Verfassungsblog
ON MATTERS CONSTITUTIONAL

# Liberal Constitutionalism Beyond the West?

## Rethinking a Global Constitutional Tradition

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The Centre for Advanced Studies "Reflexive Globalisation and the Law" (RefLex) at Humboldt University starts from the insight that legal globalisation cannot adequately be understood as a unidirectional process in which legal concepts and institutions developed in the Global North are exported to the rest of the world. Global legal development is increasingly characterised by multidirectional exchange, contestation and transformation, including a critical engagement with colonial legacies and enduring asymmetries in knowledge production.

In my book project, *Liberal Constitutionalism and its Critics,* I argue that liberal constitutionalism can be understood in similar terms. Critics associate it with five distinct pathologies: gross economic inequality, rampant individualism, democratic disempowerment, stubborn coloniality, and a dithering inability to confront existential challenges such as climate change. Its defenders, in turn, end up aiding and abetting these critiques by proceeding from a relatively fixed image of what a liberal constitution is: a familiar institutional package centred on rights, judicial review, separation of powers and limits on government. However, globalisation has not simply involved the diffusion of a Western constitutional model. It has also involved the transformation of the tradition itself. Liberal constitutionalism is no longer the hegemonic global governance ideology or model it used to be. Rather, it can be understood as an evolving, interpretively open, experimentalist tradition. Starting from these premises, my book engages the five critiques set out above.

In this blog post, I will first propose a definition of liberal constitutionalism as a tradition rather than a fixed governance ideology or model. Against this background, I will outline how I respond in my book to three of the five major criticisms identified above, that is the Left critique, the democratic critique, and the decolonial critique. I conclude with some reflections on how my book contributes to debates on the contemporary crisis of liberal constitutionalism and how it connects with the Centre's concern for reflexive globalisation.

### Defining Liberal Constitutionalism

My forthcoming book begins with a conceptual question: what is liberal constitutionalism? I argue that it is better understood as a tradition rather than a particular institutional configuration. Its central commitments – including freedom, equality, the rule of law, democratic government and constraints on arbitrary power – have never yielded a single, determinate institutional form. They have instead generated continuing arguments about how those commitments should be realised in changing social and political circumstances.

This matters because many contemporary criticisms of liberal constitutionalism implicitly take the classical US-American model as their point of reference. That model places particular emphasis on negative liberty, rights against government and strong-form judicial review. But liberal constitutionalism changed significantly after 1945. The German Basic Law, the Indian Constitution and, later, the South African Constitution are examples of a more programmatic form of liberal constitutionalism. These constitutions do not merely restrain the state. They also impose positive obligations, recognise socio-economic rights, pursue substantive equality, regulate private power, protect democratic participation and create institutions designed to sustain constitutional democracy.

Seen in this way, the history of liberal constitutionalism is a history of institutional experimentation.

A remark in Frank Michelman's "Constitutional Essentials" is helpful here because it conceives of liberal constitutionalism as an ongoing conversation about how political institutions should give practical meaning to liberal commitments.[1] The relevant question is consequently not whether liberal constitutionalism has one correct institutional form, but how constitutional orders have responded to new problems and to criticism of existing arrangements.

The idea of liberal constitutionalism as a tradition changes how we should think about constitutional circulation. Constitutional ideas obviously do travel across borders, but they do not necessarily arrive intact. Rather, constitutional ideas are appropriated, translated, combined with local political traditions and sometimes radically re-signified. India and South Africa are especially important examples of this phenomenon. Their constitutions cannot adequately be understood simply as instances of the transplantation of European or US-American constitutionalism. They were produced through distinctive political struggles over colonialism, race, inequality, democracy and political membership. Their constitutional experiences have, in turn, contributed to wider understandings of what liberal constitutionalism might mean.

