

# Constitutional Democracy in Globalization Dimension: Causes of Erosion and Prospects for Changes

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## ABSTRACT

The globalization process provoked the deep transformation of international law, political affairs and governance with controversial consequences. From the one hand, it stimulated the cosmopolitan project of global constitutionalism — transnational integration and unification of democratic standards; from the other hand, it resulted in fragmentation of international affairs, deterioration of constitutional democracy and the feeling of democracy deficits on national and international level of governance. Trying to balance the impact of these opposite trends, the author analyses positive and negative effects of globalization on constitutional development regarding such issues as transnational constitutionalization, democracy and national sovereignty, the changing place of multilayer constitutionalism, separation of powers, and system of global governance in the establishment of transnational constitutional democratic legitimacy.

Keywords: globalization, global constitutionalism, international and national law, constitutionalization, democracy, national sovereignty, multilayer constitutionalism, separation of powers, global governance, transnational constitutional legitimacy

The topic of this paper is the prospects for constitutional democracy in the globalized world<sup>1</sup>. Globalization is a process that includes opposite trends (towards integration and disintegration of international affairs) which determine the interaction of international and national public law, as well as the priorities of global governance. As stated in literature, the process of legal globalization can go both in the direction of expanding constitutional democracy and its restriction; however, insufficient attention is paid to the practical consequences of this. Therefore, the issue of the influence of the conditions of globalization on the modern democratic process is relevant: what are the specific problems of constitutionalism caused by globalization, how are they related to the revision of the role of national states, the emergence of new actors and mechanisms of solutions at the global level?

In this perspective, it is important to reconstruct the new trends in the world constitutional development that determine the positive or negative vector of democratic transformation, the factors of the erosion of representative democracy, as well as changes in the interpretation of its key concepts. These changes have already proved to be so significant that they make one think about the very possibility of applying the classical theory of constitutionalism to the description of the new social reality, or, at least, require specification of the research tools.

From these positions, the paper examines the new trends in the interpretation of the key concepts and institutions of constitutionalism: integration and disintegration trends, democracy, civil society and the rule of law state, sovereignty, hierarchy of norms, separation of powers, federalism, political participation, global governance. This analysis allows outlining the forms and ways of legitimizing constitutionalism in a transnational context.

## 1. Globalization: balance of integration and disintegration trends in transnational constitutionalism

The processes of legal globalization which have been especially intensive since the beginning of the XXI century, have caused expectations of the opposite direction.

Proponents of integration have put forward the theory of cosmopolitan or global constitutionalism based on the possibility of synthesis of international and national constitutional law in transnational law<sup>2</sup>. The following assumptions are relevant within the frames of this theory:

- admissibility of describing globalization processes in the categories of constitutionalism;
- agreement that the categories of global, supranational and transnational constitutionalism express different levels of the global system of legal regulation;

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<sup>2</sup> Lang A. F., Wiener A. (eds.). Handbook on Global Constitutionalism, Cambridge: Edward Elgar Publishing, 2017; Atilgan A. Global Constitutionalism. A Socio-Legal Perspective. Heidelberg, Springer, 2018, et al.

- belief that its normative content is determined by the process of constitutionalization of international law, that is, incorporation of a number of elements of traditional constitutional law, primarily guarantees of fundamental rights and freedoms, into it.

The cosmopolitan ideal determines the directions of constructing, the content of the choice, the boundaries of its implementation on a planetary scale, in regional associations of states and in a national state, as well as ways of implementation. For optimists, the very statement of the question is a confirmation of the acceptance of the classical liberal principles of the rule of law and parliamentarism<sup>3</sup> by the international community. For pessimists, on the contrary, this is a confirmation of the uncertainty, if not a crisis, of international law, accompanied by criticism of the negative aspects of legal integration: its undemocratic nature, unification, crackdown on the rights of minorities and telologism<sup>4</sup>.

