doi:10.1017/aju.2017.87

SYMPOSIUM ON COMPARATIVE FOREIGN RELATIONS LAW

# FOREIGN RELATIONS LAW AS A FIELD OF STUDY

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This essay offers a working definition of "foreign relations law," describes its various sources, and distinguishes it from international law. It also provides some comparative illustrations of this law and notes some reasons for both commonalities and differences in this law across national jurisdictions. Finally, it discusses the growing emergence of foreign relations law as a field of study outside the United States.

## *Defining Foreign Relations Law*

For purposes of this essay, the term "foreign relations law" is used to encompass the domestic law of each nation that governs how that nation interacts with the rest of the world.[1] These interactions include most centrally those interactions that occur between nations, but they can also encompass interactions between a nation and the citizens or residents of other nations and with international institutions. The law governing these interactions can take a variety of forms, including constitutional law (written and unwritten), statutory law, administrative regulations, and judicial decisions. Because many disputes concerning foreign relations law are addressed outside the courts, a full study of the topic also requires attention to domestic "conventions" of proper political behavior that may or may not have legal status.

Many issues of foreign relations law concern allocations of authority between political actors, such as the authority to represent the nation in diplomacy, to conclude and terminate international agreements, to recognize foreign governments and their territories, and to initiate or end the use of military force. In federal systems, these allocation issues are not only horizontal but also vertical, extending to the relations between national and subnational institutions. But foreign relations law also encompasses issues relating to the role of the courts in transnational cases, such as whether certain issues are "nonjusticiable" and thus subject entirely to political branch determination, whether courts should take into account considerations of international comity when interpreting and applying domestic law, and whether and to what extent courts can apply international law directly to decide a particular case. Because much of foreign relations law addresses how authority is allocated among governmental actors, its topics are most salient for constitutional democracies that separate power and have independent judiciaries, but the topics also have some relevance to other forms of government.

For the purposes of this essay, the term "foreign relations law" is not meant to encompass "pure" questions of international law—that is, a nation's obligations under treaties and customary international law on the international

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[1] The European Union, as a supranational institution that in some ways resembles a nation, also has a developed body of foreign relations law.

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https://doi.org/10.1017/aju.2017.87 Published online by Cambridge University Press

plane. While such international law governs in part how a nation conducts its foreign relations, it is both too vast, and in many respects too undifferentiated in its application to each nation, to be included in a working definition that will be useful for a study of comparative foreign relations law. So, when this essay refers to foreign relations law, it is referring to various forms of domestic law.

There are important interconnections, however, between international law and foreign relations law. Some international law is converted into domestic law, either by the courts or through legislative or executive branch directive. Moreover, even when international law is not incorporated into a domestic legal system, courts may construe domestic law in light of international legal obligations, and the executive branch may exercise its discretion in light of such obligations. At times, courts may even do the opposite and construe international law in light of domestic law. (A domestic court might presume when construing a treaty, for example, that in making the treaty its government would not have intended to override certain aspects of domestic law.) This definition of foreign relations law used here includes the domestic rules governing these interconnections, but not the substance of the underlying international law.

A country's foreign relations law can also have important effects on the content and operation of international law. Foreign relations law can influence how nations form treaties and what they agree to in treaties, and it can also affect the state practice that forms the foundation for rules of customary international law. In addition, by regulating allocations of domestic authority, foreign relations law can affect a nation's compliance with international law because different domestic institutions may have differing levels of commitment to (or capacity for) ensuring compliance.

Importantly, even though the focus of foreign relations law is on domestic law rather than international law, there is nothing inherent in such a focus that requires valuing domestic law over international law or resisting the domestic incorporation of international law. Nations vary in the extent to which their foreign relations law places them on the "monist" or "dualist" ends of the spectrum with respect to the incorporation of international law. Domestic doctrines that call for the direct incorporation of treaties or customary international law into the domestic legal system, or that give international law primacy over some forms of domestic law, or that look to international law when interpreting domestic law, are themselves part of foreign relations law.

### *Comparative Illustrations of Foreign Relations Law*

As illustrations of the distinction between international law and foreign relations law, consider these six examples, involving different countries and different types of domestic law:

- In 2017, the Supreme Court of the United Kingdom held that the U.K. government was required to obtain authorization from Parliament before it could initiate withdrawal from the European Union.[2] The Court reasoned that withdrawal would result in "a fundamental change in the constitutional arrangements of the United Kingdom," and that such a change "must be affected in the only way that the UK constitution recognises, namely by Parliamentary legislation."[3] The Court was addressing only U.K. constitutional law, not the international law governing withdrawal from the European Union, which is regulated by Article 50 of the Treaty on European Union.
- In 2010, the Supreme Court of Canada held in *Canada (Prime Minister) v. Khadr* that, although the United States was violating a Canadian citizen's rights by holding him at the Guantánamo Bay detention facility, how Canada should respond to this violation was a matter for determination by the executive branch, not

[2] R v. Secretary of State for Exiting the European Union [2017] UKSC 5.

