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WORKSHOP REPORT

Constitutional Transitions in a Changing World

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This report was developed as a follow up to a series of events on Constitutionalism in a Changing World, hosted in February and March 2022 by the Edinburgh Centre for Constitutional Law (ECCL) and the Peace and Conflict Resolution Evidence Platform (PeaceRep) at Edinburgh Law School.

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Key Findings

This is a report of the main themes that emerged from a series of events on Constitutional Transitions in a Changing World, organised by the Edinburgh Centre for Constitutional Law and the Peace and Conflict Resolution Evidence Platform (PeaceRep) of the University of Edinburgh in February-March 2022. The key findings were the following:

- The political, economic, and legal world order is changing, with American hegemony being replaced by multipolarity. This change has implications for constitutional transitions, both from authoritarianism to democracy, and from conflict to peace, and for practices of constitution-making and peacebuilding.

- While the rise of non-democratic global and regional powers poses a challenge for a linear understanding of the development of international liberal rules-based global order and domestic liberal constitutional democracy within states, it is unclear that the rise of non-democratic global and regional powers will fundamentally alter the existing global order.

- In some countries, the rise of non-democratic global powers has emboldened democratic regression while providing an alternative state-led pathway to economic development, while in others, this impact is less clear and democratic prospects remain difficult to determine.

- Just as in the era of American hegemony, Global South regimes have sought to maximise their self-interests and will continue to pursue their interests within the emerging multipolar world. However a more multipolar world affords greater space for the pursuit and entrenchment of non-democratic political models.

- Any causal relationship between the rise of non-democratic powers globally and the broad regression in democratisation processes across the Global South remains unclear. In some countries and regions, there are clear relationships; in others, both regression and democratic resilience seem to be more determined by local or regional causes and dynamics.

- Nevertheless, echoing the rise of movements and ideologies critical of liberal constitutional democracy and market economics in the West, the rise of non-democratic powers have given authoritarian leaders in the Global South the opportunity to challenge the foundations of liberal constitutional democracy, particularly by reference to arguments based on ethnocultural particularity and civilisational superiority.

- There is a growing variety of non-liberal constitutionalisms being practiced across the Global South, which may be authoritarian or procedurally democratic, to which students of constitutional transitions are increasingly attentive. The variety of such constitutionalisms as were discussed in this series of events is presented in the form of a typology in the report below.

- Notwithstanding the broad trend of democratic regression across the Global South in recent years, at least some elements of liberal constitutional democracy have deep roots in many societies, and will not be easily overturned.

- The changing world order presents challenges for peacebuilding practices predicated on a liberal global order, and new ideas of non-liberal constitutionalism also present a challenge for practices of constitution-making based on liberal constitutional democracy, both as regards substance and process. Scholars and practitioners of constitutional transitions should use these challenges to revisit and renew received normative assumptions about democracy and constitutionalism, and be prepared to go beyond liberalism in contextualising democratisation and peacebuilding in the Global South. The recent critiques of liberal constitutional democracy present an opportunity to reassess its weaknesses.

- Despite their sometimes radical rhetoric, it does not, on balance, appear that non-democratic global and regional powers are deliberately or systematically attempting a fundamental reorganisation of global institutional order, or pushing a particular model of domestic constitutionalism. They seem more interested in raw power relations and tend to be pragmatic in their approaches to other countries. Nonetheless, they may indirectly entrench authoritarians, and non-democratic forms of government and styles of governance, to the extent that they are more comfortable dealing with them.