The resolution of the dispute is determined by analysis of the competing processes of integration and fragmentation of international legal affairs, the idea of which trend is prevailing. From the one hand, the preponderance of integration processes contributes to spreading of liberal democracy in the form of constitutionalization of its principles<sup>5</sup>. From the other hand, there is a trend towards fragmentation of the international order, which most researchers believe to dominate today and to be often related with the retraditionalization of the liberal principles of the rule of law<sup>6</sup>. International legal constitutionalization poses a challenge to the traditional international legal order and, in particular, the position of the state in it, the role of which is consistently declining<sup>7</sup>, puts the problem of limiting the rights beyond the state point-blank<sup>8</sup>, while practice does not confirm the assumption that political power at the global level becomes more subordinate to the principles of the supremacy of the law, democracy and respect for human rights.

Thus, the previously dominant optimistic ideas about the progressive growth of integration processes and the linear development of constitutionalization demonstrating the progressive expansion of parliamentary democracy are now being questioned. Firstly, when describing integration processes, they largely indulge in wishful thinking, facing a reproach of "false unification" and "illusory legitimacy" of international representative institutions and practices. Secondly, the thesis about the end of the era of nation states turned out to be greatly exaggerated and does not explain their predominant role. Thirdly, the international law is stated to weaken, with the preponderance of the processes of fragmentation over integration. Fourthly, the assumption that normative constitutionalization at the international level will stimulate constitutional democracy at the domestic level is debatable (often the opposite is true). Fifthly, the general question of the advantages of constitutionalization remains: after all, international law, as it has developed historically, is intrinsically unfair and undemocratic (as opposed to constitutional law), and the main problem is the lack of legitimacy of representative power at the global level.

Striking the balance of globalization processes leads to ambivalent conclusions. From the one hand, international law continues developing demonstrating the need for a unified positive system of international constitutional and legal regulation, and the existing conflicts and violations do not negate its significance (since the parties are ultimately forced to appeal to its norms). From the other hand, international norms and institutions (including those of a representative type) are a product of an agreement between states regarding the regulation of international affairs: the leading states are especially interested in reducing the importance of international law to achieve their goals, and international legal cooperation does not exclude the use of force as a weighty argument. Therefore, this is not so much about the creation of a new cosmopolitan world order, but, on the contrary, about the fragmentation and hierarchization of the traditional order: creation of a "multipolar world" with emergence of new centers of power in the form of the leading states.

<sup>3</sup> *Halmi G.* Perspectives on Global Constitutionalism: the Use of Foreign and International Law. The Hague : Eleven International Publishing, 2014.

<sup>4</sup> *Schwobel C. E. J.* Global Constitutionalism in International Legal Perspective. Leiden and Boston : Martinus Nijhoff. 2011.

<sup>5</sup> *Tsagourias N.* (ed.). Transnational Constitutionalism: International and European Perspectives. Cambridge : Cambridge University Press, 2009.

<sup>6</sup> *Delpino R.* Fragmentation and Constitutionalization of International Law. A Theoretical Inquiry // *European Journal of Legal Studies*, 2013. Vol. 6. No. 1. Pp. 67–89.

<sup>7</sup> *Klabbers J., Peters A., Ulfstein G.* (eds.). The Constitutionalization of International Law. Oxford : Oxford University Press, 2009.

<sup>8</sup> *Cabrera L.* Diversity and Cosmopolitan Democracy: Avoiding Global Democratic Relativism // *Global Constitutionalism*, 2015. Vol. 4. No. 1. Pp. 18–48.

## 2. Democracy: revision of the classical paradigm of representative government

The problem of promoting representative democracy at the global level includes three options: should it be carried out at the level of traditional participants of the international process, i. e. national states, at the level of international organizations, or does it imply some kind of “dual democracy”<sup>9</sup>: interaction of internal and external legal regulation? Who is the main subject of these processes at the global level: the civil society, international institutions or states?

