This is a draft chapter / article. The final version is available in Research Handbook on Feminist Engagement with International Law, edited by Susan Harris and Kate Ogg, published in 2019, Edward Elgar Publishing Ltd ISBN: 978 1 78536 391 7

CAN GLOBAL CONSTITUTIONALISATION BE FEMINIST?

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Abstract
Global Constitutionalisation offers a utopian picture of the future of international law. Its advocates suggest a governance system is emergent that will fill the gaps in legitimacy, democracy and the rule of law present in international law. The aim is to create a better global legal order, by filling these gaps with both normative and procedural constitutionalism, but, better for whom? Feminism has challenged the foundations of both international law and constitutionalism. It demonstrates that the design of normative structures accommodate and sustain prevailing patriarchal forms that leave little room for alternative accounts or voices. Both international and constitutional law's structures support the status quo and are resistant to critical and feminist voices. The question is whether it is possible for constitutionalism to change international law in ways that will open it to alternate possibilities. Feminist Constitutionalism aims to rebuild and rethink constitutional law and reflect feminist experience and debate, to redefine its limits and refocus its ambitions, opening it to new concerns. Global Constitutionalism is not, up to the present, concerned with such questioning. It has been immune to questioning of its underlying aims or assumptions. This chapter considers whether global constitutionalism, grounded in feminist discourse, could offer international law and global constitutionalism a new pathway. In does so by offering a manifesto which global constitutionalism can take to inculcate feminist concerns into its processes from the outset.

I INTRODUCTION

Global Constitutionalisation queries whether a new constitution(s) is emerging beyond the state. Global constitutionalism is an attempt to reshape constitutionalism for the global stage. While a relatively young debate, emerging in the 2000s, global constitutionalism finds it antecedents in domestic and comparative constitutional debate. Albeit global constitutionalism is distinct from both. Feminist interventions within domestic and comparative constitutionalism make critical fissures in the accepted norms of constitutional

faith. This piece looks at global constitutionalism and asks two questions. First, has global constitutionalism taken on board the critiques that feminist scholars have offered constitutionalism? Second, how would feminist global constitutionalism work in practice? In response, it offers a seven-point manifesto that would inculcate a feminist ethic into global constitutionalism thus avoiding the patriarchal dividends that its domestic counterparts established.

The relative youth of the debate means there is no accepted definition of global constitutionalism. Generally, it takes one of the following forms: a world constitution based upon the UN Charter,[1] a series of constitutional documents or constitutional norms for specific areas of global governance such as free trade,[2] or specific groups of international norms such as *jus cogens*.[3] Global constitutional lawyers engage in a hybrid normative and descriptive project to find and explain constitutional processes at the international level.[4] At its core is a desire to improve both international and global law, making them more legitimate. Though whether this legitimacy has some basis in feminist legal critique remains open to debate and is the subject of this chapter.

Whilst begun by Alfred Verdross in the 1930s, it was not until the early 2000s that global constitutionalism emerged as a distinct debate.[5] What differentiates the global variant from domestic or comparative constitutionalism is its direct relationship with international law. Global constitutionalism regards the latter as constitutionalising rather than a conglomeration of domestic constitutional orders feeding into a shared constitutional structure. Such a strict delineation between domestic, comparative and global constitutionalism is untenable particularly in monist legal systems. Yet, global scholarship has only recently engaged directly with comparative and domestic normative and theoretical work. This chapter focuses on the global debate and the dearth of feminist scholarship located there, or perhaps more accurately the lack of engagement with existing constitutional feminist scholarship. In doing so, we place firm reliance on the work of

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[1] Bardo Fassbender, 'The Meaning of International Constitutional Law' in Ronald St John Macdonald and Douglas Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Brill, 2005) 837, 844.

[2] Joel Trachtman, 'The Constitutions of the World Trade Organisation' (2006) 17(3) *European Journal of International Law* 623; Ernst-Ulrich Petersmann, 'Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism' in Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Hart, 2011) 5.

[3] See for example, Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19(3) *Leiden Journal of International Law* 579, 598 (*jus cogens*); Karolina Milewicz, 'Emerging Patterns of Global Constitutionalization: Towards a Conceptual Framework' (2009) 16 *Indiana Journal of Global Legal Studies* 413, 416 (norms).

[4] On the relationship between the normative and descriptive projects of global constitutionalism see, Jean d'Aspremont, 'International Constitutionalism, Legal Forms, and the Need for Villains' in Anthony Lang and Antje Wiener (eds), *The Handbook of Global Constitutionalism* (Edward Elgar, 2017). (Forthcoming).

[5] EU law debates being the exception.

domestic and comparative feminist constitutional scholars whose work is critical to constitutionalism and who are thus contributing to global constitutionalism even if that debate fails to recognise its worth. This chapter seeks to bring their contribution to bare upon the global constitutionalisation debate and tease out where global constitutionalism may create or re-purpose problematic elements of domestic constitutional normative orders and reproduce them at the international level. In addition, it considers the unique feminist critiques of global constitutionalism whose problematic nature stem from its structure as a global rather than comparative or domestic constitutional debate.

Questions on how power is conferred, divided and used abound within domestic and comparative constitutional law. Feminist questioning of constitutional norms such as the separation of power, rule of law, democratic legitimacy and human rights established clear critiques of these tropes across domestic and comparative law. Feminist constitutional and human rights scholars highlight how legal structures exclude women and marginalise their rights and interests. Constitutional (alongside human rights and equality) law can be empowering,[6] but feminist scholars argue it can also be overly restrictive.[7] Constitutional legal structures can close down discursive spaces and political questions become legalised.[8]

Within international and human rights law, feminist scholars challenge the assumptions underpinning the law and expose their gendered nature. For example, they challenge the public/private distinction in international human rights law that acts to side-line violence against women.[9] In doing so feminist international law has utilised the wealth of scholarship within other legal sectors in its critique. This chapter seeks to repeat this laudable interchange between scholars by asking whether global constitutionalisation debate can be feminist.

Despite calls to engage with feminist critiques,[10] global constitutionalism appears oblivious to critical literatures within domestic and comparative constitutional law (and also to those within international law). Global constitutional lawyers talk of the rule of law, the separation

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[6] Rosa Ehrenreich Brooks, 'Feminism and International Law: An Opportunity' (2002) 14 *Yale Journal of Law and Feminism* 345, 355 'In the face of such overwhelming wrongs, the universalist human rights discourse has been extraordinarily powerful, indeed transformative, for women around the world'.

[7] Judy Fudge, 'The Effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada' (1989) 17 *International Journal of Sociology* 445.

[8] Reg Greycar and Jenny Morgan, 'Equality Rights: What's Wrong?' in Rosemary Hunter (eds), *Rethinking Equality Projects in Law: Feminist Challenges* (Hart, 2008) 109, 124.

[9] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85(4) *The American Journal of International Law* 613; Dianne Otto, 'Feminist Approaches to International Law' in Anne Orford, Florian Hoffmann and Martin Clark (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 488.

