

Through the Looking Glass of Global Constitutionalism and Global Administrative Law

Different Stories About the Crisis in Global Water Governance?

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Abstract

In addition to (or sometimes rather than primarily) attributing it to water scarcity, water crisis has been described as a 'crisis of governance'; with the word 'crisis' also indicating that water governance lacks (full) legitimacy. The article undertakes the task to analyse the current status of global water governance (GWG) from the perspective of two competing theories relating to the legitimacy of global governance, namely global constitutionalism (GC) and global administrative law (GAL). Having *mapped* the current legal framework of GWG from these two perspectives, it is discussed how these theories might *shape* GWG and how this shaping could contribute to *solving* the water crisis. In addition, it is also explored whether reading one of the most accepted proposals for legitimising global water governance, the concept of 'integrated water resources management' (IWRM), through the lenses of either GC or GAL would have an impact on how this concept is interpreted, and whether it can be a useful mechanism to address the water crisis. The use of two theories analysing the same subject matter provides interesting insights into global water governance and the nature of the water crisis as well as the relationship between these two theories.

Keywords: global water governance, global constitutionalism, global administrative law, water crisis, integrated water resources management

1. Introduction

In addition to (or sometimes rather than primarily) attributing it to water scarcity, the water crisis has been

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described as a 'crisis of governance'; with the word 'crisis' indicating that global water governance lacks (full) legitimacy.¹ Global water governance (GWG) is a relatively new phenomenon that includes water-related international and regional rules, standards and policies as well as institutions involved in the making, implementation and monitoring of these measures. The governance crisis has often been ascribed to the following: global water governance is fragmented, it is too polycentric, it is too state-centred, it is not effective, it is not inclusive, it is not fair, and so on. The article undertakes the task to explore this alleged governance crisis in global water governance.

The crisis in global water governance will be analysed from the perspective of two competing theories: global constitutionalism (GC) and global administrative law (GAL). Both schools focus on the international legal order that exists beyond the state and address the legitimacy of the structures of global governance. According to scholars linked to these schools certain (procedural/institutional and/or substantive) arrangements are capable of enhancing the legitimacy of global governance. While GC relies on constitutional principles such as common values/hierarchy of norms, human rights and separation of powers, GAL focuses on legitimacy through transparency, participation and accountability/judicial review. Although the ideas of both schools can be used as analytical tools, they are inherently normative; *i.e.* they both imply that following their agenda a legitimate global governance structure can be created. The primary question of GC in this context is the following: to what extent is water governance constitutionalised? The main question a GAL-perspective poses with regard to water governance is the following: to what extent is GWG driven by the principles of 'good governance'?

The respective responses to these questions will be used to illuminate the legitimacy gaps in global water govern-

1. 6th World Water Forum, OECD Key Messages < www.oecd.org/data-oecd/41/36/49053552.pdf > (last visited 22 October 2012); UN Secretary-General, Message for World Water Day, 18 March 2011, < www.un.org/News/Press/docs/2011/sgsm13456.doc.htm > (last visited 22 October 2012); United Nations Water, United Nations World Water Development Report: Water a Shared Responsibility, 2006.

ance, simultaneously revealing the nature of the crisis from their own perspective. The identified gaps will subsequently be compared to explore any potential differences between the findings of the two analyses and to scrutinise whether and to what extent they are able to address or mitigate the crisis in a changing world. This article will also discuss whether reading one of the most accepted proposals for legitimising global water governance, the concept of ‘integrated water resources management’ (IWRM), through the lenses of either GC or GAL would have an impact on how this concept is interpreted and applied, and whether it could offer (further) solutions for the water crisis.

In order to achieve the above indicated purposes, the article is structured as follows. First, a brief overview will be provided about global water governance (section 2) as well as the identified crisis of global water governance (section 3). Thereafter, the actual analysis will be carried out: first, the lenses of global constitutionalism (section 4), then those of global administrative law (section 5) will be put on. Each of these analytical sections will *map*² the trends in global water governance from the perspective of these theories, discuss how these theories might *shape* GWG, and last, whether shaping GWG could contribute to *solving* the water crisis. Section 6 will briefly address the concept of IWRM when put into the context of GC and GAL. Finally, some concluding reflections (section 7) will be made about these looking glasses and the water crisis.

2. A Concise Overview of Global Water Governance

It has been argued that international water law reached the level of ‘global water law’ for the following reasons: it ‘moved beyond the inter-state paradigm’, the role of states has become functional as opposed to discretionary, it ‘protects the interests of individuals and groups in society’ (not merely state interests), and international institutions ‘operate as relatively independent actors’.³ Given this development in water law and the accompanying institutionalisation of transnational relations, one can also talk about global water governance (GWG).⁴ Indeed, Conca also confirms that

2. The terminologies of ‘mapping’ and ‘shaping’ are borrowed from A. Wiener, A.F. Lang JR., J. Tully, M.P. Maduro & M. Kumm, ‘Editorial: Global Constitutionalism: Human Rights, Democracy and the Rule of Law’, 1 *Global Constitutionalism* 1, at 6-9.
3. E. Hey, ‘Distributive justice and procedural fairness in global water law’, in J. Ebbesson and P. Okowa (eds.), *Environmental Law and Justice in Context* (2009) 351, at 352.
4. According to some, the argument still needs to be made for creating such a governance system, *i.e.* the existing arrangements cannot be qualified as GWG yet. See *inter alia* A.Y. Hoekstra, ‘The Global Dimension of Water Governance: Nine Reasons for Global Arrangements in Order to Cope with Local Water Problems’, *Value of Water Research Report Series* no. 20, at 9 (2006).

‘[i]f global governance consists of governing acts that have a broadly international realm, and if those acts include such things as the framing of policy, the setting of standards, and the mobilisation and allocation of resources, then water is indeed subject to governance that is increasingly, though certainly not exclusively, global’.⁵

This development is part of what takes place in international environmental law in general. With regard to this particular development it has been explained that the recently emerging normative construct of global environmental governance ‘encapsulates the countless (and growing) political, legal and institutional arrangements at the international, regional, sub-regional, national and sub-national levels that seek to respond to environmental problems.’⁶ In a similar vein, global water governance could then be described as ‘the range of political, social, economic and administrative systems that are in place to develop and manage water resource, and the delivery of water services, at different levels of society.’⁷ The historical development of international/global water law⁸ and governance resulted in that it now incorporates different ‘dimensions’. The UN World Water Development Report, for instance, talks about four dimensions: ‘the economic (efficient use), environmental (sustainable use), political (equal democratic opportunities), and social (equitable use), together providing entry and exit points for the water governance discourse.’⁹ Rather than dimensions, other scholars describe global water governance as the compilation of different ‘discourses’, also described as ‘Mobius web arena of water governance’: the web made of the international law arena, the economic arena and the human rights and policy arena.¹⁰

Accordingly, global water governance incorporates several dimensions or discourses. Some make a distinction based on the institutions or legal documents involved,

5. K. Conca, *Governing Water. Contentious Transnational Politics and Global Institution Building* (2006), at 5.
6. L.J. Kotzé, ‘Arguing Global Environmental Constitutionalism’, 1 *Transnational Environmental Law* 199, at 201 (2012).
7. A Global Water Partnership paper addressing effective governance lays down that ‘[g]overnance is about effectively implementing socially acceptable allocation and regulation and is thus intensely political. ... The concept ... encompasses laws, regulations, and institutions but also relates to government policies and actions, to domestic activities, and to networks of influence, including international market forces, the private sector and civil society.’ P. Rogers and E.W. Hall, *Effective Water Governance, Global Water Partnership Technical Committee* (2003), at 4. Also quoted by P. Wouters, ‘Global Water Governance through Many Lenses’, 14 *Global Governance* 523, at 529 (2008).
8. For a concise overview of this historical development see J. Gupta and N. Sanchez, ‘Global Green Governance: Embedding the Green Economy in a Global Green and Equitable Rule of Law Polity’, 21 *Review of European Community and International Environmental Law* 12, at 14 (2012).
9. Wouters, *supra* n. 8, at 530.
10. J. Gupta, R. Ahlers & L. Ahmed, ‘The Human Right to Water: Moving Towards Consensus in a Fragmented World’, 19 *Review of European Community and International Environmental Law* 294, at 295 (2010). See also J. Blatter and H. Ingram, ‘States, Markets and Beyond: Governance of Transboundary Water Resources’ 40 *Natural Resources Journal* 339, at 447 (2000).

others focus on the subject matter addressed by particular institutions or legal documents. This development in global water law probably stems from the fact that water can be seen as an ecological, economic and social/human unit.¹¹ The existing instruments seem to reflect these three main features of water: the so-called water conventions regard water mainly as an ecological unit (ecological cluster), the approach of the World Bank to water deals with water as an economic unit (economic cluster), and the rather recent acknowledgment at the UN level of the human right to water seems to regard water as a 'social/human' unit (social justice cluster). As will be shown below, there are certain overlaps between these clusters, but in general each follows its own discourse and focus.

These different discourses also mean that water is not governed from a central location. An attempt was made to coordinate the different activities relating to water by the establishment of UN Water in 2003.¹² UN Water, however, is merely a coordinating organ without any power to make decisions.¹³ The explicit aim with the creation of this body was to 'provide a platform for system-wide discussions'.¹⁴ Remarkably, an increasingly important concept in water law, that is 'integrated water resources management' (IWRM), also emphasises the importance of creating a platform where coordination could take place. IWRM is defined as 'a process which promotes the coordinated development and management of water, land and related resources in order to maximise *economic* and *social welfare* in an equitable manner without compromising *the sustainability of vital ecosystems* and the *environment*'.¹⁵ The very idea of IWRM originates from the recognition that the various forms of water uses are interdependent given that they rely on the same resource.

The global water governance system will be discussed along the lines of the above-mentioned three clusters. Although there are certain overlaps between these clusters, as indicated above, the main focus of the instruments/institutions discussed still justifies their discussion along these dimensions.

The ecological cluster includes the following main instruments: Convention on the Law of the Non-navi-

gational Uses of International Watercourses (1997 Convention)¹⁶ (even though not in force yet), the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention),¹⁷ its two Protocols (Helsinki Protocol I¹⁸ and Helsinki Protocol II),¹⁹ and the 2008 International Law Commission (ILC) Draft Articles on the Law of Transboundary Aquifers.²⁰ Given that the Draft Articles follow to a great extent the 1997 UN Watercourse Convention, it will not be separately discussed, only the relevant articles will be indicated. The main purpose or focus of these instruments is the protection of waters, and environment in general – hence, its categorisation as ecological cluster. In addition to these legal documents, several treaties on the protection of transboundary rivers have also been adopted, and river basin organisations have been created, which, however, are not included in this article.

The economic cluster consists of the World Bank (WB) and its policies. An important segment (12%) of the World Bank lending projects are related to water in one way or another.²¹ In addition to its Operational Policies,²² the WB also adopted the Water Resources Sector Strategy in 2004 to guide the Bank's assistance in water-related projects,²³ and in 2010 the World Bank Group Implementation Progress Report of the Water Resources Sector Strategy was issued.²⁴ The main focus of the economic cluster is on the efficient allocation of resources as well as efficient use of water.

