Global Constitutionalism (2019), 8:1, 12–28 © *Cambridge University Press, 2019*
doi:10.1017/S204538171800031X

The ideologies of global constitutionalism

ADAM SHINAR
Harry Radzyner Law School, The Interdisciplinary Center (IDC), Herzliya, Israel

Email: ashinar@idc.ac.il

Abstract: This introduction sets the stage for the special issue on the 'ideologies of global constitutionalism'. It describes the competing approaches for conceptualising and analysing global constitutionalism. It then turns to highlight the overlooked ideologies underlying global constitutionalism through a thematic exposition of the articles in the special issue. In particular, the introduction questions the conventional link between global constitutionalism and neo-liberalism, explores a materialist analysis of global constitutionalism, analyses the validity of the liberal global constitutionalist paradigm for non-liberal regimes, and discusses the potential for the abuse of that liberal paradigm through the migration of constitutional doctrine.

Keywords: global constitutionalism; ideology; materialism; neo-liberalism; populism

I. Overview

We live in an increasingly globalised world, yet the implications of this oft-repeated statement frequently remain opaque. Mentions of 'globalisation' often conceal more than they reveal; obscure more than elucidate. Of the many things that have thought to have been 'globalised', or are in the process of 'globalising', constitutionalism and constitutional law have been, for the past two decades, central to jurists, political scientists, and international relations scholars.[1] At the same time, questions about what, exactly, is the focus of global constitutionalism, abound. Indeed, the literature on global constitutionalism covers the gamut from seeking to reconstruct international institutions according to constitutionalist features to the study of constitutional migrations among jurisdictions; from international relations and international law, to constitutional law and comparative constitutional law.[2]

[1] See, e.g., AF Lang and A Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar Press, Cheltenham, 2017).

[2] See, e.g., A Peters, 'The Merits of Global Constitutionalism' (2009) 16(2) *Indiana Journal of Global Legal Studies* 397.

https://doi.org/10.1017/S204538171800031X Published online by Cambridge University Press

The project of global constitutionalism is both multi-layered in terms of governance (local, state, regional, international, and supranational institutions) and multi-disciplinary. It is a positive project, seeking to describe the myriad ways in which institutions take on constitutional features, the ways in which constitutions affect the international legal order, and the ways in which constitutional values, principles and doctrines, travel, change and take shape. It is also a normative project facing challenges from those who claim that global power undermines domestic sovereignty, the locus of which is the state.[3] By contrast, global constitutionalism is hailed by others as bolstering the legitimacy deficit of the international legal order.[4] It bears the promise of universal standards and benchmarks, while also generating concern precisely over the promise of uniformity and hegemony and the concomitant loss in diversity.[5]

In these senses, the project of global constitutionalism examines two distinct, though interrelated, phenomena: First, the extent to which domestic constitutional law is converging (or should converge) on common global standards. Second, the extent to which supranational institutions incorporate (or should incorporate) constitutional features. As such, global constitutionalists are engaged both in mapping the constitutional terrain, especially on the transnational and international fronts, and simultaneously seeking to shape common standards that might bring about convergence.[6]

This special issue seeks to understand what constitutes the phenomenon of global constitutionalism. It does so, however, not by seeking penultimate definitions and conceptualisations, but by interrogating its underlying and possible ideologies; by looking at global constitutionalism from the outside – an external view (e.g. what are the origins underpinning the rise in global constitutionalism), and from the inside (e.g. the migration of particular constitutional doctrines). The question – 'what is global constitutionalism?' – is, of course, not new. Yet this special issue takes a critical view of global constitutionalism, by looking at it from an ideological perspective, shedding light on its assumptions, and how those play out in its day-to-day functioning. In particular, the articles in this special issue do not see constitutions as exclusive vehicles of liberal democracies, promoting human rights, democracy, the rule of law, conflict

[3] See, e.g., E Young, 'The Trouble with Global Constitutionalism' (2003) 38(3) *Texas Journal of International Law* 527.

[4] Ibid.

[5] See, e.g., M Cohen-Eliya and I Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, Cambridge, 2013).

[6] For some of these directions, see CE Schwöbel, 'Situating the Debate on Global Constitutionalism' (2010) 8(3) *International Journal of Constitutional Law* 611. On the mapping/shaping distinction, see Peters (n 2) 397.

https://doi.org/10.1017/S204538171800031X Published online by Cambridge University Press

resolution, and restraint of political power.[7] They highlight ways in which constitutions can be used to advance non-democratic aims, structure and reflect the undergirding social relations, preserve power asymmetries, and promote policies favoured by economic elites.

