

LOCATING DEMOCRACY: UNWRITTEN CONSTITUCIONAL NORMS IN GLOBAL CONSTITUCIONALISM

Ruth Houghton*

ABSTRACT

Whether there is “a” global constitution is highly questionable. Indeed, whether there is a global constitutional order is debatable. But, if there is a global constitutional order, it is “unwritten”. That said, the theories of global constitutionalism and processes of global constitutionalisation are derived from an amalgamation of sources from across international law and domestic constitutional orders. These sources, such as international treaties and political theses, are written sources, but they raise questions about the nature of the evidence that is used to evaluate the strength of global constitutionalism and the plausibility of global constitutionalisation as well as raising methodological questions about where these sources are found. Focusing on democracy as a potential unwritten constitutional norm in global constitutionalism, this article reflects on the tensions that arise when interrogating the role of writing in the development of global constitutional norms.

Keywords: global constitutionalism; democracy; international law; unwritten constitutionalism;

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*Senior Lecturer at Newcastle Law School (United Kingdom), specializing in global constitutionalism, democracy, and constituent power.

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SITUANDO A DEMOCRACIA: NORMAS CONSTITUCIONAIS NÃO ESCRITAS NO CONSTITUCIONALISMO GLOBAL

Ruth Houghton

RESUMO

A existência de “uma” constituição global é altamente questionável. De fato, a própria existência de uma ordem constitucional global é objeto de controvérsia. Contudo, se há uma ordem constitucional global, ela é, em grande medida, não escrita. Ainda assim, as teorias do constitucionalismo global e os processos de constitucionalização global derivam de uma combinação de fontes provenientes tanto do Direito Internacional quanto das ordens constitucionais domésticas. Essas fontes, como tratados internacionais e teses políticas, são fontes escritas, mas suscitam questionamentos acerca da natureza das evidências utilizadas para avaliar a solidez do constitucionalismo global e a plausibilidade da constitucionalização global, bem como levantam questões metodológicas sobre os locais e os modos pelos quais essas fontes são identificadas. Tendo como foco a democracia enquanto possível norma constitucional não escrita no âmbito do constitucionalismo global, este artigo reflete sobre as tensões que emergem ao se examinar o papel da escrita no desenvolvimento das normas constitucionais globais.

Palavras-chave: constitucionalismo global; democracia; Direito Internacional; constitucionalismo não escrito.

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INTRODUCTION

Whether there is “a” global constitution is highly questionable. Indeed, whether there is a global constitutional order is debatable. But, if there is a global constitutional order, it is “unwritten”. We cannot point to a written constitution for global law; there is no codified constitutional text allocating and limiting powers in international law and global governance. Rather, the theories of global constitutionalism and processes of global constitutionalisation are derived from an amalgamation of sources from across international law and domestic constitutional orders. These sources, such as international treaties and political theses, are written sources, but they raise questions about the nature of the evidence that is used to evaluate the strength of global constitutionalism and the plausibility of global constitutionalisation as well as raising methodological questions about where these sources are found.

Investigating global constitutionalism through the complex interplay of written and unwritten norms gives rise to a series of circumstantial questions: such as, who wrote the source, when and where was it written, and what was it written for. In locating evidence of global constitutionalisation, and in constructing theories of global constitutionalism, there are questions about where this evidence for constitutionalisation comes from. In particular, scholars have critiqued the preoccupation with the theories and praxis of the Global North in global constitutional scholarship (da Silva 2014). This raises questions about how “global” global constitutional law is.

One of the key debates within global constitutional scholarship is the “democratic deficit” of international law and global governance. In response to this so-called deficit, scholars have sought to identify the need for or emergence of a right to democratic governance and they seek out evidence of democratic processes and democratic participation both within states and in international organisations and global governance (Franck 1992, 1995, 2000; Fox 2000, 1992; Peters 2009). Yet it remains a question whether democracy is a constitutional norm in the global “constitution”. Evaluating whether it is potentially an unwritten global constitutional norm raises the same circumstantial and methodological questions about the sources of this norm.

Focusing on democracy as a potential unwritten constitutional norm in global constitutionalism, this article reflects on the tensions that arise when interrogating the role of writing in the development of global constitutional norms. The article is divided into 3 substantive sections. In the first section, the debate on unwritten constitutionalism will be introduced. The second section will explore the extent to which it can be argued that global constitutionalism is “written”. As part of this exploration, the role of history as a source and ideas of globality as a source that underpins global constitutionalism will be unpacked. The final section turns to democracy as an example of a global constitutional norm and interrogates what can be learnt about the globality of the norm from its “written-ness”.

1 UNWRITTEN" CONSTITUTIONALISM AND GLOBAL CONSTITUTIONALISM?

Within constitutional scholarship, there is an acknowledgment that a written constitution will not necessarily contain within itself everything that is necessary to interpret the constitution. There will be gaps. The question for constitutional scholars is whether it is legitimate to fill in these gaps with "unwritten" constitutional norms or principles. Whilst some scholars readily accept that 'written law is always underpinned and informed by the unwritten' (Allan 2008, 235 cited in Pal 2018, 281), others critique the illegitimate use of unwritten rules (Leclair 2019). A reliance on these unwritten rules places power in the courts, who have to identify these rules and then apply them as part of constitutional interpretation (Leclair 2019). As a method of constitutional interpretation, unwritten constitutionalism raises questions about what counts as a constitutional norm and how can these be identified.

When confronted with the idea that the constitutional text might need supplementing with additional sources, scholars have to decide which sorts of texts can legitimately be used. Larry Solum identifies six categories of sources that fall outside of the constitutional text: 'other foundational documents outside the scope of the capital 'C' constitution, documents and records relating to the framing and ratification of the constitution, moral and political philosophical understandings or values, social norms and values, institutional practices (including judicial decisions, statutes and executive actions) and various discretionary decisions by different constitutional actors.' (Solum 2018 3.5.1 cited in Dixon and Stone 2018, 4) The question though is whether these supplementary documents can generate constitutional norms, and there is a debate about whether ordinary laws – statutes, for example – can be used to create constitutional norms (Dixon and Stone 2018, 8).