Finally, the social justice cluster addresses the human right to water and the importance of water for develop-

11. For an interesting approach on the re-definition on water supply see R. Uruena, 'Expertise and Global Water Governance: How to Start Thinking about Power over Water Resources?', 9 *Anuario Mexicano de Derecho Internacional* 117 (2009).
12. The Global Water Partnership (GWP) could also be mentioned as a rather overarching organisation. On this network and institution, see E. Fromageau, 'The Global Water Partnership: Between Institutional Flexibility and Legal Legitimacy', 8 *International Organizations Law Review* 367 (2011).
13. Gupta, Ahlers & Ahmed, *supra* n. 11, at 298.
14. <www.unwater.org/v2_08/discover.html> (last visited 22 October 2012). UN Water's key responsibilities are monitoring and reporting on the progress to achieve water and sanitation MDGs targets.
15. <www.gwp.org/The-Challenge/What-is-IWRM> (last visited 22 October 2012) (emphasis added). Global Water Partnership was established with the aim to 'support the sustainable development and management of water resources at all levels' and 'to foster integrated water resources management'. <www.gwp.org/en/About-GWP> (last visited 22 October 2012). See also Fromageau, *supra* n. 13, at 367-368, 376-377.

16. Adopted on 21 May 1997, <http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf> (last visited 22 Oct. 2012).
17. Adopted on 17 March 1992, <www.unece.org/fileadmin/DAM/env/water/pdf/watercon.pdf> (last visited 22 October 2012).
18. Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, adopted on 17 June 1999, <www.unece.org/fileadmin/DAM/env/documents/2000/wat/mp.wat.2000.1.e.pdf> (last visited 22 October 2012).
19. Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents, adopted on 21 May 2003, <www.unece.org/fileadmin/DAM/env/civil-liability/documents/protocol_e.pdf> (last visited 22 October 2012).
20. <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/8_5_2008.pdf> (last visited 22 October 2012).
21. <web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:21790401~menuPK:5119395~pagePK:41367~piPK:51533~theSitePK:40941,00.html> (last visited 22 October 2012).
22. Operational Policies, <<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,menuPK:64701763~pagePK:64719906~piPK:64710996~theSitePK:502184,00.html>> (last visited 22 October 2012).
23. World Bank, Water Resources Sector Strategy: Strategic Directions for World Bank Engagement, 2004, <<http://water.worldbank.org/publications/water-resources-sector-strategy-strategic-directions-world-bank-engagement>> (last visited 22 October 2012).
24. World Bank, Sustaining Water for All in a Changing Climate, 2010, <<http://water.worldbank.org/publications/sustaining-water-all-changing-climate-world-bank-group-implementation-progress-report>> (last visited 22 October 2012).

ment. The most relevant instruments²⁵ are the following: General Comment 15 of the Committee on Economic, Social and Cultural Rights (CESCR) on the human right to water²⁶ and the United Nations Millennium Declaration²⁷ as well as the documents resulting from the conferences leading up to²⁸ and following upon²⁹ the adoption of these Millennium Development Goals (MDGs). It was not until 2003 that the independent human right to water was acknowledged by the CESCR in the above mentioned general comment. Earlier it was considered being dependent of other rights or being implicit therein. The developmental goals do not explicitly mention the right to water, rather they set policy targets that need to be attained. While equally important, a distinction is often made between the so-called rights-discourse and the developmental-discourse, the former being more legally enforceable. Nevertheless, in both cases the focus is on the individual who should have access to water and the need to achieve social justice by appropriate allocation of the scarce water resources.

3. Crisis of Global Water Governance

The alleged crisis of global water governance can be located in the broader framework of legitimacy of global governance. Traditionally, states were the subjects of international law even where some forms of public power were ‘delegated’ to an international decision-maker. Under traditional international law global governance was regarded as performing the states’ will. States needed to give their consent to the decisions made at the international level, states were the addressees of these decisions, and states could ask for review in case of a dispute. States being the subjects of international law also meant that in traditional international law the exercise of public power at the international level gained legitimacy through the participation of states.

However, currently the exercise of public power at the global level has been undergoing certain important changes as an effect of globalisation, privatisation and de-nationalisation. Unlike in traditional international law, institutions or private actors operating at the global level increasingly exercise certain forms of public power in a way that directly affects non-state actors. The series of *Kadi* (and related) cases relating to the UN Security Council’s listing of individuals and entities associated with terrorist organisations are, among others, illustrative of this phenomenon.³⁰ This increasing exercise of public power in structures of global governance raises fundamental questions as to the legitimacy of global governance, *i.e.* whether, to what extent and how this authority is and can be justified and accepted.³¹

Global water governance itself has also been argued to suffer from legitimacy deficiencies, also as a consequence of these changes at the global level, which contributed to or has led to water crisis. In general, three main reasons have been given for the water crisis. First, as indicated above, global water law incorporates different actors operating at different levels with different focuses/perspectives. Accordingly, this field has been described as ‘diffuse and fragmented’.³² This characteristic of global water governance has also led to the observation that GWG lacks clear rules of procedure,³³ and thus decisions are made in an *ad hoc* and inconsistent manner. Such governance, so the argument generally goes, cannot be regarded as either legitimate or efficient. Second, and relating to the fragmented nature of global water governance, diverging criticisms have been uttered in relation to the different clusters of global water governance. For instance, the economic cluster has been criticised for focusing too much on cost-efficiency and losing sight of social justice elements;³⁴ the ecological cluster for being too state-centred and thus not recognising interests of groups and individuals;³⁵ and the social justice cluster for lacking appropriate enforcement mechanisms for environmental rights.³⁶

Third, it has been argued that global water governance does not address the two main factors of water crisis, that is (1) increasing demand meeting with decreasing

25. See also The European Charter on Water Resources, para. 5, adopted by the Committee of Ministers of the Council of Europe, Recommendation (2001)14, 17 October 2001; Art. 14(2) of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted 16 December 1979, in force 3 September 1981; and Art. 24(2) of the 1989 Convention on the Rights of the Child, adopted 20 November 1989, in force 2 September 1990. CEDAW conceives of the right to water as part of the right to enjoy adequate living conditions for women living in rural areas; the Convention on the Rights of the Child as part of the right to health.

26. CESCR General Comment 15(2002), ‘The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)’, UN Doc. E/C.12/2002/11, 20 January 2003, [hereinafter General Comment 15].

27. General Assembly Resolution 55/2, adopted on 8 September 2000, <www.un.org/millennium/declaration/ares552e.htm> (last visited 22 October 2012).

28. The 1977 United Nations Water Conference, the 1992 United Nations Conference on Environment and Development, and the 1994 United Nations International Conference on Population and Development.

29. The 2002 Johannesburg Declaration and Plan of Implementation and the 2005 World Summit Outcome.

30. Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakat International Foundation v. Council of the European Union*, [2008] ECR I-6351.

31. D. Bodansky, ‘The Concept of Legitimacy in International Law’, *University of Georgia School of Law Research Paper No. 07-013*, at 1 (2007). Compare with the definitions by W. Hinsch, ‘Legitimacy and Justice: A Conceptual and Functional Clarification’, in J. Kühnelt (ed.), *Political Legitimization without Morality?* (2008) 39, at 39 and 51; T.M. Franck, *Fairness in International Law and Institutions* (1995), at 7-8.

32. Gupta and Sanchez, *supra* n. 9, at 14 (emphasis added).

33. *Ibid.*

34. For a brief explanation of this debate see, *inter alia*, A.K. Biswas, ‘An Assessment of Future Global Water Issues’, 21 *International Journal of Water Resources Development* 229, at 234 (2005); Gupta, Ahlers & Ahmed, *supra* n. 11, at 299; Hey, *supra* n. 4, at 365.

35. Hey, *supra* n. 4, at 353.

36. J. Gupta, ‘The Current Status of the Human Right to Water’, in M.R. van der Valk and P. Keenan (eds.), *The Right to Water and Water Rights in a Changing World* (2011) 47 at 52.

supply both in terms of water quantity and water quality, which is mainly a question of water allocation; and (2) climate change having impact on water resources, which relates to how governance deals with unpredictability and uncertainty.³⁷

Given these criticisms and observations, the attention will now turn to how global constitutionalism and global administrative law describe this crisis, and whether their respective responses could address the above-mentioned critical points, and thus contribute to solving and/or mitigating the water crisis.

4. Through the Looking Glass of Global Constitutionalism

The legal, political science and international relations literature is quite rich on the constitutionalisation of international law and international governance in general, or of a specific field thereof. Global constitutionalism has, famously, been referred to as a 'mindset' by Koskenniemi.³⁸ In this sense, GC is said to provide 'a vocabulary of institutional hierarchies and fundamental values in the application of law'.³⁹ This vocabulary generally consists of the following constitutional elements: common or shared values and hierarchy of norms (also called the rule of law), protection of fundamental rights, and guidelines for relations between different actors, and in particular interstate relations (checks and balances).⁴⁰

Depending on the approach the particular authors have taken, several categories of global constitutionalism or constitutionalisation have been created: legal process, subjectification, objectification; mapping and shaping; substantive and formalistic; substantive and procedural; modern constitutionalism, constitutionalism beyond state and postmodern constitutionalism; and so on.⁴¹ Some use constitutionalisation to show the extent to which traces of constitutionalisation can be discovered, to show the trends in the light of this theory; others rather explicitly argue for a more robust constitutionalisation of the international/global arena in order to ensure more accountability of the entities exercising

public power and thus enhance their legitimacy. Even though such distinction might conceptually be made, there is an inherent normative element in such analyses: increased constitutionalisation is needed⁴² in order to limit the unilateral approaches of states, in particular where a common or collective approach is needed to tackle a problem, such as climate change or water scarcity. Unsurprisingly, the claim for constitutionalising international water law has also been made as a response to the 'water crisis'.⁴³

Given this framework, the next section will first (1) explore the signs of constitutionalisation in each cluster separately (*exploring*). Based on this exploration, a comparative section will (2) map the extent to which global water governance is constitutionalised (*mapping*), (3) assess how further constitutionalisation would shape global water governance (*shaping*), and (4) whether such shaping would contribute to solving the water crisis (*solving*)?

As constitutionalisation is a rather complex process and thus impossible to address in this article, the present analysis will try to capture its main substantive features⁴⁴ and explore whether and to what extent they can be traced in the different clusters.⁴⁵ These features⁴⁶ are the following:

1. To what extent is there a set of *common values* that might be considered higher norms that trumps other values, that penetrate through the whole system, that inform other law?
2. To what extent is attention devoted to *individuals and vulnerable groups* of society in order to ensure the protection of human rights, human dignity, equality and solidarity?

37. See, *inter alia*, C. Bruch and J. Troell, 'Legalizing Adaptation: Water Law in a Changing Climate', 36 *Water International* 828, at 830; Gupta and Sanchez, *supra* n. 11, at 12; Hey, *supra* n. 4, at 351-352.

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

39. A. Cardesa-Salzmann, 'Constitutionalising Secondary Rules in Global Environmental Regimes: Non-Compliance Procedures and the Enforcement of Multilateral Environmental Agreements', 24 *Journal of Environmental Law* 103, at 107 (2012).

