

## Politics, Governance, and the Law

# Liberalism Constructed and Contested: Politics, Governance, and the Law

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## Global Perspectives

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At first sight, politics, governance, and the law seem distinct and easily categorized as separate disciplines within the social sciences. Yet when considering them from global perspectives, they are ultimately contested, as are the relations among them. Generically, *politics* might be seen as the continuous self-design of a polity through ways of gaining and arranging power; *governance* as the way in which governments might function effectively and simultaneously, when conceived of globally, as transnational and global regimes beyond national realms of sovereignty; and *law* as a social technique by which societies and the international community choose and live by the norms they have reason to value.

### NORMATIVE STATEHOOD AND ITS GLOBAL REPERCUSSIONS

The trinity of politics, governance, and the law has shaped the "long twentieth century" in a variety of ways. Following the unraveling of European empires and the emergence of international law based on a liberal teleology, the three concepts became closely linked with international organizations and institutions. With the affirmation of the nation-state as the main locus of the social, however, tensions emerged between the national political and social organization and the larger transnational settings within which the nation needs to settle. Legal regimes based on international contracts, enshrined in international law, or enacted by international institutions limit the scope of action of a nation while simultaneously providing opportunities, security, and collaboration. Similarly, economic relations, trade flows, and the simple fact that the world economy has created markets that are larger than national political economies have a bearing on the scope of national sovereignty. Ever since the days of the League of Nations, we can see efforts at constructing a sustainable global order based on the relations between states and on the relations between the national and the transnational level, amounting to a

co-construction of the two; the national cannot be conceived without the transnational and vice versa. The first historical example for such a co-construction might be found in the mandate system of the League of Nations, when new states emerging from the territorial grasp of former empires (particularly the German and the Ottoman Empires) were closely managed by (mostly) Western colonial powers seen as advanced and civilized. (Japan had the mandate over the South Pacific.)

At the same time, among international lawyers and within organizations of global governance ideas, norms and practices developed that have a bearing on the direction of global institutions and simultaneously on the very organization of the nation-state. Again, the days of the League of Nations were a foundational period for the establishment of transnational networks of expertise and policy-making. Importantly, these networks were not simply connections between national actors but rather sites of fundamental normative deliberation. Among the concepts globally deliberated, contested, and implemented in the early twentieth century, the notion of "human inviolability" or the "human person" gained traction in international organizations and in national constitutions, deeply informing the normative roots of state legitimacy and amalgamating secular liberal and Christian concepts (Moyn 2015; Schulz-Forberg 2019). Non-Western and non-Christian concepts do not play a large role in the early decades of global governance, a heritage under dispute today and enriched with perspectives from various religious and cultural perspectives (e.g., Diouf 2013; Mignolo 2018). Multilateral and multilevel international collaboration—call it "global order"—has one clear precondition: states need to share some of their sovereignty. This sharing begins with accepting basic norms of international law and the consequences of an economic space larger than the nation. Simply put, the effect of international law and global governance organizations is—besides the necessity of sharing basic norms and some of one's sovereignty—the

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limitation of politics, because decisive elements shaping the national polity are not bound by a nation's territorial limits.

Politics, governance, and the law are conceived in *Global Perspectives* as efforts at combining the social with the economic in ways that promise peaceful relations within and between nation-states. Law is about social practice and norms, but it also, and crucially, connects its reflections on both with the economy. Law also has strong political repercussions, taming the political realm by consciously limiting its scope—a crucial state function that could be observed in the early years of the Trump administration in the United States, when the president challenged the courts, which were forced to confirm their status as the root source of law and thus legitimacy.