It is necessary to reflect on the terminology around writing that is being used in the debate on unwritten constitutionalism. Whilst the distinction between written and unwritten is fairly self-explanatory – a rule, a norm, a directive is written down or not – the debate on unwritten constitutionalism adds a further dimension of where it is written, and whether it is written as law, in a constitution, or in a constitutional document. It also involves questions of codification. A codified constitution is one that has been written down into a single text. In contrast an uncoded constitution is written across a number of different sources.

In domestic constitutions, then, often (though not always) the written constitution will outline the constitutional norms. But when there is no written constitutional text, this raises the question: what makes a constitutional norm constitutional? The same question can be asked for global constitutional norms. One approach would be to consider whether the norm has the features of a constitution, for example; entrenchment, hierarchical, supremacy over ordinary law (Craig 2022). Another approach would be to ask (as Bodansky (2009, 572) does) what function do constitutions serve, which usually gives rise to answers of 'constituting and constraining power' (Bodansky 2009, 572). Within modern constitutional scholarship, the theories of how to constitute and constrain

power are largely drawn from liberal constitutionalism. In global constitutionalism, an additional question would be what makes the norm a “global” constitutional norm? One answer would be that it is written in the global constitution. As there is no written codified global constitution, scholars cannot use that method for identifying such norms. Another would be to consider the “globality” of the norm.

This gives rise to a follow-up question, which is how is “globality” established? If we look to the “Global Law” debate, Neil Walker argues that “global law” is ‘any practical endorsement of, or commitment to, the universal or otherwise global-in-general warrant of some laws or of some dimensions of law’ (Walker 2015, 55). Universality – as noted by Walker – is a common refrain within global constitutionalism (see Jones 2023). For Domingo, the “global” in global law can be expressed in a number of principles: universality, solidarity, subsidiarity and horizontality (Domingo 2010, 157-158). With respect to the principle of horizontality, Domingo argues that means that ‘Global Law must be built on dialogue and consensus’ (Domingo 2010, 181). Consensus is key to Cheryl Saunders’ (2009) construction of “global”. If, as Saunders (2009) argues, there is an emerging ‘gene pool’ of constitutional norms where their global spread is the marker of their place in the development of global constitutionalisation, then this “globality” derives from consensus across the world’s domestic constitutions. These different markers of globality raise separate questions about how this can be evidenced as part of the evidence that is collected to prove the emergence of a norm. In questioning the “written” nature of the norm, we can uncover answer to the role of “writing” in the development of global constitutional norms.

Unwritten constitutionalism is broadly speaking a debate around constitutional interpretation. The focus in much of this scholarship is on how courts identify constitutional norms that help them to interpret the constitution in specific contexts. In evaluating the (un)written nature of global constitutional law, the use of unwritten rules would not be just about interpretation but about the very identification of a constitution. And whilst, some scholars have pointed to the unwritten nature of global constitutionalism (de Wet 2006), this is not a common discussion in global constitutionalism. If the use of unwritten constitutional norms is considered illegitimate in constitutional interpretation, this legitimacy critique is heightened where unwritten norms are being used to form the essence of a constitution. The question then becomes about where (if at all) these unwritten norms and principles derive their legitimacy. What is often missing from these global debates is a reflection on where the constitutional sources are being found. This article highlights historical evidence and notions of “globality” as two sources of legitimacy being used in the global constitutional debates.

2 GLOBAL CONSTITUTIONALISM AS (UN)WRITTEN

When reflecting on the different sources of (un)written constitutional norms within global constitutionalism, we have to take into account the often-fragmented literature which makes up the body of scholarship that is called 'global constitutionalism'. This scholarship is made up of two distinct areas of discussion. On the one hand, global international constitutionalisation and, on the other hand, global comparative constitutionalisation. These are two distinct approaches – from different sub-disciplines within law and legal studies - that are rarely placed into dialogue. It is worth explaining the differences between these two bodies of research before examining their role in the development of global constitutionalism.

International constitutionalisation is a debate within public international law (Klabbers 2019). It is concerned with identifying the emergence of constitutional norms such as the rule of law, separation of powers and democratic accountability within international law and international organisations. Comparative global constitutionalisation is a debate within comparative constitutional law. This approach can be described as the search for a commonality across domestic constitutional orders. This includes work by Saunders (2009) on identifying an emerging common 'gene pool' of constitutional norms, and Jeremy Waldron's (2012) and Se-shauna Wheatle's (2014) work on the *jus gentium* which refers to the 'law common to all mankind' (Waldron 2012 cited in Wheatle 2014, 1060). For Waldron, these emerge from a consensus or convergence of foreign statutes, constitutions or precedents (Wheatle 2014, 1060). The work of comparative global constitutionalisation necessitates an analysis of the synergies and divergences of norms across the world's constitutional systems, including within domestic constitutions and constitutional jurisprudence. As such, this body of research can and should draw on both written and unwritten norms (Kavanagh 2023).

The task of locating the norms of global constitutionalism requires an understanding of both bodies of scholarship and the complex interplay between international and comparative examples. One of the benefits of placing these sub-disciplines into dialogue is that debates on global international constitutionalisation can be supplemented with the systematic methods used in global comparative constitutionalisation. Raising the "unwritten" question, which is a question that sits within comparative constitutionalism (rather than international law), this study on the "unwritten" nature of global constitutionalism facilitates a way to bring these two bodies of literature – that, as noted above, are often siloed – into conversation. These comparative methods also facilitate questions about the role of history and globality in identifying unwritten constitutional norms in global constitutionalism (Wheatle 2014).

2.1 "The" Global Constitution

Whilst Bardo Fassbender (2008) argues that the United Nations (UN) Charter 1945 operates as a “written” constitution for international law, this is not a common position espoused within the scholarship on global constitutionalisation. Most scholarship on global constitutionalisation relies on “uncodified” norms and principles. For example, in her early work on international constitutionalisation, Erika de Wet (2013) discusses *erga omnes* obligations (those obligations owed to the international community as a whole) and *jus cogens* norms (peremptory norms) as evidence of the constitutionalisation of international law. Yet, looking at these norms and obligations highlights the complex relationship between something being “unwritten” and “written”; indeed, writing surrounds these international law norms, but that does not equate to being a written constitutional order.

