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Article (Accepted Version)

Kochi, Tarik (2020) The end of global constitutionalism and rise of antidemocratic politics. Global Society. ISSN 1360-0826

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The End of Global Constitutionalism and Rise of Antidemocratic Politics

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(Final author version, published in *Global Society*. Published online 16 April 2020.)

Abstract

Drawing upon the idea of ‘constitutional antagonism’ this article offers a critique of the liberal cosmopolitan framing global constitutionalism and its response to the rise of antidemocratic and ‘populist’ authoritarian politics. Liberal cosmopolitan approaches to global constitutionalism generally pay inadequate attention to the ways in which neoliberal ideology and rationality have come to dominate the fragmented networks and structures of global constitutionalism and the connected emergence of an anti-cosmopolitan and authoritarian discourse of ‘nationalist neoliberalism’. Against the limits of liberal cosmopolitanism, and against the twin threats of neoliberal transnational governance and neoliberal nationalist, interstate conflict, it is argued that if an idea of transnational or global constitutionalism is to be held onto and retain any value then it must be based upon socially transformative ideas of egalitarian and ecological social justice and enacted through legal and political strategies and struggles that attempt to actively displace neoliberal ideology and rationality.

Introduction

The discourse of global constitutionalism has slowly emerged via an eclectic mix of scholars drawing upon perspectives from comparative constitutional law, international law, EU law, legal theory, and transnational perspectives in relation to global commerce and regulation, international political theory and sociology. The predominant mode of thinking that underlies much writing on global constitutionalism is ‘liberal cosmopolitan’ and often echoes the philosophical and normative legacy of Immanuel Kant and his contemporary inheritors such as Jürgen Habermas. Broadly the idea of global constitutionalism has drawn upon a degree of post-Cold War liberal optimism and draws also upon an understanding of the shifting nature of state sovereignty under globalisation in which emerging transnational networks of governance, power, authority, normativity and regulation have fundamentally transformed the

operation of many aspects of political, legal and social relations. Based upon such an understanding global constitutionalist scholars offer an account of the principles and frameworks which have shaped global order in a particular way and attempt to identify key aspects of this transformation in terms of a ‘constitutional’ hierarchy. Across the discourse global constitutionalists have attempted to clarify and enunciate a set of ‘constitutional’ hierarchical principles as a means of directing, guiding and steering the shape of global relations in a manner which is consistent with liberal principles of individual human rights, the rule of law, capitalist markets, inter-state cooperation, cosmopolitanism and some degree of democratic legitimacy.

However the contemporary emergence and rise of anti-liberal and antidemocratic ‘populist’ political sentiment across many parts of the Global North and Global South pose a stark challenge to the liberal cosmopolitan normative project of global constitutionalism and might potentially mark its end. In this article I examine and critique how a dominant stream within liberal cosmopolitan global constitutionalist thought approaches the rise of antidemocratic and authoritarian politics and show how both its understanding of this emergence and response is severely limited. My approach, drawing upon critical legal and political theory and historical sociology (Poulantzas 1980; Negri 1999; Rancière 1999; Gill 2003; Christodoulidis 2017; Brown 2019) pays attention to an idea of ‘constitutional antagonism’ (Kochi 2019) and sees constitutional frameworks as embodying underlying social and class conflicts, disagreements and struggles over how to realise conflicting normative conceptions of what counts as social and economic ‘justice’.

From this perspective I argue that liberal cosmopolitan approaches to global constitutionalism often pay inadequate attention to the ways in which neoliberal ideology and rationality have

come to dominate the fragmented networks and structures of global constitutionalism and of how this has produced the negative social effects of disciplining states and civil societies, eroding democratic political control over capitalist markets, and exacerbating levels of inequality and impoverishment. Further, I argue that liberal cosmopolitan approaches to global constitutionalism also often overlook the important causal connections between the neoliberal legacy and the rise of contemporary antidemocratic and authoritarian politics. They overlook the ways in which decades of neoliberal social and economic policies have caused resentment to inequality and impoverishment and thus of how an antidemocratic politics has emerged in relation to this. Just as crucially, liberal cosmopolitan approaches overlook how an anti-cosmopolitan ‘nationalist neoliberalism’ has emerged as a continuation and modification of a globalist neoliberal discourse. Nationalist neoliberalism has intensified a language and normative rationality of individualism, capitalist markets, and traditional, conservative moral values and celebrates an antidemocratic and authoritarian idea of the state which excludes, demonises and scapegoats anything that might challenge it like social welfare protection, active democratic contestation, policies of social equality and cultural difference, and mass migration.

Given the problems associated with neoliberal transnational constitutionalism and its legacy which has contributed to the emergence of an antidemocratic and authoritarian nationalist neoliberalism it is difficult to see how dominant liberal cosmopolitan approaches to global constitutionalism can salvage their normative project by calling for a ‘defence’ of liberal constitutional values and greater democratisation. Rather, I suggest that if an idea of transnational or global constitutionalism is to be held onto and retain any value then it must be based upon socially transformative ideas of egalitarian and ecological social justice and enacted through legal and political strategies and struggles that attempt to actively displace neoliberal ideology and rationality. Such an attitude of displacement and transformation posits a different

normative ‘end’ to the idea of global constitutionalism, one which is pitched against the twin threats of neoliberal transnational governance and neoliberal nationalist, interstate conflict.

The Normative Idea of Global Constitutionalism

Much of the growing body of academic work on global constitutionalism uses a ‘constitutional’ language and imagery somewhat broadly to explain and normatively order a process of the expansion of transnational legal regulation that emerged in the mid-20th century and intensified from the 1990’s onwards under neoliberal globalisation. For many scholars of global constitutionalism the overlapping and fragmented structures of transnational legal regulation, public and private international law, transnational governance institutions, judicial and arbitration forums, networks of experts, state and UN bureaucrats, transnational trade and finance bodies, central bankers, NGO’s, and human rights bodies, when viewed together can be seen to form and enable a degree of constitutional hierarchy, constraint, integration, uniformity and legitimacy in a world otherwise lacking any overarching political authority.

