

Enduring Principles

The End of “the West” and the Future of Global Constitutionalism

Mattias Kumm, Jonathan Havercroft, Jeffrey Dunoff, and Antje Wiener

A century after the Russian Revolution of 1917 and more than 25 years after the collapse of the Soviet Union and the “Eastern Block,” we may now be witnessing the collapse of the American Republic and the Western order it created and led after WWII. Whether NATO, the EU and the string of alliances the United States has built across Asia will continue to exist in three or five years is by no means a foregone conclusion, but it has become an open question.

2016 was the year that Americans elected the populist authoritarian nationalist Donald J. Trump as the 45th President of the United States and the British voted in favour of “Brexit.” Trump has dismissed the United Nations (UN) as a “social club” and threatened to cut down US contributions, originally characterized NATO as obsolete, and stated that he would be neither surprised nor concerned if the European Union (EU) disintegrated. Furthermore, he threatens to upend the global trade order, burying the Trans-Pacific Partnership Agreement (TPP) and ending negotiations surrounding the Transatlantic Trade and Investment Partnership (TTIP), threatening the North American Free Trade Agreement (NAFTA), at least in his pronouncements, showing no indication to take seriously World Trade Organisation (WTO) obligations.

Meanwhile under the leadership of Prime Minister Theresa May the UK is headed for a “hard Brexit,” seeking to cut all formal association with the EU. Of course none of us have a crystal ball and even those equipped with the toolbox of scientific polling, we have learnt, are unable to reliably predict political outcomes. It may, therefore, all turn out very differently: in European elections moderate candidates may well keep the upper hand, as was the case in the recent French and Dutch elections, and a bumbling and incompetent Trump Presidency might come to a quick inglorious end leaving a more conventional hard right Republican establishment in charge, or, Trump may be pushed or persuaded to pursue more moderate and internationally engaging positions. But with far right populist authoritarian parties and leaders enjoying considerable successes across Europe and the US even such a less dramatic scenario should not detract from the decay 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.

When the Soviet Union collapsed, it not only brought along with it the collapse of the order it had created and dominated after WWII, it also spelled out the end of Communism as a relevant global ideology. Even in the event of a collapse of the West, there will be no equivalent demise of Western ideology, if that ideology is understood as a commitment to constitutionalism: to pluralist, open liberal constitutional democracies domestically and a global order in which claims relating to human rights, democracy and the rule of law are asserted, negotiated and contested across different institutional fora and contexts. On the contrary, what will become clearer than ever before is that the relationship between “the West” and constitutionalism has always been complicated. “The death of the West” may lead to an emancipation from the idea that the idea of constitutionalism should paradigmatically be identified with the practices of the US and the European Union.

Summary: The end of the “West” as a political-power configuration would not imply the end of constitutionalist ideas—human rights, democracy and the rule of law—as a major force in global affairs. The varieties of anti-constitutionalist tendencies are too diverse and parochial to develop global appeal or build a globally hegemonic alliance. Furthermore, the relationship of the “West” to what is often described as its normative project has often been ambivalent at best, whereas its principles have long enjoyed support by non-western powers.

There are three reasons why the demise of constitutionalism and the institutions it has created after WWII is unlikely.

First, constitutionalist ideals have long taken hold outside of the West. Whether the American constitutional order will survive Trump may be an open question, even if many believe that it will. The fate of constitutionalism in Poland or Hungary hangs in the balance. Furthermore, recent empirical studies have found evidence for more general widespread authoritarian backsliding of states that had embraced democracy after 1989. But that tendency is by no means universal. Other constitutional democracies outside of “the West” may well be going through affirmative constitutional moments.

To take just three examples: It is difficult not to read South Korean popular dismay of their corrupt and inept President and the impeachment proceedings before the Constitutional Court as a genuine constitutional moment, a symptom of deepening of constitutionalist sensibilities in South Korea. In Myanmar, following the free and fair elections in late 2015 there has been a first peaceful transition of power from a military to a civil government. In Colombia the ultimately successful deal between the Colombian government and FARC means not only that the constitutional order in Colombia has been stabilized, but that at the time of writing the last armed conflict in South America has been settled peacefully. Perhaps the darkest pessimism is the result of a Western bias. A more complex picture emerges, when taking a genuinely global perspective.

