates, judges, classifies and excludes. By designing an ostensibly true version of history, it proclaims in a celebratory tone an end to contestation and thereby sets aside alternative narratives. Hence, the progress discourse is not a descriptive exercise but a "powerful rhetorical strategy of legitimation"[59] and exclusion.

4. FROM PROGRESS NARRATIVE TO UNIVERSAL PROGRESS?

Be that as it may, a strong claim may be made that any theory of international law shall incorporate the idea of progress to be operative, that is to provide for practical solutions to every-day legal problems. In fact, this is the main reason why almost every modern theory of international law is built on the idea of progressive history. However, there is a strand of legal scholarship that emerged as a counter-narrative to the prevailing linear understanding of historical change.[60] This counter-narrative, or what has become to be known as critical legal studies,[61] rejects the idea of law as linear progressive development towards an ideal end and substitutes it with a circular vision of international law constantly oscillating between opposing values.[62] On this account, international law is always indeterminate which allows for the producing of an infinite number of arguments that, in turn, make up the source of the continuous "renewal of the field".[63]

58 Skouteris 2010, p. 5.
59 ibid 21.
60 For a more detailed overview, see generally Koller 2012. See also Cass 1996, p. 354 ('[O]ne of the central theses of the "newstream" in international law is that the "mainstream" insists on constructing the history of the discipline as a "narrative of inevitable progress"').
61 See eg Purvis 1991.
62 Kennedy 1996, p. 399 (Claiming that international lawyers have purportedly built a progressive vision of international law to design their self-image); Koskenniemi 2002 (Contesting the prevailing narrative that international law evolved in a linear way); Koskenniemi 2005.
63 See Kennedy 2000, p. 345.

Critical legal studies do not suggest any grand theory of international law akin to positivism or naturalism. Instead, they invite legal scholars and practitioners to acknowledge the political nature of international law and accept its radial indeterminacy as an asset, as "an absolutely central aspect of international law's acceptability".[64] But if the purpose of the counter-narrative is not to provide for a workable theory of international law but rather to critically evaluate how the dominant narrative generates its structures and how these structures distort the reality, then it is not suitable for, and in fact not even capable of, proposing workable solutions. As Koskenniemi aptly opined:

> *"By reducing international law to self-contained formalistic argument around opposing concepts, the critical counter-narrative has not merely placed the content of solutions to legal problems outside international law but has actually made this content inaccessible to the international lawyer, who lacks the means and methods to reach out of law's endless circularity to sociology, philosophy, or political science to identify workable solutions and to introduce them to the legal discourse."*[65]

It follows that international law as a normative tool of regulating social interactions is inconceivable beyond the narrative of progress, at least at this stage of legal scholarship. However, this does not have to be viewed in purely pessimistic tones. Progress is not an inherently *bad thing*. On the contrary, it is needed to raise a sense of responsibility for making one's own history and to make continuous efforts to ameliorate conditions of human existence. As Collingwood noted:

> *"[M]ore dangerous [...] is the defeatist spirit which fears that what we are aiming at is no more than a Utopian dream. And this fear becomes paralyzing when [...] it calls in the help of philosophical ideas, and argues that the evils admittedly belonging to our moral, social, and political life are essential elements in all human life, or in all civilizations, so that the special problems of the modern world are inherently insoluble."*[66]

Consequently, progress narratives can act as a call for action: "[B]y de-mystifying progress narratives, new possibilities are opened for the intellectual imagination on which to act in the world".[67] Global constitutionalism is one such possibility. Not only does it not attempt to bury the progress tropes behind the seemingly objective legal semantics, but it also puts the idea of progress at the very centre of its epistemology. To reiterate, progress only becomes "unsettling" when it is couched in the seemingly objective language of international law. Such pretension for objectiveness and making progress "speak itself"[68] are the principal weaknesses

64 Koskenniemi 2005, p. 591.
65 See Koskenniemi 1997, pp. 153-54.
66 Collingwood 1934, pp. 168-69 quoted by Connelly 2004, p. 419.
67 Galindo 2010, p. 4 referring to Skouteris 2010, p. 227ff.
68 As Skouteris explained, by making progress 'speak itself', international lawyers create an image of objectiveness, rationality and inevitability of their progress narratives. Skouteris 2010, p. 17.

of the traditional theory attacked by the new stream. Considering the fact that the underlying rationale behind the counter-narrative is to make explicit the political nature of international legal argument, global constitutionalism with its explicit endorsement of global values, in a sense takes this point seriously and thus distances itself from the dominant narrative. Ultimately, global constitutionalism does not assert that constitutionalisation of international law is the only way to go, it merely makes a positive claim (instead of a normative one) that this is what is now happening without any attempt to project a desirable future.

