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Constitutionalism

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Constitutionalism

Andrew Godden and John Morison

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A. Introduction

- 1 The idea of constitutionalism—like the ideas of state, government, democracy, power and law to which it is very closely related—goes right to the heart of some of the very biggest questions about how we can live together. Where individuals co-exist in any social group—a family, tribe or nation state, or as citizens in a wider global order—there are all sorts of issues about the terms on which they come together and stay together, how rules are made to keep order within the group and how the group will react to outsiders and adapt to change. There are also issues over how order is maintained, and how disputes over the application of rules are dealt with. In addition there are questions about how individual and group aspirations are reflected in the arrangements for living together, and whether and how those who take different views are to be protected from domination by more powerful groups—whether these be simply the majority or those who exercise most power in reality.
- 2 Constitutionalism may simply be about how power is distributed within any social unit but often the idea moves beyond a simple description of how things are formally arranged—questions about who does what within a state—and taps into important political and philosophical issues as well as moral questions about how government works, and the way that we ought to live together. While almost any social group from a small tribe to a supranational government will have rules, or at

least understandings, about how to conduct its affairs, the idea of constitutionalism can refer to much more. As Grimm (at 1) puts it, ‘every political unit is constituted but not every one of them has a constitution ... the term ‘constitution’ covers both conditions’. The word constitution can refer descriptively to the political conditions of a country, or it can have a normative or prescriptive sense where it sets out the rules by which the political process of rule should be exercised. It is this second sense, emerging primarily from the American and French Revolutions at the end of the 18th century, that now dominates. As Rosenfeld (at 3) has argued although ‘there appears to be no accepted definition of constitutionalism’, the common thread that appears to unite most conceptualizations is that the subject, at its most basic level, is concerned with the fundamental principle that governmental power requires constraint in the interests of social order (Sweet 626–628).

- 3 Most constitutions in this sense are closely linked to a text. This is often a foundational document which is accorded higher status and is the foundation for a system of constitutional review carried out by the judiciary (→ *judicial review*). However a single, consolidated text is not a necessary condition of constitutionalism as the examples of the United Kingdom, New Zealand and Israel demonstrate. Constitutionalism—in the sense of a legal constraint on politics—is obviously facilitated by rules that are written down but this is not essential, and their absence may indeed facilitate flexibility in constitutional development.

1. The Arrangements for Government

- 4 With most examples of collective action that achieve any degree of formality or exist over a sustained period it is possible to separate out three main classes of activity. As philosophers from at least the time of ancient Greece have identified, there are three main classes of activity involved in the politics of living and acting together. Aristotle (384–322 BC) in *Politics* classified these roles as the deliberative, the magisterial and the judicial. There is the function of making decisions or rules for individuals and groups in society. There is the job of implementing these decisions, maintaining order, conducting affairs with other social units and defending the group. Finally, there is the task of determining disputes. In elementary social groupings it may be difficult to identify exactly if and how these functions are carried out. The allocation of functions, formal or otherwise, can be termed as a ‘constitution’ in this sense of an arrangement for organizing who does what. Certainly in developed states it is generally possible to identify clearly these three basic functions and, following the French writer Montesquieu (*De L’Esprit des Lois* (1748)) who made a classic study of the functions of government, these are generally termed the legislative, executive and judicial (→ *legislative powers*; → *executive powers*; → *judicial powers*). The Constitution of the United States of America of 1789 identifies these functions in its first three articles, while the Constitution of the Peoples’ Republic of China describes legislative power as residing in the National People’s Congress (Art. 58), governmental power in the State Council (Art. 85) and the judicial function in the People’s Courts (Art. 123). Often there is a view that not only are there three main

jobs involved in the business of rule but also that these roles should be kept separate or at least discharged by different people. In this way the simple notion of a distribution of powers moves from being a description of how things are in government into a prescription for how they ought to be. This takes us on to the second general meaning of the term ‘constitution’.