40. See *inter alia*, A. Peters and K. Armingeon, 'Introduction – Global Constitutionalism from an Interdisciplinary Perspective', 16 *Indiana Journal of Global Legal Studies* 385, at 38 (2009); K. Milewicz, 'Emerging Patterns of Global Constitutionalization: Toward a Conceptual Framework', 16 *Indiana Journal of Global Legal Studies* 413, at 422 (2009).

41. For a general overview see, e.g., J. Klabbers, 'Setting the Scene', in J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009) 1.

42. Dunoff and Trachtman argue that '[a] number of contemporary developments contribute to the demand for international constitutionalization.' J.L. Dunoff and J.P. Trachtman, 'A Functional Approach to International Constitutionalization', in J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (2009) 3, at 5.

43. Gupta and Sanchez, *supra* n. 9, at 13. The same argument was also raised with regard to global environmental governance in general. See, *inter alia*, L.J. Kotzé, 'Arguing Global Environmental Constitutionalism', 1 *Transnational Environmental Law* 199, at 202 (2012).

44. The choice of focusing on 'substantive' rules of GC might imply a particular interpretation of constitutionalism. This choice was, however, influenced by a more practical reason, namely the less ambivalent and more coherent approach chosen by GAL-theorists to explicitly focus on procedural questions. Accordingly, in order to be able to show the different approaches used by these schools, 'only' the substantive rules are included in the GC-analysis without the intent to favour any theory of constitutionalism. Increasingly, the GC scholarly works include GAL as part of GC.

45. Due to the limited space, only the legal rules will be put in spotlight, and the actual application of these principles will not be addressed here.

46. For a somewhat different approach see Dunoff and Trachtman, *supra* n. 43, at 18-22.

3. How do relevant instruments limit the actors' power, i.e. what type of *checks and balances* mechanisms are built in?⁴⁷

4.1. Exploring the Traces of Constitutionalisation in the Clusters

4.1.1. The Ecological Cluster

- Common Values

Several common values can be discovered in the ecological cluster. One of the core values is *equitable and reasonable utilisation*⁴⁸ of water resources.⁴⁹ Although separately mentioned, this principle also incorporates the need for *optimal and sustainable utilisation*⁵⁰ as well as *economically sound and rational water resources management*.⁵¹ Both the 1997 Convention and the Helsinki Convention adopt a 'holistic view' on water resources as well as environment, and based on this they lay down the obligation to rely on the so-called *ecosystem approach*.⁵² According to McIntyre, '[t]he ecosystem approach has been closely linked to the concept of sustainable development, which is central to the notion of equitable utilisation.'⁵³ The explicit focus on *future generations*⁵⁴ in the Helsinki Convention can also be linked to the concept of equitable utilisation on the one hand, and sustainable development on the other. Interestingly, the first mention of the need for *integrated water resources management*, a concept that has been linked to

sustainability and ecosystem management, has only been made in the Helsinki Protocol I in 1999.⁵⁵

Another important principle in the 1997 Convention is the principle of 'no significant harm', enshrined in its Article 7. Although '[t]he relationship between the principles of equitable utilisation and no significant harm has generated much discussion',⁵⁶ it seems accepted that the former has primacy over the latter.⁵⁷ Opposed to the 'no significant harm' approach, the Helsinki Convention relies on the *precautionary principle*,⁵⁸ which is generally recognised as creating a lower threshold due to the uncertainty element embraced therein,⁵⁹ and thus being more favourable for the environment. Although the precautionary principle has been linked to the *polluter pays* principle,⁶⁰ the latter still constitutes an important principle of this cluster.⁶¹

Finally, the obligation to *co-operate* can also be identified as an overarching or common principle both in the 1997 and the Helsinki Conventions.⁶²

- Individuals and Vulnerable Groups

Concerning this segment of the ecological cluster, the 1997 Convention signifies a remarkable lack of (direct) attention to the needs and wishes of individuals/groups. The Convention has been criticised for not establishing a more straightforward priority in terms of the use of international watercourses.⁶³ Pursuant to Article 10 of the 1997 Convention, when there is a conflict between the uses, the principle of equitable and reasonable utilisation should serve as guidance in resolving it 'with *special regard* being given to the requirements of vital

47. This feature is closely related to accountability that is discussed under the GAL perspective. The focus here is on the manner the power of the actors is constituted and constrained through institutional or other arrangements, while the accountability aspect discusses the possible ways through which access to justice can be ensured and compliance with the obligations enshrined in the different clusters can be monitored/supervised. Put differently, the 'checks and balances' aspect is concerned with the way the public power is exercised in the broader sense, and the 'accountability' angle concentrates on the enforcement of obligations.

48. McIntyre has argued that '[e]quitable utilization is the primary substantive principle of international water law'. O. McIntyre, 'The Emergence of an "Ecosystem Approach" to the Protection of International Watercourses under International Law', 13 *Review of European Community and International Environmental Law* 1, at 10 (2004). See also Arts. 5 and 6 of the 1997 Convention.

49. Art. 5 of the 1997 Convention; Art. 2(2)(c) of the Helsinki Convention; Art. 4 of the 2008 Draft Articles.

50. Art. 5 of the 1997 Convention.

51. Art. 2(2)(b) of the Helsinki Convention. McIntyre argued that 'the overriding objective of sustainable development, requiring a balancing of economic and environmental objectives, is usually acknowledged'. McIntyre, *supra* n. 49, at 10.

52. Arts. 2(a), 6 and 20 of the 1997 Convention; Arts. 2(2)(d) and 2(4) of the Helsinki Convention; Arts. 5 and 10 of the 2008 Draft Articles. See also Art. 4(2)(c) of the Helsinki Protocol I.

53. McIntyre, *supra* n. 49, at 10.

54. Art. 2(5)(c) of the Helsinki Convention. See also Art. 5(d) of the Helsinki Protocol I.

55. Art. 4(1) of the Helsinki Protocol I: '[t]he Parties shall take all appropriate measures to prevent, control and reduce water-related disease within a framework of integrated water-management system aimed at sustainable use of water resources, ambient water quality which does not endanger human health, and protection of water ecosystems.' See also Art. 5(j) Protocol I: '[w]ater resources should, as far as possible, be managed in an integrated manner on the basis of catchment areas, with the aims of linking social and economic development to the to the protection of natural ecosystems and of relating water-resource management to regulatory measures concerning other environmental mediums.'

56. E. Hey, 'The Watercourses Convention: To What Extent Does it Provide a Basis for Regulating Uses of International Watercourses?', 7 *Review of European Community and International Environmental Law* 291, at 294 (1998).

57. See, *inter alia*, O. McIntyre, *Environmental Protection of International Watercourses under International Law* (2007), at 185; S.M.A. Salman, 'The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law', 23 *Water Resources Development* 625, at 633 (2007).

58. Art. 2(5)(b) of the Helsinki Convention. See also Art. 5(a) of the Helsinki Protocol I.

59. On the uncertainty 'leg' of the precautionary principle, see A. Trouwborst, *Precautionary Rights and Duties of States* (2006), at 71-120.

60. M. Fitzmaurice, D.M. Ong & P. Merkouris (eds.), *Research Handbook on International Environmental Law* (2010), at 203. The authors argued that 'the mere fact that the potential polluters are expected to take responsibility for their actions can be viewed as encouraging a forward-looking approach that includes a degree of precaution.' *Ibid.*, at 204.

61. Art. 2(5)(b) of the Helsinki Convention. See also Art. 5(b) of the Helsinki Protocol I.

62. Art. 8 1997 Convention; Art. 9 of the Helsinki Convention.

63. Hey, *supra* n. 57, at 293.

human needs.⁶⁴ Nevertheless, the Convention emphasises in the Preamble that the Parties are '[a]ware of the special situation and needs of developing countries', which might be interpreted as requiring some special attention to those in a vulnerable situation in developing countries.

Somewhat differently, the Helsinki Protocol I prescribes that '[t]he Parties shall ... take all appropriate measures for the purpose of ensuring ... [a]dequate supplies of wholesome drinking water which is free from any micro-organisms, parasites and substances'.⁶⁵ Although it does not address the other uses of water, the concentration on drinking water still seems to establish a clear priority for *vital human needs*. In addition, this Protocol also enshrines that '[e]quitable access to water, adequate in terms both of quantity and of quality, should be provided for all members of the population, especially those who suffer a disadvantage or social exclusion'.⁶⁶ This provision not only envisages a priority of water use, it also requires that special attention is devoted to those being in a marginalised position. In addition, a particular group of *marginalised groups* is highlighted when the Protocol lays down that '[s]pecial consideration should be given to the protection of people who are particularly vulnerable to water-related disease'.⁶⁷

Finally, the individual seems to be put in the foreground in the Helsinki Protocol II, the aim of which is 'to provide for a comprehensive regime for *civil liability* and for adequate and prompt compensation for damage caused by the transboundary effects of industrial accidents on transboundary waters'.⁶⁸ Although this Protocol does not address legal standing questions in terms of the applicant, when 'damage' is defined, it includes effects on individuals and/or groups. Moreover, the fact that this Protocol concerns 'civil liability' also puts the emphasis on individuals and/or groups who can file their civil complaint against the operator.

(3) Checks and Balances

Cooperation as an overarching principle has already been mentioned above, but it is definitely also a form of checks and balances, and in this cluster the main form of constituting and constraining the power of the state parties. Based on the 1997 Convention, this cooperation can take different forms: *cooperation* in general concerning 'the regulation of the flow of the waters',⁶⁹ the establishment of *joint (management) mechanisms or commissions* to facilitate cooperation and management of an interna-

tional watercourse,⁷⁰ taking measures *jointly* to protect and preserve the ecosystems⁷¹ or *exchange information* in relation to planned measures.⁷²

Similarly to the 1997 Convention, the Helsinki Convention and its Protocol I also require the cooperation of states, both between all states and between riparian states. All states are required to *cooperate* concerning '*monitoring* the conditions of transboundary waters',⁷³ and '*research* into and *development* of effective techniques for the prevention, control and reduction of transboundary impact'.⁷⁴ In addition, riparian states are required to 'enter into bilateral or multilateral agreements or other arrangements ... in order to define their ... conduct regarding the prevention, control and reduction of transboundary impact'.⁷⁵ For this purpose they also need to establish *joint bodies* as well as *joint programmes* for monitoring the conditions of transboundary waters. The Helsinki Convention as well as its Protocol I also establish the *meeting of parties*, where 'the Parties shall keep under continuous review the implementation of this Convention'.⁷⁶

4.1.2. The Economic Cluster

• Common Values and Principles

In the World Bank's water-related documents, there are certain recurring values and principles, which can actually be divided along the lines of the three clusters. The fact that the World Bank includes, to a certain extent, each dimension of water, implies that it, indeed, aims to apply a holistic or integrated approach. The World Bank's documents indicate that there has been, even though implicit, a shift from regarding water as an economic good⁷⁷ to water as a public good (or sometimes regional public good)⁷⁸ in the World Bank's approach. Arguably, this shift has also had a role to play in the Bank's advancing the inclusion of these three dimensions in its approach to water.⁷⁹ So the implicit

64. Art. 10(2) of the 1997 Convention (emphasis added); Art. 5(2) of the 2008 Draft Articles.

65. Art. 4(2)(a) of the Helsinki Protocol I.

66. Art. 5(l) of the Helsinki Protocol I.

67. Art. 5(k) of the Helsinki Protocol I.

68. Art. 1 of the Helsinki Protocol II (emphasis added).

69. Art. 25 of the 1997 Convention. 'Watercourse States shall cooperate, where appropriate, to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse.'