Introduction

In the period after the end of the Cold War, what we term 'liberal constitutional democracy' (LCD) constituted the dominant constitutional model promoted for societies undertaking constitutional transitions, both from authoritarianism to democracy and from conflict to peace. There are many definitions of LCD, but the common core used to frame the discussions in the workshop series can be said to include the following: (a) free, fair, and periodic elections based on a democratic electoral system; (b) basic constitutional rights to freedoms of expression, assembly, and association; and (c) government formally subjected to the discipline of the rule of law.[1]

While there are many institutional models of government (e.g., presidentialism, parliamentarism, semi-presidentialism) that may deliver LCD, its core features were well understood across all continents and societies, at least on paper. Under its influence, constitutions increasingly came to resemble each other. Until recently, like new homebuyers shopping in IKEA, political elites therefore had a limited selection of off-the-rack provisions from which to choose, which they could then make limited 'hacks' on.[2]

This paradigm not only significantly limited the scope of constitutional innovation before the constitution-building process had begun, it also had procedural corollaries. Public participation was understood as central to any process, and there was often an international dimension consisting of multiple forms of financial and advisory support. In conflict-affected societies, constitution-making was frequently linked to peacebuilding processes, whereby LCD was presented as a key stepping stone to conflict resolution and prosperity. This model was supported by the international peacebuilding architecture of the United Nations (UN), and a concept of a liberal global order dominated by the United States and economic liberalism. To qualify for important international benefits, including membership of organisations and financial assistance, states normally had to implement domestic constitutional reform that at least had to pretend to pay lip service to the dictates of LCD.

In recent years, the LCD paradigm has been eroded by domestic and international changes. At the domestic level, LCD is increasingly portrayed as inimical to development in fragile and conflict-affected states. Populist leaders argue that only with executive centralisation (and corresponding weakening of oversight) can developing countries compete. Resurgence in cultural, ethnic and religious nationalism has also led to democratic decay in many contexts. This is partly informed by regional and international trends, whereby non-democratic global and regional powers, such as China, are seen as alternative models for economic success. The rise of non-democratic global powers has also begun to undermine peacebuilding processes as conflicts have become more internationalised and complex.

The discussions of the workshop series reflected in this report responded to these realities. The report draws on conversations which took place over February and March 2022 during online workshops and an in-person conference. These events were organised by the Edinburgh Centre for Constitutional Law through The Peace and Conflict Resolution Evidence Platform (PeaceRep) and involved academics and practitioners of constitutionalism, particularly those working on the Global South.[3] The report brings these discussions together with review of secondary materials, setting out the trends in international relations that impact constitutional transitions. It sets out the 'new' constitutional models and features emerging out of this changing world order, particularly non-liberal constitutionalisms. The report argues that the the pressures on LCD provide an opportunity to review the perceived and demonstrable weaknesses of the theory, doctrine, and practice of LCD in the post-Cold War world, capable of informing how LCD must respond to the emerging multipolar world order.

A Changing World

From the collapse of the Soviet Union in 1991 to the early 2000s, the United States could credibly claim status as the world's hegemon. Former adversaries from the Soviet bloc sought America's aid in developing liberal economies and the US held total sway over all the main global institutions, excluding only the UN. The US Dollar was the world's dominant reserve currency. Observing these realities and the US's global military presence, commentators concluded that humanity had shifted to a "unipolar" world order.[4] Writing as the Soviet Union collapsed, Fukuyama famously predicted the "end of history".[5] He argued that liberal politics and constitutionalism had been irrefutably established as the endpoint of human ideological evolution. Even if regression occurred, traditionally 'Western' values of democracy and liberalism would eventually prevail.

Since the early 2000s, the rise of non-democratic global powers has challenged this thesis. America has been weakened by the 2008 economic crisis, failed interventions in the Middle East, internal strife, and its own democratic challenges.[6] The full benefits to China of its 'opening up' policy have become more apparent in the same period. Growth was previously in the double digits (with President Xi now claiming to have lifted 100 million out of poverty), foreign investment grew, and technological advances in production came at a rate unanticipated in the West.[7] With such economic success, reinforced by historical memories of injustices inflicted on China in the age of Western imperialism, came the ambition to play a more prominent role globally, and to challenge Western hegemony in the world of concepts, ideas, and institutions. Other emerging or re-emergent powers, such as Russia and Turkey, are similarly driven by a desire to challenge Western hegemony. While unlike China they may not be in a position of economic or military strength to project power on a global scale, they are becoming increasingly able to do so at least within the regions in which they are dominant, or through alliances with China and/or other neighbours. All of these developments have implications for LCD as the manifestation of the Western model of political, economic, social and cultural organisation.