2. Constitutionalism as an Expression of Values

- 5 This relates to the more ethical part of the issue of how we live together. It is primarily about ideas of how we *ought* to live together. Constitutionalism here relates to establishing a legitimate model of rule, and it may have a role in affirming or actively constituting the polity by providing some sort of symbolic stamp of its status and values. Indeed, in some instances, constitutionalism may have a function in mobilizing the political community to see itself as a polity or entity sharing a common agenda. This general notion of constitutionalism connects with important political and philosophical issues about how to rule, and the nature of people, as well as moral questions about what constitutes a good life lived among others. It is here that recognizably modern ideas about the democratic foundations of government emerge in debates about how and why we live together.
- 6 A fundamental question that in a sense begs the issue of the values behind constitutionalism relates to the basis on which we agree to be governed. Constitutionalism in this sense connects to the basis on which the exercise of power is acceptable or can be seen as legitimate. There are of course many political philosophies and views of human nature that might be reflected in an idea of constitutionalism at this level. Some of these are almost beyond our imagining and have little connection with any familiar notion of government or constitutionalism today. For instance, it is perhaps difficult to identify now with the Kingdom of Khmer in what is now Cambodia and Vietnam where in the eighth century the colossal city of Angkor with its artificial mountains, lakes and canals and temples and palaces was built before disappearing into the jungle. Such a civilization, and its constitution, seems to have operated on a basis that remains inexplicable to us. It may be that such societies relied to a great extent on force, at least as regards the majority of those who lived within them. However such arrangements are often unstable. Constitutionalism is the point where raw power in the sense of force available to compel the realization of one’s will becomes more closely allied to ideas of authority and → *legitimacy*, perhaps granted by consent or obtained in some other way from those who are to be governed.

3. Constitutionalism as a Constraint

- 7 Closely related to the idea of constitutionalism containing and advancing values is an idea of the constitution as a constraint on the potential of future powers. As Hayek expressed it, the constitution is a tie imposed by Andrew when sober on Andrew when drunk (Hayek 176–192). This notion of self-binding has been controversial for some time with both Hume (1739) and Rousseau (1762) debating the logical difficulties of having constraints upon oneself that defeat the very

sovereign nature of the power that is trying to restrain itself. However there has been a recent revival of this idea (Preuss; Elster (2000/2003); Sunstein). Elster in particular has made the argument that both despotic forces and those inspired by radical democracy may lay claim to a right to intervene in political matters at any time. By contrast more settled views of constitutional democracy are founded on there being established institutions of democracy, in particular → *constituent assemblies* which lays down the ground rules for succeeding generations—and the idea that these cannot be removed once established. Indeed, Elster argues, the role of the initial constituent assembly may be *constituting* in the sense that it can bind the nation by, for example, entrusting certain powers of decision to the judiciary, or requiring periodic → *elections*, or establishing an independent central bank to remove monetary policy from the political process. Others have used this idea of self-binding to support the requirement of Western style, democratic constitutions for transitional countries in Central and Eastern Europe or to require certain fixed constitutional conditions in order to facilitate economic growth (Dennis and Söderström).

B. Global Cultures of Constitutionalism

- 8 As fundamental issues about the nature of authority and the foundation of legitimacy come to the fore in the idea of constitutionalism a number of deep cultural tensions emerge.
- 9 Within Islamic traditions there are issues about the primacy of religion as the basis of the constitution and the state, and the compatibility of western ideas of democracy and the rule of law (Brown; Abou El Fadl; Ali). Arjomand maintains that since → *Islamic constitutionalism* emerged a century ago it has undergone a number of phases. Initially Islam appeared as a limitation to government and law-making before becoming to be seen as the foundation of the state and the constitution, and more recently in an incipient, post ideological phase there has been a return to an idea of limited government within Islam (Hosen).
- 10 In the context of Western traditions as compared to those in the East and Global South, there can be seen very clearly a fundamental dichotomy between individual liberty and collective responsibility. Perhaps the greatest characteristic of the Western constitutional order is centred around individual freedom as basic to social life, while in the East and parts of the Global South the emphasis has, at least comparatively, been on statehood and collective allegiance.