[3] *Id.* at para. 82.

https://doi.org/10.1017/aju.2017.87 Published online by Cambridge University Press

the courts.[4] The Court therefore declined to order the Canadian executive branch to request the citizen's repatriation to Canada. The Court based its decision on "the separation of powers and the well-grounded reluctance of courts to intervene in matters of foreign relations."[5]

- Also in 2010, the United Kingdom enacted a statute that, for the first time, gives Parliament the formal authority to block the ratification of treaties. Although the United Kingdom has long had a constitutional convention—known as the "Ponsonby Rule"—whereby treaties will be laid before Parliament for a period of time prior to ratification, Part 2 of the Constitutional Reform and Governance Act of 2010 gives the House of Commons the authority to indefinitely block ratification.[6]
- In 2008, the U.S. Supreme Court held in *Medellín v. Texas* that the U.S. obligation under Article 94 of the United Nations Charter to comply with decisions of the International Court of Justice (ICJ) was not "self-executing" in the U.S. legal system and thus that an ICJ decision could not be applied to override domestic law absent congressional implementation of the decision.[7] The Court did not question that the ICJ decision was binding on the United States as a matter of international law.
- In 2005, Germany enacted a Parliamentary Participation Act to regulate the use of its armed forces.[8] Under the Act, the executive branch is generally required to obtain legislative authorization before deploying armed forces, and the Act specifies in detail the information that the executive must provide to the Bundestag in its requests for authorization. The Act does not address the circumstances under which such deployments are consistent with international law governing the use of force.
- Since 1973, Japan's executive branch has followed the "Ohira Principles" in deciding whether to seek legislative approval of international agreements, named after the foreign minister who initially promulgated them.[9] Under these principles, which might be viewed as a nonbinding "constitutional convention,"[10] legislative approval is to be sought in three general circumstances: (1) when new legislation will be needed or existing legislation will have to be maintained in order to comply with the agreement, (2) when the agreement affects fiscal obligations, and (3) when the agreement involves politically important obligations. These principles do not purport to determine whether an agreement is binding on Japan as a matter of international law.

In each of these examples, the relevant domestic law, whether in the form of a statute, judicial doctrine, or constitutional convention, regulates how the nation interacts with the rest of the world, but the law does not itself purport to determine the nation's international rights or duties. Such law is what this essay refers to as foreign relations law.

Common issues can often be perceived when studying foreign relations law across multiple jurisdictions. For example, a number of countries have struggled with whether and to what extent their legislatures should become

[4] Canada (Prime Minister) v. Khadr [2010] 1 SCR 44 (Can.).

[5] *Id.* at para. 2.

[6] *See* Arabella Lang, *Parliament's Role in Ratifying Treaties* (House of Commons Library, Briefing Paper No. 5855, Feb. 17, 2017).

[7] Medellín v. Texas, 552 U.S. 491, 508–09 (2008).

[8] For an English translation, see Katja S. Ziegler, *Memorandum: The Model of a "Parliamentary Army" Under the German Constitution* annex II.

[9] *See* Tadaatsu Mori, *The Making and Application of Treaties and Other International Agreements* (discussion paper for Duke-Japan Conference on Comparative Foreign Relations Law) (copy on file with author).

[10] Constitutional conventions are "maxims, beliefs, and principles that guide officials in how they exercise political discretion." Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. Ill. L. Rev. 1847, 1860.

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more involved in foreign relations decision-making. On the one hand, executives have certain advantages in foreign relations, such as a unitary voice, better access to relevant information, and the ability to act quickly. On the other hand, foreign relations decisions sometimes entail potential risks or tradeoffs for the nation that are sufficiently serious that they might seem to warrant full democratic deliberation.

Another common issue concerns the proper role of the courts in foreign affairs. On the one hand, courts are likely to be sensitive to the danger that their interventions could undercut their government's effectiveness in foreign relations or create unnecessary friction with other countries. On the other hand, they may perceive that the political process relating to foreign affairs is not by itself sufficient to ensure vindication of fundamental principles of either domestic or international law.

Despite some commonalities, there are many reasons why the content of foreign relations law might vary even among constitutional democracies. Countries have differing constitutional histories. It would not be surprising, for example, to find differences between constitutional arrangements developed after World War II and those developed earlier. Parliamentary and presidential systems may have also somewhat different approaches to questions of the separation of powers.[11] In addition, understandings of the judicial role might differ among countries, including as between civil law and common law countries. The particular domestic politics of a country can also have an important influence on the content of its domestic law, including its foreign relations law. Finally, to the extent that a nation's foreign relations law is affected by the nation's geopolitical status, this will obviously vary, both among individual countries and over time. Differences in foreign relations law also sometimes reflect differences in policy choices, and an awareness of both the existence and potential ramifications of such choices can be illuminating for nations when evaluating their own foreign relations law.

### *Foreign Relations Law as a Field of Study Outside the United States*

At least until recently, what this essay is defining as foreign relations law was not thought of as a field of study in most countries other the United States.[12] Instead, it was thought that there were various fields of domestic law, such as constitutional law and administrative law, and that these fields sometimes had international components. These domestic fields, in turn, were sharply distinguished from the field of international law, both analytically and in terms of the individuals who focused on them.