But is the definition of the limits of politics and of ideal institutional arrangements not in itself a political act? Is law free from enacting a utopian vision of the good society? Are constitutionalism and the rule of law free from assumptions defining a *telos* for society—that is, does the law just administer society's evolving norms? Clearly, the law has a normative drive and marks a contested field. Voices and perspectives from formerly colonized countries heavily criticize and contest elements of international law, including the concept of human rights (Koskeniemi 2004; Moyn 2010; Anghie 2005; Ruskola 2013; Neff 2014; Jensen 2016; Sahle 2019), which is seen by some as representative for entrenching unequal relations and keeping certain regions and their actors forever "in the waiting room of history" (Chakrabarty 2000). The Western origins of concepts such as "human rights" or "human inviolability" also stand accused of capturing individuals from non-Western societies—as well as the societies themselves—inescapably in a cage of "black reason" (Mbembe 2017) that keeps rubbing in difference, hierarchy, and subjugation based on an older (liberal) script from the nineteenth century, perpetuated and permuted to this day. Western societies are confronted with the argument that their progress, affluence, and welfare were built during the postwar period on the exploitation of cheap labor and accessible resources from former colonies and that the affluence of the West is still maintained and sustained by such hierarchies. At the same time, the early wave of subaltern studies is also not free from normative viewpoints; some accuse it of essentializing a cultural bedrock of "the Orient" while criticizing the West for doing the same (Chibber 2013).

Basic norms are contested globally almost on a daily basis. The list is long. Sovereignty and human rights are prominent on this list, and so are justice, welfare, inequality, and many more. Who has the legitimacy to tell others how to best run their affairs? On the basis of which ideas and goals does one know governance

is "good"? What formerly seemed to be undisputed within the social sciences is moving into the spotlight as a crucial question for the twenty-first century.

Describing the aggregation of regimes, laws, and practices within which global relations unfold and are regulated at the same time, governance is never innocent. While its manifold institutions and actors strive to shape global relations in sustainable, peaceful, just, and—ever more important—climate-friendly (or at least climate-conscious) ways, governance both disseminates and is driven by ideational constellations like any other regime, creating power relations, contestations, and political consequences in its wake (Koskeniemi 2004). A typical product of transnational ideational constellations is what can be called *normative statehood*: a canon of ideas and practices, fleshing out ways in which states might best organize their internal and external affairs, is produced within networks of global governance. Mostly, notions of normative statehood are of liberal currency, and the notion that others need to "catch up" by (re)designing their politics and economies according to advanced ways has been deeply ingrained in the ideational constellations of transnational governance since at least the days of the League of Nations' mandate system, which was built following the logic that various stages of development—A, B, and C mandates, the letters representing how far the mandate territories had advanced to civilized status, a kind of early rating system—can be identified and need to be gone through before "the waiting room of history" can be left and one's number is finally called (Pedersen 2015). Ever since the concept of development first emerged in the 1930s (when it mostly applied to Central and Eastern European states), such tensions between the advanced and "the behind" have been ingrained in the concept of development—a forceful key concept of transnational governance fraught with good intentions, misapprehensions, and tensions. For decades, action plans, policies, recommendations, and full-blown conditionalities regarding economic and social organization have constantly emerged. They are based on arguments derived from concepts defined as basic norms within international law, and they always find their legitimacy in relation to these basic norms and to the overarching goal of constructing a peaceful order.

Following, for example, the agreement on human rights as the cornerstone of international law at the United Nations after the Second World War, since the 1950s activating the concept of human rights at the level of the United Nations has served non-Western nations as a tool to gain global recognition (Mazower 2012; Moyn 2014; Jensen 2016) and to claim their equal status in world affairs. Human rights have also deeply changed Western countries beyond the constitutional level and have become central to democratic routines of legitimacy. Human rights

activism has permeated political practices of coming to terms with the past, dealing with past atrocities (and defining atrocities in the first place), and dealing with the adequate way of remembering victims of atrocities—as well as erecting new fault lines and inequalities and inducing struggle over unstable resources for victims of human rights atrocities (David 2020). Also, the human rights-based approach has increasingly entered the business world, informing the duty of business to act in conformity with the common good and to the detriment of more social democratic notions of "economic democracy." Theories of self-limiting and self-democratizing effects of global governance constellations depict the possibility of a pathway to reaching again a new form of economic democracy in which even transnational business needs to bend its knee to ethical pressure and be open to more democratic control of economic agency (Teubner 2020).