If the UN Charter was an accepted constitution for the global constitutional order it would amount to a written and codified constitution. Fassbender (2008) provides several arguments as to why the UN Charter does operate as a written constitution. He argues that there was a constitutional moment (573), and the charter provides for a system of governance. He draws on domestic analogies of the legislature, executive and judiciary (575-576). The fact that the charter outlines a hierarchy of norms and its amendment procedures is indicative of entrenchment are further factors that highlight its constitutional nature. Article 103 of the Charter which provides that state obligations under the Charter prevail is evidence, for Fassbender, of a move away from a bilateral model of international law (1998, 573). Fassbender also notes the Charter’s drive for universality (1998, 581). Other scholars have identified international treaties – such as the UN Convention on the Law of the Sea (UNCLOS) (Havercroft and Kloker 2023) or the constituent documents of the World Health Organization (WHO) or the World Trade Organisation (WTO) (de Wet 2006, 53) – as constitutional texts. Which would give rise to a series of “constitutions”, such that potentially global constitutionalism is an uncodified constitution. Nevertheless, across global constitutional literature the nature of these texts as constitutions – codified or otherwise – is not a mainstream view, with many seeking evidence of constitutionalisation is more diffuse and fragmentary practices.

One such practice arises from the judicial and institutional responses to fragmentation in international law (Peters 2015). International law has long been recognised as fragmenting, with a series of specific legal orders emerging, such as international human rights law, international economic law, and international environmental law (International Law Commission (ILC) 2006). Global constitutionalists, however, have noted how courts have sought to navigate these fragmentary legal regimes. One such example is the *Kadi* case law, where a state’s obligations under the UN Charter to follow the UN Security Council’s issued sanctions list came into conflict with their obligations in EU Law. Across three courts, different ways of navigating the clash were proffered (Hovell 2016). In the Court of First Instance it was held that international law took “primacy” over national or regional law, but the European Court of Justice (ECJ)

upheld EU law as taking priority, and as such the regional court (the ECJ) 'challenged the hierarchic international legal order' (Wiener et al., 2012, 1), and in contrast the CJEU on appeal held that 'while Security Council resolutions had primacy at the international level, they became subject to the primacy of constitutional guarantees of the EU when implemented at the European level' and as such the CJEU made 'no attempt to reconcile the two orders' (Hovell 2016, 161). The jurisprudence of courts is one of the central sources for unwritten constitutionalism (Dixon and Stone 2018; Leclair 2018), and as such whilst these judgments are written, they would fall within "unwritten" sources for the unwritten constitutional debate. An additional question within global constitutionalism is whether the jurisprudence of regional courts, such as the European Court of Human Rights or the Court of Justice of the European Union counts as being a legitimate constitutional source for the purposes of global constitutional law.

Another way to navigate the interrelationship between legal orders is through systemic integration. Jane Rooney focuses on the role of Article 31(3)(c) in the Vienna Convention on the Law of Treaties (VCLT) which requires the taking into account 'any relevant rules of international law applicable in the relations between the parties' or (in other words) systemic integration when interpreting a treaty as an example of global constitutionalisation (Rooney 2016). In this case, the "constitutional" norm or principle of systemic integration is "written" in the VCLT. If responses to fragmentation are evidence of constitutionalisation such responses are piecemeal, and whilst the instructions on how to navigate fragmentation are written in judgments and treaties, they are not codified.

Erika de Wet argues that jus cogens norms and erga omnes obligations in international law are evidence of global constitutionalisation. This is because, for de Wet, erga omnes obligations construct an international community (2006, 54) and jus cogens norms provide an ethical underpinning to this community (2006, 57). De Wet argues that jus cogens norms have a 'special hierarchical standing' in international law which in turn creates a 'verticalization' (2006, 59). A follow up issue is whether these norms are "written".

The recognition of jus cogens norms is outlined in Articles 53 and 64 of the Vienna Convention on the Law of Treaties 1969. At risk of stating the obvious, this international convention is a written document. Furthermore, the evidence of these "higher order" obligations and norms is found in the "written" subsidiary sources of international law – judicial decisions and writings of the most highly qualified publicists, as provided for in Article 38(1) of the International Court of Justice Statute – as well as in the work of the International Law Commission (ILC). Indeed, an accepted and indicative list of jus cogens norms (including the prohibition on torture, prohibition on genocide etc) is found in the ILC's commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001). Though scholars might debate the natural law (and therefore potentially "unwritten" (see Carolan 2018, 444) foundations of jus cogens norms, whereby these peremptory norms of international law are derived not from the will of sovereign states but from notions of morality and

the immutable rules of nature (Tladi 2024; Hall 2022), these norms are heavily supported by the primary and subsidiary sources of international law, or in other words, written texts.

Whilst there is a written element needed to secure jus cogens as sources in international law, constructing their constitutional status highlights a more complicated role for the written and the unwritten. As noted above, jus cogens can be constructed as 'constitutional' for a number of reasons. Firstly, jus cogens norms can trump incompatible treaty law (and this is provided for in writing in Article 53 and 64 of the VCLT 1969), yet interpreting that jus cogens norms have this "trump card" over treaty and custom so as to give jus cogens norms a hierarchical nature is not written in a constitutional text. This raises questions about what sort of text is needed to cement a "constitutional" reading of a norm. Secondly, Article 53 of the VCLT provides that a jus cogens norm is needed to revise a jus cogens norm, which can then be given a constitutional gloss as the quasi-entrenchment of the norms. As with the notion of hierarchy, these are provided for in the VCLT which is not understood as a constitution nor a constitutional document. In addition, as these norms are recognised in written subsidiary sources – for example international court judgments – as obligations owed to the international community as a whole (i.e. *erga omnes* obligations), they invoke an international community (de Wet 2006). Scholars have also argued that they are constitutional because they reflect the moral compass of that "international community" (de Wet 2006). Yet, where this moral compass derives from understanding of natural law, it is less likely to be found in "writing" (Carolan 2018, 444).

Of course, this then raises questions about the construction of this international community and who is included and whose views and interests are excluded, and as such to what extent it can be described as the basis for a "global" community. De Wet notes that it is not just states that are part of the international community, but also certain international organisations and individuals (2006, 55). Yet, feminist international law scholars, for example, have critiqued the type of constitutional order this constructs as it excludes the perspectives and experiences of women (Houghton 2023). Hilary Charlesworth and Christine Chinkin (2000) note that the prohibition of the discrimination against women is not considered a jus cogens norm in international law. Whilst such exclusions do not prevent the emergence of a constitutional order, they do undermine a claim of "globality" where this means all the globe and its inhabitants, and raise questions about whether this is the sort of constitutional order that is desirable for the globe, international law and global governance.