Like the character in the Molière play who discovers that he has been speaking prose all his life without realizing it, these nations of course have had foreign relations law even if they did not describe it as a field. Most obviously, foreign relations law as defined in this essay encompasses a lot of the law that is practiced, and has long been practiced, by lawyers in foreign ministries. But unlike in the United States, most nations did not treat it as a discrete field of study.

It is not entirely clear why this field of study has been more developed in the United States. The United States has the oldest written Constitution in the world, and accommodating that Constitution to a radically changed international environment, as well as a substantially different U.S. role in that environment, may present unique challenges. The Constitution's inclusion of treaties in the Supremacy Clause, which infuses a degree of monism into U.S. constitutional law, may also present particular challenges for U.S. law, especially as treaty-making has changed over time. In addition, the United States has a unique brand of federalism that tends to generate difficult legal

[11] *Cf.* Miriam Fendius Elman, *Unpacking Democracy: Presidentialism, Parliamentarism, and Theories of Democratic Peace*, 9(4) SECURITY STUD. 91, 93 (2000) (discussing "how presidential, coalitional parliamentary, Westminster parliamentary, and semipresidential democratic systems … influence the autonomy of foreign policymakers, and pose different sets of constraints and opportunities for foreign security policy making").

[12] Germany may be a partial exception. "Staatsrecht [Law of the State] III" encompasses that country's constitutional law relating to external relations, as well as the incorporation of international law within the German legal system.

https://doi.org/10.1017/aju.2017.87 Published online by Cambridge University Press

issues as globalization has blurred the line between foreign and domestic affairs. Law schools in the United States also may have a more flexible structure than in many other countries, allowing faculty to more easily cross historic subject matter divides. Finally, many internationally-focused U.S. academics have experience in the Legal Adviser's Office of the State Department, the work of which is often centered around foreign relations law.

In any event, this is starting to change. In 2014, Campbell McLachlan published an extensive treatise on Commonwealth foreign relations law.[13] This is an important volume, and it was cited in the U.K. Supreme Court's "Brexit" decision holding that the U.K. Parliament had to approve the U.K.'s withdrawal from the European Union. There have also been recent books on the foreign relations law of the European Union, which address issues such as the process for concluding international agreements and the role of federalism that are somewhat comparable to the foreign relations law issues confronted by individual nations.[14] In addition, there has been some recent focus in other countries on how federalism can affect allocations of foreign relations authority.[15] Some non-U.S. universities are starting to offer courses on foreign relations law.[16] I have been fortunate to see my own project on comparative foreign relations law generate interest outside the United States, with prominent scholars (and former and present government officials) from around the world participating in a number of conferences, and approximately fifty authors preparing chapters for the forthcoming *Oxford Handbook of Comparative Foreign Relations Law*.

Of course, there is no particular reason to think that the field of foreign relations law will end up being organized or defined in other countries in precisely the same way as it currently is in the United States. Among other things, the domestic law in different countries may reflect different normative values—for example, about the appropriate level of commitment to international law and institutions. Importantly, within the United States, there have often been vigorous debates about precisely such values, and purported orthodoxies in U.S. foreign relations law have frequently been challenged (and sometimes overturned). Whatever one's views about these challenges and the responses they have generated, this dialogue has helped to give vibrancy to the field of foreign relations law in the United States. Scholars of U.S. foreign relations law today vary significantly in their ideological orientation, and the dialogue among them is generally perceived to have strengthened the overall quality of the work in this area. One can expect a similar vibrancy as other countries engage in their own dialogue about the shape and future direction of their foreign relations law.

## *Conclusion*

There is a certain amount of arbitrariness in any attempt to define a field of legal study. When deciding whether to consider foreign relations law as a field, the ultimate question is whether valuable insights can be obtained by focusing on its particular collection of legal materials and doctrines. For U.S. scholars, the answer has long been yes, and scholars in other countries are now increasingly finding that such a focus can be useful.

[13] *See* Campbell McLachlan, Foreign Relations Law (2014).

[14] Marise Cremona & Bruno de Witte, EU Foreign Relations Law: Constitutional Fundamentals (2008); Robert Schütze, Foreign Affairs and the EU Constitution (2014); *see also* Bart van Vooren & Ramses A. Wessel, EU External Relations Law: Text, Cases and Materials (2014).

[15] *See, e.g.*, Foreign Relations in Federal Countries (Hans Michelmann ed., 2009).

[16] *See, e.g.*, *Foreign Affairs and the Canadian Constitution* (David Dyzenhaus and Karen Knop), University of Toronto School of Law; *Foreign Relations Law in Comparative Perspective* (Roland Portmann), University of St. Gallen; *Foreign Relations Law* (Campbell McLachlan), Victoria University of Wellington; *Foreign Relations Law* (Joris Larik), University of Leiden. For courses on EU Foreign Relations Law, see, for example, *EU Foreign Relations Law* (Christina Eckes, Pieter Jan Kuijper, and Ronald van Ooik), University of Amsterdam; *The Foreign Relations Law of the European Union: A Constitutional Perspective* (Marise Cremona), European University Institute.

https://doi.org/10.1017/aju.2017.87 Published online by Cambridge University Press