On Constitutional Democracy and Robust International Law

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Contemporary contributions to global political theory have been largely premised on the assumption that international law and constitutional democratic forms of government are readily compatible. However, the relationship between these two ideas has recently come under significant scrutiny. Several constitutional scholars,[1] especially in the United States, have claimed that international regulation's expanding breadth and reach into domains previously considered under the purview of domestic law and policy is far from unproblematic. The concerns raised by these scholars are numerous, but they coalesce into a relatively clear central contention: namely, that genuine constitutional democracy and the normative expansion of international law are, simply put, incompatible. Allen Buchanan's *The Heart of Human Rights* stands out in the philosophical literature for being the only sustained attempt to engage with the problem.[2] Buchanan defends what I shall call (slightly amending his terminology) a "complex compatibility thesis." The core of Buchanan's view is that although constitutional democracy and international law are in some tension, the claim that they are incompatible is overstated. There are trade-offs to be acknowledged, but incompatibility simply does not accurately describe the relationship.

Before detailing the main argument of this essay, allow me a word about the scope of my discussion. Buchanan's articulation of the (allegedly) problematic supremacy of what he calls robust international law (RIL)[3] is very broad. RIL may affect domestic law at any number of levels, from commercial and sanitary standards to constitutional provisions, and it may do so in different ways, from human rights covenants to commercial treaties and regulations associated with membership of global governance institutions. The tension between RIL and domestic legislation is thus potentially very broad. This essay addresses what we may

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call a restricted interpretation of the conflict discussed by Buchanan, primarily focusing on the tension between RIL and democratic constitutions. My main claim is modest: that Buchanan is broadly correct about the nature of the relationship between RIL and constitutional democracy, but that the tension between them runs deeper than his discussion allows us to see. Put differently, while Buchanan's approach in *The Heart of Human Rights* brings us to the correct conclusion, I will claim that it does so without addressing the tension between RIL and democratic constitutions in its strongest form. This tension can be better grasped if we attribute a legitimating role to constitutions. My aim is thus to offer a friendly rejoinder to Buchanan's thesis, tempered by a note of caution.

On Constitutions and "Cultural Fit"

There has been considerable debate about the compatibility between constitutional democracy and RIL. One worry often expressed by those Buchanan defines as "incompatibilists" comes in the form of the "unprincipled borrowing argument."[4] This, in a nutshell, claims that we should resist judicial interpretations of domestic law that borrow from international law. Unprincipled borrowing, some have claimed, would result in laws that do not "fit" the people to whom they apply.[5] Buchanan's response is, overall, rather dismissive. He suggests that the argument about fit is "sketchy" and "communitarian."[6] It is sketchy, Buchanan suggests, because it fails to articulate why exactly we should care about the fit between a legal system and a given people.[7] It is communitarian because it takes for granted that considerations of cultural fit provide overriding reasons to resist some form of judicial borrowing from international law.

From the outset let me clarify my standpoint: I believe Buchanan is broadly correct when he states that the worry about fit cannot provide *overriding* reasons to resist some form of integration between international and domestic law. However, I want to suggest that, *at least when it comes to constitutional law and jurisprudence*, things are more complex. Buchanan criticizes one version of the unprincipled borrowing argument that relies on a culturally communitarian understanding of fit. However, concern over fit need not be expressed in culturally communitarian terms. While I concur with Buchanan that the importance of fit will not necessarily be overriding, I hope my reconstruction of this problem will at the very least explain why fit is a real issue even for those who are committed to a broadly liberal outlook.

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I shall start by asking a (deceptively) simple question: What are constitutions for?[8] I will argue that there are three traditional answers to this question. The first simply does not allow us to "see" the fit problem. The second takes for granted one specific answer to it. Only the third, I shall claim, can capture what is at stake when it comes to the fit between a people and its constitution in a way that is compatible with a broadly liberal approach.