There are a number of different approaches to the issue of the ‘constitutionalisation’ of transnational legal and political relations which include perspectives from theoretical and comparative constitutional law, international law, EU law, sociology, legal theory, and political theory (Schwöbel 2011; Walker 2014; Teubner 2014; Lang and Weiner 2017). In characterising the diverse approaches to global constitutionalism Jan Klabbers argues that the literature generally takes on two forms. The first involves a “normative” sense of the attempt to set out a view of global justice which articulates how transnational legal, political and social relations should be brought under some sense of order and control. The second involves a more “empirical” or sociological approach and the attempt to describe how increasingly national and

international legal, social and political relations have so far been transformed in a manner in which represents a slow process of “constitutionalisation” (Klabbers, Peters and Ulfstein 2009, p. 4). For Klabbers these two senses are often intrinsically linked whereby the process of ‘constitutionalisation’ involves not merely the constituting of a system by a set of norms, but the emergence of a constitutional order as a “legitimate order” in which key aspects of this legitimacy is derived from its “constitutional nature” (Klabbers, Peters and Ulfstein 2009, p. 8).

Further, as much as any sense of global constitutionalism involves a particular ‘constitutional’ “attitude” or “state of mind” (Klabbers, Peters and Ulfstein 2009, p. 10), such an idea is also commonly understood, as suggested by Gunter Teubner, as involving a highly “fragmented” interaction of juridical, political and governmental networks and functional “subsystems” which overlap and conflict with each other both vertically and horizontally (Teubner 2014). As such both the process of the constitutionalisation of transnational relations, and, the differing normative attempts to direct global constitutionalism as a vision of regional or global justice, involves what Neil Walker refers to as “constitutional pluralism”. This amounts to not only a pluralism of constitutional orders lacking a clear hierarchy, but also involves also a deeper sense of “epistemic pluralism” and hence the veering between moments of coordination and regulatory alignment, and moments of conflict between differing constitutional-value systems (Walker 2014).

One of the most dominant streams of thinking and writing about global constitutionalism (cutting across ‘normative’, ‘comparative’, and ‘functional sociological’ approaches) draws upon the tradition of ‘liberal cosmopolitanism’ and the long heritage of thinkers like Francisco de Vitoria, John Locke, Adam Smith, Immanuel Kant, Woodrow Wilson, Hans Kelsen, and

Jürgen Habermas. Liberal cosmopolitanism can be understood as a broad intellectual and political tradition that espouses transnationally the values of individual human rights, representative government and liberal-democratic constitutionalism, private property and capitalist market society, international law and a spirit of international cooperation, as well as global civil society and idea of humanitarianism, and holds these together within a normative model of international society and global governance which aims to overcome inter-state conflict and trump parochial state interest (Jahn 2013).

The liberal cosmopolitan tradition inherits and echoes key elements of a tradition of ‘natural law’ and ‘natural rights’ through which, as noted by Ernst Bloch, the epistemic claim of the ‘universal’ validity of individual human rights grounded, framed and shaped key liberal-democratic (as opposed to ‘radical’) aspects the French and American constitutional projects of the late 18th century (Bloch 1996; Douzinas 2000). In this sense also the idea of the ‘universal’ validity of individual human rights expressed in the natural law and natural rights traditions grounded, framed and shaped key aspects of classical ‘naturalist’ and the modern traditions of liberal international law (Kennedy 2004; Koskenniemi 2005). These twin heritages of modern liberal-democratic constitutionalism and modern liberal international law have heavily influenced the liberal cosmopolitan conception of global order, global governance and global constitutionalism across the 20th and 21st centuries (Douzinas 2007; Jahn 2013; Koskenniemi 2005; Kochi 2019).

The liberal cosmopolitan vision of global constitutionalism, such as that put forward by Habermas, building upon the work of Kant, draws upon the universalist natural law and natural rights traditions and the natural rights framing of popular sovereignty as liberal-democratic constitutionalism and sets out an idea of the normative control and transformation of global

power relations (Habermas 2006). His approach recognises the relatively ‘thin’ concept of global justice that underpins the project of contemporary global constitutionalism, based upon the promotion and protection of human rights and societal peace, and not a ‘thick’ conception of justice and social equality drawing upon the heritage of the welfare state. In this respect Habermas’ Kantian liberal cosmopolitan sense of global constitutionalism focusses upon the international and transnational coordination and strengthening of systems, hierarchies and institutional frameworks which promote and enforce negative duties not to do harm (Habermas 2006, p. 138-142).

Within this framework Habermas notes however the continued significance of the role of democratic state institutions in providing a degree of legitimacy to the ongoing process of constitutionalisation in the face of a relatively weak global public sphere. He argues that the strengthening of transnational democratic participation over time remains a necessary condition if global constitutionalism is to avoid operating as a façade for certain types of ‘Western’ imperialism. For Habermas ongoing democratisation remains important if the normative project of global constitutionalism is to not succumb to the types of critique mobilised by Carl Schmitt which portrayed the moral and juridical language of liberal international law as a tool of apology and justification of the interests of ‘great powers’ (Habermas 2006, pp. 139-43).

This tension between liberal ‘norms’ and democratisation as noted by Habermas runs through much of the literature on global constitutionalism. For many liberal cosmopolitan theorists the ‘legitimacy’ of the normative project of global constitutionalism is split and mediated between a universal and transnational idea of human rights bound together with liberal-democratic ‘norms’, and, an idea of popular sovereignty understood as liberal-democracy. With regard to

the latter, this occurs presently only within the liberal-democratic institutions of the modern state, and the extent to which the state limits its traditional sovereignty through the participation in and acceptance of the lawfulness of transnational institutions of regional and global governance which remain largely undemocratic.

The question of the democratic legitimacy is taken up in different ways by global constitutionalist scholars. For Seyla Benhabib, building on Habermasian discourse ethics, “universal principles of human rights” already underpin and circumscribe popular sovereignty within modern liberal democracies, and therefore human rights operate globally as a cosmopolitan democratic principle of legitimacy. For Benhabib such a relationship between human rights and popular sovereignty operates as a “paradox of democratic legitimacy” – this plays out agonistically as “democratic iterations”, whereby the enunciation of rights claims form a key role in mediating cosmopolitan norms with democratic opinion and will-formation (Benhabib 2006, pp. 32-36; 45-49; Benhabib 2011). In a similar sense, as articulated by Samantha Besson, the question of democratic legitimacy within global constitutionalism moves beyond the idea of mere state ‘consent’ and is grounded instead upon overlapping domestic and transnational human rights regimes which present the minimal criteria and obligations for a democratic polity (Besson 2017, p. 236-238). On this view there is therefore a mutually reinforcing relationship between international human rights institutions and liberal democratic systems.