In this perspective, the issue of the formation of a global civil society is relevant. One group of analysts believes that the global society already exists, or at least is at the stage of formation, and sees the solution of the problem in the use of its institutions and network communications. Another group believes that in the globalized world, the civil society turned out to be structurally weakened, the 1960s should be considered the golden age of the civil society in Europe, and later the political activity of the “public” has been weakening. Finally, the third group completely denies the existence of the global civil society as a subject of reality, declaring it to be a construction that, basically, cannot be applied to international law<sup>10</sup>.

The search for priorities is related with understanding of the collective self-determination of the civil society and elites in the global (transnational) perspective: what determines the individual choice and how it becomes collective; whether the individual choice is individual or is determined by the already existing collective preferences, the predominance of one of them, or a combination of an individual interest with one of these preferences in the collective space. Therefore, very different constructions of the identity of the civil society and the choice itself are possible, which ultimately tips the scales in favor of constitutional democracy or against it. Considered from the positions of the civil society are theoretical constructions, such as: eternal peace, the law of peoples, a global democratic state, a global democratic federation, democratic world, cosmopolitan democratic law, etc. The concept of global constitutionalism is presented which understands it not as a result of statutory achievements, but as a process of a permanent dialogue of its major actors (international organizations, states and transnational non-governmental humanitarian organizations [NHOs]) about a global “social contract”, its only condition being their consent to its continuation<sup>11</sup>. An independent important part of the discussion is the construction of an Internet constitution, virtual state, electronic parliaments and governments, their implementation experience still being ambiguous<sup>12</sup>.

The democratic principles facing the challenge of globalization are considered to be: the concept of limited sovereignty, the possibility of a deliberative parliamentary democracy beyond the states, and the role of judicial assessment. Globalists believe that the challenges are to be countered by the international law, democracy within and outside the states, the deliberative (network) structure of communications and the human rights policy representing international majority groups, the parliamentary principle of democracy, and the adoption of the doctrine of politically solvable issues. The ways to solve the problem are seen in the idea of transnational constitutional power, participatory democracy and representative institutions of political power outside the states, the political concept of global justice<sup>13</sup>. All of this, however, looks like a set of theoretical schemes rather than a realistic concept fit for practical application.

The way suggested for circumventing nation states in solving these problems is the pluralistic concept of global governance designed to determine the balance of the correlation of traditional actors (states) and new ones, non-state actors, in it. According to its proponents, there already exists a global constitutional community made up of individuals, states, international organizations, parliamentary assemblies, courts, NHOs and business actors. The determinant trend of changes leads to the creation of a global identity and transnational citizenship. The interference of non-state actors in the production of law and its implementation is deemed to be an important additional source for the legitimization of the global governance. It should be consistently expanded, structured and formalized<sup>14</sup>.

<sup>9</sup> Peters A. *Dual Democracy* // Klabbers J., Peters A., Ulfstein G. *The Constitutionalization of International Law*. Oxford : Oxford University Press, 2009.

<sup>10</sup> See Materials of the Round Table: Steinbeis M., Poll R. *Krise, Kritik und Globaler Konstitutionalismus* // Center for Global Constitutionalism. *Verfassungsblog* [Electronic resource]. URL: <https://verfassungsblog.de/tag/global-constitutionalism/> (accessed on: 27.10.2020).

<sup>11</sup> Rosenfeld M. *Global Constitutionalism. Meaningful or Desirable?* // *European Journal of International Law*, 2014. Vol. 25. No. 1. Pp. 177–199.

<sup>12</sup> Medushevsky A. *Internet Constitution: Idea, Projects and Perspectives* // *Social Sciences and Modernity*, 2019. No. 1. Pp. 71–86.

<sup>13</sup> Wheatley St. *The Democratic Legitimacy of International Law*. Oxford : Hart Publishing, 2010.