1. The West

- 11 Depaigne (at 2) has argued that in ‘the Western world, liberal democracy [was] established only at the end of a long historical process through which individualism [was] incorporated as part of the local culture’ (→ *liberalism*). For centuries, this process manifested itself in the form of an endless struggle for power between the masses and the elite, which led to some of the most defining moments in constitutional history. An early example was the campaign by the English barons to force King John to acknowledge the principles of → *Magna Carta (1215)*,

- thereby limiting monarchical power and gaining explicit protection of entitlements such as the right to → *trial by jury*. This victory for individual freedom went on to inspire many others, such as the Petition of Right in 1628, the Habeas Corpus Act of 1679 and the → *Bill of Rights (1689)*, which effectively established the system of parliamentary democracy that would later be exported across the British Empire.
- 12 This fervour for individual freedom was reflected in the United States Declaration of Independence in 1776, which declared the existence of inalienable rights and their applicability to every American citizen. The liberty-based, individualist foundations of the former British colony were later incorporated into the US constitution of 1787—which opens with the now famous words: ‘*We the people*’—and went on to inspire the 1791 Bill of Rights, which guaranteed a range of further protections such as freedom of religion and the right to silence. The emancipatory language of the US constitution had a significant influence further afield, and helped to shape the discourse of the French Revolution of 1789–1799. As a leading cleric of the time remarked, ‘behold the light you have struck out, after setting America free, reflected to France and there kindled into a blaze that lays despotism in ashes and warms and illuminates Europe’ (Richard Price, quoted after Philp).
- 13 Principles such as these became the catalyst for what was perhaps the greatest legal development of the 20th century: the emergence of the modern concept of **human rights**. The seminal document here is the **Universal Declaration of Human Rights (1948)**, enacted by the United Nations (UN) in order to protect the ‘inalienable rights of all members of the human family’ from oppressive governments in the wake of World War Two. Other landmark documents, such as the **European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)** and the **American Convention on Human Rights (1969)**, have since been added such that there are now as many as 300 different types of human rights enshrined under the international treaty regime and domestic law (Posner (2014) 6). According to Ignatieff (at 57), human rights can be described as ‘a language of individual empowerment’ against the forces of the state and its monopoly on the use of violence. To that extent, human rights may be regarded as the culmination and embodiment of the Western struggle for liberty, or what Fukuyama might have referred to as ‘the end of history’ (at XI). Drawing its lineage from Greek civilization and Roman law, from the age of empire and the constitutional values of Europe and the United States, the human rights discourse could indeed be seen as the summation of certain, Western ideas of constitutionalism (cf Hopgood).

2. China

- 14 In contrast to the West, much of the development of constitutionalism in the Far East is characterized by themes of collective allegiance and social reciprocity. This is particularly true in China, which for centuries has been ruled by the precepts of Confucianism (→ *Confucian constitutionalism*), but it is also evident in other countries such as North Korea (Yoon). According to Han (at 110–111), the overall lesson of Confucian thought is that society as a whole is governed by five reciprocal relationships. These are: emperor–subject, father–son, husband–wife, elder–

younger brothers and friend–friend. Supplementing these relationships are the five virtues, which include humanity/benevolence, righteousness, propriety, wisdom and trustworthiness. Together, these principles provide philosophical authority for the collective ethos of the Chinese state. This was recognized by Yum (at 81), who observed that ‘Confucian philosophy views relationships as complementary or asymmetrical and *reciprocally obligatory*’ (emphasis added).

- 15 Prima facie, the bare concept of mutually binding relationships appears harmless. But from the perspective of Western constitutionalism, controversy arises when one traces the structure of these relationships from the familial context to the state level. Han (at 115) maintains that, just as ordinary citizens are assigned roles in society, so too are the people in leadership positions. Thus, according to Confucianism, Chinese leaders – including those within the Communist Party – are expected to ‘teach, supervise, mentor and look after’ the welfare of their subordinates, while their subordinates are expected ‘to show respect and loyalty’ in performing their own obligations (*ibid.*). This verticality is still reflected in current ideas of constitutionalism in China, where national welfare—as opposed to individual welfare—is seen as the driving force behind most aspects of social life.
- 16 As is the case in other Eastern countries with similar value systems, the Confucian ideology in China is given institutional form under the guise of Marxism-Leninism and the top-down structures of communist government. As the Preamble to the Constitution makes clear, the organization of power in China is sustained by ‘the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong thought’. In line with communist practice, then, the Constitution is prescriptive in setting out the rights of the citizenry, such as the right to vote under Article 34, the right to freedom of speech under Article 35 and the right to religious worship under Article 36. More controversially, however, the Constitution is also clear in specifying the duties that are owed by the citizens toward their motherland. This can be seen most clearly in Article 53, which outlines the duty to ‘abide by the Constitution and other laws, keep State secrets, preserve public property, observe labour discipline and public order and respect social ethics’. It is in passages like these that the authoritarian axis of Chinese constitutionalism is made apparent, and it is perhaps this feature that puts it most at variance with Western values of → *individual rights*.

