

**A Book Review of Dennis Davis, Alan Richter,
Cheryl Saunders, eds (Oxford: Hart Publishing, 2015)**

An Inquiry into the Existence of Global Values Through the Lens of Comparative Constitutional Law

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Currently, legal and political scholarship is increasingly engaging with the existence and the practicability of a global constitutionalism. This is due to two relevant phenomena: nation states' adoption of new constitutions integrating the basic elements of modern constitutionalism (limitation of the powers of government, adherence to the rule of law, protection of fundamental rights, and guarantees for the maintenance of an adequate level of democracy); and, the transnational dimension of the new constitutionalism as a result of the constitutionalization of international law and the internationalization of constitutional law.

As a result of this loss of borders between nation states and between international and constitutional dimensions of the law, our world appears to be characterized by shared norms and values, feeding in some way the dream of those who strive for a cosmopolitan dimension of world affairs. However, this cosmopolitan dimension of constitutional law has to coexist with old and modern particularisms. Many nation states have to deal with the struggle for the recognition of ethnic, cultural, and religious minorities within their territories, and the adoption of a bill of rights inspired by international instruments is not a guarantee of convergence between states. The constitutional dimension of human rights is always filtered, to some degree, through the lens of a constitutional tradition informed by the values of a specific society. Given such a tangled scenario, how can we possibly talk about a global dimension of constitutional values?

This volume, edited by Dennis Davis, Alan Richter, and Cheryl Saunders, is an excellent attempt to find an answer to this question. Their fascinating

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and challenging project explores the existence of global values through a comparative analysis of several constitutional systems. The book moves from the premise that, during the past 25 years, the world has seen a “new rights revolution.” The fall of totalitarian regimes in Eastern Europe and the crisis of apartheid in South Africa have certainly triggered in many states the adoption of constitutional systems with bills of rights. Along with the phenomenon of constitutionalism, another characteristic of the post-Cold War era is certainly the advent of economic globalization. We have seen an increasing integration of economies across the world and the formation of a new cross-border system of the free movement of goods, services, and capital. Interestingly, in light of such a situation, the editors of this volume raise the following question in the introduction: “In an era of economic globalization, is there a parallel development of human rights where the content of such human rights is shared across the boundaries?” (p. 2). In other words, do shared values across constitutional systems exist?

Given this ambitious task, the study requires a specific methodological framework. The volume adopts a comparative approach, which entails an analysis of the similarities of national constitutional texts and jurisprudence, with the latter partly based on the idea of “judicial borrowing.” During the last few decades, the courts have been the main actor in what Anne-Marie Slaughter calls “judicial globalization,”¹ the use of international law and decisions of foreign courts when they apply domestic law. However, the volume does not intend to analyze all 194 constitutions that are currently operating in the world. The existence of global values or, at least, of a constitutional convergence between them is explored through a limited range of jurisdictions. The editors have selected 15 case studies that they believe best serve their project and offer the reader a comprehensive account of the global context. Therefore, the volume includes: the United States, France, and the United Kingdom as the first states to incorporate constitutional rights in their constitutions; Germany, Canada, and South Africa as newer examples of constitutional democracies that exercise a certain influence on other jurisdictions; and finally, Australia, Brazil, China, Finland, India, Iran, Israel, Japan, and Venezuela as representative of a variety of ways to enshrine constitutional rights in very different constitutional frameworks.

Although the authors’ adopted approach is intriguing and productive, it is arguably peculiar: Davis et al. facilitate the comparative analysis by offering a list of values whose source comes from a different discipline, and each author

1 Anne-Marie Slaughter, “Judicial Globalization” (2000) 40:1 VA J Intl L 1103.

has to individually comment on each source's congruence with constitutional values. The editors explain that the interaction between legal comparative analysis and ethical and political reflection is due to the difficulty in identifying a clear and shared definition of values within the constitutional discourse. As Gary Jeffrey Jacobsohn clarifies in his contribution on constitutional values and principles: "values and principles are a familiar part of the landscape of constitutional adjudication, yet their jurisprudential status is a subject of considerable contestation, and their meaning and significance for courts vary markedly across national boundaries."²

Each contributor confronts his/her account of a specific jurisdiction with a list of values drawn from the work of the ethicist Rushworth Kidder who attempted to articulate "a global code of values."³ Such values encompass a wide range of concepts, including those of justice, fairness, equality, community, freedom, independence, responsibility, accountability, integrity, honesty, respect, tolerance, participation, inclusion, security, life, dignity, compassion, caring, family, and environment. The reference to a code of values transversally shared by the global society certainly shows how different jurisdictions articulate them in practice. However, the editors should clarify to what extent a study based on interviews with 24 moral leaders from different national, cultural, and political backgrounds, is adequate enough to identify the moral code of the global society.