Further, for Anne Peters the ongoing project of global constitutionalism demands innovative transnational approaches so as to create broader conditions of democratic legitimacy. This can potentially be obtained through the participation of global civil society and NGOs who can help to provide a degree of contestation, transparency and accountability to global governance

(Klabbers, Peters and Ulfstein 2009, pp. 313-8). In this respect enhancing the legitimacy of global constitutionalism is dependent upon creating an agonistic-democratic space that allows for deliberation, debate and contestation at the level of a global public sphere. However, scholars like Christian Volk are critical of any such idealisation of the democratic capacities global civil society if this overlooks the relations and structures of power, wealth, access and gatekeeping which currently actively limit democratic participation across the global public sphere (Volk 2012).

In contrast to the stress on the democratisation of global governance institutions, for liberal cosmopolitans like Mattias Kumm, while the eventual democratisation of global constitutionalism remains an important goal, its current lack does not render the contemporary form of global constitutionalism illegitimate. Rather, global constitutionalism gains its legitimacy as an “autonomous” legal order, over and above state consent, via what he calls “small ‘c’ constitutionalism” which is built upon a commitment to human rights, multilevel governance, the rule of law, and the normative principles that underlie liberal-democratic society (Kumm 2013). Within this conceptualisation of global constitutionalism the traditional idea of constitutional legitimacy, in part derived from an idea of ‘constituent power’ based upon democratic popular sovereignty, is displaced, limited and transformed by a renewed natural law idea of globalised rights and liberal democratic norms.

Such a transformation of the grounds of constitutional legitimacy has been highlighted by Chris Thornhill who argues that the emergence of a fragmented and uncoded global constitutional order built upon “transnational norms” has involved the displacement of the modern idea of constituent power by “rights” as a source of legitimacy within the global order. In this there has emerged a contemporary, fragmented transnational constitution which is based upon

multiple sources of legitimacy and possesses “multi-constituent form” (Thornhill 2012, pp. 374-5). For Thornhill one consequence of this is that constituent power is now almost always “subject to prior transnational legal circumscription” and characterised by an indeterminate “interlocking” of national and transnational laws and obligations. Such a loss of the autonomy of popular sovereignty at a national level has come about through the increased juridification of transnational relations and the assumption of de facto constituent power by courts, regulatory agencies and transnational governance institutions (Thornhill 2012, pp. 374-5).

Thornhill’s argument in relation to the transformation of the idea of constituent power and re-grounding of constitutional legitimacy through ‘rights’, ‘transnational norms’ and judicial action is important and reflects a broader normative insistence across many strands of liberal cosmopolitan thought in which human rights are placed at the centre of global constitutional questions of legal, political and democratic legitimacy. Yet, such an insistence upon the changed nature of constituent power through cosmopolitan rights often pays inadequate attention to nature of the rights in question and the forms of global power and capital relations which underpin and sustain these. In contrast, and viewed more critically, we can see that within the global ‘transformation of constituent power’ the rights of private property, rights of multinational corporations and rights global financial capital have over time drastically undermined social, economic, cultural and indigenous rights, and have curtailed and culturally moulded the practical operation of basic civil and political rights within liberal democracies. Understanding how this has taken place historically, sociologically and politically is essential to grasping both the nature of contemporary global constitutionalism and the challenges of right-wing, populist nationalism.

The ‘Threat’ to Global Constitutionalism

In a recent editorial in the journal *Global Constitutionalism* entitled “The End of the ‘West’ and the Future of Global Constitutionalism”, the editors Mattias Kumm *et al.* consider a contemporary range of challenges which pose a threat to the project of global constitutionalism. These threats stem from a number of directions. In one sense they emerge from an increasingly popular authoritarian, right-wing political sentiment which is critical of the liberal cosmopolitan project of transnational global governance, multilateral cooperation, liberal constitutional institutions and human rights norms. Examples of these include the domestic and foreign policy outlook of US President Donald Trump, the popular rise of anti-EU sentiment typified in the UK by the politics of ‘Brexit’, the rise in popularity of authoritarian, illiberal political regimes across the globe such as in Russia, Turkey and Hungary, and the increasing popularity of authoritarian social movements and political parties across Europe (Kumm *et al.* 2017, pp. 1-2; 5). Examples also include the rise in economic power of authoritarian-technocratic capitalist states like that of China and Singapore, the assertion of regional power by illiberal Arab states like Saudi Arabia, UAE and Qatar, and the spread of an illiberal ideology of “Islamic Fundamentalism” (Kumm *et al.* 2017, pp. 4-6).

For Kumm *et al.* such threats amount to a “crisis” within the USA and Europe, and across parts of the globe, in which the commitment to the principles of liberal constitutionalism are rendered increasingly tenuous and contested (Kumm *et al.* 2017, p. 8). They argue that such developments potentially point to the:

[D]ecay of the ‘West’ as a relatively cohesive geopolitical configuration anchoring a normative model of global order in which commitments to human rights, democracy and the rule of law are central. (Kumm *et al.* 2017, p. 2)

For Kumm *et al.* such a moment of ‘decay’ or ‘crisis’ of liberal constitutionalism within the ‘West’ raises the question of whether we might potentially be witnessing the end of the liberal project of global constitutionalism? In answering this question Kumm *et al.* posit that any

decline of liberal constitutional institutions across the USA and Europe does not however spell the end of global constitutionalism as the ideology and principles that underpin the global constitutionalist project have now detached from specific historical territories and have taken root across the globe. These constitutionalist principles – a commitment to pluralist, open constitutional democracies, and to a global order based upon human rights, democracy and the rule of law – are now championed outside of the traditional Cold War geographic constellation of the ‘West’ (Kumm *et al.* 2017, pp. 2-3). Further, they argue that that:

[T]he principle grammar of Global Constitutionalism is hardwired into a dense network of treaties, institutions and practices globally and enjoys the general support of a wide range of stake-holders. (Kumm *et al.* 2017, p. 3)

On this view such a global constitutionalist ‘grammar’ contains a degree of both “inertia” and “resilience” and in absence of any unified, alternative global ideology the progressive future of global constitutionalism is likely to be one of “resistance, reconfiguration and innovation” (Kumm *et al.* 2017, p. 4). Indeed in a subsequent editorial of the same journal the editors argue that attacks like those of Trump upon the foundational values of global constitutionalism (upon “democracy, human rights and the rule of law”) act to expose how widely shared these normative principles are across the globe. They argue that any contestation of these norms will lead to an active defence of the principles of global constitutionalism (Havercroft *et al.* 2018, pp. 4; 13).