[10] Anthony F Lang, Jr et al, 'Interdisciplinarity: Challenges and opportunities' (2013) 2(1) *Global Constitutionalism* 1, 4. 'Feminist analyses of how constitutionalism might disempower women or re-enact gender distinctions or assumptions about sexual orientation would provide new insights on global constitutionalism.'

of powers and democratic legitimacy from a traditional liberal perspective, seemingly indifferent to the feminist critiques of these ideas. This chapter aims to start a discussion where feminist scholarships and global constitutional law speak to one another. The chapter begins by outlining global constitutionalism and the current state of the literature. The piece then moves to existing feminist critiques of core constitutional norms within domestic and comparative law specifically the separation of powers, the rule of law and democratic legitimacy before asking where the space may lie for a feminist global constitutionalism. In the final section we proffer a seven-part manifesto for a feminist global constitutionalism.

Yet, a note of caution is necessary. Even if feminist theory is brought into global constitutional scholarship, whether global constitutionalism is receptive to change is debatable. Global constitutional law as a project has sought to reform international law, to make it more people-centred,[11] to increase its legitimacy. Yet, a radical or Marxist feminist critique might suggest that constitutionalism is so conservative and patriarchal that even a new project like global constitutionalism cannot respond adequately to feminist critique. Conservative in the sense of being tied to convention and traditional social and economic systems, and patriarchal in its maintenance of structures that are inescapably misogynist. In asking can global constitutionalisation be feminist this chapter is aware of such critique and is prepared for the pitfalls which may follow for women should international law be subject to a global constitutionalisation process.

II GLOBAL CONSTITUTIONALISATION: STATE OF PLAY

The variety of research questions that encompasses global constitutionalism makes defining it difficult. It can stand for the search of a world constitution, a series of constitutional systems, or the identification of constitutionalisation processes within international law and global governance. What differentiates global constitutionalism from comparative projects is the distinct focus on international law rather than on the distinctions and trends amongst existing domestic constitutional structures. Some global constitutional scholars reject any claim that it ought to resemble existing constitutional orders. As a scholarly project, it is criticised as both euro-centric and imposing on global governance an inherently conservative structure premised in liberal constitutionalism.[12] While interest in global scholarship is expanding beyond Europe, there appears to be little appetite, beyond the work of Schwöbel and Krivenko, for critical interventions. But, global constitutionalisation remains in scholarly terms a youthful debate, and there lies the potential for it to develop debates hitherto absent. This section does not set out in full detail the intricacies of the global constitutional debate, rather it describes the state of play from which a feminist narrative can launch.

[11] Ekaterina Yahyaoui Krivenko, 'Feminism, Modern Philosophy and the Future of Legitimacy of International Constitutionalism' (2009) 11 *International Community Law Review* 219.
[12] Anne Peters, 'Global Constitutionalism' in *The Encyclopaedia of Political Thought* (John Wiley and Sons Ltd 2014).

The scholarship on Global Constitutionalisation divides into two broad categories; institutional and normative constitutionalism.[13] Institutional constitutionalism concerns the location and institutionalisation of power at the global level.[14] It focuses on the constitutionalisation of international institutions or organisations. For example, some argue that the UN Charter is 'constitutional'[15] because of its commitment to peace and security,[16] its supremacy[17] and universal membership.[18] Similarly the WTO and the rise of adjudicative bodies are both suggested as constitutional or constitutionalising. Normative constitutionalism assembles constitutional norms derived from international law but may also borrow from state constitutionalism, such as the right to property. The former, which labels international legal norms as constitutional identifies their content and supremacy as indicators of constitutionalism. *Jus cogens* and *erga omnes* norms are most often the touchstones for such claims.[19] The second form of normative constitutionalism is to take constitutional norms – the rule of law, separation of powers and democratic legitimacy, – and find evidence of their (potential) operationalisation within international law. This method has the strongest link with domestic and comparative constitutionalism. Global constitutionalism's unifying quality is its reliance on constitutional frameworks, both normative and institutional, to look at international law through a constitutional lens.

A clear issue with methodology arises in discussing international law through constitutionalist language. For instance, in relation to domestic constitutionalism, debate as to the extent to which its norms are translatable to the global level abound.[20] There are questions as to whether the methodologies employed by comparative constitutional scholars are pertinent or not to the global debate. Nevertheless, global constitutionalism reads both international law and global governance through a constitutionalist lens informed by the practise at the domestic level.

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[13] Other categorisations have been suggested by Christine E J Schwöbel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff, 2011); Milewicz, above n 3.

[14] Christine Schwöbel, 'Situating the debate on global constitutionalism' (2010) 8(3) *International Journal of Constitutional Law* 611, 617.

[15] Ronald St. John Macdonald, 'The International Community as a Legal Community' in Ronald St. John Macdonald and Donald M. Johnston (eds), *Towards World Constitutionalism– Issues in the Legal Ordering of the World Community* (Martinus Nijhoff Publishers, 2005) 853, 879.

[16] Schwöbel, above n 14, 623.

[17] Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) *Columbia Journal of Transnational Law* 529, 577-578.

[18] Jürgen Habermas, 'Hat die Konstitutionaliserung des Völkerrechts non eine chance?' in *Idem, Des gespaltene Westen* (2004) 113, 159 cited in Fassbender, above n 1, 847.

[19] Erika de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (2006) 19 *Leiden Journal of International Law* 611, 614-616.

[20] On global constitutionalism being separate from domestic constitutionalism see Aoife O'Donoghue, 'International constitutionalism and the state' (2013) 11(4) *International Journal of Constitutional Law* 1021, 1030.

Within Global Constitutionalisation 'structural' norms are approached from a liberal constitutionalist perspective,[21] but the detailed treatment found in domestic constitutional studies remains lacking.[22] The rule of law within global constitutionalist literature is under-theorised; it is synonymous with introducing more law to global governance, law enforcement,[23] the use of law by states to justify their actions or as a synonym for legalisation.[24] Rarely is it understood as certainty[25] or consistency in international law.[26] Questions of substantive equality and accountability, which form part of a thick rule of law in traditional constitutional literature, are not discussed within global constitutionalist scholarship.[27] The rule of law within global constitutionalisation 'does not fully translate into the ability of constituent power holders to exercise their rights or institute a substantive rule of law'.[28] Separation of powers within domestic constitutional scholarship refers to the tripartite divestment of power between executive, legislature and judiciary. But within global constitutional literature, it is located in the fragmentation of international law[29] or characterised as structural forms within international organisations.[30] The separation of powers in global constitutionalisation is not a horizontal separation, but often based on a geographical or vertical separation between state and international organisations. Democratic legitimacy's meaning in global constitutionalisation is contested, not least because there is a failure to define what is meant by democracy. The prevailing approach is to speak of participation and representation in global governance,[31] achieved through state-based models, which side-line genuine individual or collective participation at international organisations. These structural constitutional norms are often simplified within the global context. One of the reasons for this is the missing constituency.[32] The question of *who* benefits from Global Constitutionalisation is often left unanswered or is insufficiently linked to people.

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[21] Schwöbel, above n 14, 612.

[22] For a critique of the global constitutionalisation debate see Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (Cambridge University Press, 2014) 243.

[23] Anne Peters, 'Constitutional Fragments: On the Interaction of Constitutionalization and Fragmentation in International Law' (Working Paper No 2, Centre for Global Constitutionalism University of St Andrews, 14 April 2015) 9.

[24] Ian Hurd, 'The International Rule of Law and the Domestic Analogy' (2015) 4(3) *Global Constitutionalism* 365, 367.

[25] Cf Peters, above n 23, 10.

[26] Cf Andrea Bianchi, 'Ad-hocism and the Rule of Law' (2002) 13(1) *European Journal of International Law* 26; O'Donoghue, above n 23, 217.

[27] O'Donoghue, above n 22, 218.