Each chapter is built on three parts: the first part analyzes the bill of rights and constitution of the country under observation, then identifies how the core values of Kidder's list are articulated within its constitutional framework; the second part tries to show how these values are prioritized; finally, the contributors analyze whether the values incorporated in the legal system are also actual social values.

Interestingly, the findings of this comparative study demonstrate the variety of *differences* between constitutional systems. Constitutional values vary their content and their application in accordance with the jurisprudence of the courts and with the constitutional setting of the country under review. Therefore, textual analysis does highlight many commonalities between constitutional documents — which refer to similar terms such as equality, dignity,

2 Gary Jeffrey Jacobsohn "Constitutional Values and Principles" in Michel Rosenfeld & Andras Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012).

3 Rushworth M. Kidder, *Shared Values for a Troubled World: Conversations with Men and Women of Conscience* (San Francisco: Jossey-Bass Publishers, 1994).

or privacy — yet, when we come to their use and application, we find ourselves before an extremely variable and complex global panorama. Is this clear evidence of the impossibility of global constitutional values and of a global community?

In the concluding chapter, the editors discuss Peter Singer's idea of cosmopolitanism⁴ and confront him with some of the most recent literature on global constitutionalism. Then, recalling Martha Nussbaum's criticism of Rabindranath Tagore's idea of cosmopolitanism,⁵ they come to the idea of the impartial spectator developed by Amartya Sen.⁶ The difficulty in reconciling the aspiration to have a global community of people and the attachment to nation-state-situated identities can be ultimately solved through the idea of "open impartiality." Reinterpreting Adam Smith, Sen defines "open impartiality" as "the viewpoints of others, whether or not belonging to some group of which one is specifically a member, receive adequate attention." It is in light of the idea of "open impartiality" that the editors claim the existence of considerable overlaps in the understanding of values, despite the variability of their articulations.

Such a claim is justified by reference to David Law's and Mila Versteeg's findings of their empirical account of the global evolution of rights constitutionalism.⁷ Through their analysis, Law and Versteeg demonstrate the diffusion of generic constitutional rights across jurisdictions — rights which are ubiquitous in almost all constitutional texts and are generally identifiable with negative, civil, and political rights. On the basis of these results, the editors accept the difficulty in finding a common agreement on a substantial content of global constitutional values, but they also observe that "at least some measure of overlapping vocabulary" exists (p. 473).

In conclusion, the comparative study presented in this volume has not proved the existence of a consistent and shared application of constitutional values in practice; rather, it has shown the variety of nuances that the same values can assume in different constitutional orders. In fact, the several contributors guide the reader, chapter after chapter, on a fascinating journey through jurisdictions informed by different societies, cultures, histories, and traditions. If, apparently, a globalized world seems to have led nation states to the end

4 Peter Singer, *One world: the ethics of globalization* (New Haven: Yale University Press, 2002).

5 Martha C. Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton: Princeton University Press, 2004), online: <<http://public.eblib.com/choice/publicfullrecord.aspx?p=445525>>.

6 Amartya Sen, *The Idea of Justice* (Cambridge, Mass.: Belknap Press & Harvard University Press, 2009).

7 David S. Law & Mila Versteeg, "The Evolution and Ideology of Global Constitutionalism" (2011) 99 Cal L Rev 1163.

of the line, the reality is that nation states still matter. Even so, the editors place their hope in the existence of a diffused overlapping vocabulary that may have an important normative and legal impact on political and legal discourse, thus creating the conditions for transcending national boundaries, histories, and cultures. The volume is ultimately an interesting attempt to approach the issue of the existence of global constitutional values.

Despite this expansive project, the volume is essentially limited by certain parameters. First, the study aspires to be an interdisciplinary project involving political and ethical analysis; nevertheless, it is exactly this interdisciplinary approach that has to be reinforced in order to deepen the reference to political theory and ethics. Second, when we come to talk about global constitutional values within the debate regarding global constitutionalism, we cannot forget the role of a supranational organization like the European Union (EU). Even though the EU is not a nation state, it has much to say in regard to the common values of different constitutional traditions - and has strongly contributed to the development of the global constitutional law discourse. Let us only consider, for instance, what the Treaty of Lisbon states in article 6.3: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law". The EU constitutional values are a unique attempt to find a common ground between different constitutional traditions and beyond member states' identities. Furthermore, the transnational character of these values claims a degree of universalization especially because they do not just result from different constitutional traditions but also in consideration of international human rights instruments. Therefore, a further development of this project should include the EU as a model of comparison where a reflection on global constitutional values is articulated both internally and externally.