The editor’s concern with the threat to the liberal cosmopolitan global constitutional project echoes a similar set of concerns voiced from liberal international relations theory. Scholars like G. John Ikenberry and Anne-Marie Slaughter have expressed concerns with an emerging crisis of the ‘Western’ global order in the face of declining US hegemony and potential challenges to this order. In certain respects also their response to this ‘crisis’ is similar to that of many global constitutionalists – the assertion of the universality of a set of liberal-democratic values

as the basis of future world order and global governance, an assumption of the appropriateness of this regardless of cultural background, and the need for peoples and states around the globe to negotiate and innovate around these principles for the benefit of humanity (Ikenberry 2012; Slaughter 2005). In this sense it would seem that the future of the liberal cosmopolitan project of global constitutionalism remains dependent upon a prospective alignment of peoples and states upholding a particular set of liberal values regardless of differences of historical, cultural, religious or colonial background. The hope of such a projected alignment is that it would stand against antidemocratic and authoritarian forces both within and outside of the traditional boundaries of the ‘West’.

In terms of their framing of what they see as intertwined problems of ‘populism’ and ‘authoritarianism’ the concerns Kumm *et al.* hold with regard to the robustness of the shared bedrock of norms and values that underpin global constitutionalism and its defence can therefore be understood as striking up against an inherent tension within global constitutionalist thought between the natural law and natural rights heritage of de-territorialised liberal ‘norms’ and the demand that institutions of global governance display some elements of democratic legitimacy and accountability. However, problematically, Kumm *et al.* gloss too readily over this tension. They are far too quick to detach the so-called ‘populist’ challenge to global constitutionalism from the question of democratic legitimacy simply because this challenge is uttered by right-wing and authoritarian voices such as Trump, Steve Bannon, Vladimir Putin, Recep Erdoğan, Nigel Farage or Boris Johnson. Yet doing so ignores the fact that across the US and Europe the right-wing populist critique of global governance institutions, even though built on shaky theoretical foundations and deplorable racialised and xenophobic mythologies, do still express a range of anxieties related to the problem of democratic legitimacy, the erosion of traditional state sovereignty, and a worry over the decisions over people’s lives being made

by ‘elites’, ‘technocrats’, and ‘globalists’ at a transnational level (Fukuyama 2018). Furthermore what is either ignored or too readily glossed over by many liberal cosmopolitan approaches to global constitutionalism is a concern with those social and economic problems which might drive people into the arms of right-wing, authoritarian ‘populist’ parties and political movements – namely decades of neoliberal economic and political reforms enacted by a range of state and global governance institutions which through impoverishment and rising inequality are provoking a ‘Polanyian’ ‘double movement’ of right-wing, authoritarian and even neo-fascist reaction (Polanyi 2001; Gill 2003; Robinson 2014). In relation then to these twin problems of the lack of democracy and inequality and impoverishment caused by neoliberalism it is important to turn to more critical perspectives on global constitutionalism.

Critiquing Global Constitutionalism

There are a range of differing critiques of the liberal project of global constitutionalism drawing upon critical theory (Hardt and Negri 2001), postcolonial theory (Tully 2008; De Sousa Santos 2002), critical legal theory (Christodoulidis 2017; Schwöbel 2011; Goldoni 2019), and neo-Gramscian international political theory (Gill 2003; Gill and Cutler 2014). These voices share much with a wider critique of the processes and policies underpinning neoliberal globalisation and global governance and the post-Cold War shaping of the capitalist world economy. From this perspective the development of many transnational global governance institutions have been built upon a particular expression of global social, political, economic, epistemic and class relations in which an ideology, rationality and value system of neoliberalism has come to dominate. In this national economies and political systems have been reorganised, realigned and integrated into a globalised system of neoliberal, capitalist economic and social reproduction in which the institutions of social protection under the welfare state have been eroded in favour the mobilisation of individual and corporate ‘freedom’ through expanding

capitalist markets, an enlarged private sector and regimes of privatisation and private debt, the commodification of labour and environment, and the unrestrained flow of capitalist finance. The neoliberal transformation of the state has developed in tandem with the expansion in power of multinational corporations and the expansion in jurisdiction, power and influence of global governance institutions like the World Bank, IMF and WTO which have attempted to entrench neoliberal economic and political values and policies of restructuring across the Global North and Global South (Chimni 2004; Harvey 2005; Anghie 2005; Peet 2009; Robinson 2014).

Viewed from the perspective of the critique of neoliberal globalisation Thornhill's description of the 'transformation of constituent power by rights' should thus be reinterpreted much more critically as involving a specific transformation taking place under the weight of an alignment of historical and political power relations which have been moving in a particular, neoliberal normative direction. Since the 1990s such 'rights' and 'transnational norms' either as highly individualised human rights, or as market-based rights of private property, freedom of investment, speculation and capital movement, and generalised freedom of capitalist accumulation, have increasingly echoed the normative ideals of neoliberal capitalist market society which as a value system radically attempts to minimise democratic interference in the operation of capitalist markets and perpetuates an understanding of human social relations and moral self-understanding as defined by '*homo economicus*' (Streeck 2014; Mirowski 2013; Brown 2015).