3. Latin America

- 17 Unlike the fairly strict dichotomy between East and West, the constitutional values of Latin America place greater, though not equal, emphasis on the individual and the collective. It is common for Latin American constitutionalism to be separated into three phases, the first of which may be termed ‘revolutionary constitutionalism’. Throughout the 19th century, Latin American territories from Venezuela to Chile fought for independence from colonial Europe, resulting in a constitutional format that was marked by a spirit of nationalism and territorial sovereignty (→ *colonization*). To that extent, the spirit of South America was much in line with its North American cousin a century earlier (Gargarella (2014) 10–11).

Unlike the US, however, the resulting governmental structures in Latin America were more authoritative, with less tolerance being shown for civil and political liberties.

- 18 This was to change, albeit slightly, in the second phase of development, which has been referred to as ‘social constitutionalism’ (Gargarella (2015) 7). To be fair, this term may really be a misnomer, since the period was one in which social issues were repressed as much as they were advanced. For instance, while the Mexican Revolution of 1917 created a precedent for constitutional protections of socio-economic rights, these were later restricted across the region by the Marxist-inspired dictatorships of the 1970s and 1980s. Social issues were resurrected in the post-dictatorial period, where they were combined with a greater willingness to integrate Latin American economies with a *laissez-faire* trading system.
- 19 In the end, however, these policies do not seem to have served well the majority of countries in the region, and their failure opened the door to the third phase of development from the 1990s onward, which has been referred to as ‘New Latin American Constitutionalism’ (Couso 5–6). The contemporary period is reminiscent of the second phase in the sense that it has been marked by great advancements in constitutional protections of socio-economic rights, whereas it also reflects the first phase insofar as governmental structures remain generally repressive and intolerant of political freedoms, at least in the majority of South American countries. Constitutionalism in Latin America can thus be distinguished by two contradictory features: robust protections of socio-economic rights and a weak tradition of civil and political tolerance.
- 20 It is interesting to note the ways in which New Latin American Constitutionalism reflects the Eastern and Western traditions. As seen above, one of the model’s main features is the importance that it attaches to socio-economic rights. These have been given constitutional status in a number of countries in recent years. For example, the constitutions of Colombia, Ecuador and Venezuela all contain provisions on gender → *equality*, → *affirmative action* and multiculturalism (Gargarella (2015) 22), which in many cases are far more robust than their Western equivalents. To that extent at least, the constitutional ethos in Latin America can be said to cohere with the Western tradition. The main difference is that there are comparatively fewer protections of → *civil and political rights* in Latin America than is the case in North America and Europe.
- 21 This draws attention to what is perhaps the core feature of new constitutionalism; namely, its penchant for centralized government. As Gargarella suggests, the problem with the new form of constitutionalism in Latin America is that, ‘by preserving an organization of powers that is still arranged under the nineteenth century model of concentrated authority, the new constitutions put at risk the same initiatives that they advanced through the rights sections’ ((2014) 17). In other words, the precarious state of rights in Latin America is not only the product of lack of enforcement due to cultural indifference to the rule of law (Legarre 4-5), but a direct consequence of structural barriers that are codified in a number of constitutions. Therefore, despite evidence of constitutional protections of socio-economic rights, the erosion of the → *separation of powers* and the increasing

dominance of the executive branch in countries such as Venezuela, Bolivia and Ecuador—all sanctioned by regional constitutional values—place much of Latin America in the same category as China in terms of its treatment of civil and political liberties (Couso 9-11). This is not to argue that Latin American constitutionalism has been *influenced* by the East, either directly or indirectly. As noted, the prime external actors in the development of Latin American constitutionalism were Europe and the United States. What is important, however, is to recognise that diverse countries can still share common constitutional principles, even when those countries are bereft of historical and geographical ties.