Acharya describes the new, emerging, world order as similar to a multiplex cinema. Just as audiences move between different screens to see different types of films, so too the global power balance will be much more free-flowing and decentralised.

> No single director or producer would monopolize the audience's attention or loyalty. To be sure, some would be mega hits and others spectacular flops. The audience has a choice of shows. They can also watch, enjoy, and compare several or all of them… American power would be an important part of a multiplex world. But rather than the mythical Leviathan, it is more likely to be the large but vulnerable (and occasionally errant) mammoth of the Ice Age… A multiplex world would be a world of diversity and complexity, a decentered architecture of order management, featuring old and new powers, with a greater role for regional governance.[8]

Emerging powers have displayed some unfavourable attitudes towards the existing international order. Chatham House notes that China has established parallel global organisations to compete with the Bretton Woods institutions. Existing institutions such as the World Trade Organisation and World Bank have also implemented internal reforms spearheaded by China. When institutions have impeded China's trade goals, it has tended to bypass them with regional trade agreements.[9] China has used its global economic clout to pursue illiberal political interests such as "economic coercion" tactics. Those who have criticised the CCP on Hong Kong, Tibet, Uighur Muslims, and other issues have felt the ramifications in terms of their financial and political independence.[10] Some fear that China is engaging in 'debt-trap diplomacy' in order to gain political and strategic territorial control. Others say that these fears are overblown, and Chinese banks will normally restructure the terms of existing loans and have never actually seized an asset from any country.[11]

Nonetheless, China does not necessarily have the energy or capacity to overhaul the international order and it may be abandoning the goal of setting up parallel international organisations. For example, the Asian Infrastructure Investment Bank – established as an alternative to the World Bank – now cooperates heavily with the American- and Japanese-led Asian Development Bank in carrying out its work.[12] Parallel organisations have proved costly and relatively ineffective compared to repurposing existing institutions. It may be that the forces driving the world order, such as capitalism, globalisation, and statism, will remain unaltered, even in the multipolar world. Key global institutions have been conceived to suit major powers, and so China may find them useful. Instead, it can play an increasingly important role within the existing institutions and take advantage of their structures, which are designed to benefit more powerful countries. However, the application of particular norms may become increasingly contested, for example, whether it is permissible to interfere in a smaller state's domestic affairs. Major powers' conflicting interests may lead to conflicting interpretations of existing norms.[13]

Against that backdrop, key existing norms of the global order also align with political goals to resist interference. The CCP, in particular, "remains a staunch defender of Westphalian sovereignty, especially when confronted with challenges from Western powers".[14] Powers such as Russia and China may find their role as "preventing or frustrating the continuation of American World Order rather than providing an alternative form of global governance on their own initiative".[15]

As Rasheed argues, deepening relations with China have enhanced and legitimated authoritarian characteristics in other states. This process is known as 'authoritarian reinforcement'.[16] Authoritarian reinforcement is a narrative-based phenomenon whereby leaders legitimate authoritarian institutions and practices under the "pretext of maintaining political order, preserving sovereignty, achieving progress, decoloniality and fairness in the international system".[17] Leaders have pointed to China's socioeconomic advancements as a means of justifying more authoritarian structures in their own countries. The Covid-19 pandemic and China's state capacity were emphasised in recent years.[18] This has been linked to the 'civilisational state' (discussed below) and new narratives around autonomy, ideas that have strong resonance in many contexts. China is held as a defender of state autonomy against American hegemony.[19] Countries' deepening economic and governmental ties to China have been a significant factor in this. Inter-state cooperation has enhanced the desire to imitate authoritarian structures.[20]