It is in this sense of understanding global constitutionalism as a very particular constellation of power relations that Stephen Gill refers to the idea of a "new constitutionalism" of "disciplinary neoliberalism" (Gill 2003, pp. 131). Together with A. Claire Cutler, Gill argues:

New constitutionalism forms the political and juridical counterpart to disciplinary neoliberalism, where the latter refers primarily to the processes of intensifying and

deepening the scope of market disciplines associated with the increasing power of capital in organizing social and world orders, and in so doing shaping the limits of the possible in people's everyday lives.

In that context, we view new constitutionalism as involving many political-legal elements and regulatory mechanisms, encompassing hard and soft law that have developed unevenly across space and time. (Gill and Cutler 2014, p. 6)

For Gill and Cutler the strength of new constitutionalist pressures and constraints are “uneven” and therefore vary in relation to the size and strength of particular states and civil societies, national and region capabilities, and the degree to which these are integrated into global capital and money markets and incorporate elements of neoliberal ideology and rationality (Gill and Cutler 2014, p. 6). Broadly they argue that new constitutionalism refers to a combination of processes:

1. The uneven emergence of a de facto constitutional governance structure for the world market (intended to operate regionally, nationally and globally) involving the interaction of public and private power, incorporating international organisations.
2. The neo-liberal reshaping of political subjects and restructuring of particular state forms, partly through constitutional and state means, extending the orbit and interpellation of the commodity form and its legal codification, in order to extend capitalist markets and the sway of market forces in social and political life.
3. The specific locking-in mechanisms (laws, rules, regulations, procedures and institutions, such as independent central banks) associated with neo-liberal patterns of accumulation.
4. The ‘new informality’ involving proliferation of soft, self-regulatory and ‘flexible’ or ‘double’ legal standards. (Gill and Cutler 2014, p. 7)

For Gill the ‘locking-in’ processes of new constitutionalism involve the imposition of discipline upon public institutions, insulating the economy, markets and private property rights as well as key aspects of fiscal, monetary and trade and investment policies from democratic interference and regulation. This takes place also through “surveillance” mechanisms of organisations like the IMF, as well as the pressure of private credit-rating agencies which impose market-based discipline on states desperate to entice foreign investment and credit (Gill 2003, pp. 132-3).

Further, for Gill the multiple overlapping layers of regulatory obligations stemming from treaties, hard and soft law, judicial and arbitration decisions and policies of central banks work to make political questions appear as purely “technical” questions of economic governance and therefore beyond the sphere of legitimate political contestation. Such a tendency places downward pressure by new constitutionalist forms upon democratic institutions of the nation state, limiting their sphere of engagement and attempting to limit also what is culturally and cognitively acceptable to critique, intervene and regulate. In this respect key aspects of transnational constitutionalism help to entrench as “common sense” or as culturally or epistemically normalised (in Gramscian or Foucauldian terms) a neoliberal value system as enunciated by thinkers like Ludwig von Hayek and Milton Friedman that the capitalist market economy (as the embodiment of ‘freedom’) should be secured and protected by the state and therefore as protected from democratic interference and from social democratic management and regulation (Gill 2003, pp. 131-38; Gill 2014, pp. 40-42).

In broad terms the project of neoliberal global constitutionalism contains a number of underlying conflicts and contradictions. In one sense while the emergence of overlapping transnational constitutional forms leads to a certain erosion of the traditional ‘Westphalian’ idea of state sovereignty and a limitation upon the power and reach of democratic institutions or popular sovereignty, this has not led to the evisceration of the state itself. Rather what has emerged is the strengthening of aspects of the neoliberal state as a security apparatus guaranteeing, protecting and defending markets, property rights and capital from interference. In many parts of the world the neoliberal state has expanded the reach of markets and the private sphere through non-democratic means, through authoritarianism and oligopolistic political control (Gill 2014, pp. 34-41). Further the neoliberal project of global constitutionalism, through stripping back the welfare state and forms of social protection, has

increasingly exposed populations to the insecurity of market forces and has led to rising levels of impoverishment, inequality and social dislocation. Alongside increasing ecological devastation, the erosion of democratic governance over the economy and increase in levels of inequality and impoverishment has led, and may increasingly lead, to a substantial intensification of political conflict both from the left and by way of reaction by right-wing, authoritarian and neo-fascist political movements (Gill 2003, pp. 138-142).

Such an account helps to point to a degree of ‘constitutional antagonism’ sitting within the development of transnational or global constitutionalism. This can be thought of in the sense given by Nicos Poulantzas, whereby the state and overlapping ‘constitutional’ frameworks of global governance should not be seen as a “thing” but rather but as a “social relation” (Poulantzas 1980). These are thus *constituted* by ongoing, multiple ‘struggles’ between classes, class fractions, social movements, elites, and bureaucratic, governmental and media organisations over the ordering of national and global relations in accordance with conflicting ideas of what constitutes social and economic ‘justice’. Similarly, in the sense given by Jacques Rancière such a constitutional arrangement involves then fundamental “disagreement” over constitutional values, the constant denial of political agency, and ongoing struggles over both the assertion of value, and over what can form even the legitimate ground of political debate and contestation (Rancière 1999). Further, thought of in a sense given by Antonio Negri, such an idea of constitutional antagonism involves a vital tension between “constituted” and “constituent power” whereby the traditions of both liberal and neoliberal constitutionalism have attempted to erode the active democratic participation of the masses in favour of fixed constitutional rules, principles and limited ‘rights’ which protect and enforce the rule of private property and capitalist accumulation (Negri 1999; Hardt and Negri 2004).

Crucially then when liberal cosmopolitan approaches to global constitutionalism fail to adopt a perspective which is attentive to constitutional antagonism, they risk overlooking the processes in which a constitutional language of rights and transnational norms have been co-opted by class, social and normative power struggles which have resulted in the creation of intersecting layers of global governance in order to realise overlapping neoliberal visions of social and economic justice. This is not to say that all liberal cosmopolitan approaches to global constitutionalism overlook neoliberal globalisation. There are of course liberal cosmopolitan scholars who offer a social democratic critique of neoliberal globalisation, such as that presented in the work of Martti Koskeniemi in terms rethinking Kantian moral responsibility (2007), or by Christian Volk in terms of Arendtian democratic agonism (2012), or in Rawlsian approaches to global moral obligations of redistributive welfare developed by Charles Beitz (2003) and Thomas Pogge (2008).