This perspective provides a distinctive way of addressing the major criticisms of liberal constitutionalism examined in my book. The point is not to refute them in turn. Rather, it is to use them as an opportunity to reflect on how liberal constitutionalism might address its internal contradictions and external challenges.

## The Left Critique

Consider first the Left critique of liberal constitutionalism and inequality. One version of this critique holds that inequality is effectively "baked into" liberal constitutionalism because liberal freedom is intertwined with private property, market relations and the separation of the economic realm from the political.[2] The South African experience, however, provides little support for such a strong claim. The 1996 Constitution contains extensive egalitarian resources: substantive equality, socio-economic rights, a property clause expressly linked to land reform and transformation, and mechanisms for regulating both public and private power. Post-1994 governments also used constitutional and policy instruments to reduce absolute deprivation and expand access to basic services and social security.

This does not mean that liberal constitutionalism has no responsibility for global economic inequality. But it does suggest a more contingent account has greater explanatory force: political choices, implementation failures, corruption, weak state capacity and the persistence of apartheid's material legacy have all mattered. Even this account has limits. National constitutional orders operate within a global political economy characterised by mobile capital, investment pressures and competition for economic growth. The resulting scale mismatch helps explain why domestic constitutional resources cannot by themselves overcome all the forces generating inequality. The conclusion is therefore nuanced: inequality is neither intrinsic to liberal constitutionalism nor wholly within the capacity of national constitutional politics to eliminate.

## The Democratic Critique

The book responds to the democratic critique of liberal constitutionalism in a similar way. Critics such as Mark Tushnet,[3] Jeremy Waldron[4] and Richard Bellamy[5] have drawn attention to the democratic costs of constitutional rights adjudication, especially where courts possess strong authority to invalidate legislation. These criticisms have considerable force when directed

[1] Frank I. Michelman, *Constitutional Essentials: On the Constitutional Theory of Political Liberalism* (Oxford University Press, 2022) p. 8-9, DOI: 10.1093/oso/9780197655832.001.0001.
[2] Gautam Bhatia, *Economic Inequality and the Separation of the Economic and the Political in Modern Constitutionalism*, Constitutional Studies, 11 (2025), DOI: 10.15781/6c91wf31.
[3] Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 1999), DOI: 10.2307/j.ctt7spsn.
[4] Jeremy Waldron, *The Core of the Case against Judicial Review*, Yale Law Journal, 115 (2006), DOI: 10.2307/20455656.
[5] Richard Bellamy, *Defending the Political Constitution* (Oxford University Press, 2026), DOI: 10.1093/9780191826986.001.0001.

at particular institutional arrangements. But they do not exhaust what courts do within contemporary programmatic constitutionalism. Courts can also protect democratic institutions themselves by requiring legislatures to comply with participation requirements, holding executives accountable and protecting independent institutions.

This suggests that republican constitutional theory and liberal constitutionalism need not be treated as mutually exclusive traditions. The republican concern with freedom from domination and meaningful participation has increasingly been incorporated into programmatic forms of liberal constitutionalism. There remains a genuine question about whether judicially enforced rights can sometimes displace political agency. But the relationship is not one of inherent opposition. Constitutional institutions can both constrain democratic politics and create conditions in which democratic citizenship is more meaningful.

## The Decolonial Critique

The decolonial critique poses a still more fundamental challenge. It asks not simply whether liberal constitutional institutions work, but why the liberal concepts on which many postcolonial constitutions are based should be treated as universal.[6] Liberal constitutionalism, on this view, emerged from the European Enlightenment, and its global spread was entangled with imperialism. However much they might have been adapted to local circumstances, postcolonial liberal constitutions therefore perpetuate epistemic hierarchies and forms of cultural and political power after formal colonial rule has ended.