<sup>14</sup> Peters A. *Membership in the Global Constitutional Community* // Klabbers J., Peters A., Ulfstein G. *The Constitutionalization of International Law*. Oxford : Oxford University Press, 2009.

The mechanism of institutionalizing the new trends is: constitutionalization of sectoral legal regimes, introduction of interstate parliamentary assemblies, and expansion of the “parliamentary” powers of international organizations beyond their existing (purely consultative) powers. This is a controversial thesis, given the fact that international organizations (including parliamentary ones) represent states rather than the global civil society.

### 3. State: boundaries of the principle of sovereignty

Globalization reduces the importance of nation states: new players emerge in the global governance process (international organizations and citizens); sovereignty is diluted (issues are resolved beyond the state borders); the structural parameters of governance of the states themselves change<sup>15</sup>. The question is how far these processes have gone; whether they are creating a new international configuration of centers of power and how the traditional concept of parliamentarism should response.

These topics are presented in a concentrated form by discussions about the correlation between international and state law, post-national law, the prospects of the Westphalian system in international law, but above all, about the fate of the principle of sovereignty. International law and the principle of state sovereignty in the history of their relationship are an extremely conflict area, including the opposite narratives of the participants of the conflicts, colonial and anti-colonial forces. The periodization of international law from the positions of restriction of sovereignty schematically includes three stages: from the Treaty of Westphalia to the creation of the UN (the rule of sovereignty); from the creation of the UN to the present (with the growing predominance of a limited range of international norms over sovereignty), as well as, in the current perspective, the formation of the third stage: a global (cosmopolitan) constitution (capable of radically restricting the principle of state sovereignty, if not supplanting it)<sup>16</sup>. However, international law is widely criticized as an unfair expression of the interests of the most powerful states, and the new parameters of relations between them are used as a method of revising it<sup>17</sup>. The old image of the international order as a pyramidal structure with the nation state at the top is considered by critics to be more unsustainable when faced with universal factors: the expansion of human rights and global trade. New independent regimes with a highly specialized area of norms stand out: diplomatic law, EU law, human rights instruments as unique subsystems of international law, expansion of international institutions through globalization<sup>18</sup>.

The traditional Westphalian concept of constitutionalism is based indeed on the principles of sovereignty, the supremacy of law and democracy. But since the beginning of the XXI century global constitutionalism has been challenging the constitutional ideology and the very design of the Westphalian constitutional law. The basis of this phenomenon is recognized to be: the “information revolution”, the emergence of “global space, order and values”, including the rejection of the old “Westphalian constitutional geometry”, overcoming the historical and cultural boundaries of constitutional cultures, the formation of global governance<sup>19</sup>. From these positions, the concept of the end of the era of nation states (and sovereign parliaments) is introduced, with emergence of the “post-Westphalian” concept of limited sovereignty.

The integration of international and constitutional law is differently assessed from the positions of sovereignty. Firstly, within the framework of the cosmopolitan paradigm, it is considered to be a transitional process of the society’s movement towards a new type of association: an international organization with the maintained (for an indefinite period) principle of state sovereignty<sup>20</sup>. Secondly, within the framework of the theory of a dualistic world order it acts as “constitutional pluralism”: the interaction of the international community of states and institutions of global governance<sup>21</sup>. Thirdly, in the theory of global governance it is expressed by the construction of global administrative law. This way is supposed

<sup>15</sup> Benvenisti E. *Law of Global Governance*. The Hague : Hague Academy of International Law, 2014.

<sup>16</sup> Somek A. *The Cosmopolitan Constitution*. Oxford : Oxford University Press, 2014.

<sup>17</sup> Chimni B. S. *Third World Approaches to International Law: A Manifesto* // *International Community Law Review*, No. 3. P. 3.

<sup>18</sup> Suami T., Kumm M., Peters A., and Vanoverbeke D. (eds.). *Global Constitutionalism from European and East Asian Perspectives*. Cambridge : Cambridge University Press, 2018; et al.