However, alongside these far too often many liberal cosmopolitan approaches to global constitutionalism focussed upon ‘human rights’ and ‘transnational liberal-democratic norms’ do too little to assess how their normative vision is either rendered inoperable by neoliberal power structures, or, how their language and conceptual framework is drawn upon to legitimise a neoliberal transnational project. Without a clear critique of neoliberalism, and without an account of constitutional antagonism, many liberal cosmopolitan approaches to global constitutionalism fail to adequately assess the emerging monstrous body of antidemocratic, nationalist political sentiment which challenge both the liberal cosmopolitan normative project, and the globalist neoliberal vision.

Domination, Reaction and Antidemocratic Politics

The critique of global constitutionalism draws to light a constellation of economic, political and legal processes, structures, governmental techniques and power relations which through an ideology and rationality of neoliberalism has come to order key aspects of global juridical relations. The project of constitutionalising neoliberal globalisation over the past 40 years has gone hand in hand with the reversal of social welfare protection across the Global North and parts of the Global South along with the entrenchment of neo-colonial forms of exploitation and underdevelopment across large swathes of the Global South (Chimni 2004; Peet 2009). On the back of these developments the world has witnessed a major increase in levels of social and economic inequality (Stiglitz 2012; Piketty 2014).

Such a critical perspective places in a different light the contemporary ‘threats’ to global constitutionalism as identified by many liberal cosmopolitan proponents such as Kumm *et al.* Emerging out of the critique of global constitutionalism at least two interlinked problems can be identified. The first involves key aspects of global constitutionalism operating as a form of neoliberal domination and the enactment of this as an antidemocratic form of constitutional organisation. The second involves the sense that the constitutionalisation of neoliberal globalisation and the entrenchment of the negative effects of inequality, impoverishment and social dislocation plays a causal role in the rise of antidemocratic, authoritarian and neo-fascist political movements across the globe and within the old liberal constitutional heartland of the ‘West’.

One limitation of many liberal cosmopolitan approaches to global constitutionalism is that they overlook the nature of these problems and downplay the crucial role neoliberal ideology and governmental rationality has played in the construction of a fragmented and overlapping global

constitutional framework. One consequence is that a natural law and natural rights language of ‘rights’ and ‘transnational norms’ drawn upon by liberal cosmopolitans often offers a false sense of legitimacy to the juridical entrenchment of forms of economic exploitation and antidemocratic, managerial and technocratic governance. Further, that by overlooking the causal connections between on the one hand, years of neoliberal governance practices and the pervasiveness of neoliberal discourse and, on the other, the rise right-wing, authoritarian and neo-fascist reactionary movements, many liberal cosmopolitans ignore the manner in which the authoritarian and ‘populist’ antidemocratic utterances of Trump, Bannon, Farage, Johnson or Marine Le Pen, Narendra Modi, or Jair Bolsonaro operate as a continuation of key elements of neoliberal ideology and rationality.

For Wendy Brown, focussing upon North America and Europe, decades of neoliberal policies and the increasing dominance of neoliberal ideology and governmental rationality across all aspects of social life and personal and political self-understanding have played a crucial, causal role in shaping the current reactionary rise of a right-wing, authoritarian and antidemocratic political discourse. She argues that this antidemocratic discourse is also in many crucial ways a development, continuation and modification of a key set of values expressed by “actually existing” policies of neoliberalism (Brown 2019). Echoing aspects of the historical accounts of the development of neoliberal thought given by Philip Mirowski (2014) and Quinn Slobodian (2018) Brown argues that even though there is a degree of divergence between the theoretical globalist premises of the neoliberal and ordoliberal intellectual traditions and the ‘actually existing’ policies and political practices of neoliberalism, clear lines of continuity remain, even in neoliberalism’s morphing into a monstrous, antidemocratic and anti-cosmopolitan populism (Brown 2019). Brown argues:

The neoliberal dream was a global order of freely flowing and accumulating capital, nations organized by traditional morality and markets, and states orientated almost

exclusively to this project... However, things went awry in actually existing neoliberalism, as they did in the Marxist revolutions of the last century, which is one reason there is such confusion about what neoliberalism is and whose fault its economic and political disasters are. Democracy has been throttled and demeaned, yes. However, the effect has been the opposite of neoliberal aims. Instead of being insulated from and thus capable of steering the economy, the state is increasingly instrumentalized by big capital – all the big industries, from agriculture and oil to pharmaceuticals and finance, have their hands on the legislative wheels. Instead of being politically pacified, citizenries have become vulnerable to demagogic nationalistic mobilization decrying limited state sovereignty and supranational facilitation of global competition and accumulation. And instead of spontaneously ordering and disciplining populations, traditional morality has become a battle screech, often emptied of substance as it is instrumentalized for other ends. (Brown 2019, pp. 82-4)

Brown argues that it is vital that in attempting to understand the legacy of neoliberalism we grasp how a set of ideas which were originally anti-totalitarian (as well as anti-socialist) have developed in practice to establish a dominant political culture and framework of subject production which has helped to normalise and mobilise an anti-egalitarian political discourse. For Brown, in the USA, white nationalist authoritarian political formations emerge on the back of economic inequality, abandonment and resentment caused by socially destructive neoliberal economic and political policies (Brown 2019, pp. 7-8). However, crucially, these are shaped by almost four decades of a pervading and suffocating neoliberal discourse and rationality in which the celebration of markets and traditional moral values has involved an unwavering attack upon social justice, the public sphere, on racial, gender and sexual equality, upon constitutional democracy and public education. She argues that this has all been done under the banner of “freedom and morality” and through the trivialisation and demonisation of demands for social equality, condemned and dismissed as “political correctness” (Brown 2019, pp. 7-8).