[28] Ibid.

[29] Peters, above n 23, 9.

[30] Julian Arato, 'Constitutionality and Constitutionalism beyond the state: two perspectives on the material constitution of the United Nations' (2012) 10(3) *International Journal of Constitutional Law* 627, 634; O'Donoghue, above n 22, 252.

[31] Anne Peters, 'Dual Democracy' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press, 2009) 263.

[32] O'Donoghue, above n 22, 200; Garrett Wallace Brown 'The Constitutionalization *of What*? (2012) 1 *Global Constitutionalism* 203.

Feminists, alongside critical legal scholars, have subjected constitutional law and international law to rigorous critique; highlighting the structural inequalities perpetuated by it and exposing the conservative nature of its legal frameworks. Given the extent to which Global Constitutionalism builds on constitutional and international law, it is surprising that by global constitutional lawyers has not drawn on the critical scholarship within these fields. Without a concrete definition, Global Constitutionalism can be many things to many people; from normative interventions to institutional reforms. Clearly, feminist critiques are apt amongst the differing forms within the Global Constitutionalism debate. For example, the role of human rights and *jus cogens* norms within the normative strands of global constitutionalisation ought to be subjected to the feminist analysis of international human rights law and its critique of the public/private divide in supporting their operation.

From here this chapter focuses on 'structural constitutionalism'. Global constitutionalism accepts the norms of 'structural constitutionalism' – rule of law, separation of powers and democratic legitimacy – with little critique. Within domestic constitutionalism, these structural devices lead to questions about the formation of policies,[33] used as distancing devices by courts to decide the scope of their jurisdiction[34] often overlooking questions about how the policy impacts on the lives of people. At the global level disconnection is exacerbated where 'structural' constitutional questions are manifested in international institutional reforms[35] and the internal affairs of states are side-lined. Reliance is placed on these structural devices, despite the disconnect with the lives of people whose concerns are rejected at the expense of the states' interests.[36] Global Constitutionalist literature has traditionally avoided suggesting reforms for the internal dynamics of the state, rather it has referred to the state as an actor in international law and global governance[37] and has used the internal affairs of the state only as evidence for a complementary role for global constitutionalisation.[38] Its concerns with the identification and legitimation of power,[39] its reliance on conservative legal methodologies and structures, and its constructed distance from the localised effects of global governance, make global constitutionalisation ripe for feminist critique. This chapter responds to the calls for a feminist approach to global constitutionalisation.[40]

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[33] Aziz Huq, 'Structural Constitutionalism as Counterterrorism' (2012) 100 *California Law Review* 887, 890.

[34] Se-shauna Wheatle, *Principled Reasoning in Human Rights Adjudication* (Hart Publishing, 2016) 124, 207.

[35] Klaus Bosselmann, 'Global Environmental Constitutionalism: Mapping the Terrain' (2015) 21 *Widener Law Review* 171, 172; Markus Kotzur, 'Overcoming Dichotomies: A Functional Approach to the Constitutional Paradigm in Public International Law' (2012) 4 *Goettingen Journal of International Law* 585.

[36] Milewicz, above n 3; Huq, above n 33.

[37] Thomas Kleinlein, 'Non-state actors from an international constitutionalist perspective: participation matters!' in Jean d'Aspremont (ed), *Participants in the International Legal System: multiple perspectives on non-state actors in international law* (Routledge, 2013) 43, 43.

[38] Peters, above n 3, 579.

[39] Schwöbel, above n 13, 29.

[40] Lang et al, above n 10, 4.

III FEMINIST CONSTITUTIONALISM

Irving suggests that a constitutional gender audit must be aware of both the possibility for progress or regression dependent on the form and structures of power it grants.[41] Thus any project that seeks to use constitutionalism needs to know the pitfalls enmeshed within it but also the great advances that feminist activists and scholars have made in pushing constitutionalism toward feminism.

Generally, constitutions are not written by women.[42] The constitutions on which others are modelled, such as the US or Indian, were constructed in the absence of women. In the former's case women (and slaves) were not human enough to have the legal protections or rights that liberal constitutional paraphernalia such as the rule of law, separation of power or democratic legitimacy, promote. Constitutions offer a rubric by which constituent and constituted power holders engage with each other in a frame of power and law. But this is engagement based on assumptions of reasonableness and impartiality where all constituents are both free and equal, even if the society that it aims to reflect is one where gender equality remains absent.[43]

This apparent neutrality of constitutions is manifested in the theories of constitutionalism. Hasday argues the exclusion of women from the 'constitutional canon' is such that even the struggles to bend constitutionalism toward gender equality, a substantive alteration to its operation, is by and large omitted from the central texts.[44] Over generations women have contested and, sometimes, reclaimed for the half of world's population space and voice within constitutionalism. Nonetheless, a system which purports to neutrality, as constitutionalism does, makes difficult a re-imagining that moves away from such underlying assumptions.[45]

Feminist constitutionalism aims to rebuild and rethink constitutional law to reflect feminist experience and debate, to redefine its parameters and aims, to refocus its ambitions and

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[41] Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge University Press, 2008) 23; Joseph Raz, *The Authority of Law Essays on Law and Morality* (Oxford University Press, 1979) 214-8.

[42] Laura E Lucas, 'Does Gender Specificity in Constitutions Matter' (2009) 20 *Duke Journal of Comparative and International Law* 133; Catherine MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press, 1989) 238; Kim Rubenstein and Katherine Young, *The Public Law of Gender* (Cambridge University Press, 2016).

[43] MacKinnon, above n 42, 163.

[44] Jill E Hasday, 'Women's Exclusion from the Constitutional Canon' (2013) *University of Illinois Law Review* 1715, 1716. Hasday discusses the work of Akhil Amar *America's Unwritten Constitution*: *The Precedents and Principles We Live By* (Basic Books, 2014) which also discusses other omissions from the canon including battles for racial equality.

[45] There have also been other sites of contestation of constitutionalism including from a post-colonial perspective. See, Upendra Baxi, 'Postcolonial Legality' in Henry Schwarz, and Sangeeta Ray (eds), *A Companion to Postcolonial Studies* (Blackwell, 2001) 540; Mahmod Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press, 1996).

open it to new concerns. In doing so, it has demonstrated the inadequacies of an existing and exalted constitutional system that by its very nature inculcates dynamics of patriarchal power and dominance.

A *Rule of Law*

While not inevitably linked to constitutionalism it is hard to imagine constitutionalism absent the rule of law.[46] Often wrapped in a very particular political cloak, thin rule of law relies on procedure for fairness. Thick rule of law inculcates human rights into its operation, aiming toward a more protective sphere where constituents challenge the acts of political decision-making.[47] Both thick and thin rule of law reveal the nature of constitutionalism under consideration. Thin rule of law centres upon an individualism where the basic form of society operates equally, even if in reality this is not the case, and thus substantive protection is unnecessary. Thin rule of law is reliant on the neutrality of law itself which as Catherine MacKinnon argues is predicated upon on a 'society, [that] absent government intervention, is free and equal; that its laws, in general, reflect that; and that government need and should right only what government has previously wronged'[48] requiring a minimalist rule of law. Even within thick rule of law the nature of power requires a form of protectionism against constituted governance as substantive inequality is always a possibility.