Living in the age of liberal constitutionalism, we often tend to take for granted a very specific picture of what constitutions are for. The usual conception (almost a cliché) is of constitutions as written documents (or sets of unwritten norms) stating abstract ideals and principles, listing a number of basic rights that are targeted for special protection, and providing an articulation of the basic institutional architecture of the polity by specifying, for example, the proper relationships among executive, legislative, and judicial powers. This is what constitutional lawyers would call the "normative" function of a constitution. Note how, in this picture, it is simply impossible to understand what the worry about fit even means. Why, after all, should we (the citizens of a given polity) care about, or be attached to, a given set of abstract ideals and principles specifying individual rights and formal relationships between different strata of the legal order? Why should these ideals and principles be, in some way, culturally *fitting*? On the contrary, adopting this type of functional outlook, one may intuitively think that constitutions are there to do exactly *the opposite*, namely, to constrain the sway of dominant political groups in order to protect cultural, religious, ethnic, and other minorities. Furthermore, if the putative modifications to these ideals and principles "borrowed" from the outside (that is, from international law) were to provide a morally and/or epistemically superior interpretation of their meaning and purpose, then so much the worse for cultural fit.

However, an appraisal of constitutions confined solely to their normative function would not offer an exhaustive picture of what constitutions are for. According to a second view, constitutions also have an expressive function.[9] The tradition of "expressivism" is a long-standing one. For example, in *Elements of the Philosophy of Right*, Hegel describes a constitution as "the work of centuries, the Idea and consciousness of the rational (insofar as that consciousness has developed in a nation)."[10] Within the functional framework provided by expressivism, the constitution embodies the history and character of a particular polity—it articulates the identity of a people.[11] In this picture, which acknowledges the expressive value of constitutions, we can at least make better sense of how the worry about cultural fit

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may be generated. Insofar as we have reason to value the identity claims contained in constitutional documents, we can see why importing judicial interpretations of key constitutional values and principles from international legal documents may be problematic. However, crucially (and rather unsurprisingly), the premise of the latter argument has to be correct for its conclusion to hold—and yet its premise is precisely what is at stake here. On pain of begging the question, the argument cannot simply start from the assumption that we should preserve the cultural identity of a people at all costs.

"Political Fit" and Legitimation

There is, however, a third way of understanding the function of constitutions,[12] one that, as I will argue, allows us to recognize the importance and make sense of the "fit" problem, while at the same time not requiring us to radically depart from a broadly liberal outlook. Following Frank Michelman, I shall refer to the third function of constitutions as "legitimation." According to Michelman, legitimation refers to "the social and communicative processes by which a country's people sustain among themselves a sense of assurance of the deservingness of its political regime of general and regular support."[13]

To glean how the function of constitutions can come to be understood in this way, let us briefly recount a by-now familiar story about political liberalism and reasonable pluralism.[14] In doing so I shall offer a sharp (and largely artificial) contrast between two potential models of political society and the roles that we could imagine constitutions to have within them. The contrast drawn is artificial in the sense that it is not meant to reflect existing philosophical positions. Rather, its purpose is heuristic: to help us think about the legitimating function of constitutions as a companion idea to a specific conception of the political world.

Aletheia

Imagine a conception of the political world as having some form of ideal end point—a potentially static (moral) equilibrium. Reaching this kind of equilibrium allows us to have a final account of, and justification for, individual rights and duties, government authority, and the proper uses of state power. In this imagined political world, which I call Aletheia, we also happen to have fully comprehensive accounts of all political values, which are seen as the expression of a true morality. In this picture, we can conjecture that while constitutions are still important, their role cannot really be one of legitimating the legal order as a whole. In this kind of

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political society, constitutions are not much more than tools. In Aletheia, legitimation comes from rightness alone—and laws and constitutions simply stand for a specific branch of applied moral reasoning.