For Brown the neoliberal project of privatisation involves twin orders. The first is an order of “economic privatisation” which is deeply subversive to democracy and generates and legitimates inequality, exclusion, private wealth, the privatisation of the commons, plutocracy

and the muddying of democratic imagination. The second order involves “privatisation by familiarisation and Christianisation” which draws upon antidemocratic moral values to subvert democracy and is represented by Margaret Thatcher’s dictum, “there is no such thing as society ... only individuals and their families” (Brown 2019, p. 115). Brown claims that the enactment of this proclamation holds up as legitimate the values of individualism, tradition, hierarchy, exclusion, patriarchy and Christianity against the values of social justice, tolerance, inclusion, equality and secularism and is “especially important in generating the psychic and political formation of liberal authoritarian political culture today” (Brown 2019, p. 116). She argues that when this twin model of privatisation is extended to the idea of the nation, then the nation is conceptualised by right-wing and authoritarian thought as both a “competitive business needing to make better deals” and an “inadequately secured home besieged by ill-willed or nonbelonging outsiders” (Brown 2019, p. 116). In this respect for Brown the neoliberal privatisation and familiarisation of the state sets in train the seeds of a nationalism that is “legitimately illiberal toward aversive insiders and invading outsiders” and generates an “imago and ethos of the nation” that is “walled, homogenous, unified, hierarchical, and authoritarian” (Brown 2019, pp. 117-8).

Brown’s account helps to point to the normative, ideological and discursive background through which can be traced the emergence of a 21st century anti-cosmopolitan, nationalist and authoritarian form of neoliberalism. What can be termed a ‘nationalist neoliberalism’, as expressed by the right-wing ‘populist’ sentiments of figures like Trump, Farage and Johnson, eats away at many of the traditional principles of classical liberalism (in terms of formal equality and non-discrimination) and social liberalism (in terms of a basic idea of social protection) but retains an adherence to many of the core values of economic liberalism and “market society” as described by Karl Polanyi (Polanyi 2001). As such nationalist

neoliberalism holds onto the value of the freedom of economic ‘autonomy’ for the individual and corporation, the celebration of private property, the drive to privatise the commons, the ideal of possessive individualism, the centrality of commodification, the naturalisation and societal normalisation of the profit motive and the assertion of the virtue and positive, utilitarian social role of private and self-interested wealth accumulation. Such a nationalist neoliberalism still sees as ideal the expansion of market rationality across most aspects of human social life and denounces any attempts at social democratic or socialist control of the market.

In terms of the challenge to global constitutionalism, and the liberal cosmopolitan normative projection of this, as well as to the globalist neoliberal vision, such nationalist neoliberal sentiment does raise issues in terms of the turn to protectionism, the possible opening of trade wars and the provoking of inter-state military conflict. It raises issues also in relation to the unpredictability of political decision making involving the populist, pragmatic and selective switching of policies, and the mobilisation of a nationalist imaginary built upon reclaiming and defending the ‘sovereignty’ of the nation state. As such nationalist neoliberalism exhibits a degree of unpredictability and contradiction in that it moves between, and is often torn between, moments of openness to transnational capitalist markets, and, moments of closure and defensive protectionism of the national capitalist economy.

However, when seen from a longer view of the history of capitalist economic and social development such a flipping between logics and strategies of openness and closure is not uncommon. From a perspective of world systems theory, as set out by theorists like Immanuel Wallerstein and Giovanni Arrighi, the historical development of the capitalist world economy has consistently been marked by tensions between on the one hand, transnational tendencies of state power and capitalist accumulation found in long distance trade, regional and global

finance, and hegemonic or imperial control over markets and territory, and on the other hand, a more localised, and sometimes more protectionist and defensive focus of the nation state, the national economy and the favouring of national industry and corporations (Wallerstein 2007, 2011; Arrighi 1994).

From this perspective through the latter half of the 20th and early 21st centuries, US economic, military, political and cultural hegemony had maintained a degree of stability between competing national capitalist economies, helping to create, guide and enforce many of rules of what has become the neoliberal global order and framework of neoliberal global constitutionalism (Wallerstein 2007). With the decline of US hegemonic power and ongoing crisis of capitalist accumulation since 2008 what can be witnessed is a jostling between states and groups of states over short term economic advantages and long term strategic interests leading to the increasing possibility of inter-capitalist state economic and even military conflict, or at least the testing and pushing the boundaries of the current set of neoliberal transnational rules and conventions governing the world system.

From a neo-Gramscian perspective, such as that given by Andreas Bieler and Adam David Moreton, the tension between globalist neoliberal and nationalist neoliberal outlooks reflects the fragility of the global capitalist order marked by class fractional disputes between members of capitalist classes and neoliberal political and managerial elites split across transnational/globalist and national orientations and interests. This fragility and instability is deepened by the uneven nature of neoliberal capitalist development and competing capitalist interests caught between more globalised and more regionally based forms of capitalist production, exchange and accumulation, and by the attempted mobilisation of 'consent' by competing capitalist class fractions via the appeal to differing values and imagined

communities such as global human rights or xenophobic nationalism to generate support from the electorate (Bieler and Morton 2018). On this view intra-class conflict occurs within and across nation states between neoliberal capitalist elites who attempt to implement either globalist or nationalist political policies, such as, for example over the US invasion of Iraq in 2003, or over the current US ‘trade war’ with China, or over the UK’s decision to leave the EU.

When placed within the context of an emerging antidemocratic and authoritarian populist political discourse based upon xenophobic, exclusionary and racist nationalist neoliberal imaginaries then both the liberal cosmopolitan normative project of global constitutionalism and the fragmented transnational power structures that make up the ‘new constitutionalism’ of neoliberal global constitutionalism are contested and placed under threat. A collection of nationalists, racists, neo-fascists, antidemocratic right-wingers, religious conservatives and fundamentalists can be seen to at times align in a ‘popular front’ with nationalist neoliberals, capitalist elites and disenfranchised sections of the populace. Together this political constellation can be seen to shout angrily and unpredictably in the name of ‘national interest’ and ‘national sovereignty’. Yet quite often the claim of the reassertion of national sovereignty, against the EU or against the UN, is immediately contradicted by the follow-up claim to remake a variety of ‘free trade’ deals across the world. It is in such a bizarre and contradictory environment marked by a tension between nationalist and globalist outlooks within neoliberal ideology that an international hotel billionaire like Trump and millionaire hedge fund managers like Farage or Jacob Rees-Mogg can speak in the same breath support for xenophobic nationalism and the virtues of total market thinking – or in the case of some proponents of a ‘hard Brexit’, aim to cut close ties with EU capital so as to open the UK to the greater influence of US capital.