The final question to consider in this paper is, as was poignantly formulated by Skouteris, whether "progress [can] ever be universal or will it necessarily always involve power relations and an ideological struggle during which some will gain and others will lose"?[69] As was previously mentioned, statements on progress are never neutral. They are always value-laden. But to aspire for a theory of international law that would completely do away with politics is to be utterly idealistic. The propensity to exclude and marginalize is as old as history of a man and international law is not an exception. As Gong noted, "the processes by which an international system establishes standards to define and codify its operating interests, rules, values, and institutions are continuing ones".[70] What is susceptible to change is not the progress discourse itself, but its nature and character. The challenge is hence not to make international law immune from any language of progress but from the hegemonic agenda behind it, that is to ensure that the narration of progress, by whatever name it is called, is as inclusive as possible to safeguard legitimacy and efficiency of the current international legal order. As Galindo has rightly observed, it is not the progress itself that is a problem but an *inevitable* progress: the false perception that a certain prevailing idea will remain immune from critique.[71] Only when the language of progress is transparent and inclusive can it act as an engine for the universal development.

It follows that global constitutionalism is a discourse of progress but it is founded on assumptions that minimize exclusion. First, constitutionalisation of international law entails "softening" of international law. As Shelton contented:

> *"Non-binding commitments may be entered into precisely to reflect the will of the international community to resolve a pressing global problem over the objections of the one or few states causing the problem, while avoiding the doctrinal barrier of their lack of consent to be bound by the norm."*[72]

Non-binding commitments permit, in principle, the inclusion of all interested parties in a process of international lawmaking.[73] Because traditional sources of international law, such as treaties

69 ibid 21.
70 Gong 2002, p. 80.
71 Galindo 2010, p. 3.
72 Shelton 2010, p. 144.
73 Reinicke & Witte 2000, p. 94.

(especially law-making treaties) and custom, are normally formed by leading states[74] and establish obligations towards all the world rather than towards particular parties, recourse to soft instruments is equally available to developing states and can, thus, be viewed as a tool of empowerment and greater inclusion. By allowing more voices to be heard, the increasing invocation of soft law as a source of international legal obligation enlarges the law's legitimacy basis and authority. Moreover, such changing legal environment marked by various shades of bindedness can be characterised as the maturing of the international system since the very recourse to, and shaping of one's behaviour in conformity with, non-treaty norms entails a certain degree of trust between the participating states that a particular undertaking will be implemented in good faith regardless its generic wording and lack of treaty form. The ever-frequent invocation of soft law commitments as a basis for international claims is evident, *inter alia*, in the case law of the ICJ[75] and increased academic comment.[76]

Second, constitutionalisation of international law presupposes the revision of the doctrine of custom. From this perspective, it is not the practice of individual states that counts most but rather the existence of universal *opinio juris* that a certain norm is desirable and/or needed. Lepard has put this in the following way:

> *"A customary international norm arises when states generally believe that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain conduct. This belief constitutes opinio juris, and it is sufficient to create a customary law norm. It is not necessary in every case to satisfy a separate 'consistent state practice' requirement. Rather, state practice can serve as one source of evidence that states believe that a particular legal principle or rule is desirable now or in the future."*[77]

There are two points to be stressed. First, Legard asserts that for a customary norm to arise, it is enough for *opinio juris* to reflect a belief by states that a practice *should* be required instead of a traditional doctrinal view that it is *already* required. In this way universal constitutional principles more easily find their way to the subjective element of custom, because all that is necessary is that the majority of states solely believe in the importance of these principles. Second, state practice is relevant merely to the extent it proves the evidence of such a belief. This view is shared by Bradley asserting that a new customary norm "can be recognised when it is evident — from state practices, statements, and other evidence — that the rule is something