Second, the principled grammar of Global Constitutionalism is hard wired into a dense network of treaties, institutions and practices globally and enjoys the general support of a wide range of stakeholders. If the United States and the “West” more generally are reluctant to take a leadership role in the progressive evolution of international law, a coalition of other actors may step in. The drafting of a Nuclear-Weapon Ban Treaty under the auspices of the UN, in 2017 for example, has taken place without any of the major western powers. These efforts show a degree of confidence of non-western actors as stakeholders and norm-entrepreneurs within the international system—with Brazil, Indonesia, Malaysia, Mexico, Nigeria and South Africa playing a leading role—that until recently would have seemed unimaginable. Furthermore, the inertia and resilience of existing structures is likely to be considerable, both because they are difficult to change without consensus and because they may well become the focal point of resistance or new strategic positioning. If populist nationalist authoritarians like Trump seek to undermine open borders and global trade, perhaps that will make it easier to forge coalitions among center right and center left political actors elsewhere to support deeper trade relations. The election of Trump has, for example, improved the chances for CETA to be ratified by European Member States as a clear statement against nationalist retrenchment.

Of course it will have significant implications that major powers are increasingly led by authoritarian nationalist strongmen—not just in the Transatlantic World, but also in China, Russia and Turkey. There will inevitably be some decay and loss of relevance of international laws, institutions and practices, when powerful actors imagine international relations as zero-sum interactions between powerful leaders, struggling to define and expand their respective spheres of influence. But the story is unlikely to be the demise of Global Constitutionalism, rather than a significantly more complex story with elements of demise and decay, of resistance, reconfiguration and innovation.

Third, there is no richly-conceptualized alternative ideology with potential global appeal contesting the global constitutionalist grammar. It may be helpful to distinguish between three kinds of powers/ideologies seeking to subvert a constitutionalist position. First, there is Islamic Fundamentalism that, in its various forms, is the cause of a terrible internecine civil war within the Islamic world. Here Saudi Arabia and its brand of Wahhabism, Iran and its Shiite Ayatollahs and various terrorist organizations spread across borders, most obviously ISIS, are central factors. There is no global war between Islam and the West. In a global context Islamic terrorism in Western states appears as a peripheral phenomenon. All of these Islamic groups may imagine themselves as also fighting

“the West” or cast the US as the “Great Satan,” but they are primarily fighting each other as well as constitutionalist tendencies within the dominantly Muslim world they are part of. Referring to constitutionalist values as “Western” is a rhetorical move the purpose of which is to classify these tendencies as culturally alien and inauthentic, rather than as legitimate demands of mostly Muslim fellow citizens fighting oppression and claiming their rights.

Second, there are populist nationalist authoritarian movements, parties and leaders that seek to subvert and replace liberal constitutional democracy. In that respect Trump in the US, Hungary’s Orbán, Poland’s Kaczyński, Russia’s Putin, and Turkey’s Erdoğan are ideological partners in crime. Together they present a distinctive counterposition to pluralist constitutional democracy domestically that has been described as “illiberal democracy,” “guided democracy” or “sovereign democracy”. In their world a free press is all too easily the enemy of the people and needs to be controlled, judges and academics need to be brought in line, and inauthentic elites need to be prevented from following through on their basically treasonous globalist ideologies. Instead of checks and balances provided by intermediary institutions the people are one united by the great leader, who may occasionally seek confirmation in direct referenda. In this context constitutional forms are secondary, their substance is subverted and democracy is celebrated as the will of the real authentic people, constituted by those who support the strong man.

A third group of states, combine authoritarianism and nationalism with ideas of merit-based technocratic government and a greater openness to the world. Here there are not only no constitutional courts, no free press and significant restrictions on academic freedom. There are also no referenda, as the ideal citizen is equated with a docile subject appreciating the performance of welfare enhancing elites. But there is a defense of global trade and global engagement more generally. In China the Communist Party is increasingly justifying its role with reference to its meritocratic features and economic successes, as does the People’s Action Party in Singapore that has always ensured for itself a qualified majority since Singapore achieved independence. Similarly states like Dubai, Abu Dhabi or Qatar legitimate themselves by reference to their ambitious architectural projects and general economic and civilizational appeal as global hubs for commerce, transportation or trade. Who needs constitutionalism, if significant successes are possible without it and might even be easier achievable without it?