In the pages that follow I paint, in broad brushstrokes, the discourse on global constitutionalism. I then situate the four articles in this special issue, while emphasising how they seek to depart from this discourse by charting new possibilities of understanding and conceptualising global constitutionalism.[8]

II. Mapping the discourse on global constitutionalism

No consensus can be reached on the precise definition of global constitutionalism. In an earlier editorial, global constitutionalism was defined as 'the global field of diverse, formal and informal assemblages of laws and governance, norms and actors that exhibit *constitutional qualities*'.[9] These constitutional qualities often include, among others, separation of powers, structuring the state apparatus, individual rights guarantees, and the establishment of courts and procedures to maintain the rule of law, and they are often used to describe constitutions, constitutional systems or processes of constitutionalisation.[10]

This tells us little, however, about the 'global' in global constitutionalism. Although constitutionalism sits at the intersection of law and politics,[11] it has long been viewed as the purview of domestic affairs. Linking constitutionalism with the 'global' opens up several alternate possibilities, the most common are the following three. One, the constitution of the global, which means making international law and international organisations more constitutional in operation by taking on constitutional features and qualities.[12] As Anne

[7] Indeed, constitutions are often viewed as good, per se, promoting democracy, human rights, and the rule of law. See C Bell, 'Introduction: Bargaining on Constitution – Political Settlements and Constitutional State-Building' (2017) 6(1) *Global Constitutionalism* 13, 18. See also the work of the Venice Commission, proceeding on this assumption.

[8] Of course, the possibility of non-democratic forms of constitutionalism is not disputed, nor is the endurance of power politics both within and beyond the state. See M Kumm *et al.*, 'How Large is the World of Global Constitutionalism' (2014) 3(1) *Global Constitutionalism* 1, 5.

[9] J Tully *et al.*, 'Introducing Global Integral Constitutionalism' (2016) 5(1) *Global Constitutionalism* 1, 2 (original emphasis).

[10] Ibid.

[11] KM Fierke, 'Introduction: Independence, Global Entanglement and the Co-Production of Sovereignty' (2017) 6(2) *Global Constitutionalism* 167.

[12] GW Brown, 'The Constitutionalization of What?' (2012) 1(2) *Global Constitutionalism* 201; M Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (2006) 8(1) *Theoretical Inquiries in Law* 9.

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Peters has noted, this is an agenda, or perspective, that both describes and advocates the application of constitutionalist principles in the international legal sphere.[13] Two, the rise of constitutionalism and constitutionalisation as a worldwide phenomenon. As many have documented, there has been in increase in constitutional activity at the national level in the aftermath of the Second World War. According to one important empirical study, this has led both to constitutional convergence and divergence.[14] More generally, intense constitutional activity generates what has been referred to as 'constitutional migration' in concepts, rights, and doctrines.[15] Three, the internationalised practice of promoting and regulating the domestic production of constitutional texts.[16] This can be seen, for example, in the work of the Venice Commission, among others.[17]

Much ambiguity is raised by these related possibilities. But for my purposes it suffices that global constitutionalism introduces a tension. Global influences are perceived as external, whereas constitutions are

[13] Peters (n 2) 397. For an explication of the global constitution see A Peters, 'Global Constitutionalism Revisited' (2005) 11 *International Legal Theory* 39 describing the move in international law and relations from cooperation to constitutionalisation. This is, in Peters' words, a reconstructive academic artifact, reconstructing portions of international law as international constitutional law. This is due to a hollowing out of national constitutions, as certain tasks are increasingly performed outside the state. Moving from domestic law to 'governance' thus generates a demand for constitutionalisation. Consequently, constitutional reconstruction seeks to legitimise global governance by contributing to a universally acceptable transnational network of legal orders.

[14] DS Law and M Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99(5) *California Law Review* 1163. Convergence in the sense that constitutions can be grouped into two clusters (libertarian or statist). Within each cluster there is convergence, and the divergence occurs between these ideological clusters.

[15] S Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, Cambridge, 2007).

[16] Bell (n 7) 32.

[17] To be sure, other classifications exist in the literature, with some affinity to those offered above. For Brown, *The Constitutionalization of What?* (n 12), constitutionalisation can mean 1) the formal and legal processes involved in constituting (codifying) a legal order, either through a hierarchical structure or a network of interconnected legal regimes. This is where rights and duties and adjudicative mechanism are established 2) making an entity subject to a constitutional order 3) informal and extra-legal processes of norm solidification and normative convergence. The editors of *Global Constitutionalism* identify three schools of thought: Normative (geared toward moral and political ideals), Functionalist (studying the processes of constitutionalisation as revealed through negotiations and bargaining of international organizations, a taxonomic rather than normative approach), and Pluralist (those who focus on constitutionalisation beyond the state and view it with equal importance). A Wiener *et al.*, 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law' (2012) 1(1) *Global Constitutionalism* 1.