Thick or substantive rule of law is distrustful of power and assumes the need for contestation both against and to engage the state's interference. This suggests the possibility for a more feminist account of the rule of law. Yet, substantive rule of law is not inevitably feminist. In particular, if the protected rights are only those manifested in the interaction between state and so called public action it is more likely to reinforce gender inequality and the division into the public and private spheres. Hilary Charlesworth notes that the subjects of international law, states, are constructed on this division of labour between private and public spheres.[49] Nonetheless, as demonstrated by feminist scholars it is possible to underpin the rule of law with rights and rights interpretation that is not gendered and rejects women's absence from the constitutional community.

While the contemporary rule of law ought to mean that even in older constitutions where masculinised language remains *in situe* constitutions will not be interpreted to exclude women, the rule of law does not ensure that women enjoy 'full membership of the constitutional community.'[50] This in turn has a direct impact upon other constitutional structures, in particular, democratic legitimacy. Feminist rule of law necessitates the implementation of substantive equality as core to rule of law.

B *Separation of Powers*

[46] Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1.
[47] Tom Bingham, *The Rule of Law* (Penguin, 2011), ch 7.
[48] MacKinnon, above n 42, 163.
[49] Hilary Charlesworth, 'Alienating Oscar? Feminist Analysis of International Law' in Dorinda G Dallmeyer (ed), *Reconceiving Reality: Women and International Law* (American Society of International Law, 1993) 1, 9-10.
[50] Irving, above n 41, 63.

Division of powers or indeed the separation of power has thus far managed to avoid being defined with any great enthusiasm or detail.[51] What can definitively be stated is that constituted power is divided to ensure that one site of governance does not hold the main points of decision making, be it executive, legislative or judicial. In addition, this division supplements the dividing of power by enabling each constituted power holder to hold the others in check.[52] At its most traditional it is as Vile's suggests

> ...essential for the establishment and maintenance of political liberty that the government be divided into three branches...[e]ach branch of government must be confined to the exercise of its own function and not allowed to encroach upon the other functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct...[i]n this way each of the branches will be a check on the others and no single group will be able to control the machinery of State.[53]

This focus on constituted power within separation of powers means that it identifies a form of aggressive and dominant authority which must be divided to hold in check any egotistical and avaricious overstretching by one set of constituted power holders over another, or indeed over constituents. Thus, by its very nature, it assumes a covetous power always fighting to take hold of more authority. Rather than a shared or interactive form of constituted power; it is combative at its core. It is also innately hierarchal and while it shares power at one point even in a federalised system, there is no attempt to fracture constituted power or bring constituent power closer to its operation. The separation of power is entirely driven by the notion of fences, supremacy, monitoring, hierarchy and defence. The traditional tripartite division, which Montesquieu assumed was necessary to avoid tyranny, was entirely based on a public notion of power held by men in their traditional sites of public power and while it pushed against monarchical or dictatorial power, it is innately conservative and does not question why constituted power operates in such a manner.[54]

The traditional tripartite division between the legislature, judiciary and executive is bound to French and US experiences of revolution, rebellion and the removal of monarchies and tyranny. Their radical roots however became bounded to 18th and 19th Century legalism which was increasing conservative in its regard for the role of women in public life.[55]

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[51] Christoph Möllers, *The Three Branches: A Comparative Model of the Separation of Powers* (Oxford University Press, 2013); Jeremy Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 *Boston College Law Review* 433, 433-435.

[52] M J C Vile, *Constitutionalism and the Separation of Powers* (2nd ed, Oxford University Press, 1967) 18.

[53] Ibid 13.

[54] Baron de Montesquieu, *The Spirit of the Laws* (Thomas Nugent trans, Hafner, 1949) [first published 1748].

[55] George Lachmann Mosse, *Nationalism and sexuality: respectability and abnormal sexuality in modern Europe* (H Fertig, 1985) 6; Joan B Landes, *Women and the Public Sphere in the Age of the French Revolution* (Cornell University Press, 1988); Glenda Sluga, 'Identity, gender, and

Conservatism's innate paternalism, focus on practicality – a practicality based upon the maleness of political life – hierarchy and incremental change leaves little space for the separation of powers to be a source of feminist change.[56] The underlying assumption of covetous power further buttresses the conservative ideal as any change, even incremental, is dangerous, as it could unleash this power and revert the system to tyranny. Fences, supremacy, monitoring, hierarchy and defence are all necessary and the radicalness of revolution and rebellion no longer desired.

The separation of powers also precedes on the basis that division will ensure that the neutrality of law is preserved, particularly through the judiciary. Constitutionalism requires government of law not of men and any deviation from such neutrality by courts is checked by the other two constituted powers.[57] Such legal neutrality of law and courts has been repeatedly demonstrated to be inaccurate and indeed the work of Feminist Judgments projects clearly sets out the terms in which law and courts continue to be male.[58] Feminist Judgments projects also show how the judicial branch can, even within the confines of traditional judicial craft, bring feminist critique to bare on the other branches of government and upon constitutionalism itself.

From the outset, modern constitutional thought proposed alternative power beyond the traditional sites of governance. For instance, Sieyes considered the necessity of a fourth estate.[59] Geographical separation of powers eschews the traditional horizontal plane to include a vertical idea of power being held at different points. This idea is heavily related to subsidiarity and the notion that the state-only descriptions no longer suffices. But, geographical separation of powers does not challenge the covetous or combative form that separation of power inculcates nor has federalism or subsidiarity proven to be entirely feminist.

A more radicalised version of the separation of power moves beyond the traditional three divisions, opening the state to other forms of power. For instance, in Bolivia there are multiple divisions including rights for mother earth, a cooperative planning model, autonomous powers for indigenous populations and other communities, external power of the social movements as well as some other elements with the specific intent to disrupt the traditional operation of constituted power based on independence, separation, coordination and cooperation.[60] While these recent innovations do not necessarily change the nature of constituted power as a gendered form of governance sustained through the separation of

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the history of European nations and nationalisms' (1998) 4 *Nations and Nationalism* 87, 90-91.

[56] Robert Nisbet, *Conservatism* (Milton Keynes Open University Press, 1986); Michael Oakeshott, *Rationalism in Politics and Other Essays* (Liberty Press, 1991); Edmund Burke, *Reflections on the Revolution in France* (Hackett, 1987/1790).

[57] MacKinnon, above n 42, 238 -239.

[58] Rosemary Hunter, 'The power of feminist judgments?' (2012) 20 *Feminist Legal Studies* 135.

[59] Emmanuel Joseph Sieyès, *What is the Third Estate?* (Frederick A. Praeger, 1964).

[60] *Bolivian Constitution 2009,* Chapter III Title I Article 12; other examples include Colombia and Ecuador.

powers, it suggests it is possible to disrupt its operation.[61] The Bolivian and other South American examples are attempts to alter constitutional structures to reflect a socialist governance order that leaves more space for the voices of Indigenous Americans and the poor within society. They show that fluidity beyond the tripartite model is possible. The success of these models has not yet been fully tested but they present the possibility that alternative methods are imaginable and the ingress by unheard voices into constituted power is conceivable.

Both the experiments in South America and the Feminist Judgments Projects reveal the possibilities for a feminist separation of powers. While neither unpicked the covetous power that conservatism ingrained into the separation of powers both demonstrate that it is possible to place alternative voices and sites of governance into its form. Both inhabit separation of powers and use its form to disrupt traditional sites of decision making.