Where these businesses pay their taxes, as well as how much they pay, is another matter and another deeply political effect of economic governance regimes larger than national political economies. Indeed, the transnational economic regime is in direct relation to nation-based social politics. The tendencies to national political closure that are gaining ground around the world in the form of new populism and authoritarianism call for close scrutiny (Biebricher 2020). As such, the concept and practice of nation-state democracy and its relation to a world economy and a world polity are back in focus and need to be openly tackled from global perspectives. For decades, a discourse assuming democratization via legal constructions and market expansion—"integration through law"—dominated the social sciences (Cappelletti, Secombe, and Weiler 1986; Joerges 2016; Vofskuhle 2017). New and critical voices have emerged, however, and are increasingly based on sophisticated research both on historical origins and developments, and on contemporary ideational constellations informing Western ideas of law, capitalism, and democracy as these meet and are contested by non-Western global actors (Orford 2006; Dallmayr and Tingyang 2013; Schulz-Forberg 2014; Slobodian 2018; Pistor 2019; Weber 2020). That politics, governance, and the law are ultimately shaped by human agency has become the center of attention once more. Similar to the period following the First World War, not only have global and national actors grown conscious of their enactment of established norms, but their shaping of new norms and hegemonic conceptualizations of normative statehood are currently undergoing change, historicizing the dominant vision of the 1990s market-based global vision of unleashing market forces to create democracies in their wake. Ties between economy and democracy are being reconceptualized today. So are the normative notions of statehood that go along with the relation between democracy and the

economy, both nationally and globally—and climate change and digitization are adding to the intensity of discussion.

## LIBERALISM CONSTRUCTED AND CONTESTED

Undoubtedly, then, the constructed nature of the postwar liberal international order as well as the very construction of any market economy are clearly evident. Politics, governance, and the law map the field within which crucially important ideational constellations are negotiated, concrete policies and rules as well as normative frameworks for political actors are established, undermined, and reestablished. The interrelations between politics, governance, and the law were and are still marked by tensions within and between the three concepts and by idealized visions of their unfolding.

Pulling politics, governance, and the law together means going to the roots of global order construction. It also means being aware of the open-ended character of that same construction. It is never finite, never automatically follows a script, never just falls into place once the parameters are defined. The interplay of politics, governance, and the law creates a playing field so vast and so filled with both open-ended possibilities and narrow-minded, strict conditionalities that it is of fundamental interest from global perspectives. The field of inquiry constructed in this way contains notions of ideal social orders, of political economies and their interplay, indeed their very design. The politically and economically constructive force of the law, particularly international law, is a marked characteristic of the twentieth century and continues to be so today. Indeed, progress through law (rather than politics) has been a leitmotif in international law ever since at least the Second World War—a leitmotif turning sour recently, it seems, in light of political developments that point in unexpected directions. Unexpected by the social sciences, at least, whose very epistemology is undergoing critical revision, too, as the political nature of epistemology becomes increasingly apparent and the ideological undertones of the social sciences are excavated and contested (Mignolo 2009; Sousa Santos 2014; Beddeleem 2020).