70. Art. 8(2) of the 1997 Convention. Art. 8(2) of the 1997 Convention enshrines that 'watercourse states may consider the establishment of *joint mechanisms or commissions*, as deemed necessary by them, to facilitate cooperation on relevant measures and procedures in the light of experience gained through cooperation in existing joint mechanisms and commissions in various regions' (emphasis added). See also Art. 24(1) of the 1997 Convention; Arts. 7(2) and 14 of the 2008 Draft Articles.

71. Arts. 20 and 27 of the 1997 Convention; A Art. 12 of the 2008 Draft Articles.

72. Art. 11 of the 1997 Convention; Art. 15 of the 2008 Draft Articles.

73. Art. 4 of the 1997 Convention.

74. Art. 5 of the Helsinki Convention; Arts. 11 and 13 of the Helsinki Protocol I.

75. Arts. 2(6) and 9 of the Helsinki Convention.

76. Art. 17 of the Helsinki Convention; Art. 16 of the Helsinki Protocol I.

77. See, *inter alia*, Gupta, Ahlers & Ahmed, *supra* n. 11, at 299.

78. 'As water transcends political boundaries, it becomes a *regional public good* for which collective action can secure sustainable win-win benefits.' World Bank Group Implementation Progress Report of the Water Resource Sector Strategy: Sustaining Water for All in a Changing Climate [hereinafter *Sustaining Water for All*] (2010), at 39 (emphasis added).

79. 'The nature of water as a fundamental public good makes its control and management a sensitive political economy issue', *Sustaining Water for All*, at 7.

acknowledgement of *water as a public good* might be regarded as the first, and overarching, value establishing the linkages among the clusters.

Concerning the *ecological* aspect of water, the Water Resources Sector Strategy (2004) as well as the World Bank Group Implementation Progress Report of the Water Resources Sector Strategy (2010) explicitly point to the need to adopt a *holistic approach*, to rely on the concept of *integrated water resources management*. Starting in the Sector Strategy, '[t]his integrated water resources management ... framework changed the vision for the sector and provided the basis for moving away from a sector-based investment focus to a multi-sectoral approach to planning.'⁸⁰ Nevertheless the Progress Report acknowledged that '[t]he integration of resource management has occurred mostly among water sub-sectors and less between the water sector and other sectors.'⁸¹

Other related principles, which are often also seen as embedded in the IWRM approach, are *sustainable development*, focus on *resilience*, *climate change mitigation*, and *future generations*.⁸² These principles are used as directing the Bank's project management.⁸³

In addition to the ecological focus, the World Bank's strategy also incorporates principles relating to the *human rights or social dimension* of water management and the water sector. An important aim of the Bank is to *reduce poverty* and to comply with the related *Millennium Development Goals*. 'An overriding thrust of the World Bank's work on water and sanitation is to ensure that poor people gain access to safe, affordable water supply and sanitation services by reducing costs and increasing accountability.'⁸⁴ Very remarkably, the Sector Strategy highlights *water rights* several times, and explains that '[r]ecognising and managing water rights is as essential for managing irrigation systems as for managing river basins or aquifers. ... water rights (of individuals and communities, including traditional users)

enjoy the same legal certainty as land and other property rights.'⁸⁵

Finally, the most outstanding aspects of water management are the *economic*-related principles. Two main common values can be discerned here: *efficient management* and *cost efficiency* (water pricing). An important facet of efficiency is the involvement of the *private sector* in the financing and managing of water resources.⁸⁶ In this context the so-called 'principled pragmatic approach' deserves mentioning. This approach focuses on the costs while taking into account the context in which the reform takes place.⁸⁷ Significant sections are devoted to pricing and cost calculation in these documents.

- Individuals and Vulnerable Groups

There is reference and attention to certain individuals and/or groups both in the Bank's water-related documents and safeguard policies. As mentioned above, the management of water resources and services is important for the Bank not only in terms of strict cost-efficiency, but also in terms of *reducing poverty* and thus improving the position of the poor. For instance, the Sector Strategy makes clear that priority is given to access to water services of the poor.⁸⁸ '[B]ecause it is usually poor people who inhabit degraded landscapes, poverty-targeted water resources interventions designed to improve catchment quality and provide livelihoods for poor people are of major importance.'⁸⁹ In addition, in the operation policies of the Bank, thus relating to all its projects, the so-called *project affected people*⁹⁰ as well

80. *Ibid.*, at 16. 'Coordination between development and management of water, land and other resources took center stage in the thinking about water, on the basis that it would be a necessary condition to maximise the resultant economic and social welfare in an equitable manner without compromising the sustainability of vital ecosystems. IWRM is regarded as critical for sustainable outcomes, and increasingly viewed as offering the best available frameworks for building the resilience needed to adapt to climate change.'

81. *Ibid.*, at 24.

82. See e.g. *World Bank Group Water Resources Sector Strategy: Strategic Directions for World Bank Engagement* [hereinafter *Water Resources Sector Strategy*] (2004) at 17, 20-21; *ibid.*, at 4, 16.

83. *Sustaining Water for All*, at 4. 'Water resource management must follow a sustainable development path that achieves human well-being without exceeding the earth's capacities for natural resource generation and waste absorption. The challenge is to manage the social, political, and institutional processes of balancing the water use of present generations with the needs of future generations.'

84. *Water Resources Sector Strategy*, at 18.

85. *Ibid.*, at 16. The Strategy further explains that: '[t]his is not to suggest that there is unanimity on the concept of water rights, for some see this as an unhealthy commodification of a public good. Nor is it meant to imply that it is simple to introduce rights-based systems for a fugitive resource with deep cultural implications in administratively weak environments. Nonetheless, there has been substantial progress in recent years (in Brazil, Chile, Mexico and South Africa), and there are pressures from the local level (villagers who have stored rainwater in Rajasthan, for instance) to the international level (between the United States and Mexico, for example) to define the rights to use an ever-scarcer resource. The World Bank is gaining practical experience in the legal and administrative machinery for setting up and managing rights-based systems of water management.' *Ibid.*, at 16.

86. 'Financing for water resources infrastructure is not cleanly separable into public and private sectors; increasingly, it requires public-private partnerships, both in investment and operation. While private investment and management are playing, and must play, a growing role, this must take place within a publicly established long-term development and legal and regulatory framework, and without crowding out community-managed infrastructure and beneficiary participation in design and management of water systems. Attracting private investment into low-income countries is particularly important and necessarily a major focus for institutions like the World Bank.' *Ibid.*, at 12.

87. 'In some areas of institutional reforms, such as water pricing and water rights, the Bank has followed a "principled pragmatic approach" – principled because economic principles ensure that users take financial and resource costs into account when using water, and pragmatic because "solutions need to be tailored to specific, widely varying natural, cultural, economic, and political circumstances in which the art of reform is the art of the possible."' *Sustaining Water for All*, at 31. See also *Water Resources Sector Strategy*, at 22-25.

88. *Water Resources Sector Strategy*, at 24.

89. *Ibid.*, at 2.

90. See also *ibid.*, at 77.

as *indigenous people*⁹¹ enjoy a particular position: in order to protect their interests, they are involved in the decision-making procedure relating to the project, and they have the right to file a complaint to the Inspection Panel if they become victim of non-compliance with the Bank's policies.

- Checks and Balances

With regard to this constitutional ambit, a distinction needs to be made between those constraining arrangements that are applicable to the Bank itself and those that the Bank imposes on its clients in its project. While the former relate to the Bank's general institutional set-up and the guiding principles in its policy-making, the latter focuses on the institutional requirements of the Bank from states and the Bank's relationship with its clients in water-related projects. Given the limited space, here only the water-specific arrangements of both aspects are introduced.

In order to be able to comply with the integrated approach it subscribes to, the Bank created an overarching water unit. First in 1993, the *Global Water Unit* was set up, which was replaced by the *Water Resources Management Group* in 2000. This change was found necessary because of 'the growing consensus that water resources was emerging as a critical development issue and with the understanding that greater coordination across units working on water was vital.'⁹² This Group was later 'consolidated with the Water Supply and Sanitation Sector Board',⁹³ and the *Water Sector Board* was established. The establishment of this board has made it possible for the Bank to actually have an overview about all the water-related activities within one unit. Also, the *World Bank Sustainable Development Network (SDN)*⁹⁴ was created in 2007 in order to 'think and deliver in a more integrated way, ensuring that Bank actions are anchored by a commitment to sustainable development.'⁹⁵ The Progress Report acknowledges that '[t]he adoption of an integrated approach has been a challenge throughout the institution'.⁹⁶ In addition and relating to the changes that take place both in the environment in general and as an effect of climate change in particular, the Sector Strategy Report and the Progress Report pay special attention to the need for the World Bank to be

91. See also *ibid.*, at 77-78. The World Bank Operational Policy 4.12 [hereinafter OP], para. 8 lays down the following: '[t]o achieve the objectives of this policy, particular attention is paid to the needs of vulnerable groups among those displaced, especially those below the poverty line, the landless, the elderly, women and children, indigenous peoples, ethnic minorities, or other displaced persons who may not be protected through national land compensation legislation.'

92. Water Resources Sector Strategy, at 50.

93. *Sustainable Water for All*, at 19.

94. 'The Sustainable Development Network (SDN) at the World Bank is responsible for implementing the organisation's sustainable development agenda.' <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSDNET/0,,contentMDK:22165495~menuPK:64885102~pagePK:64885161~piPK:64884432~theSitePK:5929282,00.html>> (last accessed 22 October 2012).

95. *Ibid.*, at 19.

96. *Ibid.*

flexible.⁹⁷ The Progress Report emphasises that 'the external environment is rapidly evolving and the water agenda is becoming more complex, requiring the WBG to be flexible and responsive to new challenges and opportunities.'⁹⁸

Concerning the second aspect of this constitutional ambit, the Sector Strategy observes that the client countries 'face major challenges in developing the laws, regulations and institutions required for managing water resources in a more economically productive, socially acceptable and environmentally sustainable fashion.'⁹⁹ In the Bank's view clients need to realise that water management is *beyond boundaries*, it requires *cooperation*, and it requires *public-private partnerships*. In addition, certain projects might even require changes in the *governance structure*, given the need for the *integrated approach*. In the WB's view, [a]n important constraint for implementing an integrated approach has been the governance structure in client countries.¹⁰⁰

4.1.3. The Social Justice Cluster

- Common Values

An overarching principle of this cluster is that *water* is seen as a *public good*, more specifically, as a *social and cultural good* (as opposed to economic good).¹⁰¹ This view on water also has effect on water uses: the relevant documents clearly define the *priority of uses* – '[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.'¹⁰² The priority for domestic and personal uses is also implied in the acknowledgement that '[t]he right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.'¹⁰³ The same can also be observed in the GA resolution on the human right to water¹⁰⁴ as well as in the GA Millennium Declaration.¹⁰⁵

97. One of the lessons that the Bank has learned based on the projects that were included in the assessment report is that 'it is important to address institutional objectives in the context of long-term programmatic engagements, rather than individual projects'. *Ibid.*, at 60.