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conventionally conceived of as a site of internal domestic activity.[18] This tension, in turn, generates anxieties over its negotiation. On one end of the spectrum there are the familiar charges of global constitutionalism undermining sovereignty and displacing law-making capacity.[19] This claim has been met with two types of responses: descriptive and normative.

The descriptive response is that despite emphasis on the 'global', we remain tied to the nation state.[20] Indeed, legal and political features of the nation state are reinforced by a global constitutionalist order. Global constitutionalism lends power to the nation state, by recognising it as the relevant unit of analysis. States seemingly cede power to transnational and global regimes, but in a way that is supportive of the state project itself.[21] Despite our pluralistic legal universe, states still comprise the members of international organisations such as the UN, NATO or ASEAN. But they are also powerful shapers of policy even when they do not take a direct part in NGOs, since often (perhaps almost always), NGOs apply pressure on states to change state policy. Moreover, as Peer Zumbansen argues, presenting globalisation as a threat to sovereignty is an ahistorical view of international history, which has always had an uneven distribution of political and economic powers.[22]

By contrast, the normative responses acknowledge the threat to democratic governance posed by global constitutionalism. The responses either try to show that supranationalism offers an attractive version of democracy,[23] or attempt to uncouple legitimacy from democracy. Thus for Sadurski, for example, the legitimacy of supranational authorities is grounded in the

[18] This perceived tension is not shared by all. Martin Loughlin maintains that global constitutionalism is an oxymoron, since state and sovereignty are expressions of unity and closure. Being sovereign means being a source of the law. The fallacy, he argues, is that constitutional pluralists replace the state with the constitution. See Loughlin, constitutional pluralism an oxymoron. M Loughlin, 'Global Pluralism: An Oxymoron?' (2014) 3(1) *Global Constitutionalism* 9.

[19] Young (n 3).

[20] Although Law and Versteeg (n 14) demonstrate the domestic constitutional text is no longer primarily a statement of national identity, be it for reasons of conformity, learning, competition, or network effects.

[21] PF Kjaer, *Constitutionalism in the Global Realm: A Sociological Approach* (Routledge, Oxford, 2014). For a deeply statist account linking constitutionalism with sovereignty see Loughlin (n 18).

[22] P Zumbansen, 'Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order' (2012) 1(1) *Global Constitutionalism* 16.

[23] EO Eriksen, 'The Question of Deliberative Supranationalism in the EU' (1999) ARENA Working Papers 99/4 <https://www.sv.uio.no/arena/english/research/publications/arena-working-papers/1994-2000/1999/wp99_4.htm>. Anne Peters argues that global governance and globalisation generate deconstitutionalisation on the domestic level, so global constitutionalism compensates for this loss – see Peters (n 2) 404–5.

https://doi.org/10.1017/S204538171800031X Published online by Cambridge University Press

type of reasoning they deploy – public reason. Even if there is a democratic deficit, public reason can provide the necessary legitimation. On this view, supranational authorities can reinforce national democracies due to their insistence on public reason.[24] These varied responses thus present global constitutionalism as a salve against the anxieties brought about by globalisation.[25]

Much of the literature on global constitutionalism can thus be read against the background of hope. In a world where states are still powerful, but no longer the self-contained units they supposedly were (and they were never that, of course), global constitutionalism seeks to deliver a method to make sense of the plurality of the overlapping and connected norms, processes, and institutions.[26] But it is not only conceptual clarity that is sought. There is a deeper normative commitment to the values of human rights, democracy, and the rule of law.[27] Similarly, as Koskenniemi wrote, the 'virtue of constitutionalism in the international world' is to expose fundamental global injustices so as to then exercise critical judgment upon these existing features of global order.[28]

Yet the goals of democracy, human rights, and the rule of law, have come under recent strain. The presidency of Donald Trump, Brexit, the democratic backsliding and concomitant rise of populism in Hungary, Poland, Turkey, Venezuela, Israel, and elsewhere, has brought about a deep worry coupled with scepticism and dismay about the promises of global constitutionalism generally, and liberal democracy in particular.[29]

III. The articles in this special issue

The articles in this special issue, the result of a two-day workshop at the Harry Radzyner Law School at the Interdisciplinary Center Herzliya, are situated at the intersection of these two prongs: first, coming on the heels of the debate about 'what is global constitutionalism?' they provide new ways to think about this phenomenon, highlighting its origins and adding a theoretical layer of analysis. Second, they address the changing constitutional terrain, specifically the transition to less than fully liberal

[24] W Sadurski, 'Supranational Public Reason: On Legitimacy of Supranational Norm-Producing Authorities' (2015) 4(3) *Global Constitutionalism* 396.

[25] Brown (n 12) 204.

