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GLOBAL SOUTH IN COMPARATIVE CONSTITUTIONAL LAW SYMPOSIUM

Towards a Constitutionalism of the Wretched

Global Constitutionalism, International Law and the Global South

VIDYA KUMAR — 27 July, 2017



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The field of Global Constitutionalism (also sometimes called “International Constitutionalism”) is a very odd field, one which, with very limited exceptions ([Frankenberg](#), [Schwöbel](#), and [Volk](#)), has been neglected by most critical international and constitutional law scholars. One reason it is an oddity is because of its disciplinary hybridity. That is to say, it is neither fish nor fowl – it is neither fully a discipline of comparative constitutionalism nor is it fully a discipline of international law.

Neither fish nor fowl

With respect to the former, it is definitely partly a form of comparative constitutionalism. Global constitutionalists regularly make and rely on comparisons between constitutional cases, rights, systems and courts in a infinitesimally small handful of Western democracies – almost without question, the US, France, and Germany. Sometimes Canada is included, and often cases from the European Court of Justice and/or the European Court of Human Rights are discussed. It is entirely fair to say that the focus of Global Constitutionalism, when it makes such comparisons, is *primarily* (and often wholly) on Europe and the United States. If countries in the geographical Global South are mentioned, they are mentioned as an aside, not as a focus, and often only to confirm that the “universal” or “global” norms, ideas, rights, and

concepts evinced in US and European constitutional systems and law, are coincidentally exactly the same as those in the geographical Global South. Most scholars from the Global North rarely mention any countries associated with the Global South by name, with the exception of South Africa which is often discussed as if it were the only country and constitution in Africa, and as if it were representative of African constitutionalism *tout court*.

With respect to the discipline of international law, global constitutionalists regularly discuss the role of international institutions and organisations as *formative* of the global legal order. International institutions and organisations such as the UN (esp the UN Security Council), WTO, IMF, World Bank, and EU are consistently mentioned in the literature as constituting the “global” of global constitutionalism. In this respect, most global constitutionalists view their work as specialist extensions of the literature on global governance produced primarily by international lawyers. That said, few global constitutionalists teach global constitutionalism as a required component of the study of public international law.

Filling the lacuna

Being neither fully comparative constitutional law nor fully international law, the place, purpose, and nature of Global Constitutionalism is unclear. Perhaps its disciplinary oddness, where it sits as a field of study, explains why it has fallen under the radar of *critical* international lawyers, constitutional scholars, and legal theorists (i.e. TWAILers, NAILers, international legal historians, international legal feminists, Marxists, poststructuralists, etc). Professor Philipp Dann’s wonderful conference on “Constitutionalism and the Global South” aims to begin to fill this lacuna. In my contribution to the conference, I sought to write and speak about Global (and International) Constitutionalism in a way which was expressly critical of *liberal international law* (a perspective which unquestionably dominates the field); which tried to take the category of Global South seriously (raising some qualifications and concerns); and which sought to decolonise international legal fields of knowledge and thinking.

In this blog contribution, I will offer only some preliminary comments about the limitations of the field of Global Constitutionalism, with the full critique I made at this Conference to be made in a forthcoming publication. I will first sketch a number of initial observations I made about the field and the practices of the Global Constitutional scholars,

and then mention two critiques.

What are the concerns of global constitutionalists?

Although the field is broad, one cannot say it is diverse with respect to the issues and concerns it addresses. The concerns of global constitutionalists are remarkably predictable and uniform: the effect(s) of “*globalisation*” on the international and domestic legal orders; the new interdependence between domestic and international orders in light of globalisation; the new “global norms” emanating primarily from specific institutional institutions (namely the UN, IMF, World Bank, and WTO) and the new “constitutional networks” forged between these institutions; and finally, other “cosmopolitan” or “higher” norms which have appeared since globalisation – including the (Occidental and exportable) holy trinity of democracy, rule of law, and human rights. These concerns are treated in an almost entirely descriptive manner by global constitutionalists. They are primarily concerned with *mapping* and *delineating* the processes and effects of globalisation on the respective capacities and responsibilities of the domestic and international legal orders.

What is truly interesting, from my perspective as a scholar interested in the historical framing of this field, is its chosen periodisations: that is to say, those historical moments and events which global constitutionalists take to shape the “modern” world. These include 1945 (the end of World War II and the beginning of the post-war era) and 1989 (the fall of the Soviet Union and putative end of the Cold War). The triumphalism of these two moments speaks volumes.

It is not that there haven't been *any* critiques of the field and its preoccupations. Some have criticised the post-war constellation of institutions in the new global order as encouraging “fragmentation”. These critics argue that the otherwise lauded international institutional lawmaking regimes deal separately with what are often *related* international legal issues (eg human rights, trade, labour, and security). This creates *practical* problems of enforcement, compliance and coordination at the international level, as indicated by the ILC fragmentation report. Another critique is that the institutions themselves suffer from “a democratic deficit” – there is little or no accountability of these international institutions to their stakeholders. These critics call for increased transparency and accountability in these institutions (whilst *sustaining* their existence and rationale). It is my contention that neither of these critiques addresses fundamental problems of Global Constitutionalism as a field.