C *Democratic Legitimacy*

Around the world, whilst the project of universal suffrage is near completion, genuine democracy for women is still a work in progress. The Vatican City is the last state to deny women the right to vote, with Saudi Arabia granting a limited right to vote to women in 2011. Beyond the right to vote, comparative constitutional scholarship in particular has brought to the fore the need for women's presence as constituted power holders in executives and legislatures. Feminist critique of constitutionalism shows the need for genuine inclusion of women in democratic decision-making processes and the necessity of creating spaces for de-formalised resistance, but also the *a priori* requirement of their presence in the processes that establish constituted power.[62]

Democracy is predicated on a *demos,* which in liberal democratic theory is assumed to be homogenous. This assumed unity of the democratic polity excludes the voices of women. The power relationship between men and women is a dynamic that obfuscates the unity of the *demos*, but it is an inequality that is ignored in the theory. Liberal democracy is built on a paradox: it 'guarantees universal equality to all "persons" while excluding women and other subjugated groups from the status of the subject on the basis of "difference" construed as inequality or inferiority'.[63] MacKinnon shows that '[g]ender as a status category was simply assumed out of legal existence, suppressed into a presumptively pre-constitutional social order through a constitutional structure designed not to reach it.'[64] This gives rise to an absence of women in the initial process of constitutional identification of constituent power, they are not counted as positive political actors nor as constituted power holders. Feminist constitutional scholarship identifying women's absence from constituent power has demonstrated how this creates a gap in democratic legitimacy.

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[61] *Bolivian Constitution 2009,* Chapter III Title I.

[62] Elizabeth Kingdom, 'Citizenship and Democracy: Feminist Politics of Citizenship and Radical Democratic Politics' in Susan Millns & Noel Whitty (eds), *Feminist Perspectives on Public Law* (Cavendish, 1999) 149.

[63] Ewa Plonowska Ziarek, 'Right to Vote or Right to Revolt? Arendt and the British Suffrage Militancy' (2008) 19(5) *differences* 1, 9.

[64] MacKinnon, above n 42, 163.

Democratic processes and the call for democratic legitimacy cloak the problem of constituent and constituted power. It is not enough to grant the right to vote, without first challenging the exclusion of women from the public sphere and 'the limited political system of representation constructed on the basis of this exclusion'.[65] Democratic legitimacy means more than mere representative or direct democracy. It goes further by suggesting that the use of constituted power is only legitimate when that power has democracy at its roots.[66] What follows is that law, and constitutional law suffers a legitimacy gap where constituted power has emerged without direct engagement by women.[67] In scenarios where women have been entirely excluded from the nexus between constituent and constituted power the law created and enforced is illegitimate in its attempts to regulate their lives.[68] The radical nature of the action taken against what was and is illegitimate power has always been at the centre of feminist action.[69]

This brief discussion of feminist constitutionalism cannot hope to set out fully the breadth of scholarship that domestic and comparative feminist critique has established. Rather it establishes both the depth of the critique and its importance to contemporary ideas of constitutionalism. This next section sets up where global constitutionalism shows unacknowledged indebtedness to this scholarship but also where direct feminist critique is necessary.

IV Barriers: Gendered Nature of International Law and Scholarship

Orford notes that feminist international law questions 'the justice of the international legal order'.[70] Would global constitutionalism centred on questioning justice facilitate reform to international law, could it bring about a form of global constitutionalism disentangled from both conservative domestic constitutional traditions, international law's imperial past and gendered elements of international law? The section explores the prospects for such a project.

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[65] Ziarek, above n 63, 8.

[66] James Tully, 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutionalism and Democracy' (2002) 65(2) *Modern Law Review* 204.

[67] Martha Fineman, *Transcending the Boundaries of Law: Generations of Feminisms and Legal Theory* (Routledge, 2011).

[68] See for example, Elizabeth Katz, 'Women's Involvement in International Constitution-Making' in Beverley Baines, Daphne Barak-Erez, and Tsvi-Kahana (eds), *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press, 2012) 204, 222.

[69] Laura E Nym Mayhall, *The Militant Suffrage Movement: Citizenship and Resistance in Britain, 1860-1930* (Oxford University Press, 2003) 72; Yxta Maya Murray, 'Creating New Categories': Anglo-American Radical Feminism's Constitutionalism in the Streets' (2012) 9 *Hastings Race & Poverty Law Journal* 454.

[70] Anne Orford, 'Feminism, Imperialism and the Mission of International Law' (2002) 71 *Nordic Journal of International Law* 275, 276.

Within the feminist international law, proposals for critical change abound. Orford highlights attempts to develop an alternative practice in reading international law.[71] Threadgold argues that change can be brought about by re-examining the narratives told be international law and re-telling them in a new frame.[72] However, such calls are mitigated by an orthodoxy – similar to conservative claims within constitutionalism - who suggest moderation. D'Amato argues that '[i]f feminists want to "use law to transform an oppressive society", they would be better off "taking law as it is, with all its rationality, objectivity and abstraction"'.[73] Similarly, Simma and Paulus suggest that the role of feminist scholarship is to use 'the transformative potential of the adaption of positive law to meet women's concerns'.[74] Some describe international legal scholarship as hostile to feminist theory.[75] If international law is gendered at its core,[76] then a feminist critique can only hope to have limited impact. Even where there are victories, these can come at the cost of weakening the feminist emancipatory goals.[77]

Effecting change in global constitutionalisation through a feminist re-reading of international and constitutional law depends not just on the feminist objectives and methodologies, but also on the potential for re-reading within the discipline. If global constitutionalism follows the voice of moderation and traditional legal frames that some international legal scholars advocate, it is unlikely that a feminist constitutionalism can emerge. Nonetheless, the relative youth of global constitutionalism debate means that such orthodoxy has yet to become embedded in the discourse and so potential remains.

At the surface there is an increasing commitment to gender issues in the institutions of Global Governance.[78] Examples include the creation of UN Women to co-ordinate the UN's

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[71] Ibid, 278.
[72] Terry Threadgold, 'Book Review: Law and Literature: Revised and Enlarged Edition by Richard Posner' (1999) 23 *Melbourne University Law Review* 830, 838.
[73] Anthony D'Amato, 'Book Review: Rebecca Cook (ed.), *Human Rights of Women: National and International Perspectives*' (1995) 89 *American Journal of International Law* 840 cited in Orford, above n 7-, 277.
[74] Bruno Simma and Andreas L Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Postivist View' (1999) 93 *American Journal of International Law* 302, 306.
[75] Dianne Otto, 'Remapping Crisis through a Feminist Lens' (Legal Studies Research Paper No 527, University of Melbourne, 16 February 2011)
[76] See China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Pluto Press, 2005); Otto, above n 75.
[77] Dianne Otto states 'The feminist project in international law is losing ground, even as many are celebrating its victories.' Dianne Otto, 'The Exile of Inclusion: Reflections on Gender Issues in International Law Over the Last Decade' (2009) 10(1) *Melbourne Journal of International Law* 11, 25.
[78] Research by Shahra Razavi and Carol Miller found that gender mainstreaming efforts in three international institutions – the ILO, World Bank and UNDP – all suffered from the lack of commitment of senior managers, poor resourcing, lack of expertise, marginalisation within the institution, and failure to translate into concrete action. See Shahra Razavi and Carol Miller, 'Gender Mainstreaming: A Study of Efforts by the UNDP, the World Bank and

work on gender, the passing of Resolution 1325 aiming to incorporate women into peace processes, as well as commitments by the UN General Assembly to end violence against women.[79] However, feminist scholars such as Otto and Charlesworth have warned that this use of 'inclusive language' is misleading.[80] States and other actors within international law have manipulated feminist arguments to give legitimacy to their decisions.[81] The UN's engagement with gender issues has become synonymous with 'women's issues' and criticised for becoming limited 'gender-mainstreaming'.[82] These examples suggest a superficial engagement with feminist theory.[83] The UN's continued failure to meet its own gender quotas amply demonstrates this failure. Since 1986 the UN has consistently failed to meet every quota, it has set for the Secretariat and its Agencies to achieve gender parity.[84] This lack of leadership at the heart of international governance demonstrates the shallow nature of its engagement with feminism.