To summarise, this exploration of the written nature of global constitutionalism has highlighted the disconnect between the source of law qua law and the source as constitutional law. Much of the evidence for global constitutionalisation is textual, whether that is in treaties or the jurisprudence of international courts. Yet, this does not mean that there is a written global constitution. Although jus cogens norms are evidenced through writing, and their hierarchical role in international law is provided for in treaty law, the constitutional status of jus cogens norms is not "written" in a constitution. There

is then a distinction between being written as a norm in international law and the additional step of being written as a constitutional norm. If the source of the constitutional nature of the norm is not in writing, *per se*, then this raises questions about where its “global” and “constitutional” quality comes from. The next sub-sections explore two suggestions: the use of history and the idea that something is or has become “global”.

2.1 History as a Source of Global Constitutionalism

Global constitutional scholarship often draws on historical examples to elucidate on the normative content of constitutional norms, such as the rule of law, separation of powers and democracy. When we consider the history that global constitutionalism turns to, it is not a “global” history. In an attempt to write an account of global constitutionalism, the scholarship has tended towards a particular white, male, Enlightenment history (Houghton and O’Donoghue 2020).

Within global constitutional scholarship, there is a tendency to draw on a selective number of Western examples and predominately it is the American Revolution and French Revolution that loom large. Anthony Lang and Antje Wiener (2023) critique this Anglo-American history in the introduction to the second edition of the Handbook on Global Constitutionalism. Texts such as the Declaration of the Rights of Man or the Declaration of Independence are centred in global constitutional debates. It is often the same written political works (such as *The Federalist Papers*, *The Leviathan*, *Locke’s Theory of Government*) that are cited in the literature on constitutionalism that emerge in global constitutionalism. An overreliance on these specific histories excludes the customs, knowledge and practices of the Global Majority.

Vidya Kumar (2017) critiques the reliance on histories of Western, Global North states, which leads to a liberal construction of constitutionalisation in the historical sources of global constitutionalisation. Discussions on the separation of powers, for example, hark back to Montesquieu’s theory, which is allegedly inspired by the English constitution in the 18th century (Papworth 2022, 19), despite the fact that England did not have a separation of powers in practice. Another example is work that explores the meaning of constituent power in global constitutionalisation, which often uses Emmanuel Sieyès’ definition of *pouvoir constituant* which was coined as part of his political pamphlets in the French Revolution (Rubinelli 2020). It is an account of constituent power as a constitutional norm or principle that is frozen in a particular historical time and political moment, proffering an Enlightenment theory of the individual and a narrow conceptualisation of democratic processes (Houghton and O’Donoghue 2020).

Within the international school of global constitutionalisation, there have been attempts to diversify this particular historical account. Feminist scholars, such as Houghton and O’Donoghue (2023) have sought to revisit this history. By drawing on transnational examples of women’s activism and on the diverse experiences of feminist activists, their work seeks to problematise and pluralise

accounts of constituent power. Adam Rowe and Ruth Houghton have centred the work of a contemporary of Sieyès – Madame de Staël – exposing the extent to which the role of women in the development of constitutional thought has been overlooked in the academy (Rowe and Houghton). Where Houghton and O'Donoghue (2023) turn to an array of different feminist manifestos (including the Declaration of the Rights of Women (1791) and the Declaration of Sentiments (1848) which mimic the Declaration of the Rights of Man and the Declaration of Independence), which can often be ephemeral in nature, Rowe and Houghton turn to de Stael's political treatises and literary works (including plays and short stories). These alternative texts – manifestos, pamphlets, plays, and novels – demonstrate the importance of interrogating what sorts of sources are included within the debates on the written nature of constitutionalism. Diversifying the historical source material allows for these alternative histories on the development of (global) constitutionalism (Houghton 2023).

In summary, history and historical examples inform the development of theories of constitutionalism, and within global constitutionalism there has been a tendency to turn to the same white, western, Anglo-American or Euro-centric, Enlightenment histories to espouse the meaning of the constitutional tenets. It is these historical accounts that are used to inform whether a norm is "constitutional" within global constitutionalism. An exploration of what writing is being used in this historical account or where it is written exposes this narrow construction of the theories of constitutionalism.

2.3 Putting the Global in Global Constitutionalism

Within the comparative scholarship, there is a move away from this narrow construction of history. Indeed, in global comparative constitutionalism more work has been done on interrogating the turn to "global" values (Wheatle 2014). Wheatle asks which actors play a role in determining the content of the *jus gentium* and 'what is the extent of the role played by different countries' (Wheatle 2014, 1073). There has been an attempt to diversify the countries and legal systems that are included in the discussions, with special journal issues on Global South constitutionalism, and analyses of Asian perspectives of global constitutionalism (Suami 2018; Chang WC et al., 2023; Bui 2024).

Within comparative constitutionalism, there has been a trend towards interrogating the claim to the "global" divergence and convergence of constitutional norms (Wheatle 2014). This trend is accompanied by widening of the scope of countries that are taken into consideration. In her latest book on Global Gender Constitutionalism and Women's Citizenship, Ruth Rubio-Marin (2022) explains how she selected the country examples that inform the book's discussion on feminist approaches to constitutional law, attempting to 'draw from many jurisdictions, identifying regional trends' and decentre the Global North (Rubio-Marin 2022, 21). Rubio-Marin 'brings to the fore experiences of relatively small and underexplored countries' so as to 'challenge the Global North/Global South [divide]' that informs the scholarship (Rubio-Marin 2022, 21). She notes that there are methodological challenges that make it difficult to

study the different constitutional frameworks of other countries, such as language and translation (Rubio-Marin 2022, 21) and to these challenges Wheatle adds the lack of access to documents in specific jurisdictions (Wheatle 2014, 1076). The result of attempting to be geographically “global” might be ‘decontextualizing and a significant amount of oversimplifying’ (Rubio-Marin 2022, 22).