Contesting and Reimagining Global Constitutionalism

Antidemocratic and anti-globalist nationalist reassertions of state sovereignty and the nationalist attempt to redirect the direction of actually existing neoliberalism both contest and threaten to bring to an end the viability of the liberal cosmopolitan project of global constitutionalism. The normative end or goal of liberal cosmopolitan global constitutionalism often projects an idealised political and juridical vision that is radically divorced from the present sociological reality of the ‘new constitutionalism’ of disciplinary neoliberalism with its strong antidemocratic tendencies and its contribution to the generation of inequality, ecological devastation and impoverishment across the globe. In this respect it seems unlikely that liberal cosmopolitan proposals to defend and reinvigorate global constitutionalism against the forces of antidemocratic authoritarian populism hold much weight or chance of success.

Social democratic approaches which develop and extend Rawls’ account of moral obligation in a liberal cosmopolitan direction, such as that given by Beitz (2003), Pogge (2008), and Amartya Sen (2009) generally pay insufficient attention to the violence of capitalist accumulation and underlying moments of social and constitutional antagonism to offer a deep enough critique of neoliberal rationality and its processes of social reproduction. More agonistic accounts of liberal cosmopolitanism, such as that presented by Benhabib (2006) and Volk (2012) offer important ways of framing democratic-constitutional questions but otherwise need to be radically re-gearred to focus attention on forms of class and social antagonism which are central to a clearer understanding of actual the operation of communicative rationality, discourse ethics and political agonism. Further, more juridical liberal cosmopolitan approaches like that presented by Kumm, emphasising the importance and universality of overly vague notions such as ‘human rights’ and ‘liberal-democratic transnational norms’ skim too far over

the top of neoliberal, globalised social processes to offer any form of sustained, critical analysis of the present. At their worst, such juridical approaches risk providing a moral and legal language of legitimacy to a globalist neoliberal project, and, offer merely target practice for antidemocratic populist and nationalist attacks on anything seemingly ‘global’ or ‘cosmopolitan’.

However, there remains value and worth in holding onto an idea of transnational or global constitutionalism against and beyond its liberal cosmopolitan projections and against and beyond the twin neoliberal nightmares of neoliberal global governance and nationalist neoliberal interstate conflict. From a critical perspective there remains an importance of holding onto a global constitutionalist idea as a means of pushing back against and countering the social and ecological devastation caused by the legacies of colonialism, US hegemony, and neoliberal transnational constitutional governance. The idea remains important also for pushing back against a rise of nationalist neoliberalism, aggressive state action and neo-fascism.

In terms of juridical strategy an important sense of holding onto the significance of constitutionalism is given by Emiliios Christodoulidis. Drawing upon Negri and Rancière, in relation to the EU, Christodoulidis argues for the importance of making constitutional claims in the name of social rights understood as “solidarity” whereby such claims are antithetic and antagonistic to a dominant neoliberal legal rationality of “total market thinking” framed by individualistic rights, individual responsibility, and the expansion of market competition. For Christodoulidis the deployment of claims to solidarity and dignity thus help to “stage” a constitutional conflict within the law and attempts to render more visible, problematic and contestable the technical operation of neoliberal rationality (Christodoulidis 2017). The value of such an approach is that it goes beyond a mere affirmation of human rights constitutionalism

and Arendtian democratic agonism, and locates as a target of critique and contestation the social, cultural and epistemic values of neoliberal rationality grounded within a broader context of capitalist accumulation.

Broadly then from a critical perspective the importance of holding onto a ‘constitutional’ idea in relation to global or transnational governance goes beyond the liberal cosmopolitan approach of merely reasserting the value of traditional individualistic liberal rights and norms which do little to challenge or displace the dominance of neoliberal ideology and rationality. If the value of a ‘constitutional idea’ is to have any meaning in egalitarian, democratic, ecological and liberatory terms then it *must* be tied to an awareness and critique of neoliberalism and thus enact a juridical and political contestation and attempted *displacement* of the values, logics and justice claims of neoliberal ideology and rationality.

In this respect any alternative conception of global constitutionalism draws upon and enacts what Ernst Bloch called the “not yet” of justice (Bloch 1996), or what Jacques Derrida called the “impossibility” of a justice which is “yet to come” (Derrida 1994). Politically this involves a radical idea of democratic socialism renewed through an attentiveness to feminism, identity politics, postcolonial thought, and ecological ethics (Hardt and Negri 2001; Gill 2003; Federici 2012; De Sousa Santos 2016). Such an approach thinks of global constitutionalism in a transformative sense of dynamic ‘constituent power’ recreating and reimagining global constitutional relations and institutions beyond their current historical coordination of ‘constituted power’ of liberal individualist rights, capitalist property and market relations and neoliberal ideology.

Such a radical idea of the creation of an *egalitarian and democratic global constitutional order* involves then an idea of struggle over the democratisation, reorganisation and transformation of current regional and transnational constitutional institutions, and the creation of new democratic constitutional intuitions alongside these. Such a difficult and almost impossible utopian idea of global justice is necessary if humanity is to avert a future characterised by humanitarian and ecological catastrophe. Yet in more pragmatic terms, the importance of a struggle to transform the nature of existing transnational constitutional institutions (such as the EU or UN or World Bank) and to wrench these out of the hands of those who treat neoliberal rationality as a form of ‘common sense’ remains vitally necessary if the world stands any chance of beating back the current rising tide of neoliberal nationalism, authoritarianism and neo-fascism. In this respect, it is not enough to affirm the value of these transnational institutions uncritically, to do so is to fall prey to many of the failures of liberal cosmopolitan constitutionalist thought and to feed the growing belly of the beast that is nationalist neoliberalism. For any transnational or global constitutionalist project to be legitimate it must be radically transformed. How, and in what direction or directions remains a key legal, political and social question of our time and subject of course to ongoing debate and disagreement. In the least we know what the constitutionalist idea cannot and should not be – it cannot be neoliberal, theoretical or actually existing, and it cannot be an uncritical liberal cosmopolitan vision that offers false legitimacy to an unjust constitutional order.

Acknowledgements

I would like to thank the anonymous referees for their very helpful comments.

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