The Substance of Constitutionalism in a Changing World

The move away from the unipolar world order has consequences for constitution-making and peacebuilding. The dominance of LCD norms as the only acceptable aspirational form of constitutionalism is increasingly challenged both within the consolidated liberal constitutional democracies of the West as well as in the Global South through the rise (or resurrection) of 'structural populism',[21] 'authoritarian reinforcement',[22] and what we term 'civilisational claims', in addition to more familiar forms of nationalism and authoritarianism. Global-scale surveys have noted the steepening curve of de-democratisation across the world in recent years.[23] This regression affects not merely the health of electoral democracy, but also the constitutional enjoyment of rights and the constitutional subjection of government to the separation of powers and the rule of law. Against this backdrop, there are a range of objections to the orthodox conception of LCD. It has been criticised "for its conceptions of the self, polity, and secularity as organizing ideals, and the constraint-oriented liberal state's inability positively to address multiculturalism and development issues".[24] There are therefore 'blind spots' of LCD. Four of the most prominent are: (1) focusing on constraining power while having little to say about state-building; [25] (2) rigidity and irresponsiveness to political and economic trends; [26] (3) a lack of capacity to deal with pluralism and political equality; [27] and (4) "semantic decay", whereby cosmopolitan approaches with an "international toolkit" are not always understood at – or are not relevant to – the local level.[28] However, these objections have played out unevenly across the world with distinct regional trends.

1. Regional Trends

The regional perspectives from Africa, Latin America, the Middle East, South Asia, and East and Southeast Asia that follow are based on the discussions of the workshop that focussed on these issues in the series. The discussions were led by inputs from regional specialists.

(a) Africa

In the post-Cold War era, there are emerging strengths in African politics and constitutionalism. The 1990s democratisation wave had two fundamental effects. Firstly, there is a continent-wide legal and political commitment to constitutional democracy. States recognise that they need each other for democratic support through regional and sub-regional organisations.[29] In the African context, international norms in regime change, for example, are particularly prominent.

Instruments such as the African Union's standards on 'constitutional regime change' represent an "attempt to regulate constituent power by trying to constrain when and how polities legitimately constitute themselves as such".[30] Secondly, there is a continent-wide popular demand for democracy. The people feel that they need both economic development and strong democracy.[31] The Afrobarometer (2015) found in the continent's South, East, and West "high – and, indeed, rising – levels of democratic support".[32] Recent coups are concerning, but perhaps should not be overstated. They are primarily responses to other problems such as state capacity and responsiveness rather than ideological objections to democracy.

African constitutions have also innovated new norms to suit local contexts. Participants noted that many constitutions have a dual commitment to global LCD standards and cultural diversity. They do not exhibit adoption of a single package of rights and values, but instead a mixture of global and local norms. These norms have included traditional authorities and customary law.[33] Legal, written, and supreme constitutions are extremely important in the African context, despite their limitations. They are important for structuring transitions as well as political relations. They also connect the state with society and the international community, and LCD is now intertwined with African history and practices. It is therefore unlikely that LCD will be uprooted from Africa.[34]

There are, nonetheless, still challenges. For example, South Africa's constitutional infrastructure has corroded over time and belief in the Constitution is low. Firstly, there are continued accusations that the 1996 Constitution entrenched historic injustices, particularly relating to the distribution of land ownership. There is also a second attack against the idea of LCD itself: for example, a cabinet minister recently argued that democracy has been undermined by judicial review and portrayed judges as liberal puppets.[35] Along with West Africa's recent spate of coups, significant challenges to democracy obviously remain and even seem to be on the rise.[36]

(b) Latin America

Latin American states have started to move from traditional models of constitutionalism as a solution to three problems: high levels of inequality; limited citizenship and democratic participation; and concentrated, unaccountable executive power. In recent years, both successes and challenges have been characterised by increasingly sophisticated constitutional design.[37]

The desire to overcome inequality through the constitution has a long history in the region. There have been constitutions based around indigenous cultures and practices; a middle-of-the-road option centred upon the market and individual but with some space for state intervention and extensive socio-economic rights; and enshrined neoliberal values.[38] This has taken place in parallel with attempts to expand citizenship and democratic rights. Latin America is moving beyond individual rights, for example, indigenous groups have been granted limited self-government in some areas. Mechanisms of participation have also been expanded, for example through referendums.[39]