98. *Ibid.*, at xii.

99. Water Resources Sector Strategy, at 11.

100. *Sustainable Water for All*, at 26. The Progress Report also explains that '[w]hile institutional settings and governance structure of most client countries do not encourage integrated planning, development and management of water resources, it will remain critical for the Bank to support a holistic dialogue with client countries on water issues.' *Sustainable Water for All*, at 57.

101. General Comment 15, para. 11.

102. *Ibid.*, para. 2.

103. *Ibid.*, para. 3.

104. 'Acknowledging the importance of equitable, safe and clean drinking water and sanitation as an integral component of the realization of all human rights.' GA Res. 64/292, The human right to water and sanitation [hereinafter GA Human right to water and sanitation], 3 August 2010, Preamble.

105. '... to halve the proportion of people who are unable to reach or to afford safe drinking water.' GA Res 55/2. United Nations Millennium Declaration [hereinafter GA Millennium Declaration], 8 September 2000, para. 19.

In addition, each related document also puts an emphasis on *sufficient, safe and affordable drinking water*. While the economic cluster paid particular attention to cost-efficiency, this cluster can be seen as placing a minimum requirement on the cost-efficiency thinking – that is the affordability of drinking water. Interestingly, these qualifications (affordability and drinking) make the cost-calculation relative, and might allow for distinctions to be made among individuals as well as among water uses in water-pricing. Such distinctions, given the inherent differences among these aspects, might be justified on the basis of *substantive equality*, which seem to pervade not only this financial side, but the whole system, of human right to water, making the idea of equality a foundational aspect thereof. General Comment 15 and the Millennium Declaration place the access to water within the broader framework of *sustainability/environmental protection* at the same time emphasising the need to focus on future generations.¹⁰⁶ Finally, it is important to note that General Comment 15 identifies some important ‘*core obligations*’, which are very useful given the broad scope of the right to water as well as the obligation of progressive realisation in general for economic, social and cultural rights. These core obligations require immediate action, and are based on the normative content of the right to water, an important element of which is that ‘[t]he elements of the right to water must be *adequate* for human dignity, life and health’.¹⁰⁷

- Individuals and Vulnerable Groups

Unlike the other clusters, the human rights cluster explicitly concentrates on *individuals* and *groups*, and in particular those being in *vulnerable position* (poor and marginalised).¹⁰⁸ Again, this attention to the vulnerable originates from the *principle of equality*. The General Comment explains that ‘[i]nappropriate resource allocation can lead to discrimination that may not be overt’.¹⁰⁹ Interestingly, General Comment 15 also highlights the need to ensure ‘that disadvantaged and marginalised farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology’.¹¹⁰ The GA resolution on human right to water calls

upon states to support developing countries, and through this it essentially can achieve support for those being in a vulnerable position.¹¹¹

- (3) Checks and Balances

Probably due to the focus of the human rights cluster on the content of human right to water, there is not much discussion about how to constrain the exercise of power, in this case, of states. The most relevant, but actually also the most general, reference to any control mechanisms is made in the GA Millennium Declaration, which makes clear that *democracy*¹¹² is essential for ensuring the fundamental values of international relations. At the interstate level, both General Comment 15 and GA resolution on human right to water and sanitation state the need for *international assistance and cooperation*.¹¹³ An additional ‘instrument’ enshrined in General Comment 15 also serves as a ‘check-and-balance’ mechanism: the *prohibition to use water as a political and economic pressure*.¹¹⁴

4.2. Mapping the Current Status of Constitutionalisation in Global Water Governance

Comparing the traces of constitutionalisation in each cluster, as explored above, the status (or extent) of constitutionalisation in global water governance can be mapped providing an indication about the nature of water crisis when read through the lenses of GC.

First, there is no written or unwritten ‘constitution’ in global water governance that would give directions to the whole system. Second and closely related to this previous point, the cluster-based exploration reveals the differences among these clusters. There might be some commonly shared approaches in the clusters, but a real coherence cannot be observed among them: they seem to operate in isolation, while addressing the same subject matter – from different perspectives and/or material scope. Although fragmented, two main common values can still be discovered in each cluster: the principle of equality and sustainability or ecosystem approach. In addition, cooperation is acknowledged in each cluster as a form of checks and balances. Besides these commonly shared elements, there also are some overlaps between the economic and the ecological cluster¹¹⁵ as well as between the economic and social justice cluster,¹¹⁶ but clear overlaps can hardly be discovered between the social justice and the ecological cluster. All in all, the system can, indeed, be described as fragment-

106. ‘To stop the unsustainable exploitation of water resources by developing water management strategies at the regional, national and local levels, which promote both equitable access and adequate supplies.’ GA Millennium Declaration, para. 23. ‘The manner of realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations.’ General Comment 15, para. 11.

107. General Comment 15, para. 11. Adequacy defined based on the following factors: availability, quality and accessibility. General Comment 15, para 12.

108. General Comment 15 explicitly lays down that ‘[w]hereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees.’ General Comment 15, para. 16. See also GA Millennium Declaration, 8 September 2000, III and VI.

109. General Comment 15, para. 14.

110. *Ibid.*, para. 7.

111. GA Human right to water and sanitation, para. 2. See also GA Millennium Declaration, VII; General Comment 15, para. 34.

112. GA Millennium Declaration, V.

113. General Comment 15, paras 30 and 38; GA Human right to water and sanitation, para. 2.

114. General Comment 15, para. 32. ‘States parties should refrain at all times from imposing embargoes or similar measures, that prevent the supply of water, as well as goods and services essential for securing the right to water. Water should never be used as an instrument of political and economic pressure.’

115. E.g. focus on future generations, reference to IWRM.

116. E.g. focus on individuals, incorporation of water rights.

ed, as noted by many scholars in relation to global water law as well as general environmental law.¹¹⁷

Third, no particular hierarchy can be observed among the clusters or within the clusters in terms of higher or lower law, which eventually could give some direction to law-making and law-application. Again, this confirms that each cluster, or even each new legislative piece, develops its own approach irrespective of the other clusters and/or other rules adopted in the same cluster. One might argue, though, that the above-mentioned two recurring principles might create a certain hierarchy due to their overarching nature.

Fourth, not only the material scope of each cluster is different, but the clusters seem to have distinct personal scope, form and locus of governance. Concerning the first aspect, the ecological cluster addresses states and states are also the explicit beneficiaries of the measures taken, although implicitly individuals will also benefit from these norms; the economic cluster also addresses states, but it also explicitly embraces individuals as beneficiaries; and finally, the social justice cluster's addressees are also states, but with a main focus on individuals and vulnerable parties as beneficiaries of state obligations. While water use is governed mainly through treaties in the ecological cluster, in addition to loan agreements internal rules of the World Bank also govern the project in the economic cluster. The social justice cluster is also governed through treaties, but a certain role is also given to legally non-binding UN instruments. Finally, the ecological cluster is governed at the inter-state level, the economic cluster through an international organisation (IO), and the social justice cluster both at the inter-state level and through IOs. Notwithstanding these observations, certain changes can be observed over time; changes that might pull the approach of the clusters towards the same direction, though they might use different language for the very same phenomenon. In other words, one might say that traces of constitutionalisation can be spotted in global water governance. This 'pulling force' is the acknowledgment that water has different dimensions (or different uses in other words), which somehow all need to be addressed, and eventual conflicts between the dimensions need to be balanced.

4.3. Constitutional Shaping of Global Water Governance

Where would further or closer constitutionalisation lead to in global water governance? How would further constitutionalisation shape global water governance? These are rather hypothetical questions, given the fact that international law is generally seen as fragmented – both in institutional and substantive sense –, not only with regard to global water law. Nevertheless, in an ideal constitutional situation, global water governance and

global water law would become de-fragmented.¹¹⁸ This de-fragmentation can take place in two ways. First, the different clusters could become part of the same system aiming to achieve the same objectives and having a coherent and overarching global enforcement mechanism (*constitutionalisation proper*). Second, de-fragmentation can also be achieved if it is ensured that, although operating in their own sphere, each cluster incorporates the points of the other cluster when making decisions (*constitutionalisation light*). In this latter case, the purpose of the different clusters would be to help achieve appropriate balancing between the interests and needs. Such balancing would require that attention be devoted to the (potential) clashes between privatisation and human rights, privatisation and sustainability, sustainability and state sovereignty and territorial integrity and so on.

In addition to harmonising the material scope, de-fragmentation will also be achieved in relation to the constituency¹¹⁹ (or personal scope) as well as the locus and form of the decision-making in the global arena. Further constitutionalisation would probably entail that the distinction between the global and the national constituencies disappears and individuals and groups can become direct addressees and beneficiaries of global decision-making. This development also seems to be required by the fact that water is a public good. All in all, the result of stronger constitutionalisation would be a common value-based, de-fragmented, more inclusive and less state-centred governance with global enforcement and monitoring mechanisms.

There are, however, certain obstacles or problems that constitutionalisation faces. At least, three of such issues can be identified. One of the main difficulties is how to obtain state consent for further constitutionalisation. Second, and closely related to this previous point, so far most of the developments have been achieved by strictly defined inter-state relations, and in the economic cluster by the World Bank. This point then raises the question whether states would be willing to transfer some important aspects of their sovereignty to one global water governance body. The argument has been made that 'States are unwilling to select one forum for a comprehensive approach with which to deal with all problems; and one comprehensive forum for global sustainable development governance uniting trade, investment, development and environment may not be feasible.'¹²⁰ Last, the

118. On de-fragmentation see A. van Aaken, 'Defragmentation of Public International Law through Interpretation: A Methodological Proposal', 16 *Indiana Journal of Global Legal Studies* 483 (2009). Dunoff and Trachtman argue that '[t]o the extent that fragmentation arises because of the lack of centralized legislative and adjudicative institutions, constitutionalization can respond by providing centralized institutions or by specifying a hierarchy among rules or adjudicators. That is, constitutionalization can be seen as a way of introducing hierarchy and order, or at least a set of coordinating mechanisms, into an otherwise chaotic system marked by proliferating institutions and norms.' Dunoff and Trachtman, *supra* n. 43, at 8.

119. N. Krisch, 'The Pluralism of Global Administrative Law', 17 *European Journal of International Law* 247, at 269-274 (2006).

120. Gupta and Sanchez, *supra* n. 9, at 19.

117. Gupta and Sanchez, *supra* n. 9, at 12-13.

substantive rules or constitutional principles of global water governance also need procedural guarantees.¹²¹ Indeed, Cottier argued that '[p]rocedures are key and where they are lacking, values cannot be realised.'¹²²

4.4. Solving Water Crisis through Constitutionalisation of Global Water Governance?

How would further constitutional shaping of global water governance contribute to solving, or at least provide some steps towards moderating, the global water crisis? As indicated above, in addition to the fragmented nature of water governance two main problematic issues – as main factors of the water crisis – have generally been identified: allocation of water and adaption to environmental changes.