Comparative constitutional scholars highlight ‘the difficulties inherent in “comparing the incomparable”’ (Gayoye 2023, 116) and therefore challenge the possibility of drawing out global trends. In work on Global South constitutionalism, Martha Gayoye (2023) notes that there are disagreements over the scope and meaning of certain concepts (for example, there are epistemological differences and different approaches to feminism and gender). In her work, Evelyn Wang (2024) explores environmental constitutionalism within China, and notes the differences in approaches to how ideas of environmental constitutionalism are interpreted and transposed into China’s constitution. Some scholars would argue that doing comparative work requires a contextual or socio-legal approach to place the laws within the specific legal culture of that country (Hendry 2024). Moreover, as Wheatle notes, the drive to universality or commonality is underpinned by historical factors (such as empire) and geopolitical dynamics (2014, 1074). This requires more than simply reading the text of the constitutional provisions. This deeper contextual or socio-legal engagement with constitutional norms can expose the differences between countries and therefore bring into question the idea of a convergence around certain norms.

Within international law, there has been a “global” shift. One example of this shift can be found in *Third World Approaches to International Law (TWAIL)*. Another is the recognition that international law needs a comparative methodology. Drawing on post-colonial and decolonial scholarship, TWAIL seeks to centre the experiences and interests of countries, peoples, and places that have been marginalised within and by international law (Mutua and Anghie 2000). The recent emergence of *Second World Approaches to International Law (SWAIL)*, which focuses on the experiences of Eastern Europe as a liminal space or semi-peripheral site furthers this pluralisation of international law (Labuda 2024). Regional variations in international law is not new. Lauri Mälksoo uses a study on *Russian Approaches to International Law* to question whether international law is universal or whether it is different in different places (Kennedy 2008, 17 cited in Mälksoo 2015, 12). He shows that soviet approaches to international law, for example, demonstrate that there was not a universal approach (Mälksoo 2015). Onuma Yosuki argues that international law only became “international” in the 20th century, as before that point there were “regional” international law(s) with “European” international law being the one that became recognised as international law (Onuma 2010, 266 cited in Mälksoo 2015, 13). History can be used to uncover this lack of “globality”, as Onuma shows that alongside the Westphalian model of international law there were other normative orders such as the Sinocentric tribute system in East Asia (Onuma 2010, 266 cited in Mälksoo 2015, 13). The use of both history and

globality work to expose the plurality – rather than universality – of international law, and as such this raises questions about the narrow set of sources used in global constitutionalism.

There is then a tension between the turn to history that takes place within global constitutionalism and a reliance on constructions of “globality” within comparative constitutional or international law scholarship. Asking questions about the written nature of the norms – and therefore the sources that underpin the development of these norms – exposes the complex dynamic between historical narrative and the construction of “global”. Interrogating the sources in this way works to highlight the limited basis on which these global constitutional norms are identified.

3 DEMOCRACY IN THE UNWRITTEN GLOBAL CONSTITUTION

Within both unwritten constitutionalism and global constitutional scholarship, there is a reoccurring debate around democracy. Democracy is often identified as an unwritten constitutional principle. For Pal, ‘the challenge is to define the democracy principle so that it has the scope to inform constitutional interpretation in a meaningful way, but narrowly enough so as to not push aside the text or swallow up the other unwritten principles’ (Pal 2019, 285). Drawing on the discussions above to examine the development of a norm of democracy in global constitutionalism highlights the often-complex relationship between the “written” and the “unwritten”. As the discussion above shows, the exploration of the “written” nature of the norm exposes further challenging questions about the meaning and evidencing of ‘globality’.

Democracy is a contested term, but democracy as a constitutional norm in global constitutionalism is often constructed from two main arguments: that there is an emerging norm or right of democracy that is protected in international law (Franck 1995), and that there are increasingly participatory processes (e.g. Member States voting, consultations, and civil society engagement) at international organisations (Peters 2009). These two arguments lead to a procedural notion of democracy that is predicated on elections, voting and participation. The following sub-sections explore how writing and the written word have an ambiguous role in the formation of these arguments, and how globality and historical narratives and evidence are used to construct the narrow approach to democracy.

3.1 Right to Democracy in International Law

There is a debate in international law about whether there is a right to democracy. Sometimes this debate is referred to as a right or ‘norm of democratic governance’ (Franck 1992, 46), a ‘right to political participation’ (Fox 1992) or the ‘right to free and open elections’ (Franck 1992, 52). There is also an alternative ‘principle of democracy’ (Marks 2000, 40). These different labels are used ‘with relative interchangeability’ (Marks 2000, 40). The labels signify different legal statuses and legal obligations, and in particular, there is a

difference in the obligations between a right to political participation and the more specific right to free and fair elections. Not only does this raise questions about the scope and legal nature of democracy in international law, but the plurality of terms raises further questions about the constitutional nature of democracy. To unpack this, the next sub-section explores how scholars have defined the right or norm of democracy and what methods they use to identify evidence of the emerging norm.

3.1.1 What is meant by democracy?

In international law, the right to democracy centres on participation and elections. For Franck, '[t]he right to democracy is the right of people to be consulted and to participate in the process by which political values are reconciled and choices made' (Franck 1995). Participation, for Franck (1995, 84 and 92), means 'meaningful participation' and consultation refers to elections and plebiscites, where the people's opinions are collected. The question then becomes what constitutes meaningful participation and whether that involves requirements such as free and fair elections or multi-party elections.

Using international and regional human rights treaties, Fox derives a right to political participation that protects the right to vote in multi-party elections (Fox 2000, 50 and 55). He uses interpretations of these rights documents to argue that elections must have universal and equal suffrage and secret ballots, they must happen at frequent intervals, and there must be no discrimination (Fox 2000, 69). For Fox, a 'genuine election' is one that guarantees the expression of the people (Fox 2000, 57), but that does not necessarily mean a need for multi-party elections (Fox 1992, 251). The International Covenant on Civil and Political Rights (ICCPR) does not provide for multi-party elections (Vidmar 2010, 241). As Fox (2000, 55-56) notes, during the Cold War socialist states would not agree to party pluralism. Vidmar points to UN General Assembly resolutions that do not proclaim that elections have to 'take place in a multiparty setting', and he argues that international law does not provide for multi-party elections, thus restricting the scope of the people's choice (Vidmar 2010, 267). Yet, multi-party elections are the requisite standard proffered in the scholarship. Franck demands multi-party elections (Franck 1998) and scholars have engaged with human rights documents to demonstrate a commitment to party pluralism (Fox 1992, 251). For example, Higgins points to the Human Rights Committee, which said that the principle of self-determination is impossible to meet without multiparty elections (Higgins 2015, 219). In general, the scholarship conceives of democracy as requiring multi-party elections as part of the procedural approach to democracy.