[26] Cf. Fierke (n 11) 176.

[27] Wiener *et al.* (n 17).

[28] Koskenniemi (n 12).

[29] M Kumm *et al.* '"The End of 'the West" and the Future of Global Constitutionalism' (2017) 6(1) *Global Constitutionalism* 1; M Rosenfeld. 'Is Global Constitutionalism Meaningful or Desirable?' (2014) 25(1) *European Journal of International Law* 177.

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democratic constitutionalism, and the possible consequences that flow from these shifts.

Mark Tushnet, in his article, discusses the affinity between global constitutionalism and neo-liberalism. Previous literature has argued that global constitutionalism imposes uniformity with a European bias;[30] that constitutional convergence can explained by competition for capital and growth;[31] and that global constitutionalism is simply a mask for entrenching political values, a sort of 'civilising mission' that in reality reinforces domination and power.[32] Tushnet argues, however, that there is no causal relationship between global constitutionalism and neo-liberalism. Their relation is one of elective affinity rather than deductive logic. Global constitutionalism is amenable to and facilitative of neoliberal policies, but its ideological roots are not necessarily identical. Similarly, the distributive consequences of global constitutionalism lend support, even if unintentionally to neo-liberalism, but this is not preordained, and could be configured differently.

Tushnet's direction alludes to an important question: who owns the state?[33] Goldoni takes up this issue, in the broad sense, when he proposes a material study of the constitution. Examining existing approaches to global constitutionalism and finding them lacking, he suggests a materialist approach that examines the interaction between constitutional norms and the underlying social relations. He thus abandons both normative and functionalist approaches, providing a neo-Marxist approach to global constitutionalism, which in turn better explains how global constitutionalism ruptures what is (wrongly) perceived as the absolute sovereign state.

Whereas Tushnet and Goldoni discuss the ideological underpinnings of global constitutionalism, Stopler, Dixon, Landau and Roznai turn to specific case studies that either seek to expose global constitutionalism's liberal 'tilt' or demonstrate the malleability of constitutional doctrines, which in turn support illiberal ends. Stopler's article shifts the focus from liberal regimes to what she calls 'semi-liberal' regimes. Global constitutionalism's outputs have for too long focused almost exclusively on liberal democratic countries or those which aspire to be such. Semi-liberal regimes challenge global constitutionalism's cored ideals, and Stopler's piece is an important corrective for how global constitutionalism should account for this new category, and for how courts and decision-makers in these regimes should decide the cases that are brought before them.

[30] C Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17(1) *European Journal of International Law* 187.

[31] Law and Versteeg (n 14).

[32] Brown (n 12) 213, 219 (discussing though not endorsing this claim).

[33] Bell (n 7) 14.

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Finally, Dixon, Landau, and Roznai examine the migration of the 'unconstitutional constitutional amendment' doctrine. Originally, the doctrine was developed in order to restrain legislatures from amending a constitution in a way that significantly deviates (perhaps abandons) core democratic commitments. Their careful study of Honduras demonstrates, however, how constitutional ideas, developed for one purpose, can be abused when imported in a different context.[34] The progression from 'unconstitutional constitutional amendment' to the much more far-reaching idea of an 'unconstitutional constitution', as was the case in Honduras, highlights the pliability and plasticity of extant constitutional concepts, which often emphasise form over substance, and can thus be used toward different (often competing) ideological agendas.

All these themes will be developed below, as I turn to a more extended analysis of the articles in this special issue.

Global constitutionalism and neo-liberalism

Mark Tushnet's examination of the globalisation of constitutional law focuses on norms that should be or are in the process of becoming embedded in domestic constitutions the world over. Global constitutional law, he argues, requires a liberal democratic regime that is sufficiently pluralist and open in terms of the franchise, yet not overly populist. And while global constitutionalism does not mandate a particular democratic regime, it is supportive of limits on whatever regime (e.g. parliamentary or presidential) is chosen, including the possibility of constitutional review of legislation by the judiciary.

While all of this may seem neutral and par for the course, there is a deeper ideological underpinning. The seemingly standard structural features actually track the contents of constitutions in the global North. This is confirmed when looking at the 'rights' component of global constitutionalism. Most of the rights that are a 'must' are the familiar set of first-generation rights, with an emphasis on the right to private property. Countries in the global North protect (to a degree) property owners from expropriation, but they also require strong justifications for decisions to prohibit private property rights in particular objects. Put differently, Tushnet argues that global constitutionalism 'strongly favours private ownership of important national industries'.

The above observation can also be gleaned from the status socio-economic rights are awarded under the paradigm of global constitutionalism.

[34] For the idea of abusive constitutionalism, see D Landau, 'Abusive Constitutionalism' (2013) 47(1) *University of California Davis Law Review* 189.