Concentrated executive power and limited oversight also have a long history in Latin America. Newer debates, however, are less concerned with traditional, grand authoritarian moves such as closing down the legislature. Participants described how authoritarian actors are challenging democratic commitments by well-targeted constitutional engineering. Along with more traditional tactics such as manipulating term-limits,[40] authoritarians have also manipulated institutions in more subtle ways to attack opponents. While tactics such as suing media outlets, frequent referenda, and tax audits for critical businessmen have long roots in Latin America, the practice is now being traded and refined between states.[41] A variety of institutions are purposefully operated against the opposition and in favour of the government.[42]

(c) Middle East

The Middle East and North Africa lack any strong LCD systems. There have been brief periods during which people appeared to hope for a variety of LCD, particularly the Arab Spring, but also before. However LCD has not emerged. There are appear to be three conspicuous political models in the region: hyper-presidentialism, which is complete rule by a single individual (e.g., Egypt and Jordan); hyper-parliamentarism, where parliamentary elites hold total control (e.g., Iraq and Lebanon); and conflict and fragmentation (e.g., Yemen and Libya).[43]

The major popular uprisings of 2011, many with similar democratic aspirations, was a moment of hope that the authoritarian path dependency of Middle Eastern regimes might be broken. However, in no case was this successful. Failure was caused by a variety of factors, but the discussion suggested that the most important was that there were no organised political forces that were capable of articulating visions of the national democratic community across competing pluralist constituenices, but rather fragmented opponents of the status quo who negotiated for factions and sectional communities.[44] The Tunisian President is the post-Arab Spring's only remaining head of state and government to have won a free and fair election. Here, weak institutions were originally an advantage in avoiding a collapse in the transition negotiations.[45] Even in this relative success story, an authoritarian trend is currently re-emerging: for example, the Tunisian President recently dissolved the judicial council.[46] Syria, on the other hand, exemplifies non-democratic powers' growing role in peace- and constitution-building.[47] Russia has taken on a significant role in steering the constitutional process.[48]

(d) South Asia

There is a mixed, fluid, and varied picture in South Asian countries with respect to LCD. On the one hand, the region's most prominent and celebrated democracy, India, is undergoing what seems to be a long-term erosion of its liberal and constitutional character, legitimated by an electoral majoritarianism driven by Hindutva chauvinism.[49] In other countries, such as Pakistan and Sri Lanka, recent de-democratisation processes through the election of authoritarian or conservative leaders have been at least partially halted by parliamentary assertiveness or by major public protests.

The most promising region for the taking root of LCD at the moment of de-colonisation, South Asia today seems to be witnessing something of a loss of faith in LCD. Disillusionment with neoliberal economics, corruption, and rising ethnic and religious intolerance and violence, have pitted unresponsive elites against both fairly well-entrenched traditions of democracy and constitutionalism in the region, as well as the aspirations of the young. The discussion underscored the need for a renewal of faith in the rule of law, democracy, and reason: while LCD values and institutions must be protected, an intellectual and popular movement of renewal must come organically from society, without perceived Western, colonial, or elitist baggage.[50]

(e) East and South-East Asia

The discussions in this session showed that in East and South-East Asia, there appears to be a preference for communitarianism rather than individualism when it comes to rights. A narrative of rule by those understood to be 'virtuous leaders' predominates, rather than relying on checks and balances and competing powers. Finally, there is a problem with the lack of certainty of outcomes. East Asians value long-term planning rather than short-termism.[51] An alternative to LCD has been communitarian constitutionalism. In Thailand, the Constitution makes reference to morals that must be upheld. In other contexts, there are often specified public goods that it is the individual's duty to uphold. South Korea and Japan both embrace similar logics while delivering functional democracies. Relations between the branches of government tend to be more cooperative than adversarial, even where constitutions are deliberately modelled on the philosophy of competing powers. Checks therefore function differently to Western LCD models, but are often still effective.[52]