3.1.2 Is it a written norm?

This literature on democracy and international law from the early 1990s, built on international legal practices engaged in promoting democracy; elections monitoring, international human rights instruments, the requirement of

democracy as a membership criterion for the European Union (EU), Organization of American States (OAS) and The Common Market of the Southern Cone (MERCOSUR), and the speeches of UN political actors, such as the Secretary General (Fox and Roth 2000, 9). Many of these sources are “written” and as such the emerging norm or right of democratic entitlement, advocated for in the early 1990s, is, therefore, partly “written”.

In terms of the development of this norm, Franck’s theory of democratic entitlement is premised on three stages; the right of self-determination in international law (which is protected in Common Article 1 of the International Covenants on Human Rights), the protection of human rights associated with democracy (such as the freedom of expression which is provided for in a plethora of human rights documents), and the creation of a right to vote and elections monitoring (for which he draws on the ICCPR that protects the right to political participation (Article 25 ICCPR) (Franck 1998). The right in this sense is supported by written international human rights treaties which de Wet (2006) claims are *erga omnes* obligations and on this reading would form part of the constitution.

In addition to the human rights bases for democracy, the literature places heavy emphasis on elections monitoring (Franck 1995). The literature notes the role of elections monitoring by the EU, the Organization for Security and Co-operation in Europe (OSCE) and sometimes the UN (Franck 2000, 38; Binder 2007, 136). However, documents such as elections monitoring standards or reports do not have the same legal weight as international human rights treaties. Nevertheless, these standards are “written” documents that inform state practice and thus the development of the scope of the norm of democracy.

Much of the discussion in the international law debate is around state practice. Franck places emphasis on the swathe of states adopting democracy in the late 1980s and early 1990s, drawing in particular on the increasing number of states requesting elections monitoring and the types of texts on democracy that international organisations were adopting (Franck 2000). For example, the General Assembly Resolution on ‘Enhancing the effectiveness of the principle of periodic and genuine elections’, the Organization of American States, ‘Resolution on Representative Democracy’, or the Conference on Security and Co-operation in Europe: Conference on Security and Co-operation in Europe Charter of Paris For a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter. State practice is not written *per se*, though it is often perceived through written sources, such as reports from the elections monitors or communiques from new governments. Through the requirements for customary international law - state practice and *opinio juris* - international law carves out a unique and important role in law formation for state practice.

With respect to the written nature of state practice, the ILC report on customary international law provides an indicative list of the types of written material that can be used as evidence for state practice. This includes ‘diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational

conduct “on the ground”; legislative and administrative acts; and decisions of national courts’ (ILC 2018, conclusion 6). But, it should be noted that state practice can also be evidenced by omission. Whilst much of this will be written, evidence of these elements of customary international law can be written or unwritten.

The democracy norm is also supported with customary international law rules, for example Anne Peters (2014) argues that there are customary international law rules on the use of referendums to support succession. Peters argues that there is a customary international law requirement ‘to hold a referendum (or to legitimise a territorial change in an indirectly democratic fashion)’ (Peters 2014). This potentially “unwritten” norm is supported by a wealth of written source material, when we consider when the requirement to hold a referendum will be considered met within international law.

Peters goes on to argue that there are certain requirements for the modalities of territorial referenda. In her discussion of these requirements she notes that their legal status is ambiguous, as they may or may not be customary international law. These requirements, which substantiate the norm, can be derived (in part) from written sources. ‘If a state decides to hold a referendum, then it must satisfy international standards’ (Peters 2014). The procedural standards are: Peacefulness (ceasefire or pacification), Universal, equal, free and secret suffrage (based on article 25 ICCPR and article 3 of the First Protocol of the European Convention on Human Rights (ECHR)), framework conditions of freedom of media and neutrality of the authorities - ‘the authorities must provide objective information: the public media have to be neutral in particular in new coverage; the authorities must not influence the outcome of the vote by excessive, one-sided campaigning; the use of public funds by the authorities for campaigning purposes must be restricted’ (which she derives from the Venice Commission, Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organisation of Referendums with Applicable International Standards, 19 December 2005, para 12) and International observation - ‘robust international oversight, ideally encompassing a transfer of authority over all matters connected with the referendum to an international institution’ (Peters 2014). Whilst peacefulness and international observation are not justified by Peters, nor evidenced in written sources, the other two requirements draw on written documentation. As discussed above with respect to elections monitoring though, there is a material difference between the “hard” law of a human rights treaty and the “soft law” of the Venice Commission (Bartole 2014). The Venice Commission - or the European Commission for Democracy - was established in 1990 to provide advice on constitutional matters for states in the Council of Europe. Its task is to develop common standards and practice practices and its delivers opinions on constitutional reforms in the Member States (Scholtes 2025). Its membership has expanded beyond Europe (Scholtes 2025, fn 12) and its have a broader authoritative role within international law. So although it can have a claim to being authoritative, it is not a strong source for a constitutional basis.

In summary, the right to democracy is supported by a mix of written and unwritten sources, though for the most part it has been found in “writing”. As this subsection highlights though, the question then becomes, what sort of texts are being used, what is their legal weight and to what extent can they be said to confirm the “constitutional” nature of the norm?

3.1.3 Is it constitutional?

Franck’s theory spawned discussions that cover democracy as an international human right and the relationship between rights and democracy (Cerna 1995, 329; Wheatley 2005), democracy as a criterion for statehood (Slaughter 1993, 236; Murphy 2000; Crawford 2006, 150; cf Higgins 2015, 217), its role in government recognition (d’Aspremont 2006; d’Aspremont 2008), as well as in relation to intervention and security (Crawford (1994) 4; Carothers (1992) 266). But, this level of traction still leaves open a question of whether it is a constitutional norm. For many global constitutionalists, it is assumed that democracy is a constitutional tenet and therefore would be part of the global constitution (Bodansky 2009, 568; Wiener et al., 2012). As it is part of traditional liberal constitutionalism, it is assumed to be part of global constitutionalism. Yet, for de Wet this is not as clear cut. Within de Wet’s framework, constitutionalisation is about the supremacy of constitutional norms, such as *jus cogens* and the development of an international community through *erga omnes* obligations. One of the reasons de Wet gives for rejecting democracy as part of the constitutionalisation discussion is that there is no consensus on democracy as an *erga omnes* norm of international law (de Wet 2006, 63). She argues that although democracy is clearly important because it underpins other *erga omnes* obligations such as human rights, there is not sufficient evidence that democracy has emerged as customary international law, and as such, cannot amount to an *erga omnes* obligation either (de Wet 2006, 63).