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Global constitutionalism is not hostile to those rights, as it recognises the importance of a social safety net and even lists generic rights such as housing, health and education. Yet the protection of these rights is far less robust than that accorded to civil and political rights. For example, such rights are often subject to reasonableness standards and should be 'realised progressively'. Consequently, judicial remedies for the violation of these rights has less bite, even if a violation was identified, which is, of course, more challenging under a less exacting standard of judicial scrutiny.

The interesting point here is that counter to what many would guess would be neo-liberalism's hostility to socio-economic rights, it turns out that some measure of socio-economic rights enforcement is actually needed to secure the broader project of neo-liberalism. But if global constitutionalism is somewhat open to second-generation rights, it is mostly silent when it comes to third-generation rights. This silence could be traced to the idea of global constitutionalism being a project of the global North, whereas third-generation rights are associated with the global South. It could also be, however, that third-generation rights result in possible redistribution of property, which in turn threaten private property rights.

Tushnet's nuanced argument, then, is not that global constitutionalism is the result of neo-liberalism, but that their relations is one of elective affinity rather than deductive logic. Global constitutionalism can thus be viewed as amenable to and facilitative of neoliberal policies, but its ideological roots are not necessarily identical. For example, Tushnet argues that neoliberals distrust popular politics that have the potential to upset policies that supposedly advance long-term growth. Similarly, global constitutionalism's focus on rights protection is rooted, partly, in its wariness of populist politics and crude majoritarianism. Perhaps relatedly, global constitutionalism says very little about economic policy choices that have major distributive effects such as privatisation. Here too global constitutionalism facilitates neo-liberalism through the non-imposition of significant constraints on governments with a deregulatory agenda.

The facilitative function also exists when one considers the distributive consequences of first-generation rights. As Tushnet notes, first-generation rights primarily give voice in political life. However, since free speech rights are agnostic as to the identity of the speaker, those with more power to speak will tend to utilise their speech rights more effectively, possessing greater political clout. Since there is a correlation between neoliberal policies and the type of people who tend to support them (economic elites), and since content neutrality empowers those with money to speak more 'loudly' toward their preferred economic views, it follows that the core rights advanced by global constitutionalism work to serve, albeit perhaps unintentionally, a neoliberal agenda.

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Although global constitutionalism might be driven by a neoliberal ideology, the two are not identical. As Tushnet notes, given the institutional plurality, there are disjunctures. For instance, although property rights are protected, it is with a level of generality that lets courts limit their scope, for example by granting constitutional status to claims of public assistance, imposing due process safeguards on their administration, and even ruling against austerity measures that reduce public employee pensions.

Despite such rifts, however, Tushnet concludes that global constitutionalism is a neoliberal project, in that its effect is to limit the expansion of the welfare state coupled with the encouragement of austerity programmes. This is most vivid in the workings of international organisations such as the World Bank and the IMF. Despite the sceptical tone of the article, there are bright spots. Global constitutionalism's emphasis on the rule of law, democracy, and human rights, is a significant advance in some countries. Global constitutionalism, therefore, should be thought of not as one project, but as multiple projects, differentiated by economic and political performance. This might reproduce the problematic distinction between the global North and the global South, but it is a direction worth exploring.

The material study of global constitutionalism

Whereas Tushnet explored the ideological affinity between global constitutionalism and neo-liberalism, Marco Goldoni examines global constitutionalism through a materialist lens, by embracing a Marxist and institutionalist approach. This approach yields important insights, in particular the way that global constitutionalism affects domestic constitutional law, namely its confirmation of the relational nature of sovereignty. The materialist approach, Goldoni argues, lets us see the true working of global constitutionalism, which seeks to expose and then deflate the often exaggerated view of the absolute sovereign state.

To gain this understanding, Goldoni looks at the constitutional order as reflecting transformations in the societal order. Yet Goldoni's analysis does not stay at a level which he terms reductionist, and which Marx calls the formalisation of the superstructure. The organisation of modes of production is important, but there is more. Marxism, or at least one popular version of it, holds that law is merely a legitimising mask imposed on the extant social relations. Law, then, is a type of puppet; the real action is in the social relations themselves. On this view, global constitutionalism would be 'more of the same': it would be merely reflective of changes in the global political economy. Goldoni rejects this particular materialist approach, which leaves little autonomy for the constitutional order as participating in the constituting of social relations.

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Instead, Goldoni sustains his gaze on a second type of materialist analysis, one driven by the transformations that resulted from the economic collapse of 1929. The dominant constitutional account until then focused on separation of powers and core civil rights. The Great Depression generated a new material organisation of the state itself, one which needed to be addressed with new tools. It is on this materialist approach that Goldoni develops his thesis, engaging primarily with the work of Costantino Mortati.