While regional organisations have strengthened LCD in Africa, the discussion showed that regional alliances may have led to more authoritarian constitutional borrowing in South-East Asia. There are countries banding together as a regional, authoritarian alliance. Coups in Thailand arguably emboldened the army to do the same in Myanmar. There are even arms supplied between them and activists being extradited to the countries they are wanted in. Cambodia shows how authoritarian constitutional borrowing is happening across South East Asia.[53] Smaller states have been inspired both by each other's innovations and also Chinese structures. Ideologically, part of the appeal has been Chinese ideas of distinct civilisational models, however, reworking of constitutional frameworks is also driven by authoritarian opportunism more generally. Lawrence writes that:

> Thailand was explicitly cited as the inspiration for the 2017 amendments to the Law on Political Parties, which precipitated the dissolution of the opposition Cambodian National Rescue Party that same year. The introduction of lèse-majesté offences to the Criminal Code in 2018 appears to be another prominent instance of borrowing from Thai law although it was not explicitly recognized as such. An amendment to Article 49 of the Cambodian Constitution which prohibits actions by all citizens that "affect the interests" of the nation or its citizens appears to be borrowed from China's constitution. Finally, the Supreme Council for Consultation and Recommendation, created under the supervision of the Council of Ministers, resembles China's People's Political Consultative Conference.[54]

2. Non-liberal Constitutionalisms

(a) Typology

The discussion showed that practitioners and scholars of comparative constitutional transitions are increasingly interested in emerging types of non-liberal constitutionalisms. Global and regional 'non-liberal types' of constitutional and state order are beginning to be developed and borrowed between countries. While some of these have a long history (such as the 'developmental state'), many are much newer, particularly the 'civilisational state' and the category of practice that has been theorised as 'abusive constitutionalism.' The table below captures the models of non-liberal constitutionalism highlighted in the discussions.

Sham constitutionalism [56]	**Ethnocracy/civilisational State** [57]	**Non-liberal democracy**
• A written Constitution, often based on the liberal-democratic model, which is not followed in practice. • Practice is determined by whims of a ruling elite or single authoritarian. • There are no meaningful elections. • There is no independent apex court capable of enforcing the Constitution against the government.	• The Constitution is designed to give life to a particular civilisational vision, often to the exclusion of minority ethnic groups. • Constitutional practice is determined by pre-democratic norms. • This model is often mixed with developmentalist visions.	• Meaningful democratic elections take place. • The Constitution is largely followed in practice, however it is an oppressive instrument or does not try to restrain state power.

Religious constitutionalism [58]	Non-constitutional democracy [59]	Constitutional authoritarianism [60]
• The Constitution is used to entrench a particular religion. • Religious practices and bodies shape state institutions and practice.	• Meaningful democratic elections take place. • There is a written Constitution, often based on the liberal-democratic model, which is not followed in practice. • Practice is determined by whims of a ruling elite or single authoritarian.	• The Constitution is largely followed in practice, however it is an oppressive instrument. • There are no (meaningful) elections.

Developmental state [61]	Ethno-Pluralist state [62]	Abusive constitutionalism [63]
• The Constitution and political legitimacy is based upon economic development. • There are few or no restraints on executive power, which is normally centralised.	• Sharing of state power is based on an agreement between ethnic groups, which seriously undermines principles of the franchise. • Government practice tends to represent deals between elite ethnic leaders.	• Liberal constitutional forms and structures are invoked in order to achieve authoritarian outcomes.

It remains to be seen whether non-liberal constitutions, even those with virtuous motives, are sustainable – particularly those based on ethnic group-based compromises. These constitutions can easily slip into "principles drawn from an exclusive ethno-religious or ideological regime in absolutist fashion".[64] Moreover, systems built on the wisdom and self-restraint of leaders naturally run the risk of non-restraint and corruption. Finally, non-liberal constitutions, such as those above, built as an agreement between competing groups for a particular timeframe, often have a shelf life. Important realities underpinning any constitutional division of group power can shift. These include demographics and wealth distribution.[65]

(b) The Civilisational State – A Closer Look

We turn now to look at one of the ideological alternatives to LCD that has recently come into prominence alongside the rise of multi-polarity as a potential model of state, and in particular the concept of the 'civilisational state' as an alternative to the 'liberal democratic' one.