<sup>19</sup> Belov M. (ed.). *Global Constitutionalism and Its Challenges to Westphalian Constitutional Law*. London : Hart, 2018.

<sup>20</sup> Fassbender B. *The Meaning of International Constitutional Law* // *Transnational Constitutionalism*. Ed. by N. Tsagourias. Cambridge : Cambridge University Press, 2009. Pp. 307–328.

<sup>21</sup> Cohen J. L. *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*. Cambridge : Cambridge University Press, 2012.

to achieve interaction of various regional integration projects: Europe, Asia, and Latin America. The key instrument of the integration of international legal regimes are recognized to be the UN, the WTO, the Bretton Woods system (World Bank, GATT [General Agreement on Tariffs and Trade], etc.), the system of the international criminal court and certain tribunals. The constitutionalization of international affairs expresses the unity of the norms and practice of relations between states in their dynamics: movement from diplomacy to law<sup>22</sup>. Finally, there is an idea of separating constitutionalism from sovereignty at the national level in order to overcome its historical ties with national statehood and creating ways of normative integration of the institutional set-up at the transnational level<sup>23</sup>.

The logic of transnational regulation reflects the contradictions in the interpretation of the principle of sovereignty, it demands that states should integrate international norms at the level of domestic law, allowing citizens to become part of global regulation and to use its results, but at the same time causes "erosion of statehood" (sovereignty) which poses a serious challenge to the established processes of internal democratic constitutionalism. The result is weakening of national parliamentarism faced with a limited choice of becoming a mere vehicle for decisions of international structures; entering a more general system of transnational parliamentarism as an integral part of it, or generally losing its independent significance. Hence, weakening of state sovereignty means weakening of parliamentary sovereignty.

#### 4. Principle of separation of powers: from hierarchy to heterarchy

The division of the power structure between state and international institutions is part of the process of constitutionalization of international law. Within the framework of international constitutionalism, there are several alternative models of the separation of powers which enter into contradictory relationships: geographical model (based on the regional principle); hierarchical model (based on the levels of constitutional and legal regulation); functional model (along the line of compensatory interaction of international and national norms and institutions); sectoral model (based on the areas of structural organization).

At the global level, this leads to a revision of the classical theory of separation of powers: the correlation between vertical division (territorial centers with separate levels of governance) and horizontal (the classic triad: legislative, executive and judicial power), and the general trend is defined as a shift of the regulation vector from horizontal to vertical separation of powers which brings up the issues of the hierarchy and structure of global (and national) governance in a new way. The traditional understanding of the vertical separation of powers (as a justification of federalism) is considered by many people to be a past stage, since the focus is shifting from the national understanding of constitutional power (based on sovereignty) to the transnational one.

The transnational system of vertical separation of powers differs from the standard understanding of federalism by a number of parameters: firstly, it presupposes geographical division into regions (rather than separate states); secondly, it means a more differentiated hierarchy of legal regulation subdivided into at least five main levels (represented at the local, regional, state, continental and global levels); thirdly, it stimulates the decentralization of governance (redistribution of financial, legislative and administrative powers from the central parliament to regional parliaments or legislative assemblies of different levels). This actualizes the search for quasi-federal models of the transnational territorial structure exemplified by the EU integration project, experiments with devolution (United Kingdom), as well as various concepts of regionalization and autonomization based on the national, cultural, administrative, economic, functional principles implemented in different countries of the world which are perceived by their proponents as a promising form for new international integration regimes.

In this perspective, the traditional hierarchical structure of the separation of powers is replaced with a heterarchical structure which includes a wider range of its carriers with different legal nature. There is a problem of diffusion of the constitutional powers of the state to international non-state institutions of different levels and preservation of the state as a center of governance. According to the proponents of this approach, in the process of international constitutionalization the state will be unable to maintain its place as the sole focus of legally constituted power, especially when international organizations achieve significant control. Separation of powers necessitates a shift in the balance of power within international law and the recognition that ultimately regional and global organizations can also be seen as carriers of constitutional power. Following this logic, as the constitutionalization of international law

<sup>22</sup> Bhandari S. *Global Constitutionalism and the Path of International Law: Transformation of Law and State in the Globalized World*. Leiden, Boston, Brill : Nijhoff, 2016.