Contrary to earlier socialists, who viewed the constitutional order as a mask, Mortati embraced a dialectic approach that located law and politics in the shaping of societal organisation, rather than reflecting the extant power hierarchies. Put differently, a constitutional order is not imposed on an already structured society, but is an active participant in its structuration. A materialist analysis, then, examines the features by which social relations acquire legal significance. It is these features that are part of the material constitution (of which the formal constitution is a part). Importantly, these features do not mirror societal relations, but introduce constraints on hegemonic power, while generating an equilibrium that channels the actions of political actors and through which civil society operates. For Goldoni, and here is the punch, this is true not only for the domestic constitutional order, but also for global constitutionalism.

Global constitutionalism, according to Goldoni, lacks a material theorising. This is evident in both of the dominant forms of global constitutionalism theory, the normative (non-pluralist) and the sociological (pluralist). Reasons of space prevent me from explicating this fully here, so let us focus only on the normative conceptualisation. On this view, global constitutionalism simply upgrades sections of domestic constitutional law to the global sphere while employing a normative discourse. The problem is that this normative discourse, which relies on the quality of its reasoning, is untethered from its material basis and is not grounded in a hierarchical ordering of authority. The status of these constitutional principles, Goldoni argues, is 'free-floating', and it remains unclear whether and how principles that govern the relationship between transnational and domestic derive their authority from each other. Authority is derived, if at all, from the persuasive power of the reasoning itself, and thus rationality is divorced from the social relations, upon which the material constitution is predicated.

It is no coincidence, then, Goldoni notes, that global constitutionalism heavily emphasises constitutional rights. Rights obviously have significant normative appeal, but they are also sufficiently ambiguous so as to be applied differentially given the multiple contexts in which they operate. But the question remains why rights are the vehicle that was chosen by global constitutionalism. Even if global constitutionalism takes a particular

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form, we still need to figure out why it has taken this particular form and not others. Here is where the study of the material constitution can be of help, for it sheds light on the social order coalescing around political goals that give rise to a particular constitutional form.

Global constitutionalism, Goldoni argues, implements a new series of conventions. States are still the dominant actors – which is why global constitutionalism is not an autonomous legal order – but they have delegated powers to the supra-state level in order to achieve certain goals that would not be available had they been pursued independently. This suggests changes in the states' constitutional orders, but also an attempt by sectors of the state's social factions to achieve particular goals. As a key example, he analyses what he (and others) has termed the move from the fiscal state to the debt state, meaning the international financial convention that has led to austerity and labour market reform (driven by states and international organisations), which has led to the reconfiguration of social relations. This new global convention puts finance capital at its apex, replacing systems that emphasised labour productivity. It is finance capital that is now hegemonic over social production and division of labour. This global constitutional shift is evidence of social transformations below. A corollary of this insight is that contrary to much of the literature, courts play a marginal role in the global constitutionalism, except in discrete areas. Global constitutionalism, then, is very much operationalised by non-judicial institutions.

The material study of constitutions yields a final important insight about the nature of sovereignty. Contrary to the idea of sovereignty being absolute at the state level, the state is a site of struggle among competing social forces. The absolutist view naturally marginalises global constitutionalism because if sovereignty is reposed in the state, global constitutionalism cannot be constitutional.[35] Goldoni finds this approach outmoded and inaccurate. Sovereignty has never been absolute, but always relational. Specifically, Goldoni advances an institutionalist conception that sees sovereignty as the mediating principle between the social order and the political and constitutional unity, between society and politics. Thus sovereignty is linked to governing, and for this reason the state is not purely 'domestic'; it contains supranational and global law as part of its material constitution.

To sum up, the material study of constitutional law sees the state as a central unit, but it is not the 'absolute achievement of the autonomy of politics'. Sovereignty is still important, but cannot be seen only in domestic terms. It produces and reproduces social relations, but those incorporate

[35] The absolutist position is premised on the distinction between state and government, which Goldoni addresses.

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global constitutionalism, which in turn lend support to the non-absolutist conception of state sovereignty.

Global constitutionalism and semi-liberal regimes

The vast majority of the literature on global constitutionalism focuses either on countries with liberal democratic constitutions or is geared toward countries that aspire to have one. To be sure, many countries do not belong to either of these two groups. Those have not been neglected, and recent years have given rise to important scholarship examining constitutions in illiberal and authoritarian regimes.[36] In these countries, constitutions are not aimed so much at safeguarding individual rights or limiting sovereign power. Instead, they augment and bolster political authority, downplaying democratic aspirations.[37] Aside from a few important exceptions, the study of global constitutionalism vacillates between these binary and dichotomous poles.