The response developed in the book is not to deny that liberal constitutionalism draws significant resources from the Euro-American intellectual tradition. It is rather to argue that its Western origins do not settle the question of whether it can be appropriated and transformed elsewhere. Anti-colonial and postcolonial actors have repeatedly taken constitutional ideas developed elsewhere and made them their own. The Indian and South African constitutional experiences are important precisely because they complicate the distinction between imposition and appropriation. They raise the possibility that constitutional borrowing can be an exercise of political agency and that the meaning of liberal constitutional principles can change through their encounter with different histories and normative traditions.

This does not dispose of the decolonial critique: the possibility of colonial assumptions persisting within apparently emancipatory institutions remains an important object of scrutiny. But it does change its point of focus, away from assumed epistemicide to questions of political agency.

## The Book's Contribution to Debates on Reflexivity

Taken together, these arguments suggest a different way of understanding the contemporary crisis of liberal constitutionalism.[7] The question is not whether liberal constitutionalism has failed once and for all, nor whether it should be defended as the world's best form of government. My claim is more modest, but also more historically defensible. Liberal constitutionalism is a tradition whose ideals have generated continuing disagreement about institutional design, and whose institutional forms have changed in response to political struggle, criticism and changing circumstances.

That conception also changes how we should understand the globalisation of constitutional law. If liberal constitutionalism is a tradition, then its global history is not simply a story of diffusion from a Western centre to passive recipients. It is a history of circulation and transformation. Constitutional ideas move across borders, but they are altered in the process. The Global South is not merely a site in which liberal constitutionalism is implemented. It is also a site in which its meaning is contested and remade.

It is in this respect that the book's argument connects most directly with the Centre's concern for reflexive globalisation. The globalisation of constitu-

[6] Philipp Dann, *Liberal Constitutionalism and Postcolonialism in the South and Beyond: On Liberalism as an Open Source and the Insights of Decolonial Critiques*, International Journal of Constitutional Law, 20 (2022) DOI: 10.1093/icon/moac035.

[7] Mark A. Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press, 2018), DOI: 10.1093/law/9780190888985.001.0001.

tional ideas becomes reflexive when the process of circulation itself becomes an object of scrutiny: when legal traditions confront their own histories, when previously marginalised actors challenge inherited categories, and when the exchange of ideas changes both sides of the exchange. Liberal constitutionalism, understood as a tradition rather than a fixed model, is capable of precisely this kind of reflexivity.

The conclusion is not that liberal constitutionalism is universally applicable, or that it is necessarily preferable to all alternative traditions of political ordering. Nor does it follow that liberal constitutionalism imposed from the outside cannot be damaging. Popular support and local political struggle remain essential to constitutional legitimacy. The more limited claim is that liberal constitutionalism should not be understood as exclusively Western simply because many of its formative ideas originated in Europe. Its subsequent history has been shaped by actors and struggles far beyond Europe and North America.

The book's broader purpose, then, is to change the terms of the debate between liberal constitutionalism and its critics. Criticism need not be understood only as an external challenge to a settled tradition. It can also be a source of constitutional learning. The Left critique exposes the limits of nationally bounded constitutionalism in a global political economy. The democratic critique forces attention to institutional forms that protect rather than displace democratic agency. The decolonial critique requires continuing interrogation of the tradition's origins, categories and claims to universality.

None of this guarantees that liberal constitutionalism will remain politically influential, or that its principles will always be interpreted in emancipatory ways. It does, however, suggest that the tradition's capacity for adaptation is part of what it is. Liberal constitutionalism has changed because political actors have contested it, appropriated it and forced it to confront problems that its earlier forms did not adequately address. Its future therefore depends less on defending a fixed institutional model than on maintaining the political and intellectual capacity to revise constitutional arrangements in light of experience.

In that sense, liberal constitutionalism may itself be an example of reflexive globalisation: a tradition that began in particular historical circumstances, travelled across borders, encountered radically different political and social worlds, and was repeatedly transformed through those encounters. The question for constitutional scholarship is not simply whether that tradition should be accepted or rejected. It is how we understand what it has become through its global circulation – and what it might yet become.

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