Now, imagine that you are not really convinced about the kind of picture offered by Aletheia. You may think, for example, that the idea of a public morality with a comprehensive set of foundations does not sit well with free institutions, given that, even when the most favorable conditions obtain, such institutions will generate deep forms of reasonable disagreement about comprehensive justifications for the use of political power. Human reason, even when freed from prejudice and partisanship, leads to a social world populated by a plurality of outlooks relating to value, meaning, knowledge, and so on—a social world in which only the oppressive use of state power can eliminate fundamental differences of thought and belief concerning some of the deepest aspects of the human experience. Thus, in Aletheia we can conjecture that the use of state power will be oppressive. And yet to accept the oppressive use of state power is to accept that some will exercise power over others in a way that is incompatible with basic respect for persons. If you think this is unacceptable, you may also think that a different conception of political society is called for.

Politeia

In this alternative picture, which I call Politeia, political society is a form of ongoing conversation—some would call it a justificatory community.[15] The moral equilibrium of a justificatory community can only ever be provisionally fixed: it oscillates around a core set of political conceptions of right and justice, the proper interpretation of which is subject to endless debate and disagreement. Yet the fact that the conversation is ongoing, and that it is carried out within the framework of general ideas and principles that all citizens can reflectively endorse as free and equal, allows the inhabitants of this political world to live without feeling degraded as being the object of unreasonable exercises of political power. Here, clearly, the constitution—however interpreted—is not a tool for the implementation of true morality. Instead, we can conceive the constitution and its traditions of interpretation as being a locus of legitimation—one of the most important sources of the moral and political cohesion that allows for a kind of non-Hobbesian stability, to follow Paul Weithman.[16]

The legitimating function of a constitution, in turn, rests on some form of special relationship between the abstract ideals and principles that are part of any

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modern liberal constitution and a given legal and political order ruling over a specific people in a specific time and place. It is, after all, such a historically and geographically defined people who need to legitimize a specific legal and political order through a specific constitution. Put differently, seeing the constitution as a locus for the legitimation of the legal and political order as a whole requires us to understand the nature of the special ties between a polity and its constitution. And yet, crucially, there is no reason to believe that such specificity can only be captured by identity claims of the broadly culturally communitarian kind. After all, some things are specific to a people without necessarily concerning culture, strictly speaking. As Cécile Laborde has argued, national identities are multilayered. Ethnicity, culture, and kinship coexist with less exclusionary forms of shared experience, such as the commitment to a set of practices contained in a specific political culture and to general political ideals and universal values.[17]

One possible way to capture the idea of a nonexclusionary specificity is to see it as grounded in the ongoing history of particular disagreements about the interpretation of constitutional principles and values. These disagreements are at the heart of what some have called constitutional cultures. Constitutional cultures can be seen as exercises in mediation between specific historical experiences and abstract moral and political principles,[18] and are constituted by disagreements concerning the interpretation of abstract principles and ideals contained in constitutional documents. These disagreements create distinct constitutional identities as the historical product of ongoing "conversations between generations."[19] In this picture, it is precisely the ongoing process of deliberation about the meaning of these principles and ideals at the level of a specific polity (that is, the process of constitutional deliberation at the level of the local juridical community) that grounds the very legitimacy of the legal and political order. Put differently, according to the functional framework provided by legitimation we can say that constitutions are "special" for the people over whom they apply. The latter is, however, not a claim about cultural fit of the communitarian kind. Rather, it is a claim about "political fit": the fit between a constitution and the historical processes through which a people has contributed to shaping its meaning and interpretation.

Legitimation and Robust International Law (RIL)

Thus, we can say that there is at least one possible way of expressing concern about the effect of external influences on democratic constitutions that does not

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require us to draw on a culturally communitarian view of the function of constitutions, or to understand the ideals and principles that inspire aspects of RIL—such as international human rights law—as parochial or nonuniversal in nature. Recognizing that constitutions are central to the legitimation of the legal and political order, we have to think very carefully about importing any specific articulations of such ideals and principles "from outside."