One of the barriers to feminist international law is the distance created between global governance and local decision-making and people.[85] International law still priorities the state as its focal point, which has two consequences. First, there is a tendency to approach power relations as being contained by the state. [86] Second, global constitutionalisation and international law have both traditionally relied on the construction of a divide between the state and international law, and global constitutionalisation rarely engages with the domestic affairs other than to justify its existence as complementary. Yet, feminist experiences do not always take place at the state, they can be localised and, as contemporary feminist thought acknowledges, women's vulnerability can arise from transnational forces. Feminist theory and international law 'cannot adequately challenge gender injustice if they remain within the previously taken-for-granted frame of the modern territorial state.'[87]

Despite these limitations, there is room for optimism about the potential for feminist theory to effect change. International law, albeit selectively, bears witness to feminism having impact. For instance, Otto refers to repeated formal commitments to realising women's

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the ILO to Institutionalize Gender Issues' (Occasional Paper No 4, UN Research Institute for Social Development, 1 August 1995).

[79] *Declaration on the Elimination of Violence Against Women,* GA Res 48/104, UN GAOR, 85th plen mtg, UN Doc A/RES/48/104 (23 February 1994).

[80] Hilary Charlesworth, 'Talking to Ourselves: Should International Lawyers Take a Break from Feminism?' in Sari Kouvo and Zoe Pearson (eds), *Between Resistance and Compliance? Feminist Perspectives on International Law in an Era of Anxiety and Terror* (Hart Publishing, 2011) 17; Otto, above n 77, 15.

[81] Dianne Otto uses the example of the war in Iraq and Afghanistan. See Otto, above n 75.

[82] See Hilary Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations' (2005) 18 *Harvard Human Rights Journal* 1, 14.

[83] Otto, above n 77, 21.

[84] UN General Assembly Resolution 41/206 Staffing at the UN 11 December 1986

[85] Otto, above n 75.

[86] Cynthia Enloe, *Bananas, beaches and bases: Making Feminist Sense of International Politics* (University of California Press, 2000) 196.

[87] Nancy Fraser, *Scales of Justice: Reimaging Political Space in a Globalizing World* (Columbia University Press, 2009) 112.

equality.[88] Though to be impactful, she suggests that feminist critique has to stay removed from hegemonic power by staying 'outside the institutions of government'.[89] The capture of women's organisations and political strategies is not without precedent within international law. The activities of women's organisations in the 1918 Paris Peace Conference was essential in ensuring women were entitled to join the League of Nations Secretariat.[90] Yet, their establishment of NGO lobbying of international conferences is rarely credited as a women's political innovation. In that instance women created their own network, their own active constituency to ensure their participation in the new organs of international law.

Tentative optimistic conclusions from international law testify to the value of feminist critique to substantive change but also the potentiality of further iterations of feminist international law. Whether these are networks of women holding the UN to account, the idea of an iterative constituent power,[91] or the process of re-telling the stories international law tells itself, feminist international law remains as vital as ever. Nonetheless, as feminist scholars have reiterated repeatedly the space for women's voices, the acceptance of feminism as a 'legitimate' critique and the potential for capture of feminist campaigns remains an ever-present danger. The next question is how to bring feminist international and constitutional critique to bare upon global constitutionalism.

V GLOBAL CONSTITUTIONALISM: A FEMINIST MANIFESTO

"The ballot is not even half the loaf; it is only a crust - a crumb."[92]

What are the contents of feminist global constitutionalism? A preliminary question is *what* change feminist theorists would want to bring to global constitutionalism. Global constitutionalism starts with international law that, as Charlesworth highlights, excludes women's voices: 'the silence of women is an integral part of the structure of the international legal order, a critical element of its stability'.[93] As already considered, such silencing finds its correspondent within domestic constitutionalism. The silencing of particular women and their lived experiences is endemic. For instance, subaltern women through representation by the Global North's feminist traditions is a self-critical example.[94] But this example also warns against re-fashioning existing barriers within international law into constitutional forms that inevitably continue to silence subaltern women but re-close the small fissures that feminism achieved. From here, this chapter will set the groundwork for a feminist global constitutionalist manifesto. Such a manifesto must cover the *ex ante* processes, constitution-

[88] Otto, above n 75.
[89] Ibid.
[90] See Jane Adams, *Peace and Bread in a Time of War* (Hail & Co, 1922) 53-55.
[91] see Nico Kirsch 'Pouvoir Constituant and Pouvoir Irritant in the Postnational Order' (2016) 14(3) International Journal of Constitutional Law 657.
[92] Laura Bullard, 'What Flag Shall We Fly?' *Revolution,* 27 October 1870, 264.
[93] Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93 *American Journal of International Law* 379, 381 cited in Orford, above n 70, 279.
[94] Gayatri Chakravortty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press, 1999).

writing and evolution, and contents of constitutional systems. Seven agenda points aims to set a foundation for debate and are based on understanding feminism as necessitating a discursive space that ensures voice and deliberation for legitimacy.

The first element of the feminist global constitutionalism manifesto is that women are active agenda setters in global constitutionalism. We cannot replicate the *fait acompli* presented at the domestic level. Rather substantial constituent involvement and contestation on what ought to be put on the schema for inclusion in global constitutionalism is essential. We ought not consider such engagement legitimate if, for instance a constitutional convention, academic or otherwise, takes place in the absence of women. Women set a precedent for such agenda setting in their activism during the writing of the League of Nations Covenant and their engagement in the drafting of the UN Charter. While both these incidences resulted in small adjustments to texts, these were critical, particularly the inclusion of women in both these organisations, to ensure that women were regarded as a necessary part of international relations even before such acceptance within states.[95]

The second element of the manifesto requires that agenda setting move beyond a Eurocentric gaze both regarding the forms of constitutionalism it looks to but also the international legal authorities it relies upon. Other sites of international legal and governance evolution are not populated by the Global North and masculine power brokerage. Within the global constitutionalisation debate this is not the case. While there are signs that scholarship is moving beyond its European frontiers it is incumbent upon current scholars in the field to seek and engage with the much wider community of scholarship if it is to avoid the historic Eurocentrism that plagues international law.

The third element of the manifesto is a right of rejection. Feminist global constitutionalism must contain a power of rejection, to discard either elements or the entire base of a global constitutionalist agenda. Should global constitutionalism's agenda become a re-assertion of patriarchal constituted power or a re-iteration of traditional public international sites of governance, feminist agenda setting would enable the rejection of such a pursuit. While this may result in the end of the project then it may be a necessary cessation. This right of rejection is not time limited. As global constitutionalism evolves, as domestic constitutionalism does, women must retain the right to reject such change.