Where is the Global South?

What are these more fundamental problems? I cannot discuss them all here, but I will mention just two criticisms. The first begins with a question: *where* is the Global South in the field and accounts of Global Constitutionalism? What do global constitutionalists say about “the Global South” in their analyses and descriptions of the global legal order? If one examines any of the most cited works on Global Constitutionalism (disproportionately written by German and American scholars), one will be hard-pressed to find even one which discusses the Global South as either a geographical area or epistemological category. It then becomes very easy to answer the question posed by the 2014 editorial of the journal *Global Constitutionalism* ‘How Large is the World of Global Constitutionalism?’ The answer is not very large at all.

One could just say the Global South is missing and leave it at that. But one could go further and ask *why* it is missing. Here it is useful to embark on what Bonaventura de Souza Santos calls “a sociology of absences”. This “transgressive” sociology answers the “why” question as follows: “what does not exist is in fact actively produced as non-existent”. I agree. The production of global constitutional theory by global constitutionalists involves *the active non-production of the Global South – as an object or as a subject – of the global legal order*. This is easily evinced by the *practices* of the majority of global constitutionalists writing in the last two decades. The Global South has been written out of descriptions of the international or global legal order as a relevant actor or relevant geography. This absence of the Global South in Global Constitutionalism reminds me of a piece I often teach by Teemu Ruskola entitled ‘Where is Asia? When is Asia? Theorising Comparative Law and International Law’, where he concludes that mainstream international legal theorists and legal comparativists too often view the answer to these two questions as: *not here and not now*. Similarly, the Global South appears to be too remote in time and space for global constitutional theorists to even consider, let alone take seriously.

One explanation for absence of the Global South from accounts of Global Constitutionalism may be the fact that global constitutional theorists make an unsubstantiated assumption that nothing would change in their account of Global Constitutionalism if you simply “added in” the Global South “and stirred”. The constitutional networks and institutional and global norms and processes they speak about *and endorse* would remain exactly the same. Another more likely

explanation may be that global constitutionalists are just not very interested in or informed about the power relations and history which create and sustain the contemporary international legal order. As *liberal* legal theorists, global constitutionalists take both the extant international institutions they are so fond of (especially the UN and the Bretton Woods institutions) and the existing wealth and power distributions between peoples and countries located in the Global North and Global South as givens, not produced or contested. Any differences between the Global North and Global South are therefore naturalised – they are assumed to always have been there, since 1945 or 1989. Power and wealth disparities between people living in the Global South and Global North can only be explained using the tools of a history which begins in the mid-20th century, not before.

Erasures of history

And this leads into my second criticism. Not only is history before 1945 not viewed as relevant to the characterisation of the existing global legal order, there is a wholesale erasure of the history, existence and effects of colonialism on this order. From their theory and practices, there is no question that global constitutionalists believe in a form of creationism that began at the end World War II. This periodisation of the field conveniently prevents colonialism and slavery and their global legacies (such as the call for reparations) from being discussed. What makes Global Constitutionalism merely a reiteration of various modes of liberalism (i.e. liberal constitutionalism, liberal internationalism and liberal humanitarianism) is both its refusal to recognise the role of the West in the production of global inequality between the Global North and South and its deeply held belief in the fundamental irrelevance of neo/colonialism in the *present* global legal order as well as in the past. Well beyond the purview of the global constitutionalist is settler-colonial constitutionalism (which influences and animates globally many constitutions including those of Canada, Australia, Peru, Kenya, South Africa, Zambia, the US and Israel, to name a just a few). The groundbreaking work of Mazen Masri, Tshepo Madlingozi, and Amar Bhatia is instructive here, as well as that of the distinguished postcolonial constitutional theorists Upendra Baxi and Issa Shivji. Given the profound effects and legacies of colonialism on the global legal order, a fundamental reimagining of the world of Global Constitutionalism is imperative.

This myopia in the field is unfortunate and needs to be changed. There are some critical international legal and constitutional scholars who have begun highly useful discussions. Jan Klabbers for instance has

explored the nexus between colonialism and the contemporary ‘functionalist’ operation of international institutions. There are others such as Christine Schwöbel and Christian Volk who decry the liberal bias of the field of Global Constitutionalism; Günther Frankenberg’s work on Edward Said’s ‘travelling theory’ in the practices of global constitutionalist; and Thomas Müller’s call for the field to be historicised in a way which does not reproduce Eurocentrism or Western-centric views of constitutionalism in the international legal order. I take this call up, and try to sketch what a *Constitutionalism of the Wretched* would look like for Global Constitutionalism and the Global South, mindful of Franz Fanon’s compelling directive: “The Third World must not be content to define itself by the relations which preceded it.” (The Wretched of the Earth, at 55).

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