What is increasingly at stake in the twenty-first century is an amplification of twentieth-century struggles over legitimate national and global order—and how to make sure relations among nations and between the national and the global levels remain supportive of peaceful coexistence. One of the key conundrums of global governance has always been how to construct the transnational (or global) in ways conducive to national peace and how to construct the national in ways conducive to transnational (or global) peace. What was framed as tensions between "the political" as the ultimate source of normative power

(a concept often identified with the German jurist Carl Schmitt; see Balakrishnan 2000; Müller 2003; Kelly 2003) and "the law" as a value-based construction on which normative power is built and toward which all politics need to refer had reached a compromise in the postwar decades. Yet the semantics of normative concepts shaping global order were mostly from and about "the West," and the construction of international law and national constitutionalism on presupposed basic norms, such as human inviolability and human rights, increasingly unraveled, with former colonies moving toward their own normative orders and with the rise of non-Western powers such as China and religious influences that refrain from copying the liberal script into their constitutions and their constructions of legitimacy. Global governance, for a long time, was really Western governance. This is not an adequate approach for the twenty-first century, which is reshaping power constellations and ideational constellations very fast. A new and globally inclusive co-construction of the national and the transnational is underway.

Against the backdrop of the inescapable tensions between transnational and national spheres—which have co-determined, or even co-constructed, each other for roughly a century—the old twentieth-century tension between legality and legitimacy is back on the agenda with full force. Alas, this tension arises in a much more complex global setting than seventy or fifty or even twenty-five years ago. The relations between politics, governance, and the law will play a decisive role in shaping a peaceful unfolding of the twenty-first century as the need for a new global sustainability becomes increasingly urgent, particularly in the face of tendencies to autocratic rule and lasting "states of emergency." When are nation-states shaped in a way conducive to global peace? And when are global relations shaped in a way conducive to national peace? What is the future of democracy in the twenty-first century? Will regional federations finally democratize, or will democracy continue to reside in nation-states? How will the concept of democracy change in order to accommodate increasing economic inequality and the challenges of climate change? How resilient are national democracies in the face of authoritarian challenges, and how shall national, regional, and global politics, governance, and law interact to work together peacefully, based on which kind of economic relations, and on which kind of practices promising a good society for all, not only for the affluent?

### THE STUDY OF POLITICS, GOVERNANCE, AND THE LAW FROM GLOBAL PERSPECTIVES

Contributions to *Global Perspectives'* section on politics, governance, and the law are invited to think broadly, innovatively, and deeply about the past, present, and future of the relations between the three

concepts as well as implicated fields and issues. To begin with, we have focused on developing three broad research themes clustering around the concepts of neoliberalism, human rights, and economic constitutionalism.

Neoliberalism, in many ways, is a governance concept. Emerging at the tail end of interwar discussions on global order in the 1920s and 1930s, the concept defines not only how economies should run and be run, but also, really, how states should be organized to keep markets from doing harm and instead to bring out the best of what a market economy can do for society. Early neoliberalism had fleshed out a new agenda of liberalism conscious of its value core, its international compatibility, and its social responsibility as well as the limits thereof (Biebricher 2019; Schulz-Forberg 2019). As such, it took shape in the web of experts and policymakers clustering in and around the League of Nations (Walpen 2004; Mirowski and Plehwe 2009; Laqua 2011; Clavin 2013; Schulz-Forberg 2020).

A study of neoliberalism is, of course, crucial for our times as the concept is in heavy critical usage, and recent analyses have laid bare connections between neoliberal thought and right-wing libertarianism and racist undertones (Slobodian 2018, 2019), amounting to "folk neoliberalism" (Ban 2016). Coupling the concept with a historical understanding of its genesis and of the variations of (neo)liberalism is paramount to an understanding of today's discussions, which include global actors such as China, Russia, and the Latin American nations as well as South Africa in the history and present of neoliberalism. Both the content of the concept and the environment within which it was shaped and continues to be shaped—a transnational environment of knowledge and policy-making—need to be taken into account. *Global Perspectives* follows the dynamic research that is ongoing in the field of neoliberalism studies. The field widens and deepens constantly, yielding new and sophisticated insights. In our section, we will map this field and innovatively contribute to it.