74 See eg Byers 1999; Anghie 2007, pp. 36-39.
75 *Nuclear Tests Case (Australia & New Zealand v France)* (Merits) [1974] ICJ Rep 457, para. 46; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, p. 186.
76 Hillgenberg 1999, p. 503; Shelton 2000; Pellet 2006, p. 714; Guzman & Meyer 2010, p. 171; D'Aspremont 2011, p. 149; Goldmann 2012, p. 346; Gammeltoft-Hansen, Lagoutte & Cerone 2016.
77 Lepard 2010, p. 8

that the relevant community of states wishes to have as a binding norm going forward and that it is socially and morally desirable".[78]

Thus, constitutionalising international law for the purposes of ascertainment of a customary norm discounts the requirement of general and consistent state practice and instead focuses primarily on statements.[79] Unlike traditional doctrine of custom, where the formation of custom is commonly criticised for being effectuated by a handful of the most powerful and rich states,[80] the process of the so-called "modern custom" formation is a conscious, egalitarian and deliberate process. Because it gives an equal voice to all participating parties, it makes international law, in words of Charney, truly "universal".[81]

Another domain where constitutionalisation transformed international law more inclusive is the doctrine of sources itself. Global constitutionalism presupposes a shift of emphasis from individual state *consent* to universal *consensus* as the basis of an international legal obligation. In more concrete terms, it would mean that treaties as the main source of obligations in Westphalian society give way to the sources more easily accommodating the common interest of the international community, such as custom in its above-mentioned conceptualisation and general principles. As to the latter, it is now widely accepted that although Article 38(1) of the Statute of the International Court of Justice does not establish a hierarchy of sources, in actual fact general principles of law are almost never referred to, at least in explicit terms, in the international fora due to their non-consensual character.[82] Constitutionalisation of international law envisages a more frequent recourse to the third source as an ultimate repository of universal values. Because general principles of international law derive from a large number and variety of domestic legal systems, obligations they impose are more universal than those established by a (multilateral) treaty or custom. As Kolb concluded, "[t]he law of general principles is constitutional law in the fullest sense of the word".[83]

Ultimately, recent changes animating the field of treaty interpretation exhibit another bit of strong empirical evidence of progressive march of global constitutionalism as a tool of empowerment. It is a generally accepted proposition that treaty is to be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty and in the light of its object and purpose.[84] Yet, it is still a matter of debate how these interpretative elements – text and object and purpose – shall be treated. Global constitutionalism as a value-centred approach implies teleological interpretation because the latter aids in revealing the common interest of the international community vested in the text of the treaty, instead of attempting to ascertain a fluctuating, inward-looking and synallagmatic will of an individual state, commonly referred to as "intention of state parties". Moreover, the generic and abstract nature of the object and purpose as a guiding formula in treaty interpretation ensures a needed flexibility and evolution of the treaty text in line with global constitutional principles, which states themselves endorsed in a variety of binding and non-binding instruments, such as the UN Charter and the Universal Declaration of Human Rights. Because such principles reflect the conscience of the international community as a whole (*opinio juris communis*),[85] the interpretation based thereof comprises a wider spectre of interests than those of initial drafters.

In addition, teleological approach requires that a term is interpreted evolutively, that is, that a meaning given to a text changes over time. This is reflected in article 31 VCLT, which states that apart from treaty text and object and purpose, other developments shall be taken into account in treaty interpretation, such as context, subsequent agreements, state practice and "any relevant rules of international law applicable between the parties"[86]. The latter element – interpretation of treaties against the backdrop of general international law – is widely known as a "principle of systemic integration"[87]. Because this previously highly disdained principle[88] is now increasingly invoked in the international fora,[89] the trend is commonly viewed as "an action in favour of the unity of the international legal system" and therefore another manifestation of international law's constitutionalisation. Further, since it is now agreed that "rules of international law" refer