An easy rebuke to the aforementioned argument is that it seems to give too much importance to the fact that constitutional documents are, in some way, "local." What if a given constitution contains something that we find (ex hypothesi) morally indefensible? Would the legitimating function of the constitution, and the associated concern for political fit, trump the need to change the morally defective content of the constitutional provisions in question? No, it would not. While merely a sketch of an answer can be provided here, the legitimating function of constitutions is only something that we may want to take seriously, from a normative perspective, where specific preconditions obtain. Legitimation is, after all, a normative idea, and cannot simply rest on people's beliefs about the legitimacy of their legal and political order. However, the most straightforward response to the aforementioned questions is that, for the purposes of the present argument, the scenario that they seem to suggest does not apply. The tension between aspects of RIL and a legitimating constitution would remain in place even if we were to agree to exactly the same list of fundamental ideals and principles to which any constitution would have to be committed in order for it to be morally acceptable from a liberal point of view.[20]

At least when it comes to constitutional essentials, "borrowing" from an outside set of legal provisions is problematic even if the borrowing concerns ideals and principles that match the ideals and principles of the "borrowers" themselves. No matter how closely we see ourselves as committed to those ideals and principles, the way in which they are interpreted, their relative weight, their application to concrete cases, and the level of moral urgency that they lay claim to are likely to differ from one constitutional culture to another.

To illustrate this point, consider as an example the different ways in which constitutional provisions concerning freedom of expression are articulated in the United States and Germany. Both are stable, wealthy, liberal democratic constitutional orders. Both jurisdictions are also committed to the protection of freedom of expression. However, it clearly does not follow that one could simply transpose the basic elements protecting freedom of expression from one constitution to the

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other—and there are good reasons to refrain from doing so. The two constitutions have different juridical histories. First Amendment jurisprudence and the jurisprudence of Article 5 of the German Basic Law (*Grundgesetz*) are not easily interchangeable.[21] What is more, the German law in general and the *Grundgesetz* in particular are both clearly affected by German political history. For example, the *Grundgesetz* allows normal acts of legislation to impose limits on freedom of speech,[22] while its Article 21 grants the German Constitutional Court the power to ban political parties. In Germany, as in other European countries, the historical experience of a genocidal fascist regime has clearly affected the extent to which freedom of speech and freedom of expression more broadly are seen as justifiably curtailed in order to protect wider societal interests.

What is relevant from the perspective of the legitimating function of constitutions is that the content of the *Grundgesetz* and its traditions of interpretation are deeply connected to Germany's political culture. The same can be said about First Amendment jurisprudence in the United States. Disagreements about the limits and implications of freedom of speech and expression are at the heart of both countries' "conversations between generations." It is thus plausible to think that alterations to such provisions resting on external interpretations could be legitimately resisted. Yet such resistance would in no way detract from the commitment to freedom of speech and expression articulated by both constitutional orders. A similar logic can also be discerned in the United Kingdom's (less hypothetical) sustained defiance of the rulings of the European Court of Human Rights.[23] It would be hard to explain this recalcitrance by, say, the British public not believing in human rights, or the U.K. government not welcoming the court's attentions due to holding a conception of sovereignty in which a state is the sole originator of its own powers.

My argument about the legitimating function of constitutions may suggest that RIL is necessarily a threat to liberal democracy. I do not think so. Rather, what emerges is that, while the integration of RIL and liberal constitutions is possible and perhaps even desirable, it can only be conducted at a relatively slow pace. The idea of legitimation is not a call to splendid juridical isolation, and yet it cautions us against the idea that the issue of "fit" between a people and its fundamental laws can be easily dismissed. I believe Buchanan would be happy to accept the aforementioned conclusion. I also believe that it is important to have a thoroughly liberal account of why that conclusion holds.

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Conclusion

While Buchanan is right that the concern for fit cannot provide overriding reasons to resist judicial borrowing from international law, the framework he uses to make his case obscures what is the most charitable form of the worry he wants to defuse. The strongest account of the concern he aims to address, at least from a broadly liberal standpoint, is that constitutions have a legitimating function. Their legitimating function, in turn, requires them to involve elements of specificity that relate to a given polity. And we have good reason to preserve some aspects of this specificity because it provides a crucial link between abstract principles and concrete historical communities, and in so doing constitutes an essential element of the legitimation of the legal and political order.