As far as the first issue is concerned, it is undoubted that appropriate allocation is based on the idea of justice or fairness, and stems from the fact that natural resources, and thus water, are public goods. What does then 'appropriate allocation' mean? One might say that this is the focus of the human rights/social justice cluster. So this cluster is not only one of the three approaches towards water, but it is also a particular one, given its focus on human dignity and autonomy, which is the ultimate purpose and point of departure of constitutionalisation.¹²³ Hence, in order to be able to address this cause of the crisis through constitutionalisation, this cluster needs to be given a primary position in devising the common principles and values of global water governance.¹²⁴ Interestingly, the concept of equality or fairness can be found in each and every cluster to a certain extent, which then shows some willingness to take this issue on board.

The principle of sustainability (or ecosystem approach) was also considered to have a particular status, given its overarching nature. The need for adaptation/flexibility is part of this concept and/or stems therefrom, which then seems to be addressed to a certain extent at the level of principles in each cluster separately. In order to be able to address the crisis through further constitutionalisation (either constitutionalisation light or proper), sustainability should not be only one of the principles, but should also be a guiding one, and should serve as a 'building block' for adaptive management.

All in all, given their importance, it could be argued that these two principles could drive the constitutionalisation process with necessary specification and/or adjustments, and any potential clash between them should also be addressed in this process. If done so, it seems that these two main factors could be addressed – at least at the level of constitutional principles. The difficult process of implementation will, however, still raise sev-

eral questions and lead to ambiguities. This point then indicates that the problem might not be located at the level of constitutional principles, but at the level of implementation: how to interpret equality in concrete cases relating to water allocation,¹²⁵ how to create adaptive governance systems and so on. Constitutionalisation probably cannot answer these questions in itself, but can nevertheless indicate their importance by providing the principles with constitutional status.

Interestingly, in relation to fairness, Franck argued that '[j]ustice-based claims generally focus on distributive modalities and advance reasons for change in existing entitlements and patterns of distribution. ... They may sacrifice expectations of stability in exchange for a new and better order.'¹²⁶ In his view, norms such as equality would add dynamism to the system. However, in relation to constitutionalisation it has also been stated that 'constitutional arrangements are notoriously conservative'.¹²⁷ This observation relates to the system of checks and balances, the difficult amendment procedures as well as the slow process of changing an interpretation that had earlier been given to a constitutional principle. So to what extent such a constitutional stability can provide substratum for flexible approaches needed to address changes in the environment as well as distributive justice concerns? While the constitutionalisation process gives authority to the norms and equips them with an overarching nature, at the same time it also preserves what has been created in a particular moment of time.¹²⁸ This conclusion might then indicate that mechanisms that keep the interpretation of these principles fresh and alive might need to be set in place, procedures which GAL might envisage.

5. Through the Looking Glass of Global Administrative Law

Similar to GC, global administrative law is also a project to describe some trends and developments in international law using concepts from domestic (or rather public)¹²⁹ law. As hinted at above, GAL focuses on three main procedural issues,¹³⁰ that is, transparency, partici-

121. See, *inter alia*, T. Cottier, 'Multilayered Governance, Pluralism, and Moral Conflict', 16 *Indiana Journal of Global Legal Studies* 647, at 678 (2009).

122. *Ibid.*

123. Gupta, *supra* n. 37, at 51.

124. Peters argues that the concept of constitutionalisation is essentially based on humanity. A. Peters, 'The Merits of Global Constitutionalism', 16 *Indiana Journal of Global Legal Studies* 397, at 398 (2009).

125. It does not address the role of the private sector either. See, *inter alia*, Hey, *supra* n. 4, at 352; Biswas, *supra* n. 35, at 234-235.

126. Franck, *supra* n. 32, at 477.

127. G.W. Brown, 'The Constitutionalization of What?', 1 *Global Constitutionalism* 201, at 212 (2012).

128. See also Dunoff and Trachtman, *supra* n. 43, at 24. In their view, 'constitutions mediate between stability and change. ... In fact, some would say that this dynamic feature is a critical part, if not a constitution, then of a constitutive process in a society.'

129. E. Hey, 'International Public Law', 6 *International Law FORUM du droit international*, 149, at 151 (2004).

130. 'The focus of the field of global administrative law is not, therefore, the specific content of substantive rules, but rather the operation of existing or possible principles, procedural rules, review mechanisms, and other mechanisms relating to transparency, participation, reasoned decision-making, and assurance of legality in global governance.' B. Kingsbury, N. Krisch & R.B. Stewart, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* 15, at 29 (2005).

pation and access to justice.¹³¹ The underlying idea is that these procedural elements are necessary (but not sufficient) to ensure good governance, and enhance the accountability of the entities exercising public power. It has been argued that at the global level a global administrative space is being shaped, as increasingly more international institutions and other entities active in this arena are trying to comply with the requirements of good governance. This school is often regarded as being more unified than GC, in that it is more difficult here to find different sub-schools.¹³² The GAL-project emphasises its power to discover trends,¹³³ while also highlighting its normative potential.¹³⁴

In this light and similar to the GC analysis, (1) after tracing the trends of good governance in each cluster (*exploring*), a comparative section will address the following questions: (2) to what extent is GWG driven by the principles of ‘good governance’ (*mapping*), (3) what would further ‘compliance’ with these requirements, or further GAL-shaping of GWG, entail (*shaping*), and (4) whether and to what extent such shaping can contribute to solving the water crisis (*solving*)?

The following points will be highlighted in the analysis below:

1. To what extent is attention paid to *transparency* in the legal (either binding or soft law) documents?
2. How is *participation* ensured, who is enabled to participate, what is the nature of this participation?
3. Are there mechanisms enshrined through which the entities exercising public power can be held *accountable* for non-compliance with their obligations and/or which enable those affected to have *access to remedy*?¹³⁵

5.1. Exploring the Traces of Good Governance in the Clusters

5.1.1. The Ecological Cluster

• Transparency

Transparency towards state parties and riparian states is provided through different mechanisms. As indicated above, the 1997 Convention mainly focuses on inter-state relations. In terms of these inter-state relations transparency is mainly ensured by *regular exchange of data*¹³⁶ and *notification-consultation* procedures.¹³⁷ Simi-

131. See, *inter alia*, N. Krisch and B. Kingsbury, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’, 17 *European Journal of International Law* 1 (2006); D.C. Esty, ‘Good Governance at the Supranational Scale: Globalizing Administrative Law’, 115 *Yale Law Journal* 1490 (2006); C. Harlow, ‘Global Administrative Law: The Quest for Principles and Values’, 17 *European Journal of International Law* 187 (2006); Krisch, *supra* n. 120.

132. As explained above, in the more recent GC-literature GAL is regarded as being part of the research on discovering constitutionalisation trends at the global level.

133. Krisch and Kingsbury, *supra* n. 132, at 3.

134. *Ibid.*, at 5-10.

135. As explained above, the focus here is on the enforcement of compliance with obligations rather than exploring the mechanisms for constraining in general the exercise of public power.

136. Art. 9 of the 1997 Convention; Art. 8 of the 2008 Draft Articles. See also Arts. 6 and 12 of the Helsinki Convention.

137. Arts. 11-17 of the 1997 Convention.

larly, the Helsinki Convention and its Protocol I also require states (all states, and in particular riparian states) to ‘*cooperate in the conduct of research*’, the result of which shall be exchanged.¹³⁸

The Helsinki Convention and its Protocol I aim to achieve transparency through creating an obligation to provide the public with *access to information*.¹³⁹ The provisions not only lay down this obligation, they also define how this has to be ensured. Finally, Protocol I also emphasises the need for raising *public awareness* about the importance of the relationship between water and health as well as the rights, entitlements and obligations relating to water.¹⁴⁰

• Participation

An overarching or general principle of the 1997 Convention is the *equitable and reasonable participation of state parties*, as enshrined in its Article 5.¹⁴¹ Moreover, next to their general obligation to *cooperate*, as indicated above, states can also establish different *joint mechanisms*.¹⁴² Finally, *public participation* is a foundational principle in the Helsinki Protocol I, which lays down that

‘[a]ccess to information and public participation in decision-making concerning water and health are needed, *inter alia*, in order to enhance the quality and the implementation of the decisions, to build public awareness of issues, to give the public the opportunity to express its concerns and to enable public authorities to take due account of such concerns.’¹⁴³

Closely related to this aspect, the Protocol also requires the involvement of *locals*, when it enshrines that ‘due account should be given to local problems, needs and knowledge.’¹⁴⁴ Similarly, this Protocol also calls upon states to create a platform for parties, where ‘the public, private and voluntary sectors can make its contribution to improving water management for the purpose of preventing, controlling and reducing water-related disease.’¹⁴⁵

138. Arts. 5 and 13(4) of the Helsinki Convention; Art. 9(4) of the Helsinki Protocol I.

139. Art. 16 of the Helsinki Convention; Art. 10 of the Helsinki Protocol I.

140. Art. 9(i) of the Helsinki Protocol I.

141. ‘Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilise the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention.’

142. For instance, Art. 8(2) of the 1997 Convention enshrines that ‘[i]n determining the manner of such cooperation, watercourse States may consider the establishment of joint mechanisms or commissions, as deemed necessary by them, to facilitate cooperation on relevant measures and procedures in the light of experience gained through cooperation in existing joint mechanisms and commissions in various regions.’

143. Art. 5(i) of the Helsinki Protocol I.

144. Art. 5(n) of the Helsinki Protocol I.

145. Art. 4(5) of the Helsinki Protocol I.

- Access to Justice/Accountability¹⁴⁶

In this cluster different modes of accountability are present: ensuring compliance with obligations and providing access to justice for those affected. In terms of the former, the above-mentioned *joint actions* deserve particular attention under the 1997 Convention. In the Helsinki Convention two particular measures can be highlighted in the context of broader accountability: the obligation of parties to *monitor* the conditions of transboundary waters¹⁴⁷ (with particular rules for riparian states)¹⁴⁸ and ensure that *environmental impact assessment* is applied.¹⁴⁹ Protocol I also requires the establishment of ‘effective systems of monitoring’ in relation to disease.¹⁵⁰ Importantly, this Protocol vests the parties with the mandate to ‘*review the compliance of the Parties with the provisions of this Protocol*’.¹⁵¹

As opposed to these ‘broader’ accountability mechanisms, Protocol II was drafted in order to call upon states to provide access to justice by creating *civil liability* mechanisms for the benefit of individuals when ‘damages [are] caused by the transboundary effects of industrial accidents on transboundary waters.’¹⁵² Last, the 1997 Convention lays down that in case of transboundary harm watercourse States shall ensure cross-border access to justice without discrimination.¹⁵³

5.1.2. The Economic Cluster

- Transparency

Three main pillars of the transparency element can be distilled in the water-related reports of the World Bank. Interestingly, each of them relates to *communication* ensuring that the necessary information is shared and distributed. While the first is a general element, the two others are specifically related to certain projects. First, the Bank highlights in general the importance of *building knowledge and sharing it*.¹⁵⁴ ‘The Bank has been supporting client countries efforts to obtain better information

for decision-making.’¹⁵⁵ Second, in relation to ‘high-reward–high risk’ projects ‘with spillovers that go well beyond the country and the region’,¹⁵⁶ there is a need for the so-called ‘corporate projects’ approach, an ‘essential’ element of which is *communication*. In this context communication means ‘the development of a unified communication strategy for addressing head-on in an open manner the concerns of different stakeholders, including critics.’¹⁵⁷ Third, in relation to projects on international waterways, the Bank points to the need of *notification* of all riparians before financing a project on an international waterway.¹⁵⁸ In addition, the general rules concerning the decision-making within the Bank are also applicable.

