



GLOBALIZATION AND THE FUTURE OF CONSTITUTIONAL RIGHTS

the global order can influence the development of constitutional law.

The question is how?

Over the last sixty years, the world has witnessed a wave of constitutionalism.

In Central and Eastern Europe alone, more than twenty-five national constitutions have been adopted or revamped since the end of the Cold War; a trend of similar magnitude has occurred in Africa.

In Asia, newly established and long-dormant courts alike have begun to flex the power of judicial review.

The spread of constitutionalism at the national and regional levels has occurred in symbiosis with the post-war proliferation of **international human rights instruments** such as

- the **Universal Declaration of Human Rights**,
- the **International Covenant on Civil and Political Rights**, and a growing array of United Nations protocols and conventions.

It is almost without exception, moreover, that the constitutions fashioned during this period have expressed a “core set” of civil and political rights that include:

the right to life, freedom from torture, freedom from arbitrary arrest and detention, the right to be presumed innocent, the right to privacy, freedom of movement, the right to property, freedom of thought, conscience, and religion, freedom of expression, freedom of assembly and association, and the right to participate in government.

Why have national and supranational governments alike flocked to adopt constitutions that recite the same core set of rights? Is this trend itself a form of globalization?

To speak of globalization is to speak of rapid and extensive **transnational flows** in money, goods, services, people, ideas, culture, and technology.

The **membrane of the nation-state is becoming increasingly permeable**: not only are governments lowering the barriers to transnational exchange, but their capacity **to enforce those barriers** is continually under-mined by advances in transportation, communication, miniaturization, and digitization technology.

Thanks to these advances, persons who once inter-acted with each other rarely or with difficulty for reasons of time and space can now influence each other quickly and with ease.

The spread of **constitutional ideas** has no doubt been facilitated by these developments.

We can remark specifically upon the growth of legal “cross-fertilization” in the areas of human rights and constitutional law.

That **constitutional law** is riding the wave of globalization should come as little surprise.

By their very nature, law and policy lend themselves to rapid and extensive distribution: not only are they intangible, but they are also conveyed in standardized formats (cases, statutes, constitutions) over extensive and well-established avenues of transmission, both print and electronic.

Some scholars have remarked upon the contagion-like ability of economic policy and constitutional law to spread from country to country.

The consequences of globalization for constitutional law are not limited to the rapid and extensive propagation of ideas.

Globalization also influences the **success** of constitutional law. A constitution consists of a set of rules and practices that both enable and constrain public and private activity.

it provides the foundation of legal and political activity and shapes a nation's ability to achieve its goals.

A successful constitution is nothing less than a major feat of social engineering with ramifications for all aspects of a country's performance.

The quality and characteristics of a country's legal infrastructure—not least of all its constitutional law—affect its prospects for economic prosperity.

Debate about Italian Constitutional Reform

Constitutional law and constitutional rights are an integral part of the legal infra-structure that determines whether and to what extent a state will thrive as barriers to transnational interaction fall.

Globalization **rewrites** the rules of trans-border interaction in ways that render certain constitutional practices advantageous and others disadvantageous.

Some actors benefit from greater **interconnectedness**; others are placed at a relative handicap.

Legal rules and practices that worked well in a world of relatively impermeable borders and immobile factors of production may prove a handicap in a world of relatively porous borders and relentless mobility.

Globalization **generates new opportunities** for prosperity at the same time that it exposes new vulnerabilities.

Constitutional law makes possible certain responses to these challenges while excluding others altogether. On the one hand, for example, a liberal democracy with a favourable reputation for the protection of personal freedom can exploit that reputation to attract human and intellectual capital from elsewhere;

on the other hand, it is not a **constitutional option** for such a country to combat the departure of its own skilled workers by barring emigration.

What sorts of constitutional practices is globalization likely to reward?

Is globalization bound to have a deleterious effect on the constitutional rules and practices of the liberal state, or might it prove more benign?

THE IMPACT OF GLOBALIZATION ON DOMESTIC LAW

In order to understand the impact of globalization on constitutional law in particular, it is helpful to understand the **impact of globalization on the development of domestic law** more generally.

-How will globalization re-shape domestic law?

-Will its effects be systematic across countries?

-What patterns, if any, are likely to be generated by the pressures of globalization?

There are five competing possibilities to be considered.

The first is legal convergence driven by destructive competition, in the form of states engaging in a “race to the bottom.”

The second possibility is the opposite of the first—namely, legal convergence driven by constructive competition, in the form of a “race to the top.”

A third possibility is legal convergence that is partly or wholly the result of cooperation as opposed to competition.

A fourth possibility is legal divergence, or specialization, which might occur if states were to respond to the globalization of the market by carving out niches and catering to different audiences.

Finally, there is what social scientists would call the null hypothesis—namely, that globalization may have no systematic and meaningful impact on the policies that states adopt.

Perhaps the most popular hypothesis is that **globalization drives countries to adopt similar domestic policies** in the form of a “race to the bottom,” wherein jurisdictions compete to attract mobile capital by slashing taxes, regulatory standards, and social spending.³⁵

the threat of capital flight as a powerful constraint upon the scope of democratic policymaking that forces states to adopt laissez-faire

economic policy tailored to the desires and priorities of international investors.

The notion that the threat of capital flight constrains government taxation efforts is a venerable one that can be traced back to such writers as Adam Smith, Montesquieu, David Hume, and Benjamin Constant.

It was centuries ago that Smith argued in *The Wealth of Nations*:

The proprietor of stock is properly a citizen of the world, and is not necessarily attached to any particular country. He would be apt to abandon the country in which he was . . . assessed to a burdensome tax, and would remove his stock to some other country where he could either carry on his business or enjoy his fortune more at his ease.

Notwithstanding either the intellectual pedigree or brute logic of this view, there is no scholarly consensus that globalization is in fact causing a race to the bottom.

With respect to tax policy, for example, some have pointed to evidence that greater capital mobility leads to lower capital taxation: in a number of industrialized countries, the relaxation of exchange rate controls since the early 1980s has been accompanied by falling tax rates on capital, even as taxes on labour have continued to rise.

Even full capital mobility, however, does not necessarily entail downward convergence in tax rates, as evidenced by the significant variation in income and sales taxes across states within the United States.

Likewise, in the regulatory arena, there is a dearth of firm empirical evidence that the lowering of barriers to the movement of goods and capital forces jurisdictions to race to the bot-tom.

To be sure, international trade relationships have sometimes forced countries to conform to regulatory standards that are more lenient than those countries might otherwise choose. For example, the **World Trade Organization (WTO)** has prevented the United States from barring the import of tuna fish caught by dolphin-unfriendly means and frustrated European Union policy against the use of animal leg-hold traps.

At the same time, however, the experience of American federalism belies the general proposition that market integration entails regulatory convergence on the lowest common denominator. Even within the fully integrated American market, states often adopt regulatory standards higher than those imposed by the federal government or neighbouring states.