Gila Stopler's article offers a much needed corrective, introducing and elaborating a new category which she calls semi-liberal constitutionalism. According to Stopler, a semi-liberal constitution meets two conditions. First, it possesses a dual normative commitment to liberal rights and to other values that result in significant restrictions on these rights. For example, a commitment to equality, but also to religious dogma that can limit full equality in the areas that religion dominates. Second, the dual normative commitment exists at the constitutional level, which is expressed in the basic structural elements of the system. Stopler refers to these conditions as the dual normativity condition and the basic elements condition, respectively.

Stopler develops the concept of semi-liberal constitutionalism by examining the case of Israel. Israel is often considered a liberal-democratic state, but Stopler persuasively exposes this view as false. Israel's occupation of the Palestinian Territories and its treatment of its Arab citizens, evidenced most recently in the new Basic Law Nation State, warrant the semi-liberal label. Stopler, however, focuses on the way liberal values clash with religious demands, encapsulated in Israel's twin constitutional commitments to democracy and Judaism (a Jewish and democratic state). In particular, she focuses on the exclusive jurisdiction religious courts have

[36] See, e.g., T Ginsburg and A Simpser, *Constitutions in Authoritarian Regimes* (Cambridge University Press, Cambridge, 2014); NJ Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (SUNY Press, Albany, NY 2002); B Breslin, *From Words to Worlds: Exploring Constitutional Functionality* (Johns Hopkins University Press, Baltimore, MD, 2009).

[37] Brown (n 36).

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over marriages and divorces (there are no civil marriages in Israel), as a feature of semi-liberalism. Mandating religious courts, which impose religious law on all Israelis, religious law, violates both freedom of conscience and freedom from religion, and the constitutional commitment to equality. The latter, as Stopler shows, because of the discriminatory nature of Jewish law toward women. This theocratic system, she argues, is immune from liberal intervention and is thus part and parcel of Israel's constitutional package. Although one can always argue that certain features are simply shortfalls in a liberal constitutional system rather than a shift to semi-liberalism, Stopler maintains that semi-liberalism can be ascertained when looking at the intent behind the system, the structure of the system, and the extent of the deviation from liberal principles.

What follows, however, from the semi-liberal category? Here Stopler's contribution is a normative argument that exposes the fallacy of liberal reasoning when analysing rights violations in a semi-liberal constitutionalist regime. Writing from a feminist standpoint, and employing a Foucauldian framework of power relations, Stopler argues that where the semi-liberal nature of the system changes the power balance between parties, then applying liberal rules that do not take these asymmetries into account is mistaken. A liberal framework that does not take power imbalances between litigants into account thus cannot be justified.

This is an important (and overlooked) point. Applying liberal rights analysis works only where the background social and legal reality is liberal and egalitarian. But in situations where the background structure is semi-liberal, the application of liberal reasoning will often serve to protect and empower those who are already protected and advantaged by the background norms. Put differently, a liberal ideal of neutrality cannot be wholly applied to a scenario which is, at its core, not neutral. Thus, in order to protect liberal rights, courts must acknowledge the semi-liberal nature of the constitutional system. This problem is compounded because courts and policymakers in a semi-liberal regime often cloak the illiberal result in liberal justifications. For example, Stopler demonstrates how, in the context of Jewish marriages, when there is a conflict between the couple and the rabbinical establishment, the latter often prevails. The court will describe the conflict using a liberal framework of 'balancing' between competing rights and interests, without taking into account the monopolistic status the rabbinical establishment occupies under the law, in effect forcing any Jew who wants to marry inside Israel to do so under its auspices, without the option of civil marriages.

Stopler's conclusion is that courts (and other decision-makers) must be attuned to the semi-liberal context in which they are operating if they want to protect liberal rights. This is a call both to domestic institutions and to the

https://doi.org/10.1017/S204538171800031X Published online by Cambridge University Press

global constitutionalism literature, which often analyses semi-liberal regimes within a liberal framework. Of course, the question is whether courts in a semi-liberal regime will be up to the task. Operating in a semi-liberal regime could mean that courts, alongside other decision-makers, are committed to semi-liberalism. For them, it could be the case that protecting liberal rights is precisely the problem semi-liberalism seeks to resolve.

Global constitutionalism and the migration of constitutional doctrine

The first two articles in this symposium offered a new methodological lens through which to view global constitutionalism. Tushnet argued that global constitutionalism is a neoliberal project, though the linkages between the two are complex and not straightforward. Goldoni advanced the argument that the study of constitutionalism lacks a material angle, and that employing the material approach yields important insights about global constitutionalism. Although not explicit, the two articles assumed that (or did not state otherwise) that the basic unit of analysis was a democratic state or one transitioning to become one. Stopler's article paved a new path, by looking at semi-liberal regimes, where the commitment to democracy is becoming significantly weaker. Finally, Rosalind Dixon, David Landau and Yaniv Roznai discuss what they call a move from the unconstitutional constitutional amendment doctrine to the unconstitutional constitutional doctrine.