78 Bradley 2016, p. 56.
79 Roberts 2002, pp. 757-91.
80 For a more detailed discussion of the inherent link between power and traditional customary law formation, see generally Byers 1999; Anghie 2007, pp. 36-39 (Arguing that much of modern international law was shaped by the European colonial encounter with non-European civilisations, with the latter as the objects of reform); Kelly 2017, p. 47 (Claiming that the history of CIL 'suggests that to a large degree publicists and powerful nations ignored inconvenient state practice and generated customary international law norms based on prior assumed values or perceived self-interest irrespective of the general acceptance of a norm').
81 Charney 1993, p. 529.
82 Pellet 2006, p. 780.
83 Kolb 2006, p. 36.
84 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 33 (VCLT) art. 31(1).
85 Herczegh, Decsenyi & Pulay 1969, p. 36.
86 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 33 (VCLT) art. 31.
87 See generally McLachlan 2005; Merkorious 2015.
88 Sands 1998, p. 95 (Contending that article 31(3)(c) fell into such a disdain that it has 'been expressly relied upon only very occasionally in judicial practice', and had 'attracted little academic comment'). Likewise, French noted that 'as a feature of treaty interpretation it has long since been marginalized and ignored'. See French 2006, p. 300.
89 *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) [2003] ICJ Rep 161, para. 41 ('[U]nder the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account "any relevant rules of international law applicable in the relations between the parties" (Art. 31, para. 3 (c))'); ILC, 'Report of the International Law Commission on the Work of its 58th Session' (1 May - 9 June and 3 July - 11 August 2006) UN Doc A/61/10, pp. 413-16; ILC, 'Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (29 July 2005) UN Doc A/CN.4/L.676; WTO, *European Communities: Measures Affecting the Approval and Marketing of Biotech Products – Reports of the Panel* (29 September 2006) WT/DS291/R, WT/DS292/R and WT/DS293/R.

to the law applicable at the time of treaty application[90] and refer to all sources of international law, including general principles and soft law commitments,[91] it goes without saying that the principle of systemic integration promotes inclusion and diversity in the international legal order.

5. CONCLUSION

This study showed that narratives of progress are vital for international law's identity and self-perception as well as its capability to shape future paths. Making these narratives explicit curtails abuse and serves as a platform for revising the "filter of right solutions".[92] Global constitutionalism is one of the most sophisticated modern approaches in international law. Not only is it explicit about its vision of international law as a sign and instrument of progress, but it also attempts to make this a virtue by universalizing this progress and minimizing exclusion. On this account, international law is increasingly a product of international consensus rather than consent of a dozen of the most powerful nations. It is clear that following the global decline of the rule of law and ongoing human rights violations around the globe caused by transnational terrorism, civil wars, state aggression and the rise of a new type of authoritarianism – "authoritarian in political form, capitalist in economics, and nationalist in ideology"[93] – global constitutionalism is now in (temporal) retreat. However, constitutionalisation of international law is not necessarily a linear process: temporal setbacks do not signify its decline but rather prepare the ground for its future revival.

90 This position is now dominant in contemporary literature. See eg McLachlan 2005, p. 291; ILC, 'Report of the International Law Commission on the Work of its 58th Session' (1 May - 9 June and 3 July - 11 August 2006) UN Doc A/61/10, para. 22; Linderfalk 2010, p. 178; Helmersen 2013, p. 147; Bjorge 2014, ch. 4.

91 McLachlan 2005, p. 290; ILC, 'Report of the International Law Commission on the Work of its 58th Session' (1 May - 9 June and 3 July - 11 August 2006) UN Doc A/61/10, para. 18 ('Article 31(3)(c) deals with the case where material sources external to the treaty are relevant in its interpretation. These may include other treaties, customary rules or general principles of law'); Linderfalk 2010, pp. 177-78; Helmersen 2013, p. 147. Application of soft law commitments is discernible in international judicial practice. See eg *Loizidou v Turkey* ECHR 1996-VI 2231, para. 44; *Al-Adsani v United Kingdom* (GC) ECHR 2001-XI 761, para. 60; Case of *Vargas-Areco v Paraguay* (IACtHR, 26 September 2006) Series C no 155, para. 122; *Saadi v United Kingdom* App no 13229/03 (ECtHR (GC) 29 January 2008) para. 65; *Demir and Baykara v Turkey* App no 34503/97 (ECtHR (GC) 12 November 2008) paras. 74-75; Case C-63/09 *Axel Walz v Clickair* SA [2010] ECR I-04239, para. 27.

92 Skouteris 2010, p. 229.

93 Ignatieff 2014, p. 30.

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