<sup>23</sup> Preuss U. K. *Disconnecting Constitutions from Statehood. Is Global Constitutionalism a Viable Concept? // The Twilight of Constitutionalism*. Ed. By P. Dobner and M. Loughlin. Oxford : Oxford University Press, 2010.



proceeds, states (national parliaments) will be relocated from the center of international decision-making and production of law to its periphery. They will survive but will have to give way to differentiated systems of governance that form democratic legitimacy and civil society at the transnational level<sup>24</sup>.

In the aggregate, these processes are expressed by the concept of “multilevel constitutionalism” comprising its international, regional and national manifestations, and the goal is to see their relationship in harmonization (but not substitution). This concept which has almost become the official doctrine of the EU is causing growing criticism due to the unification of legal diversity, the relativization of democratic participation and the transnational phenomenon of “the rule of judges” (substitution of decisions of elected parliaments with verdicts of non-elected international courts). One of the consequences of bureaucratization is the response of populist movements to it defending the so-called national “legal identity”<sup>25</sup>.

There still remains the undecided problem of which institutions represent the civil society in the global legal construction and whether they can become the basis of global governance. The position of the extreme supporters of global constitutionalism sees the solution in the consistent ousting of states from the constitutionalization process at the international level. The predicted result will be a revision of the concept of global governance as focused exclusively on the state in favor of non-state network models and interactions in the global system. An unpredictable (much less talked about) side effect may, however, be the erosion of the constitutionalism of nation states with the prospect of increasing authoritarianism<sup>26</sup>.

## 5. Constitutionalism in the global governance system: institutions, actors and strategies of modernization

With the general awareness of the deficit of control at the global level, the proposals for its elimination include both theoretical and practical steps.

*The first way* is seen in the legal identification of special international (transnational) regulatory areas or regimes. In the context of globalization, the principle of popular sovereignty has overcome the boundaries of national group rights and is beginning to be seen as a legitimizing basis of organization of territorial power in the global society, allowing operation of transnational regimes, their model of regional organization primarily being the EU, and the model of sectoral organization being the WTO. A parallel is drawn between the self-determination of peoples and the emerging self-determination of international regimes included in the system of global governance<sup>27</sup>. In the context of international regulation, the determinant themes are deemed to be the immunity of states (especially after the establishment of the International Court of Justice), international organizations, institutions of commercial activities and public officers<sup>28</sup>.

*The second way* is constitutionalization of international organizations, that is, endowing them with the role, functions and some features of constitutional institutions (including legislative assemblies)<sup>29</sup> and transfer of constitutionalism to the international level determining the order and hierarchy, regulating strengthening and, at the same time, restriction of international actors<sup>30</sup>. While acknowledging that the projects of global constitutionalism are not feasible in an abstract form, some believe that they can only get practical implementation at the level of institutional reforms: the UN, the WTO and especially the EU. The basis of the process is the UN Charter and the decisions of the Security Council on key

<sup>24</sup> This review of the positions is given based on the paper: O'Donoghue A. International Constitutionalism and the State // International Journal of Constitutional Law, 2013. Vol. 11. Issue 4. Pp. 1021–1045.

<sup>25</sup> Sajo A., Uitz R. The Constitution of Freedom: An Introduction to Legal Constitutionalism. Oxford : Oxford University Press, 2017. Discussion see in: Medushevsky A. Freedom and suspicion: how to protect liberal constitutionalism from its opponents // Comparative constitutional review, 2018. No. 3 (124). Pp. 124–135.