NOTES

[1] See Jeremy A. Rabkin, *The Case for Sovereignty: Why the World Should Welcome American Independence* (Princeton: Princeton University Press, 2004).
[2] Allen Buchanan, *The Heart of Human Rights* (New York: Oxford University Press, 2013), ch. 6.
[3] Buchanan defines robust international law as "international law that claims the authority to regulate matters once considered to be the exclusive concern of the state, including the state's treatment of its own citizens within its own territory." Ibid., p. 224.
[4] Ibid., pp. 225, 230.
[5] See especially, Rabkin, *The Case for Sovereignty*.
[6] Buchanan, *The Heart of Human Rights*, p. 231.
[7] Ibid., pp. 234–35.
[8] The question of what constitutions are for is intimately connected to what they actually are. This would include reference to their standing as superior law, their justiciability, their level of entrenchment (i.e., the special procedures required to amend them), their ability to provide a modicum of continuity through time, etc. For a discussion of what constitutions are, see Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (New York: Oxford University Press, 2009), ch. 13.
[9] See Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law: Cases and Materials* (Saint Paul, Minn.: Foundation Press, 1999).
[10] Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right*, ed. Allen W. Wood, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), p. 313.
[11] The preamble to the Irish constitution provides a clear example of this functional claim. *Bunreacht na hÉireann* (Constitution of Ireland), July 1, 1937, www.taoiseach.gov.ie/eng/Historical_Information/The_Constitution/February_2015_-_Constitution_of_Ireland_.pdf.
[12] An expanded version of the argument I present in this essay would have to pay particular attention to the differences between written and unwritten constitutions in terms of their legitimating function. I will not pursue this issue any further here, but will simply assert that I do not think that the difference between written and unwritten constitutions is detrimental to the substance of the overall argument.
[13] Frank I. Michelman, "Legitimacy, the Social Turn, and Constitutional Review: What Political Liberalism Suggests," *Critical Quarterly for Legislation and Law* 3 (2015), pp. 3–4.
[14] Sources here include the work of authors such as John Rawls, Charles Larmore, and Bruce Ackerman, although I draw not on a specific author's interpretation of political liberalism, but rather on what I understand to be the common core of political liberalism as a whole.
[15] Christopher J. Eberle, *Religious Conviction in Liberal Politics* (Cambridge: Cambridge University Press, 2002).
[16] Paul Weithman, *Why Political Liberalism? On John Rawls's Political Turn* (New York: Oxford University Press, 2010).

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[17] Cécile Laborde, "From Constitutional to Civic Patriotism," *British Journal of Political Science* 32, no. 4 (2002), p. 598.
[18] See Jürgen Habermas, "Struggles for Recognition in the Democratic Constitutional State," in *Multiculturalism*, ed. Amy Gutmann (Princeton: Princeton University Press, 1994), and Jan-Werner Müller, *Constitutional Patriotism* (Princeton: Princeton University Press, 2007), for an original reconstruction.
[19] See Bruce Ackerman, "A Generation of Betrayal?" *Fordham Law Review* 65 (1997).
[20] That, of course, is unlikely to be the case: first, because reasonable pluralism would apply to at least a subset of those issues; and second, because no such list could plausibly be literally exhaustive.
[21] See Oliver Jouanjan, "Freedom of Expression in the Federal Republic of Germany," *Indiana Law Journal* 84, no. 3 (2009).
[22] As of 1985, section 130 of the German Penal Code outlaws different forms of "incitement to hatred" and gives special attention to Holocaust denial (see especially, sections 130.3 and 130.4).
[23] The paradigmatic case here concerns the discussion of prisoners' voting rights. See Hirst v. the United Kingdom (no. 2), 74025/01 (2005).

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