4. Africa

- 22 Synergies can also be traced from the West and Latin America to Africa, where, despite significant cultural and temporal differences, strong similarities are evident in terms of their constitutional tendencies. This is also true across the Global South more generally (Maldonado 2013). As with Latin America, the evolution of African constitutionalism can be divided into ‘waves’. The first of these took place in the 1950s and 1960s, when a number of African countries – such as Ivory Coast, Cameroon, Niger and Senegal – gained independence from colonial Europe (Viljoen 159). In league with the departing powers, African leaders adopted Western constitutions that reflected Anglo-French traditions. Thus, the constitutionalism of this era was congruent with the norms and customs of the Westminster system on the one hand and French republicanism on the other (Hessebon 187).
- 23 Over the next two decades, however, African constitutionalism experienced radical changes as a result of two factors. First, the nationalistic fervour of the independence movement convinced many that the post-colonial constitutions were vestiges of empire, which needed to be extinguished in the interests of freedom. Second, the chronic levels of underdevelopment across the continent, and the illegitimacy of the capitalist system that gave rise to them, justified the adoption of a centralized economic and political system to deliver a fairer and more prosperous social order (Prempeh 2007). For these reasons, the post-colonial frameworks of the ‘50s and ‘60s were modified and replaced on a grand scale, with democratic elements such as individual rights, multi-party elections and the separation of powers being sacrificed on the altar of development (Thomson 108-130). It is ironic that Africa’s leaders sought to advance the cause of freedom by instituting an authoritarian form of constitutionalism. Indeed, it is even more ironic given that they had to rely, to a large extent, on the laws and procedures left over from the colonial period to achieve these ends (Prempeh 2007). Characterized as it was by a lack of civil and political rights and the dominance of the executive branch, the second wave of constitutionalism in Africa – in common with the same period in Latin America – has been described as a period of ‘constitutions without constitutionalism’ (van Vliet, *et al*, 12).
- 24 It was perhaps inevitable that the collapse of communism in the 1980s, combined with the failure of dictatorial government, would lead many Africans to reassess the

logic of the previous two decades. This ongoing process of constitutional development has been referred to as the ‘third wave’ of African constitutionalism, and it is a period that many hope will bring the kind of freedom and progress that failed to materialize in previous years. Inspired in part by the **African Charter on Human and People’s Rights (1981)** and the end of apartheid in the 1990s, African nations, including Angola, South Africa and Botswana, have amended their constitutions so as to provide greater protection of civil and political rights (Fombad 11-12). Likewise, there has been a noticeable shift in countries such as Kenya, Malawi and Mozambique in the direction of electoral choice and away from one-party government (Gutto 4). Hopes that the third wave will lead to a ‘new dawn’ in African constitutionalism must be tempered, however, by acknowledging that many remnants of the dictatorial past remain in place. For instance, African presidents still wield enormous power and influence, while the checks and balances provided by national parliaments are weak compared to their Western counterparts. According to Prempeh (2007), these discrepancies are evidence that ‘elite commitment to constitutionalism remains weak or lukewarm at best’ in Africa. Perhaps above all, the haphazard development of African constitutionalism, and in particular, its tendency to fluctuate between authoritarianism and liberalism, underscore the importance of factors such as political history and social attitudes toward the rule of law when analyzing the evolution of constitutional preferences (Fombad 41).

C. Contemporary Tensions in Constitutionalism

- 25 As we now know, individualism is central to Western notions of constitutionalism. In Depaigne’s words (at 2), the ‘struggle for recognition’ is at the heart of individualism’. What the majority of Western scholars often fail to recognize, however, is that the ‘struggle for recognition’ is also the source of social and constitutional discord. Fuelled by the emancipatory language of human rights, Western citizens have been criticized for striving in pursuit of their own interests, at the expense of what Asian and African jurists may refer to as the ‘collective good’. In turn, it has been argued that this trend has produced a culture of grievance and factionalism in many Western countries, with inter-communal violence no longer uncommon (Frohnen and Grasso 5). As the recent debates around Scottish independence and the UK’s exit from the European Union make clear, factionalism of this kind is not only a problem at the local level but also at the national and regional levels. It is for this reason that Glynn has characterized the tension between social fragmentation and collective unity as ‘the new bipolarity of global politics, the new dialectic of a new age’ (Glynn 1993).
- 26 Against this trend of constitutional discord, the homogeneity and prosperity of the Asian sphere is all the more remarkable. Nowhere is this fact more evident than in China, where, as Posner ((2008) 1776) has observed, even though the Chinese authorities violate human rights on a systematic basis, they are ‘also responsible for the greatest enhancement of human welfare in recent history’. This was achieved through the abandonment of the bulk of the communistic policies (→ *communism*)

associated with the state and by the integration of the Chinese economy into the global trading system, which would have been difficult to achieve on such a large scale without the authority accorded to the government by the Chinese Constitution. In carrying out these policies, China has managed to secure its place as the most powerful emerging economy in the world today (Das). What these developments underscore is that constitutional principles—even those of a totalitarian persuasion—can still shape the contours of economic processes (→ *totalitarianism*).