<sup>26</sup> Coradetti C., Sartor G. (eds.). Global Constitutionalism Without Global Democracy? San Domenico di Fiesole : EUI (European University Institute). Working Paper. Law. 2016. No. 21.

<sup>27</sup> Skordas A. Self-determination of Peoples and International Regimes: a Fundamental Principle of Global Governance // Transnational Constitutionalism. Ed. by N. Tsagourias. Cambridge : Cambridge University Press, 2009. Pp. 207–268.

<sup>28</sup> Peters A., Lagrange E., Oeter S., Tomuschat Ch. (eds.): Immunities in the Age of Global Constitutionalism. Leiden : Nijhoff, 2015.

<sup>29</sup> Dunoff J., Truchtman J. P. (eds.). Ruling the World: Constitutionalism, International Law and Global Governance. Cambridge : Cambridge University Press, 2009.

<sup>30</sup> Walker N. Postnational Constitutionalism and the Problem of Translation // Weiler J. Y. Y., Wind M. (eds.) European Constitutionalism Beyond the State. Cambridge : Cambridge University Press, 2003. Pp. 27–54.

issues of war and peace. Constitutionalism is interpreted as a strategy for searching for adequate legal forms of the international order and a tool for “reforming this order” along the line of global, sectoral and regional institutions of the parliamentary and quasi-parliamentary type<sup>31</sup>.

*The third way* is to transform the traditional electoral democracy at the transnational level by analogy with corporate governance. New theories of transnational democracy offer models for exercising “people’s” control different from the electoral mechanisms of authority reporting. Their proponents speak of shareholder democracy as the antithesis of the state, where one institution (parliament) represents the “demos” trying to control the unified executive power. According to its proponents, the corporate governance system includes more decentralization, offering diversification of control systems: interaction between management, institutions, committees, etc. in the decision-making process in corporations. The organization of a transnational civil society according to this scheme is based on a set of norms, rules of the game and use of network communications, their general meaning being to overcome the monopolization of control (represented in traditional parliaments): separation of its centers and participants with expanded discussion of decision-making<sup>32</sup>. Nothing, however, guarantees that this scheme cannot be used for undemocratic decisions generally characteristic of the corporate sector.

*The fourth way* is an attempt to relocate some of the constructs of constitutionalism from the national level to the supranational one. One method of achieving this goal, “deliberative democracy”, is primarily related with “extrinsic” legitimacy: a discursive process of developing rational decisions over parties and private interests (for example, a bilateral dialogue between management and trade unions in the EU). Another method, corporatism, is related with “derived” legitimacy, since legal norms are formulated through the process of their development in practice through the functional interaction of management and public organizations in the formation of norms adequately reflecting the conflicting social interests (for example, a trilateral dialogue of the government, entrepreneurs and workers within the ILO [International Labor Organization – Editor’s note])<sup>33</sup>.

*The fifth way* is restructuring of the system of global governance and administrative law on new foundations and with account of the current tasks. Three areas of legal regulation are stated in this area: planetary problems (global warming and ecosystem erosion, water shortage); the state of humanity (poverty, conflict prevention, global infectious diseases); and, actually, the problems of control (proliferation of nuclear materials, toxic waste, intellectual property rights, rules of genetic research, rules of trade, finance and taxation). If those who argue that the world is moving away from the Washington Consensus (and the economic policy based on it) are right, then the transition to a broader understanding of the tasks and institutions of global governance that go beyond parliamentarism is justified<sup>34</sup>.

In general, there is a contradiction between two main theoretical approaches to governance: from the positions of global constitutionalism and global administrative law. The first approach focuses on the principles of constitutionalism and sees the goal in the constitutionalization of governance; the second focuses on ensuring political legitimacy (transparency, participation, accountability, judicial examination) and solves the problems of governance effectiveness (for example, distribution of water resources among different states)<sup>35</sup>. However, both theories suffer from idealism, failing to offer a solution to the central problem of the global governance crisis: ensuring its legitimacy.