Governments in India, China, and Russia have formulated conceptualisations of their civilisations, which, they argue, the state should use law to promote. Due to its fundamental focus on the uniqueness of particular civilisations, the civilisational state is not a universalist model. Nevertheless, certain common features can be identified. Where a civilisational claim is made on behalf of the state, it represents a rejection of the state as merely a nation. Civilisational states claim that for reasons of their historical longevity and territorial extent, the identity of the state is defined by an idea of a civilisation rather than of a nation. The highly distinctive culture that defines this civilisation has evolved not only through the continuities of a long period of time, but also emerged dominant in the context of the significant cultural diversity of a large and widespread territory.

Civilisational states also differ significantly from nation-states in terms of their constitutional practices. The nation-state and the doctrines associated with it, including popular sovereignty, democracy, limited government, individual rights, the rule of law, the separation of state and religion, the public/private divide, and depersonalised office, are all depicted as culturally and historically specific creations of the European Enlightenment. The dominance of Western power in the last 500 years made this the basis of international order as well. While non-Western civilisational states have in the last century participated in this order, it is claimed that none of these doctrines have had much impact on their own sense of identity in terms of history, culture, and ways of thinking and being.

The organising principles of the civilisational state are not merely different but inconsistent with those of the Western nation-state. The social legitimacy of the civilisational state derives not from the trappings of democracy but the close relationship between the state and the civilisation. The culture of the civilisation is defined by its own traditional values as well as other elements like food, language, and distinctive practices around the family and extended social networks.

As Jacques observes of the Chinese version of the civilisational state, "The state is seen as the embodiment, guardian, and defender of Chinese civilisation. Maintaining the unity, cohesion, and integrity of Chinese civilisation – of the civilisation-state – is perceived as the highest political priority and is seen as the sacrosanct task of the Chinese state".[66] Over its long history, the Han race moreover has assimilated others and it is around the Han identity that the Chinese civilisational state is built. Particularly, this has a spiritual dimension and the Western division of church and state does not apply. China has rediscovered Confucianism and uses it to develop an image of the Chinese civilisation, which it promotes through law.[67]

The civilisational state concept seems to have parallels in constitutional development elsewhere. In India, the BJP has stoked up Hindu grievances and sense of vulnerability. The state has been repurposed as the promoter of Hindu nationalism.[68] Putin has co-opted the Orthodox Church, which now provides a spiritual dimension to his rule, and uses appeals to Russia's history, to ground political moves in the present.[69] Putin also makes reference to the "spiritual" links between Russians and their immediate neighbours as a way of promoting stronger cooperation and, now, invasion.

Proponents claim to champion their civilisation's long historical continuity, binding together civilisations even across borders and areas, through a form of centralised unitary authority, but involving 'different peoples'. This can be contrasted with LCD, where constitutionalism is about constraining authority and leaving individuals (and often groups, including territorially organised ones) to pursue their own conception of the good.[70] In all these ways, civilisational state constitutionalism is thick, substantive, and monistic, in contrast at least to the classical versions of LCD, which are thin, procedural, and pluralistic.

Specific constitutional characteristics of the civilisational state are: (1) the state is a spiritual and civilisational protector; [71] (2) the state's constitutional practices are determined by pre-democratic values; [72] (3) the legitimacy of the state and its authority stem from the state's commitment (a) to the correction of historical injustices and (b) reflexive, complex, and indirect democratic credentials; [73] and (4) the relative lack of formal procedural propriety as a condition of valid or legitimate constitutional authority.[74]

What then is the global purchase of this model, vis-à-vis LCD? During our workshops, the consensus was that this model is not being pushed on states by non-democratic powers. Instead, developing countries are trying to replicate China's economic and social successes, and the civilisational state as a government model therefore has appeal amongst elites in various Global South polities, including for motivations based on 'authoritarian reinforcement' noted above.[75] This attraction may be strongest in states where ethnocultural nationalism plays a central role in contemporary politics, and the appeal of past 'glories' remains strong. For power-hoarding elites in such states, the appeal of the civilisational state is its contrast with the LCD model, or in other words, that constitutionalism is shaped more by pre-democratic practices than by democratic ones.