D. Future Developments

- 27 There are at least two main trends which seem now to be shaping the future development of ideas of constitutionalism. The first of these relates to the wider globalization theme, and the clash of values that are being played out at an international level. The second can be seen as a response to the failure of constitutionalism in its national, institutional form to deliver democracy through formal process and a resulting interest in developing democratic processes to reinvigorate constitutionalism.

1. Global Constitutionalism and the Struggle of Liberalism

- 28 Notwithstanding the varying patterns of constitutionalism in the East, West and Global South, each way of life is now shaped by the machinations of an emerging global order. Indeed, the growing influence of supranational power has prompted Law (at 1180) to announce the coming age of the ‘world constitution’.
- 29 This involves a significant change in existing ideas of constitutionalism, since, from the 17th century until the latter half of the 20th, the global (or at least Western) political order very much reflected the Peace of Westphalia of 1648 (**Westphalia, Peace of (1648)**). This agreement was the foundation for a shared system of constitutional values, the most important of which were ‘territoriality and the exclusion of external actors from domestic authority structures’ (Straumann 173; → *territoriality*). With the creation of the **United Nations (UN)** in 1945, however, the Westphalian settlement gave way to what many now see as a global constitutional orthodoxy, under which the actions of nation-states are subject to the influence of the world community and, in some versions, an underpinning wider cosmopolitan democracy (Archibugi). If the UN can be regarded as the formal political arm of the global institutional regime, then the economic arm can be found in the form of international trade and financial institutions (IFIs; **Financial Institutions, International**) such as the **World Trade Organization (WTO)**, the **International Monetary Fund (IMF)** and the **World Bank Group**, which are responsible for the expansion of free trade policies across the world. Together, these political and economic forces have engendered a new form of constitutionalism that transcends traditional regional boundaries.
- 30 According to Strang and Meyer (1993), the objective of global governance institutions is to ‘promote the homogenization of their members around models of progressive policy’ (at 492). Chief among these is the human rights framework,

which the UN advances via regular diplomatic contact between nations and the promulgation of human rights instruments such as the Universal Declaration of Human Rights. On the economics side, the IFIs are instrumental in spreading the *laissez-faire* approach. This is achieved through the WTO's tendency to adjudicate trade disputes between nations in ways that are seen as advantageous to free trade interests (Ala'i), and the structural adjustment policies of the IMF and the World Bank, whereby needy countries—many in Africa and Latin America—are forced to submit to market processes in order to avail themselves of aid (Ayres 14–17). The effect of these processes is that the national way of life is now mediated to a large extent by the exigencies of global power-brokers, 'whose expanding scope and reach ... seem to place the very ideal of the sovereign state... into question' (Cohen VIII; Cassese).

- 31 The rise of global constitutionalism has not been met with universal approval. In fact, it is noteworthy that while the centre of political power continues to move upward, recent years have been marked by the emergence of nationalism and a peculiar form of 'neo-Westphalianism'. This refers to the tension between the national and supranational orders, which has seen nation-states retreat behind national borders and the veil of sovereignty. What is all the more remarkable is that this trend has presented itself in all four regions discussed above. In terms of the West, the 'Brexit' vote in 2016 and the election of President Trump in the same year were clear signs of disillusionment with the status quo. On the one hand, the UK determined that it would assert its sovereignty by withdrawing from the European Union, while the Trump administration has vowed to 'put America's interests first' (Holland and Stevenson). In a similar way, China has always been reluctant to engage with or contribute to the human rights agenda, with many believing it to be a tool of Western imperialism (Gorman 186). This sentiment is also common in Latin America, where, although contemporary constitutionalism has been heavily shaped by rights, countries such as Bolivia and Ecuador are sceptical of human rights institutions such as the **Inter-American Court of Human Rights (IACtHR)** (Couso 17–18). As with China, this reticence is borne from a desire to maintain control of national issues and to avoid the kind of failures that were experienced in the 1980s, when globally-imposed economic policies wrought so much discomfort in the region. Unsurprisingly, given the spectre of imperialism in Africa, anti-globalist sentiment is also prevalent across the continent, although this also reflects a desire by African elites to maintain their grip on power and avoid the kind of scrutiny and accountability demanded by global governance organizations. These tendencies are evidence of the fact that while constitutionalism is now a global phenomenon, it has yet to supersede the boundaries of sovereignty, still so central to regional constitutional thought.