## Conclusions: prospects for ensuring legitimacy of constitutionalism at the transnational level

The conflicts related with the determination of global legitimacy include the following topics: determination of democratic forms; lawmaking at the international and national level; correlation of values and interests, institutional aspects of parliamentarism.

The construction of the global political identity has faced the decline of liberal democracy, showing the limits of its spreading beyond the classical models and the Western historical oecumene. General

<sup>31</sup> Engstram V. International Organizations, Constitutionalism and Reform // Finnish Yearbook of International Law. Vol. 20. Pp. 9–33.

<sup>32</sup> Singer A., Ron A. Models of Shareholder Democracy: A Transnational Approach // Global Constitutionalism. 2018. Vol. 7. No. 3. Pp. 422–446. See especially pp. 431–432.

<sup>33</sup> Novitz T. Challenges to International and European Corporatism Presented by Deliberative Trends in Governance // Transnational Constitutionalism. Ed. by N. Tsagourias. Cambridge : Cambridge University Press, 2009. Pp. 269–304.

<sup>34</sup> Held D. Reframing Global Governance: Apocalypse Soon or Reform! // New Political Economy, 2008. Vol. 11. No. 2. Pp. 157–158.

<sup>35</sup> Ambrus M. Through the Looking Glass of Global Constitutionalism and Global Administrative Law. Different Stories about the Crisis in Global Water Governance? // Erasmus Law Review, 2013. No. 1. Pp. 32–49.

questions have not been resolved in the international discussion: how is the approximation of international and constitutional law possible with account of the fundamental differences in their nature and structure; are the concepts of justice (primarily based on history and tradition) and legitimacy (with legal arguments prevailing in its rationale) identical; how can the historical injustice of international law (related with the predominance of the most powerful states) be overcome; can the different moral grammars of the regions of the world be reconciled; what constitutes the subject of transnational constitutionalism?

The focus is on the problem of “false universalism”: a formal system of international principles and norms hiding the significant differences between international and national legal regimes. It is important to determine the criteria of the legitimacy of new transnational and national structures with account of the fact that the electoral structures of the major international organizations prevent full implementation of democratic practices of parliamentarism, to rethink the contribution of multilevel constitutionalism and the vacuum of legal regulation generated by it, when the remoteness of states (and national parliaments) from transnational decision-making structures (for example, international legislative assemblies) reduces trust and their impact on the result.

It is still to be determined whether the dominant criterion for assessing the legitimacy of institutions is the classical legal ideal of European states (democracy, elections, a rule-of-law state, autonomy of the personality) or also the orders of states not committed to these values, since the role played by non-democratic states in international law is still very significant. It is important to understand the way to treat the cultures where parliamentary democracy will not take root in an authentic form (at least in the foreseeable future), and the way to solve the issue of the correlation between global, regional, national identity, as well as real and constructed identity of constitutionalism. All these obstacles challenge the thesis that the interests of states will be legitimately represented by the constituent power in the international constitutional regime.

The recommended instruments of legal globalization are the concepts of deliberative democracy (and diplomacy), constitutionalization of international law, the compensatory model of regulation (the mutual complementarity of international and national law), multilevel constitutionalism, regional regimes and the limitation of the principle of sovereignty (by international and constitutional norms), subsidiarity (the principle of complementarity), the pluralistic concept of global governance (interaction of state and non-state actors) generally proceeding from the preservation of constitutional guarantees at the transnational level.

However, all these instruments can be practically implemented provided that a number of conditions are met: rethinking of the global public law ethics based on universal values; ensuring the independence of transnational justice; understanding of international constitutionalism both as a legal and a political theory; creation of authoritative independent institutions for mediation of conflicts, as well as a transnational social movement and centers for its promotion. Bringing these issues into the sphere of ethics, political constitutionalism and global governance can strengthen the arguments for a democratic interpretation of transnational constitutionalism countering the growing threat of a global Leviathan.

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