3.1.4 Is it global?

In evidencing the emerging norm of democracy, international law scholars draw on historical moments, and in their accounts certain historical examples of elections and election-monitoring prevail (Franck (1995), Fox and Roth (2001), Carothers (1992)). The so called “End of History” (Fukuyama 1992), brought about by the fall of the Berlin Wall in 1989, is the common starting point for much of the literature on democracy in international law. The swathe of elections across Europe in the wake of the breakdown of the Soviet Union is constructed as evidence of a norm of democracy (Carothers (1992)).

There is then a question about what types of examples are used when collecting this evidence for customary international law. Scholars such as B.S. Chimni (2018) and Sheri Labenski (2023) have critiqued the narrow focus of evidence gathering in customary international law that can often overlook the practices of Global South states, and states on the peripheries, as well as sideline transnational organisations and action by civil society actors. The Western-bias

that informs the collection of evidence arguably has eschewed the practices of marginalised states and as such 'prevented CIL from developing' and in turn 'reinforce[s] a worldview that omits the lives and histories of the people it governs' (Labenski 2023, 447). It is generally accepted that state practice for customary international law is 'primarily on the conduct of states (executive, legislative, judicial or other functions) and international organizations in certain cases' (Labenski 2023, 446). This means the acts and activities of transnational – and broadly speaking global – networks, such as women's movements advocating for the enhancement of women's rights, or transnational solidarity networks built around self-determination are not recognised as "practice". The "global" evidence basis of custom can then be left wanting.

Whilst Franck bucks this trend in the international law discourse on democracy and discusses the international response to the coup in Haiti in the early 1990s (Marks 2011), it is striking which examples do not get discussed as part of this "emerging norm". For example, prior to the fall of the Berlin Wall, the Purple Rain Protest occurred in South Africa on 2 September 1989. The Purple Rain Protest was an anti-apartheid protest in which police used a watercannon against protestors, spraying them in purple dye so that they could be identified and arrested. Ignoring this example of grassroots popular revolt occurring alongside events in Eastern Europe is to risk constructions of democracy that do not include anti-racist, post-colonial and de-colonial accounts of democratic action.

Another example of popular democratic action in 1989 that took place just after the fall of the Berlin Wall but is overlooked in the scholarship on democracy in international law is the Velvet Revolution which brought about the end of communist rule in Czechoslovakia (cf Wilson 2016). Sparked by a student demonstration that took place on 17th November 1989 that was brutally suppressed by the police, the revolution is known for being non-violent, with a key role being played by theatres and cultural spaces (Seggerman; Oszlly 1990). Whilst the rise of liberal democracy aligns with the evidence international lawyers were gathering, the Velvet Revolution also pluralises the account. Centring this example of democratic action would bring to the fore questions of statehood as the revolution eventually led to the dissolution of Czechoslovakia, as well as the dynamic role of a public sphere that is not just characterised by public, outdoor, open, civic spaces, but in cultural spaces such as theatre and the arts. Earlier in the 1980s in Brazil, the Corinthians Democracy movement highlights a novel political movement and experiment in democratisation that also gets lost in the narrative. This was an attempt at self-governance within a football team, which sought to also critique the authoritarian civil-military regime in Brazil (Florenzano 2024). As an uncommon civic, public space, football provides a unique site to explore questions of democracy. Whilst this was not directly about national elections, the governance of the club had political ramifications across the body of fans and signalled a political message to the governmental regime. These are just three examples, there will be hundreds more, but centring these types of grassroots resistances and democratic practices – instead of only focusing on Western, euro-centric liberal democratic

examples – facilitates a broader understanding of democracy and its function in society.

The failure to engage with examples such as the Purple Rain Protest also reflects the preoccupation of international law with state practice rather than the practices of people(s). This is (in part and as discussed above) a result of the focus on state practice within the development of customary international law. As a result, in international law's discussions on democracy and self-determination, the focus is on the states' response to civil disobedience in the same way that the focus is on how states organise and manage elections rather than a focus on the peoples' protests, their activism and participation. This is in contrast to the focus in constitutional scholarship where theories are built from particular historical moments of popular participation (for example, the French Revolution). Whilst constituent power and ideas of popular sovereignty are derived from a pamphlet written by an Abbé during the revolution, democracy in public international law is constructed from the responses of sovereign states. Asking the "unwritten" constitutional question highlights this bias within international law and global constitutional law.

Furthermore, overlooking the Purple Rain Protest facilitates a liberal construction of democracy within international law, which is predicated on a minimal standard of free and fair elections. Marks criticises this procedural understanding of democracy that arises from scholarship such as the work by Franck and Fox. In *Riddle of all Constitutions*, she proposes an alternative solution to the contested emerging norm of democratic governance; the 'principle of democratic inclusion' (Marks 2000, 109). Whereas the norm appears to propose a 'low-intensity' electoral democracy, the 'principle of democratic inclusion' includes 'an ongoing call to enlarge the opportunities for popular participation in political processes and end social practices that systematically marginalize some citizens whilst empowering others' (Marks 2000, 109). Marks has a radical notion of democracy; for her, democracy addresses inequalities (in particular, inequalities of class), and democracy 'demands change of transformative proportions' (Marks 2000, 95). Despite these more radical notions of democracy being part of the discussion in international law, the way that the scholarship has approached evidencing democracy, reaffirms the liberal, procedural approach which sidelines alternative democratic models.