2. Frameworks and Democratic Values in Constitutionalism

- 32 Finally a clutch of important newer ideas about constitutionalism as *process* must be considered. This approach sees constitutions as concerned not only with a single 'constituting moment' but also as an on-going process of democratic dialogue

where each generation uses the framework it inherits in continuing struggles for recognition and inclusion (Habermas 203). Indeed in 1790 it was Edmund Burke (2015) who first characterized society as ‘a contract between the past, the present and those yet unborn’ (Osai 504). However most of these ideas are rather more modern and seek to develop constitutionalism as more than a simple *framework* guaranteeing what the US founding fathers described as ‘life, liberty and the pursuit of happiness’—goals which are to be pursued by whatever means each individual wishes. Instead the constitution itself is to provide an operational process creating institutional conditions that can exert pressure on society to constantly re-order itself in ways that emphasize → *participation*, dialogue and mutual recognition as a means of renewing democracy (Preuss).

- 33 These process theories of constitutionalism are concerned with the creation of a public space where dialogue can take place beyond the placid limits of orthodox → *representative democracy* and, indeed, where conflict can be expressed and accommodated. For example Tully argues for both a philosophy and practice of constitutionalism that is informed by a spirit of mutual recognition, continuity and consent and the accommodation of cultural diversity. In living together in a post-imperial century, which is marked by a series of intractable conflicts, Tully sees constitutionalism as being about the negotiation of claims for recognition through constitutional dialogues that can reach agreements about appropriate forms of accommodation of difference. There are a range of theories of radical democracy that pick up the dissatisfactions that may be felt with the superficialities of mass democracy where electoral outcomes are dependent on various arbitrary social and economic factors and where majority views dominate (Blaug; Saward; Fung and Olin Wright). Instead of such aggregative processes, where a simple head count determines policy, they argue for a more deliberative approach that is concerned with preference building through closer participation in decision-making. In a sense such ideas reach back to the sort of → *direct democracy* practised in the *polis* or city of classical Athens where each (free, male) citizen discussed and voted on policy in a deliberative way. Advocates of deliberative approaches often maintain that it somehow mediates or transforms disagreements rather than simply minimizing or accommodating them. There are different ways in which this is supposed to occur and this reflects the various perspectives within this general approach. There are approaches reflecting the influence of Jürgen Habermas’s ideas where the emphasis is on ‘communicative action’. Here the process of discussion itself, and the practical stance of being reasonable, willing to talk and listen will produce agreement. Others suggest that democratic deliberation works because it emphasizes politics as the public space where people demonstrate their plurality, and thinking in the presence of others produces an enlarged mentality which discourages individual self-interest and encourages altruism. Other versions see deliberation as transforming preferences, inducing agreement and producing a self-determining participatory democracy that transcends the narrow limits of traditional representative democracy.
- 34 All of these ideas of deliberative or discursive democracy are however united by the emphasis that they put on the fairness of the debate that precedes the taking of

any decision. The focus of constitutionalism thus moves away from the institutions and structures of traditional representative democracy—at whatever level—and towards the processes that ensure and facilitate participation. In this way constitutionalism is about guaranteeing fair procedures, including free and equal access to the relevant deliberative arenas for the purposes of establishing procedures, setting the agenda and making the final decision. All the standard, legally guaranteed liberties, such as freedom of speech, association etc. are of course required but their basis may be slightly different in so far as they are there to ensure participation. Indeed, in its more radical forms ideas of deliberative democracy bring in trenchant criticisms of existing state structures and rights, complaining that these are not the sole or exclusive sites of public, civic interaction, and that furthermore, they may even be exclusionary because they deny or swallow up other forms of public debate in → *civil society* and structurally discriminate against full interaction along lines of race, class and gender.

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Constitutionalism

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