As noted above, women rarely write constitutions, this cannot be the case for global constitutionalism. The forth manifesto point is that women co-write the constitution. Encouraging, within the academic debate women are important actors and, on many fronts, lead the debate.[96] More negatively, much of the existing international law that global

[95] Helen McCarthy, *Women of the World: The Rise of the Female Diplomat* (Bloomsbury, 2014); Margaret E Galey 'Forerunners in Women's Quest for Partnership' in Anne Winslow (ed), *Women, Politics, and the United Nations* (Greenwood Publishing Group, 1995) 1; Steve Charnovitz 'The Emergence of Democratic Participation in Global Governance (Paris, 1919)' (2003) 10 *Indiana Journal of Global Legal Studies* 45, 68.

[96] Anne Peters, 'The Merits of Global Constitutionalism' (2009) 16 *Indiana Journal of Global Legal Studies* 397; Erika De Wet, 'The International Constitutional Order' (2006) 55 *International and Comparative Law Quarterly* 51; Schwöbel, above n 13; Jean Cohen,

constitutionalism relies upon has not been as inclusive. Through decades of activism, women have ensured they are legally entitled to be part of the international institutional machine, including academia.[97]Nonetheless, this representation remains partial and those present cannot fall into the trap which Orford outlined of 'saving' or perhaps more prosaically representing what a feminist constitutionalism may mean for them but not women's global concerns. Just as men's imprint has always been evident in constitutional and international law, women's imprint must be equally as strong a force in the content of global constitutionalism.

Writing the constitution must go beyond being in the room, women must be substantively involved in constitutionalisation and this is the fifth manifesto demand. Women must be involved substantively in the writing and evolution of the constitution. The experience of transitional justice is particularly instructive on this basis. While Security Council Resolution 1325[98] was hailed as a landmark[99] for the role of women in peace and security, subsequent practice shows it fails to fulfil the potential set forth.[100] While UN Women, the Sustainable Development Goals and the Millennium Development Goals are hortatory in their language toward gender equality and participation, as O'Rourke has commented, there is a feeling that transitions to peace ought to be transformative for women but the reality is that the forms of gender harm particularly in the private and public dichotomy remain.[101] As such, constitutional agenda setting and writing, even if mandated to have women present, does not necessarily manifest itself in feminist outcomes. The substantive character of the involvement of women and feminist debate is critical at both the point of agenda setting and writing.[102] The engagement of women in transitional justice constitution-making demonstrates both the potentialities but also the gaps in what international law has thus far achieved in incorporating feminist ideals of constitutionalism. It also demonstrates the difficulties with using international law to 'save' groups of women in the Global South and how a lack of engagement with them in designing their own involvement can have unintended consequences. Encompassed in this manifesto point is a dedication to considering just what 'writing' means from the perspective of all participants and not simply replicating the conventions and conferences of constitutional and international legal lore. It also requires perseverance. Regarding constitutions as living documents has enabled women to insert themselves into domestic constitutionalism through legislative change and judicial

Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism (Cambridge University Press, 2012); Deborah Cass, *Constitutionalization of the WTO* (Oxford University Press, 2005).

[97] Charnovitz, above n 95, 68.

[98] SC Res 1325, UN SCOR, 4213th mtg, UN Doc S/RES/1325 (31 October 2000).

[99] Office of the Special Adviser on Gender, *Landmark resolution on Women, Peace and Security* <http://www.un.org/womenwatch/osagi/wps/#resolution>.

[100] Catherine O'Rourke, *Gender Politics in Transitional Justice* (Routledge, 2013); Catherine O'Rourke 'Walk[ing] the Halls of Power'? Understanding Women's Participation in International Peace and Security' (2014) *Melbourne Journal of International Law* 128.

[101] O'Rourke, *Gender Politics in Transitional Justice*, above n 100, 237.

[102] Fionnuala Ní Aoláin and Michael Hamilton, 'Gender and the rule of law in transitional societies' (2009) 18 Minnesota Journal of International Law 380, 395-396.

activism. Writing constitutions includes women's active participation in the evolution of the global constitutionalist debate.

The sixth manifesto point requires real concern for constituent and constituted power. The structural form that a feminist global constitutionalism takes is bound to the interaction between constituent and constituted power. Instead of replicating the forms of rule of law and separation of powers rather, we can 'reread' the dialectic of constituent and constituted power. Accountability, and mechanisms for holding constituted power to account, is central to the norms of structural constitutionalism. In relation to constituted power, a feminist approach demands stronger accountability mechanisms.[103]

Women's suffrage movements highlight the myth of constituent and constituted power in constitutional law ensuring equality, particularly the blindness of constitutional democratic forms to constituents that fail to meet the standard of citizen. As Ziarek argues

> The creative freedom of women's militancy both evokes and redefines another paradox of revolutionary action, namely, the incommensurability between constituted and constituent power, articulated for the first time in the course of the French Revolution by Sieyes in terms of "his famous distinction between a *pouvoir constituant* and a *pouvoir constitute".*[104]

The conflation between constituting power and national sovereignty presents a problem for political theory in general and for feminist politics in particular.[105] 'If the constituting power is identified with national sovereignty, then its excess is interpreted, as has historically been the case, with the transcendence of the sovereign will and disconnected from the multiplicity of contingent political struggles.'.[106] In other words, the particular interests of people are lost within the constructed notion of "The People."[107] As Linera argues, modern constituent power ought to be, 'based on what we really are as opposed to simulating what we will never be nor could be'.[108] Feminism has always called for a recognition of what a society actually is rather than some idealised form of citizen entitled to constituent power. But this reality is one that is manifestly not static. Rather it is a form of constituent power which must continually reconceptualise itself at the global level to ensure that the multitude of women's voices are articulated.[109] For constituent and constituted power to work for women, the narratives of the idealised citizen or constituent must always be capable of reconsideration in the context of constituted power's operation.

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[103] Otto, above n 77, 12, 20.
[104] Ziarek, above n 63, 12 citing Hannah Arendt, *On Revolution* (Penguin 1963) 163.
[105] Ziarek, above n 63, 12.
[106] Ibid.
[107] For a more detailed discussion see Martin Loughlin, 'The concept of constituent power' (2014) 13(2) *European Journal of Political Theory* 218, 226, 233.
[108] Á García Linera, *La potencia plebeya: Accio´n colectiva e identidades indı´genas, obreras y populares en Bolivia* (ed Pablo Stefanoni. Prometeo Libros, 2008) 267.
[109] Jean L Cohen, 'Whose Sovereignty? Empire versus International Law' (2004) 18(3) *Ethics and International Affairs* 1.

The seventh manifesto call is the right to revolt. Within the global constitutional context, discussions on democracy focus on the extent to which global constitutionalisation can complement the domestic processes. There is little discussion on the *de jure* denial of the right to vote and continuing *de facto* exclusion. Democratic legitimacy in international law is tied to voting and elections.[110] Yet, suffrage movements redefined the right to vote as a right to revolt, indeed they had to revolt so as to construct a political identity that was not present in the constitutional structure. Ziarek argues that the 'reinterpretation of the right to vote as the right to revolt reclaims and redefines in the context of gender politics and important legacy of the revolutionary tradition, namely, the productive tension between the constituted, institutionalized character of power and its inaugural, constituting force'.[111] Feminist global constitutionalism must insist on this right to revolt as a basis of continued contestation. This may be made manifest in combination with the other manifesto points. For instance, in the rejection of the part or the entire paradigm and the forms of privilege which has allowed the Global North to frame both international law and constitutionalism.