- Participation

In this segment of the economic cluster two main focuses can be distinguished: in relation to each project of the Bank, participation of those who are or are potentially affected by the Bank financed project; and in relation to water projects, the participation of those who are suggested to be involved in the domestic decision-making. The requirement to ensure the *participation of project-affected people* is enshrined in the operational policies of the Bank.¹⁵⁹ The OP prescribes that ‘[w]here the project affects Indigenous Peoples, the borrower engages in free, prior, and informed consultation with them.’¹⁶⁰ Concerning resettlement, the OP lays down that ‘[i]n projects involving involuntary restriction of access to legally designated parks and protected areas ..., the nature of restrictions, as well as the type of measures necessary to mitigate adverse impacts, is determined with the participation of the displaced persons during the design and implementation of the project’.¹⁶¹ In water-related projects, and in particular concerning irrigation, the World Bank pinpoints the need for ‘[s]caling up *user associations* and ensuring that they are representative of all farmers’,¹⁶² thus emphasising the participation of these groups of people.

- Access to Justice/Accountability

Similar to the ecological cluster, two main modes of accountability can be distinguished in this cluster too: ensuring compliance with obligations and ensuring access to justice of those affected.

146. Although most states that ratified the Helsinki Convention are also parties to the Espoo (Convention on Environmental Impact Assessment in a Transboundary Context, adopted on 25 February 1991, entered into force on 10 September 1997) and Aarhus Conventions (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted on 25 June 1998, entered into force on 30 October 2001), which impose more far-reaching obligations on states in terms of accountability, the focus here will be on the duties of states under the Helsinki Convention.

147. Art. 4 of the Helsinki Convention.

148. Art. 11 of the Helsinki Convention.

149. Art. 3(1)(h) of the Helsinki Convention.

150. Art. 4(2)(e) of the Helsinki Protocol I.

151. Art. 15 of the Helsinki Protocol I (emphasis added).

152. Art. 1 of the Helsinki Protocol II.

153. Art. 32 of the 1997 Convention. ‘Unless the watercourse States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who have suffered or are under a serious threat of suffering significant transboundary harm as a result of activities related to an international watercourse, a watercourse State shall not discriminate on the basis of nationality or residence or place where the injury occurred, in granting to such persons, in accordance with its legal system, access to judicial or other procedures, or a right to claim compensation or other relief in respect of significant harm caused by such activities carried on in its territory.’

154. See, *inter alia*, Water Resources Sector Strategy, at 13; *Sustainable Water for All*, at xiii or at 57.

155. *Sustainable Water for All*, at 36.

156. Water Resources Sector Strategy, at 48.

157. *Ibid.*, at 48.

158. Compare with the recommendation of the World Commission on Dams, according to which ‘where a government agency plans or facilitates the construction of a dam on a shared river in contravention of the principle of good faith negotiations between riparians, external financing bodies withdraw their support for projects and programs promoted by that agency.’ *Ibid.*, at 78.

159. OP 4.10 and 4.12.

160. OP 4.10, para.10. In addition, ‘the Borrower is required to conduct a social assessment to help assess the scope and extent of adverse impacts, and to discuss proposals to avoid, or minimize and mitigate them.’ Water Resources Sector Strategy, at 78.

161. OP 4.12, para 7.

162. Water Resources Sector Strategy, at 15 (emphasis added).

One manner to ensure better compliance, as the Progress Report points out, is *better monitoring of the water projects*, and for this reason ‘the Bank has begun developing a screening tool for water projects and will explore how it can be implemented in water projects.’¹⁶³ In addition, ‘the Bank will conduct a more thorough review of the financial aspects of water projects ..., strictly enforce the projects’ financial covenants related to cost recovery, and pay more attention to financial issues in water projects in general.’¹⁶⁴ This aspect also relies on a broad conceptualisation of accountability, and emphasises the need for continual assessment and evaluation by the Bank in order to ensure the proper financial management of projects.

In addition, better compliance can be guaranteed by *efficient/effective working* of the projects, a clear emphasis in the reports. *E.g.* the Bank highlighted the importance of ‘effective and equitable use of utility subsidies’ at the country level, which is assisted by the use of Water Public Expenditure Reviews (PERs).¹⁶⁵ A related point is the so-called GAC (Governance and Anti-Corruption) strategy, which requires that ‘water projects address governance at the sector level by strengthening transparency, accountability and participation across the value chain’.¹⁶⁶ These two strategies aim to ensure the efficient implementation of the projects at the domestic level. In addition, this approach seems to indicate a strong correlation between the extent of effective management of the projects and the degree of accountability. Access to justice is guaranteed through the establishment of the *Inspection Panel*. Those who may be adversely affected by a Bank-financed project can submit their complaint to this forum. The task of the Inspection Panel is to determine whether there has been a violation of the operational policies and procedures by the Bank.¹⁶⁷

5.1.3. The Social Justice Cluster

• Transparency

Undeniably, General Comment 15 highlights the need for access to information throughout the text. An essential factor for determining the *adequacy* of water required for human right to water is ‘*information accessibility*’, which ‘includes the right to seek, receive and impart information concerning water issues.’¹⁶⁸ As a

163. *Sustaining Water for All*, at 52.

164. *Ibid.*, at 56. ‘The Bank will continue to improve the performance of the water portfolio’, and ‘will continue to focus on the quality of its engagement in the sector through regular portfolio monitoring.’

165. *Ibid.*, at 32. ‘Water PERs have proved a useful instrument for dialogue with client countries to tackle the issue of sustainability of water utilities and tariffs’.

166. *Ibid.*, at 30.

167. On the Inspection Panel see more here: <www.inspectionpanel.org> (last visited 22 October 2012). See also Citizen-driven Accountability for Sustainable Development: Giving Affected People a Greater Voice – 20 Years On. A contribution to Rio+20 by the Independent Accountability Mechanisms Network, 2012. For an academic analysis of the Inspection Panel as a quasi-judicial oversight body, see A. Naudé Fourie, ‘The World Bank Inspection Panel and Quasi-judicial Oversight: In Search of the “Judicial Spirit”’, in *Public International Law* (2009).

168. General Comment 15, para. 12(c)(iv).

core obligation, it explicitly calls upon governments ‘to adopt and implement a *national water strategy* and plan of action’, which ‘should be devised, and periodically reviewed, on the basis of a participatory and transparent process’.¹⁶⁹ Finally, individuals and groups should also be *timely and fully informed about the proposed measures* that might interfere with their right to water, as well as be provided with the necessary ‘legal assistance for obtaining legal remedies’.¹⁷⁰

While the general comment focuses on the individuals’ access to information in relation to their water rights, the GA resolution on human right to water and sanitation emphasises the need for *capacity-building and technical transfer* by states in order to help each other, as well as provide financial resources ‘in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all’.¹⁷¹ Such efforts, if complied with, are also important aspects of transparency – accessibility of the available technical and scientific information relating to water and water management.

• Participation

General Comment 15 explains the different forms of state obligations: respect, protect and fulfil. The right to *participation in relevant decision-making processes* is embedded in the obligation to protect.¹⁷² Similarly, as also referred to in relation to transparency, ‘[t]he formulation and implementation of national water strategies and plans of action should respect, *inter alia*, the principles of non-discrimination and people’s participation. The right of individuals and groups to participate in decision-making processes that may *affect* their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water.’¹⁷³ This last point clearly pinpoints the close link to, or blurred boundaries with, transparency and access to information.

• Access to Justice/Accountability

Similar to the above clusters, both modes of accountability can also be found in the social justice cluster, which are, however, more intertwined here. Under the *obligation to protect*, states are expected to establish independent *monitoring mechanisms* as well as to impose *penalties* ‘[w]here water services ... are operated or controlled by third parties’ in order to prevent and effectively address abuses.¹⁷⁴ As part of the core obligations, the general comment lays down that states need to *monitor the realisation of the national water strategy*. States might also adopt *framework legislations* for the implementation of their water strategy. This legislation then should set up ‘institutional responsibility for the process’, ‘national mechanisms for its monitoring’, and ‘remedies and recourse procedures’.¹⁷⁵ In addition to the responsibility

169. *Ibid.*, paras 37(f), 48 and 49 (emphasis added).

170. *Ibid.*, para. 56.

171. GA Human right to water and sanitation, para. 2.

172. General Comment 15, para. 24.

173. *Ibid.*, para. 48 (emphasis added).

174. *Ibid.*, para. 24.

175. *Ibid.*, para. 50.

of states for the national strategy, the Committee, using rather strong language, also lays down that '[a]ny persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels'.¹⁷⁶ Finally, states' compliance with their treaty obligations are monitored by the Committee on Economic, Social and Cultural Rights. Citizens of those states that have ratified the Optional Protocol can also submit individual communications to this Committee, which is a form of access to justice.¹⁷⁷

5.2. Mapping the Current Status of Good Governance in Global Water Governance

Two main observations can be made about the nature of the crisis when read through the lenses of GAL as explored in each cluster. First, as the above overview illustrated and similar to the constitutional aspects, each cluster uses different forms and mechanisms to ensure good governance. One can, nevertheless, find some recurring elements relating to good governance: the importance of information exchange, the involvement of certain affected entities in the decision-making process and monitoring. Remarkably, the question of who is involved seems to depend to a great extent on the personal scope of the particular cluster. While the ecological cluster relies on the concept of reasonable and equitable participation of states, the economic as well as the social justice cluster both emphasise the participation of individuals/groups affected by the measures at stake.

Second and notwithstanding these elements, the system is yet far from fully complying with the requirements of good governance. On the one hand, the lack of (quasi-)judicial enforcement mechanisms at the global level is remarkable in two of the clusters.¹⁷⁸ On the other hand, some of the norms relating to participation and transparency are somewhat vague in that indication of concrete forms, means, channels or mechanisms is lacking, meaning also that they are open to different interpretations and/or compliance with these norms are hard to enforce.

One must admit, though, that the extent to which one can talk about good governance is difficult to measure mainly because these procedural arrangements can be devised only against or in relation to substantive rules

that give directions to them.¹⁷⁹ Without such substantive rules, the processes have no actual basis: it is then unclear what should be transparent, who should participate in what, and what kind of accountability mechanism needs to be devised. In other words, the appropriateness of these procedural measures cannot be assessed in themselves, they need to be set against the substantive rules. Indeed, it can be observed that each cluster has its own mechanism – similarly to the constitutional analysis – which implies that they are set up in the light of the existing substantive rules within their own cluster. If we further follow this line of thought, it can be argued that good governance can only be ensured if and to the extent global water governance is constitutionalised.