History and ideas of globality – or global history – can be used to expose the limits of the democracy debate. Historians and anthropologists have demonstrated the alternative histories of democracy from around the world (Bentzen et al., 2019). John Keane, for example, in his *The Shortest History of Democracy* (2022), locates the emergence of democracy in ancient Mesopotamia rather than Athens, which is the usual starting point. As such, the narrative of democracy is not 'the steady march of the Western world', but rather a more "global" story that is more akin to 'an odyssey full of twists and turns, crises, and reinventions' (Ikenberry 2022). Sen (2003) argues that the narrow focus on institutional democracy – elections and voting – is skewed towards a Western history of democracy. Opening up a 'broader view of democracy in terms of public reasoning also allows us to understand that the roots of

democracy go much beyond the narrowly confined chronicles of some designated practices that are now seen as specifically “democratic institutions” (Sen 2003, 29). Interrogating if democracy is a written constitutional norm means asking about whether the evidence come from and as has been shown with respect to global constitutionalism more broadly, the evidence of democracy is constructed of a narrow set of histories and this provides a thin basis for a claim to being “global”.

3.2 Democracy in International Organisations

The second line of argument for the emergence of democracy in global constitutional scholarship is the democratisation of processes within international organisations (Peters 2008). This idea of democracy is known as “global democracy” within international relations literature, and is more often expressed as a debate on the “democratic deficit” of international organisations and global governance (Abraham and Houghton 2025). The question for this section is whether this form of “global democracy” is an (un)written constitutional norm.

Participatory practices within international organisations, which are often sources of evidence for constitutionalisation (Peters 2009), are “written” down. For example, constitutive documents of international organisations outline the voting processes (see, UN Charter 1945, article 18 (which outlines voting in the UN General Assembly) and article 27 (which outlines voting in the UN Security Council); International Labour Organisation Constitution, article 4). The treaty establishing the International Labour Organisation (ILO) provides for the participation of employers' and workers' associations (ILO Constitution, Article 7(1)). In certain instances, the UN charter provides for the participation of states in Security Council debates even where they will not have a vote (UN Charter, articles 31 and 32). The participation at the UN Economic and Social Council of “specialized agencies” is provided for in the UN Charter (article 70).

There are also more informal written sources, such as the details of how civil society groups and organisations could participate at international organisations. The participation of Non-governmental Organisations (NGO) at the UN Human Rights Council is provided for in UN General Assembly Resolution 60/251 (para 5(h) and para 11). ECOSOC Resolution 1996/31 on the Consultative relationship between the United Nations and non-governmental organizations (25 July 1996, E/Res/1996/31) dictates how long certain civil society actors and NGOs can talk for, how long their written submissions should be, and on which topics they can participate (paras 31(d) and (e) and 37(e) cited in Freedman and Houghton 2017). There are documents that outline the procedures for the “global” consultations on the World Bank’s Economic and Social Framework and these are provided for on the World Bank website (Houghton 2019). It is from this diversity of written documentation, that the “unwritten” constitutional norm of democracy is constructed by drawing upon these sources to evidence a global democratic norm.

This focus on voting and participation gives rise to the procedural notion of democracy within international organisations, which further cements the idea that international law is concerned with a liberal model of democracy. Scholars have, rightly, critiqued the extent to which these processes can be labelled democratic (Abraham and Houghton 2025). Where the actors participating in processes are the Member States of international organisations, there are questions around how effective all states are at providing a conduit between their people and the international level (see Abraham and Houghton 2025). Where the actors are civil society actors and NGOs, there are often funding structures and geopolitical interests at play that can restrict the representation of the people (Sénit and Biermann 2021; Rajagopal 2003, 261 cited in Abraham and Houghton 2025)

Stepping outside of institutional structures, however, global democracy has the potential for a wider remit. Kavi Abraham and Ruth Houghton (2025), for example, argue that global democracy debates need to centre grassroots accounts of democratic practices. As international law debates on democracy take 1989 as the starting point, it is worth revisiting this temporal marker but in search of alternative manifestations of democracy. The 1990s also witnessed mass movements on environmental activism and transnational activism against neo-liberal globalisation. The Battle in Seattle in 1999, a protest at the WTO conference, would be one such example of transnational solidarity and popular movements. The World Social Forum (WSF) which was initiated in 2001 is an annual meeting of civil society movements, and it too offers an alternative example of “global democracy”. The WSF brings together a range of interest groups and social movements, including activists, feminists, environmentalists, and advocates for Indigenous peoples (Eskelinen 2025). The aim of the WSF is to provide alternatives to global capitalism (Eskelinen 2025). Against this backdrop of anti-capital and anti-globalisation emerged the Occupy Movement that spanned the world in 2011 (Graeber 2013). This grassroots movement had global ramifications, with encampments across approximately 82 countries. Scholars have documented how the camps prefigured alternative ways of decision-making and governance (Butler 2015), where these approaches offer more radical accounts of democracy.

What these movements offer are alternative approaches to global democracy that fall outside the institutional frames. These are also accounts of “global” movements, in the sense that they transcend state borders. Yet, as evidence of a transnational approach to democracy these accounts are rarely included within discussions on democracy within international law. “Globality” as a source, as evidenced by the transnational movements, is not a factor driving the identification and construction of democracy as a norm of global constitutionalism. Revising the histories that are relied upon as evidence for global democracy uncovers the narrow spread of the source material.

CONCLUSION

Investigating the “unwritten” nature of global constitutional law forces us to question the sources of the normative content of global constitutionalism and the evidence for the emergence of global constitutionalisation. What emerges is a plethora of texts and written documents that are utilised by global constitutionalists to construct an account of the global constitutional order. Interrogating the nature of “written-ness” though exposes the complex interplay between the amalgamation of written and textual evidence of the law and the unwritten constitutional status. Such an interrogation also highlights the roles of history and globality as legitimating factors in identifying “global” norms for global constitutionalism.

This article focused on the specific construction of democracy as a constitutional norm in global constitutionalism. As with other aspects of global constitutionalism, the right to democracy is shrouded in writing. That said, within international law and global constitutional scholarship it is still not settled whether it is evident as law let alone whether it then has constitutional status. Through an investigation of the written nature of this norm, the article demonstrates the ways in which certain histories and historical accounts are utilised as the primary source material. In doing so, the article reflects on the narrow basis for the right and the particular form of liberal democracy that emerges.

Going forwards, global constitutional law can use the written constitutionalism debate from comparative constitutional scholarship to interrogate where the constitutional norms are written and how their constitutional status is constructed and evidenced. This article has added to the ongoing critique of the particular histories that global constitutional law rests upon and in concluding calls on global constitutional scholarship to diversify the sources and epistemologies that are utilised in evidence-gathering processes of constitutionalisation.

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