This 'pre-democratic' aspect of the civilisational state is strongest in China. The CCP sees itself as part of the "unbroken line of Chinese civilisation".[76] China "has its own logic and cycles of development, and the idea of dynasties is helpful here. A good dynasty in China tends to last 200-300 years or more, and this logic has been observed in the past 4000 years".[77] In India, the Rashtriya Swayamsevak Sangh (RSS), a right-wing Hindu nationalist volunteer paramilitary organisation, has gained new inroads (in some ways fusion) with government since Modi entered office.[78] Putin also situates himself within "the unbrokenness of Russian history".[79] Linde writes that "Russia's identity as a distinct civilisation is seen as the enduring foundation on which the state as a political entity rests" and Putin has gradually become more concerned with culture-building over the course of his career.[80] This leads to a situation where the state and the civilisation are "practically indistinguishable" [81] and a major implication of this conflation is the territorially open-endedness of the civilisational state compared to the territorially boundedness of the nation-state. Leaders such as Putin and Erdoğan have used claims of civilisational unity to legitimise wider territorial ambitions, and the war in Ukraine (and tensions over Taiwan) vividly underscore the potential consequences.[82]

(c) Reflections on LCD

While non-liberal constitutionalisms are unattractive options for many societies, they are important for highlighting LCD's weaknesses. In India, and, until recently, also in neighbouring Sri Lanka,[83] this model is usurping democracy by preying on its failures. Interrelated points of attack are:

- LCD cannot deliver economic prosperity because it is too concentrated on restraining power.
- LCD has little to offer state-building in pluralist societies.
- LCD's traditional conceptions of division of power do not always keep pace with economic and political trends. They are too rigid and unresponsive in the modern world.
- LCD is inconducive to distributing wealth.
- LCD emerged out of a very specific Western context and is unsuitable for other societies.
- LCD supresses local traditions, norms, and cultures.
- LCD is inconducive to virtuous leaders, virtue-based law, and consensual decision-making.

These critiques require fuller research and consideration. It is likely that the response to them will involve a mixture of re-asserting and also re-considering LCD; and it is worth remembering that many of these counterpoints to LCD are also being articulated in constitutional theory and comparative constitutional law debates today by alternative schools of thought within the Western tradition, that have little in common with the authoritarian civilisational state.[84] Indeed, the internationally-promoted LCD model, in a sense, edited out the country-specific nuances of actual Western liberal democratic constitutional orders, that reflected complex historical bargains.

For scholars and practitioners of comparative constitutional transitions the present and the future holds both challenges and opportunities, in a changing world of multipolarity and deep value pluralism. There is a need to reflect how the principles of consent and constraint that define constitutional democracy might be defended, without relying exclusively on Western liberalism as supplying a simple, one-size-fits-all 'model' for normative purposes. There is also a need to better harness the Global South's own historical, ideational, and cultural resources for legitimising arguments in favour of constitutional democracy.

Endnotes

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About Us

PeaceRep is a research consortium based at Edinburgh Law School. Our research is rethinking peace and transition processes in the light of changing conflict dynamics, changing demands of inclusion, and changes in patterns of global intervention in conflict and peace/mediation/transition management processes.

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The Edinburgh Centre for Constitutional Law (ECCL) provides a focal point for staff and postgraduate research students working in all areas of Scots and UK public law, Commonwealth and comparative constitutional law, human rights law, environmental law and climate change law, democratization and transitional constitutionalism, and constitutional theory. Our members undertake research and teaching in all these areas, as well as providing expertise to institutions outside academia in the UK and beyond.

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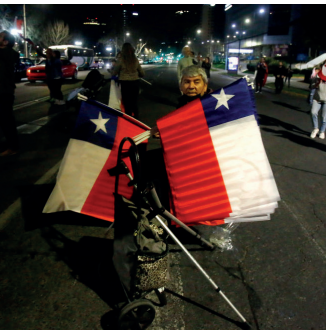

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