It is worth pausing here and explaining how their article fits in with the general theme of this special issue – the ideologies of global constitutionalism. The article shows, I believe, the pliability and plasticity of many of constitutional law's doctrine. The study of the unconstitutional constitutional doctrine is itself a study in constitutional migration.[38] In their case study of Honduras, the authors describe how the controversial doctrine of unconstitutional constitutional amendment has transformed into an even more incredible idea of an unconstitutional constitution. They examine how the Honduras Supreme Court invalidated an unamendable provision of the original constitution which limited the presidential tenure to one term and associated provisions that prohibited attempts to change the one-term rule.

The Honduras Supreme Court relied on the arguments supporting the unconstitutional constitutional amendment to justify its ruling. Yet as the authors demonstrate, those arguments collapse when applied to substantive

[38] Cf. Y Roznai, 'Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea' (2013) 61(3) *American Journal of Comparative Law* 657.

https://doi.org/10.1017/S204538171800031X Published online by Cambridge University Press

review of the original constitution rather a constitutional amendment. The plausibility of the unconstitutional constitutional amendment doctrine rests on the distinction between constituent and constituted power. A constitutional amendment is an exercise in constituted power, so when it deviates from the constituent power, it is ultra vires. When courts strike down constitutional amendments they do so on behalf of the constituent power inherent in the original constitution. Put differently, they strike down a constitutional amendment on behalf of 'we the people' located in the original document. However, the distinction between constituent and constituted power falls apart when a court strikes down a part of the original constitution. This is compounded when one of the provisions itself is unamendable.

The authors suggest alternative paths that could have supported a doctrine of an unconstitutional constitution, for example the need to support a liberal democratic order or a hierarchy between international and domestic law, which would hold that a domestic constitution must comply with some elements of international human rights law. Had the Court pursued either of these paths, they claim, this would be important for the project of global constitutionalism, because it would indicate at a normative goal of converging on global constitutional standards.

The Honduras Supreme Court's ruling was done in the name of democracy – limiting the term to one frustrates both the office holder's and the constituents' free expression rights and political rights, found in the Honduran Constitution and in regional and international human rights instruments. But the malleability of democracy (and its associated rights) is quickly apparent. It is not that the Court is mistaken in associating voting rights with democracy, but that the concept of term limits gives rise to at least two opposite conceptions – one favouring them and one rejecting them. Term limits can be compatible and incompatible with democracy, depending on the particular conception one holds of democracy. The elasticity of democracy is thus used to two ends – a judicial power grab (striking down parts of the original constitution – an unprecedented move) and executive aggrandisement. Indeed, as the authors point out, the Court's decision undermines liberal democratic constitutionalism in order to support the National Party's rule and the Hernandez government. Not coincidentally, this happened after the Party packed the Court with judges favourable to its agenda.

Although the authors highlight ways in which an argument for an unconstitutional constitution can be made, my point here is different. The important takeaway, I believe, is that both the success of the unconstitutional constitutional amendment doctrine and the nascent unconstitutional constitution doctrine are a product of global constitutionalism. The article

https://doi.org/10.1017/S204538171800031X Published online by Cambridge University Press

implicitly shows, then, that despite any presumed ideological content global constitutionalism might possess, it can be manipulated by domestic actors. Doctrines that migrate from one jurisdiction to the other can and are used in multiple ways, sometimes toward conflicting normative aims. Does this mean that the project of global constitutionalism is ideologically empty, to be filled with differing normative content in different places?

IV. Conclusion

The contributions to this issue provide new perspectives and approaches for the study of global constitutionalism. In particular, they challenge three central strands of received wisdom. The first, the commonplace linkage of global constitutionalism with neo-liberalism, by suggesting that the two are not causally related, but instead share elective affinities. The second, critiquing global constitutionalism's dominant functionalist methodological focus, by proposing a competing Marxist materialist approach. The third, interrogating global constitutionalism's liberal political valence, which traditionally examines liberal countries or those in the process of liberalisation, by proposing a constitutional analysis of 'semi-liberal' regimes.

As the study of global constitutionalism proceeds, complexities are unfolding. Both individually and in the aggregate, the articles in this issue expand our methodological and conceptual tool kit, and thus contribute to a richer and more nuanced understanding of the ideologies of global constitutionalism. With the ideational pluralism inherent in global constitutionalism on display in this issue, much has to be gained from the disciplinary and methodological openness that these articles put forward.

https://doi.org/10.1017/S204538171800031X Published online by Cambridge University Press