A right to revolt inculcates continual challenges to constituted power but does not undercut constitutionalism to a point of nothingness. Locke asserted that constituent power is maintained by the notion that it can always take back the legitimacy to act given to constituted power holders.[112] As the suffragettes demonstrated and present activists who manifest their revolt in presenting themselves to authorities or the media as violators of constitutional law through control of their own contraceptive decisions, women challenge the authority of constituted power holders to both regulate their body and they work to agitate legal change. Revolt is a continual necessity to drive constitutionalism forward and establishing this within global constitutionalism will require a reconsideration of its current terms of reference.

Revolt is central to conceptualising a global feminist separation of powers. As discussed above, the separation of powers is the ultimate display of covetous and combative power but is also conservative in its maintenance of the status quo. As Wall comments 'the constitution, and the state that apparently emanates from it…seek[s] to quell instability' but as Wall goes on to argue 'instability, contestation and contradiction'[113] are central to a new order that is multifarious. Existing constitutionalism has examples of such constituent disruption of the separation of powers and feminism forefronts this contestation. Feminist global constitutionalism must include space for such fracturing both of the sites of separation of powers but also by puncturing constituted power. A feminist global separation of powers would have to go beyond a horizontal and vertical division and check as these inculcate its combative and covetous forms. Rather separation of powers must be multidimensional and multifarious and enable space for constituent revolt.

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[110] See Thomas Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1998), ch 4; Gregory H Fox, 'International Law and the Entitlement to Democracy After War' (2003) 9(2) *Global Governance* 179, 180; Thomas Carothers, 'Empirical Perspectives on the Emerging Norm of Democracy in International Law' (1992) *Proceedings of the American Society of International Law* 261.

[111] Ziarek, above n 63, 22.

[112] John Locke, *Two Treatise on Government* (3rd ed. Cambridge University Press, 1988) 4.

[113] Illan Wall 'Beyond Development' Unpublished, copy with author.

As already discussed the rule of law in its thin form assumes an equality amongst constituents that has never been the case within constitutionalism.[114] Revolt lies at the heart of keeping equality within the domain of global constitutionalism. In international law, much is made of an operational international rule of law. Yet, the notion that international law, at the very least, is made, enforced and adjudicated openly is debatable, and whether it prevails in all circumstances remains a live debate.[115] Substantive rule of law within a feminist global constitutionalism is a necessity. Thin rule of law's assumptions of equality would merely replicate the existing system where the myth of sovereign equality permeates contemporary international law.[116]

Within global constitutionalism much is made of a burgeoning rule of law though surprisingly, given its prominence within international law, human rights are not a major area of deliberation. Rather, the focus tends to be on legitimacy, what international rule of law adds to domestic constitutionalism and human rights as a sub-group of international law.[117] *Jus cogens* and *erga omnes* are also prominent in the debate, but it is not their substantive content that is at issue rather emphasis is placed on their roles as peremptory norms within a hierarchical structure.[118] Yet, as was already demonstrated *jus cogens* are by no means feminist and without substantive reform and expansion they remain tied to masculine objectives and priorities.[119]

Yet, while sovereign equality gains much traction within international law, as Third World Approaches to International Law (TWAIL) scholars demonstrate, this is by no means the case in practice.[120] Further as constituents within a feminist global constitutionalism will not be categorized by the traditional hard lines of international law, the need for a functional understanding of equality within the rule of law that is derived from feminist jurisprudence and experience with constitutionalism will be necessary. Further, the "public" elements of international law mean that a layering of the public/private divide has beset it as evidenced

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[114] For a discussion of how thin rule of law and the obsession with law can exclude groups including women, Lynne Henderson 'Authoritarianism and the Rule of Law' (1991) 66 *Indiana Law Journal* 379, 383.

[115] Ruti G Teitel, 'Humanity's law: rule of law for the new global politics' (2001) *35 Cornell International Law Journal* 355; Simon Chesterman 'An International Rule of Law?' (2008) 56 *American Journal of Comparative Law* 331; Dencho Georgiev, 'Politics or Rule of Law: Deconstruction and Legitimacy in International Law' (1993) 4 *European Journal of International Law* 1.

[116] Aoláin and Hamilton, above n 102, 385.

[117] Mattias Kumm, 'The legitimacy of international law: a constitutionalist framework of analysis' (2004) 15 *European Journal of International Law* 907.

[118] De Wet, above n 19, 616.

[119] Hilary Charlesworth and Christine Chinkin, 'The Gender of Jus Cogens' (1993) 15 *Human Rights Quarterly* 63.

[120] Michael Byers, Vikram Raghavan and Manuel Becerra-Ramirez, 'Voices from the Outside: Sovereign Equality, International Law, and the Imbalance of Power (2005) *Proceedings of the Annual Meeting American Society of International Law* 43; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004).

in constitutional-making within transitional societies.[121] As such, any feminist global constitutionalism will have to consider how it will dismantle the public/private divide to ensure that the gendered nature of the rule of law can be eliminated. For constituent action to remain operative and to ensure that the international rule of law does not suffocate the right to revolt, feminist notions of voice and equality must remain at the core of global constitutionalism.

VI CONCLUSION

'Constitutions found nations, define states, and ground and bind governments.'[122] If constitutional power is male power how do we break that link, if the law sees and treats women as men see and treat women is it at all possible for there to be a disentangling? Here we suggest there is a potentiality within the law to be feminist and that the nascent character of the global constitutionalist debate provides an opportunity to define its agenda, terms and parameters in a feminist way. But it is imperative that women are engaged with global constitutionalism from the beginning or else feminism will have to re-fight to open the fissures that feminist activism introduced to domestic and international law. The seven-point manifesto establishes how this can be achieved.

The approaches to certain tensions within feminism (equality and difference) and what is regarded as necessary to achieve either or both is something that neither constitutionalism nor international have successfully addressed. Yet, a global feminist constitutionalism could have both in its sights. Where its potential might lie is in having the space to explore both as within global constitutionalism the identity of the constituents and their power and interests are far from yet determined. Here feminism can contribute to an agenda that can be global in geography in a true sense that is not simply horizontally with countries and international organisations but rather a multiplicity of sites of power. What is then necessary is for the feminist debate to be inculcated into the global constitutionalist discourse alongside TWAIL and sub-altruism and other critical voices. Here we have set out suggestions of where global constitutionalism might be feminist to show where the possibilities lie.

Our manifesto for a feminist global constitutionalism and its seven demands are a starting point for a discussion of where the debate could go. Women's place in setting the agenda, a move beyond Euro-centracism, a right to reject the paradigm or a part thereof, women present in writing and forming the constitution, substantive and not procedural engagement of women, real concern for the nexus between constituent and constituted power and the nature of democratic legitimacy and perhaps most critically, the right to revolt. Of course, the rich scholarship of feminist constitutionalism should inform all aspects of the global constitutionalism debate. These seven manifesto points stand as a baseline from which the global constitutionalism can choose to gain traction and legitimacy by both recognising its

[121] Katharina Pistor, 'Launching a Global Rule of Law Movement: Next Steps' (2005) 25 *Berkeley Journal of International Law* 100; Aoláin, and Hamilton, above n 102, 380.
[122] Catherine A MacKinnon, 'Gender in Constitutions' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 398, 398

inheritance from domestic constitutionalism but also acknowledging the unique qualities of the global constitutional debate.