5.3. Administrative Shaping of Global Water Governance

From the above, it would follow that to the extent constitutionalisation is possible and will be achieved, good governance is also conceivable. Nevertheless, constitutionalisation in itself will not bring about good governance, the procedural guarantees need to be adapted to those constitutional guarantees and need to be designed in accordance with them. These administrative measures then will ensure proper control by the constituencies on the decision-making processes with regard to each cluster. Indeed, it has been argued that

procedural fairness needs to be enhanced in global water law by introducing a degree of formalism, associated with the rule of law, in decision-making procedures, both to ensure that the outcomes are fair in terms of distributive justice at the level of both states and individuals, but also to enhance, what Lon Fuller found distinguishes law from other normative systems, good process.¹⁸⁰

So the potential effects of further ensuring good governance could be the following: defining the constituencies (addressees and beneficiaries), creating legitimate procedures, establishing institutionalised accountability mechanisms, and designing stable feedback channels. Similar to constitutionalisation, states' willingness and consent to establish more formal and effective procedures are the main obstacles to achieving further administrative shaping of global water governance.

5.4. Solving Water Crisis through Ensuring Good Governance in Global Water Governance?

Can good governance address the two main factors of water crisis? As indicated above, good governance struc-

176. *Ibid.*, para. 55. See also para. 56.

177. The Optional Protocol enshrining individual communications was adopted in 2008 and is open for ratification since 2009. As of 3 February 2013 the tenth ratification required for entering into force has been achieved.

178. Although the Committee on Economic, Social and Cultural Rights has been ratified by the tenth state on 3 February 2013, the individual complaint mechanism, a form of quasi-judicial enforcement, will only be applicable for these ten countries. The monitoring activity of the Committee is different from this quasi-judicial review.

179. Concerning the GAL initiative it has been argued that 'in the absence of a simultaneous critique and reform of substantive law, GAL has only a limited potential to further the cause of democracy and justice in the international system. Indeed, without a concurrent concern with substantive law GAL may merely go to legitimize unjust laws and institutions.' B.S. Chimni, 'Cooption and Resistance: Two Faces of Global Administrative Law', IILJ Working Paper 2005/16 Global Administrative Law Series, at 2-3. See also Harlow, *supra* n. 132, at 189-190.

180. Hey, *supra* n. 4, at 369 (emphasis added).

tures can be designed in the light of substantive principles giving guidance to the procedural principles of transparency, participation and accountability. If the constitutional principles relating to fairness/equality and adaptation/sustainability are adopted as driving principles, the question to be asked is whether GAL can further contribute to solving the water crisis and/or eventually filling the gaps constitutionalisation leave behind?

Global administrative law focuses on procedure, or one might say ensuring legitimate or fair procedures. These procedures also have to enable fair allocation of water resources and the operation of adaptation mechanisms. They both require ample flexibility in the procedures, which, given their formal nature, might, however, be difficult to achieve in practice. Franck argued that procedures in themselves create order and stability in that they bring formalism into the decision-making processes,¹⁸¹ at the same time they can also bring dynamism into the inherently conservative constitutional relations and help keep the interpretation of constitutional concepts and principles up-to-date through participatory or accountability 'conversations'. Such dynamic inclusionary mechanisms could provide useful guidance for actual implementation, and could lead to de-fragmentation of both substantive and procedural rules.

6. IWRM through the Lenses of GC and GAL

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If IWRM is seen through the lenses of GC, it can be clearly identified as a constitutional value or principle, as was indeed the case in the economic and ecological clusters. Although, one might say, essentially a management and ecological principle, IWRM has the potential to be read as a foundational principle of global water law. In that case, the principle could contribute to (further) constitutionalisation, and in particular de-fragmentation, of GWG by laying down the foundations thereof, that is an integrated treatment of all aspects of water resources. This 'integration' would imply that even if different clusters remained operating (constitutionalisation light), they would need to incorporate the principles of each cluster when making decisions or adopting certain policies. Irrespective of the fact whether or not institutional de-fragmentation will ever take place (constitutionalisation proper), IWRM as a constitutional principle has, accordingly, the power of achieving functional de-fragmentation. The focus of IWRM in this understanding is on ensuring equality¹⁸² and sustainability,¹⁸³ while combining each cluster. If this,

181. Franck, *supra* n. 32, at 477.

182. '... to maximize economic and social welfare in an equitable manner'. <www.gwp.org/The-Challenge/What-is-IWRM> (last visited 22 October 2012).

183. '... without compromising the sustainability of vital ecosystems and the environment.' < www.gwp.org/The-Challenge/What-is-IWRM> (last visited 22 October 2012).

indeed, is the case, then it also means that IWRM as a constitutional principle focuses on addressing the two main factors of water crisis, that is allocation of water resources and mitigating the effects of climate change, in parallel with having a de-fragmentation pull.

IWRM can also be placed in the GAL narrative, and can be interpreted as a procedural concept. This understanding is actually supported by the second principle of the Dublin Principles (1992) from which this concept originates.¹⁸⁴ This principle emphasised the need to create a participatory system of water management. Under this interpretation, the focus of the concept is on '*coordinated development and management of water, land and related resources*'.¹⁸⁵ In other words, the aim of such an approach would be to create a platform where the different stakeholders representing different interests relating to water can participate and work together in order to ensure that the different purposes for which water is used are balanced keeping in mind the three main features of water (ecological, economic and human rights). IWRM then implies that information relating to each cluster should be made available (and should be collected); participation in the decision-making should be ensured; and accountability mechanisms should also be devised for addressing complaints relating to each cluster. When creating this platform, IWRM further requires that the principles of equality and sustainability be observed. Important to note is that while IWRM as a procedural principle seems to focus on the need to create an interdisciplinary and inter-sectoral platform, it does not specify who should actually participate (in the broader sense) on this platform and what this platform should look like.¹⁸⁶

Could the introduction of the concept of IWRM help solve the water crisis in addition to further constitutionalisation and designing good governance? The above analysis indicates that IWRM, if read as a constitutional principle, inherently incorporates the answers to the main factors of water crisis: it aims to ensure fair allocation and flexibility for adaptation.¹⁸⁷ So it could essentially act as a guiding principle, and if applied in each cluster it could at least lead to constitutionalisation light. When seen as a procedural concept, IWRM gives somewhat more concrete guidance about the need to create common platforms and coordination; *i.e.* to integrate different approaches through participation (in the broad sense). So in this regard IWRM also leads to further

184. 'Principle No. 2: Water development and management should be based on a participatory approach, involving users, planners and policy-makers at all levels.' Dublin Statement on Water and Sustainable Development, adopted on 31 January 1992, <www.un-documents.net/h20-dub.htm> (last visited 22 October 2012).

185. <www.gwp.org/The-Challenge/What-is-IWRM> (last visited 22 October 2012).

186. The concept of 'affectedness' might serve as a good candidate for identifying those entitled to participate as well as the constituency.

187. It has been argued that '[m]any of the principles that underlie the process of IWRM planning also lend themselves to effective adaptation planning. ... The adaptive nature of IWRM planning and implementation are precisely what will be necessary to address the uncertainties and changing information related to climate impacts that will trigger various adaptation responses.' Bruch and Troell, *supra* n. 38, at 831.

formalisation of procedures. The very fact that a principle can be interpreted both as a substantive and a procedural concept also confirms their interrelatedness. Given the vagueness of the principle,¹⁸⁸ however, similar obstacles remain as with regard to achieving constitutionalisation or the introduction of more formalised procedures. Indeed, this principle has been criticised for not giving ample guidance how it should be implemented in practice, that is the reason why compliance therewith is lacking behind. In general, IWRM is addressed to states with regard to domestic water uses under the ecological cluster (and increasingly more under the economic cluster), in relation to which the above critical comments were made. Based on this, it can also be expected that the principle would face the same concerns at the global level as it does at the domestic level.

5. Final Reflections

Through this comparative analysis important insights have been gained not only into global water governance, but also into the relationship between global constitutionalism and global administrative law.

The analysis revealed that at present GWG is indeed fragmented, in that the three clusters operate separately, rely on different principles, and use different procedures – with negative impact on the legitimacy of global water governance. This difference can probably be linked back to the diverse personal scopes as well as the diverse loci and forms of governance of each cluster. In addition, formalised participatory procedures are almost absent in global water governance, with the exception of the economic cluster. Remarkably, it seems as if the trend of constitutionalisation in water governance is stronger than that of the formalisation of procedures. The constitutionalisation trend might be interpreted as illustrating that states are somewhat more willing to agree upon substantive principles as long as no or no strong procedural rules are attached to them – besides classical international dispute settlement mechanisms.

Concerning the relationship between global constitutionalism and global administrative law the following three main observations can be made. First, both theories are somewhat idealistic in that they use ambitious concepts and ideas that might be difficult to achieve in practice. At first sight, GAL seems to paint a somewhat more realistic picture because it adopts a hands-on approach suggesting concrete steps to be taken, while GC gives the impression of a much more romantic painting in that it envisions and relies on the grandiose idea of one community united for common goals. However, and this is the second observation, the analysis also revealed that the appropriateness of procedural rules (GAL) can be assessed only in light of substantive rules (GC), which might also have some implications for the

relationship between these two theories. If read in this light, then GAL might not seem to use more realistic strokes than GC. Moreover, this substantive-procedural relationship might also imply that ‘global constitutionalism stands in the background as the constitutive other to the construction of the identity of global administrative law’.¹⁸⁹ If not necessarily for GAL’s identity, but GC is definitely important for giving guidance for the shaping of the administrative procedures. Third, this link between substantive-procedural issues also illuminates Franck’s theory on substantive and procedural fairness. In Franck’s view there is a tension between the two concepts of fairness due to their advancement of change and order, respectively. If placed within the context of constitutionalisation, this pull towards change and order can also work the other way around, as argued above. In any event, the point of substantive and procedural rules being inherently linked is also adduced by Franck who concluded that

while claims of legitimacy and justice can be symbiotic, they may also be adversarial. Since legitimacy and justice together constitute fairness which is perceived as such, it is inevitable that fairness discourse will, in large measure, take the form of attempts to reconcile claims of legitimacy with those of distributive justice.¹⁹⁰

This is what IWRM is essentially promoting: combining (‘integrating’) the focus on substantive, fairness-driven issues with procedural consequences.

The paintings of the two schools implicitly promote de-fragmentation and formalisation as tools for addressing water crisis, and enhance the legitimacy of GWG. While de-fragmentation and formalisation might be desirable from a legal perspective, politically they seem difficult to achieve. The two paintings nevertheless leave us with the following reflective questions: is it possible to get beyond the inter-state paradigm and think globally; can we create solidarity among states and among citizens?

188. See, *inter alia*, M. Muller, ‘Fit for Purpose: Taking Integrated Water Resource Management Back to Basics’, 24 *Irrigation and Drainage Systems* 161, at 165 (2010)

189. Ming-Sung Kuo, ‘Between Fragmentation and Unity: The Uneasy Relationship Between Global Administrative Law and Global Constitutionalism’, 10 *San Diego International Law Journal* 439, at 466 (2009).

190. Franck, *supra* n. 32, at 476.