There is currently little prospect of a stable coalition between these groups of states—religious fundamentalist, nationalist or technocratic—or even groups of states within each category. At the present time, they are united only in their rejection of “the West.”

But it would be a mistake to describe the core plot as “the constitutionalist West against the (divided) rest.” What the current crisis in the US and Europe makes clearer than it has ever been in the post WWII era is that it was always little more than a convenient simplification—either with an apologetic or a critical purpose—to connect a geographical term “the West” with the liberal ideas of the constitutionalist tradition.

It was always a radical simplification to identify “the West” with a commitment to constitutionalist principles. Yes, the French and the American Revolutions which brought about a re-imagining of law and politics within a constitutionalist paradigm took place in “the West”. But the revolutionary ideals did not gain uncontroversial acceptance in much of Europe until very late in the 20th century. By 1815 with the defeat of Napoleon the revolution and its ideals appeared to have been defeated as reactionary powers established their own order in the Congress of Vienna. As the 19th century wore on, various kinds of nationalism supplanted, sometimes allied with, but sometimes opposed “the ideas of 1789.” The deep divide in France between those who may be inclined to vote for Marine Le Pen and her Front National and dismantle the EU and those who oppose her reflects a dividing line that has its historical antecedent in the battle lines between the liberal supporters and the opponents of the French 3rd Republic in



Mattias Kumm is Professor for Global Public Law and managing head of the WZB’s Center for Global Constitutionalism. Along with Jeffrey Runoff, Anthe Wiener and Jonathan Havercroft he is Co-Editor in Chief of *Global Constitutionalism*, a journal managed by the Center and published by Cambridge University Press. (Photo: David Ausserhofer)

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the late 19th century. The conflict between an authoritarian cultural-identity-based nationalism and constitutionalist ideals was also dramatically highlighted by significant parts of the German cultural establishment celebrating the outbreak of WWI in Germany favorably contrasting the nationalist culturalist ideals of 1914 to those of 1789. Contemporary political movements and authoritarian strongmen on the far right in the US and Europe repeat in a remarkably unoriginal way the core tropes of nationalism, sovereignty and identity that were invoked against liberal constitutionalist ideals of the pre-WWI European world.

The lesson to be drawn from this is simple: We should give up the idea of a deep connection between constitutionalist ideas and geographical regions, countries or power constellations. Perhaps there is no region in the world where the demands of constitutionalism have not at some point fostered resistance and alienation among some who invoke national culture, identity, and sovereignty. Is there anything structurally different from Chinese debates about Confucianism and Asian values, when compared to Russian debates between Pan-Slavists and Westerners, or French 19th century debates between those defending the Catholic-authoritarian “moral order” against liberal and republican ideas, or the debates among German intellectuals in the early 20th century between the “ideas of 1914” and the “ideas of 1789”? The structure of reactionary challenges appear remarkably stable across time and space, with no “western” country completely immune to them and no country outside of the “west” irrevocably condemned to succumb to them.

The commitment to human rights, democracy and the rule of law is not a commitment to abolish or flatten national cultures, but to change national culture and identity to make it more reflexive and inclusive, opening it up to the wider world, creating more opportunity and a wider cognitive horizon, recognizing difference, embracing pluralism and allowing for the contestation of structures of domination, whatever form they may take. Similarly, Global Constitutionalism is not about abolishing sovereign states, but about integrating them globally and building the appropriate legal and institutional infrastructure to empower them to better fulfill their function to respect, protect and fulfill the rights of those under their jurisdiction. Historically both the appeal and the resistance to constitutionalism is a global phenomenon.

If there is a lesson to be learnt it is that a commitment to human rights, democracy, and the rule of law can never be taken for granted and political entrepreneurs are prone to exploit, with devastating consequences, publics who lose faith in them because they cannot see how their lives are protected and improved by these practices. The principles of the constitutionalist tradition need nurturing. This requires critically exposing false friends justifying complacency or oppression in their name. It requires constructively marshalling these principles to improve institutions and laws. And it requires to vigorously defend them against peddlers of ideological snake-oil.