Similarly, a second thematic cluster will be pursued initially, namely that of *human rights* and its many facets. Causing resistance in non-Western countries, human rights is today among the most fundamental concepts, one where deep contestations and quite fierce debates unfold (Hoffmann 2010; Jensen 2016; David 2020). These debates have strong political consequences. As human rights are coupled with the very basic norm of Western constitutionalism of the twentieth century—the concept of human dignity and human inviolability enshrined in constitutional orders—it is a moral concept as much as it is a legal one. As such, it is activated by a broad variety of actors, which, as a result, shape and change its meaning and application. The contestation of the meaning and origins of human rights challenges a

dominant narrative that places human rights into a trajectory of successful secularization, a telos of rationalism and humanism (Koskenniemi, García-Salmones Rovira, and Amorosa 2017), particularly when inquiring into the effects of human rights on social inequality (Moyn 2018).

Thirdly, the concept of *economic constitutionalism* is developed as an initial field of research and counterposed to the concept of *economic democracy*. Both concepts were two sides of the same coin of liberal state design, the latter a social democratic variant of political liberalism and the former a transnational concept connected to early neoliberal and ordoliberal ideas. Economic constitutionalism is connected to the field of neoliberalism studies in many ways, as it also is to studies of varieties of capitalism—and it really is about varieties of (neo) liberalism. What neoliberals could agree upon was that economics should be somehow insulated as much as possible from politics. To avoid arbitrary economic policies and to root them in apolitical grounds, economics should be guarded by science more than anything else and enshrined in the rule of law at the very source of legitimacy: the constitution. How a constitutional order should be best designed became a matter of co-construction by national actors and transnational experts and organizations. From the interwar constitutional designs of the 1920s to the conditionalities of reconstructed constitutional orders following the end of the Cold War, such co-construction of the national and the transnational order is among the core tasks of global governance.

With rising inequalities and new global challenges such as climate change and economic crises, the concept of economic constitutionalism is under scrutiny. Yet can there be a renaissance of economic democracy within liberal societies? If so, what will the new semantics of the concept be? It was of prime importance from the 1960s to the 1980s and the 1990s, and in some countries, like Sweden and Finland, it was even hegemonic. A return to practices from the dusk of the postwar boom period is highly unlikely. Can a new transnational form of economic democracy consolidate (Teubner 2020)? What might be the contours of a new progressive alternative? Intellectual analysis is sometimes short of constructive imagination, and prominent critical voices seem to call for turning back the clock to bring the European welfare state of the early 1970s back to life. In doing so, national closure was back in the debate (Streck 2016). Reflections on progressive transnationalism are

emerging, however (Klein 2020). Among the core questions that must be asked are the following: Can a transnational market regime allow for a democratic decision-making process about what kind of economy we should have? What is the relationship between the rule of law and democratically elected governments when the scope of decision-making power of an elected democratic government is effectively limited by transnational governance? The trinity of politics, governance, and the law is not without tensions: what are relevant new tensions that need to be tackled? Where and how did they emerge in the first place? On the level of production, should workers and employees co-decide what to produce? Are we moving back toward a policy practice in which the economy is more reined in—and is asked to address what exactly it is doing for society—than during the last decades, when the primary question was how we can change societies to fit the economy? Will the Green New Deal and wider global awareness of climate change have the effect of reintroducing more democracy (and not only regulations and standards) into economic practice? And what would the role of law be in this process?

Clearly, the field mapped by politics, governance, and the law touches upon more topics than the three fields just outlined. This is merely the beginning. Authors are encouraged to engage with *Global Perspectives* and make their voices and ideas heard to facilitate a truly global dialogue. Discussions of the political consequences of unequal epistemologies (always favoring the Global North); of all the complex implications of colonial heritage and the continuity of "coloniality" in the mind-set of public discourse, politics, and the social sciences; of the general rise of inequality within societies; of the Anthropocene and its political and legal implications; of the concept of the common good and what a good society might look like in the twenty-first century—all of those themes are of vital importance for a deeper understanding of the relations between politics, governance, and the law that we will have to meet head on. Let us begin.

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