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SYMPOSIUM ON COMPARATIVE FOREIGN RELATIONS LAW

CONSTITUTIONS AND FOREIGN RELATIONS LAW: THE DYNAMICS OF SUBSTITUTES AND COMPLEMENTS

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National constitutions are central to the field of foreign relations law, which is defined by Curtis Bradley in his essay as "the domestic law of each nation that governs how that nation interacts with the rest of the world."[1] In this contribution to the symposium, I wish to explore the relation between foreign relations law and national constitutions, arguing that a "foreign relations lens" helps elucidate an underappreciated core purpose of these foundational texts. Next, I want to show how the shifting boundaries of constitutions serve to allocate lawmaking authority, emphasizing the substitution between international and domestic norms. Finally, I offer a comparative constitutional perspective on foreign relations law, laying out an agenda for future work in the area.

A Foreign Relations Lens on National Constitutions

Foreign relations functions are essential to the very operation of national constitutions. Law professors and political theorists speak grandly of the role of constitutions in ordering power, in limiting government, and in expressing the fundamental values of a people. But even prior to these "internal" functions, constitutions have a more primary "external" role on the international plane: they signal independence, and clearly define who it is that can speak authoritatively on behalf of the state. This allows *other* states to be able to recognize a legitimate government, and to deal with it. This may be one reason that rebel groups, governments-in-exile, and others who do not fully wield territorial authority nevertheless take steps to adopt putative constitutions. It signals a desire for admission to the club of nations, whether or not such admission is actually forthcoming.

This international signaling function has been central to the very constitutional form since it first emerged. The Constitution of Corsica, to take one early example, was adopted by rebels trying to set up an independent country breaking away from Genoa, with at least some factions seeking to gain protection of a new foreign power.[2] The United States Constitution was adopted with a purpose of securing independence from foreign influence, and with careful consideration to how international commitments ought to be made.[3] And the short-lived Polish Constitution of 1791 was adopted "free of the ignominious dictates of foreign coercion," to secure "external independence and internal liberty of the people."[4]

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[1] Curtis A. Bradley, *Foreign Relations Law as a Field of Study*, 111 AJIL UNBOUND 344 (2017).

[2] Dorothy Carrington, *The Corsican Constitution of Pasquale Paoli (1755–1769)*, 88 ENGLISH HIST. REV. 481, 485–86 (1973).

[3] THE FEDERALIST NO. 75 (Alexander Hamilton).

[4] 1791 KONSTYTUCJA preamble (Pol.).

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The international signaling function may help explain why it is that national constitutions spend a good deal of time articulating rules for treaty formation: it allows other states to know when a treaty has been authoritatively concluded and therefore relied on. Indeed, some 90 percent of all written constitutions ever adopted by nation states include provisions for how treaties are adopted.[5] Along with such features as defining how the head of state is selected and who is in charge of the military, treaty formation rules are part of the constitutional core.[6] Designating who speaks for and can bind the nation makes international communication possible, and is an essential if underappreciated function of national constitutions.

Scholars of constitutional texts also note that some features are best explained, not as a result of rational processes of design, but of chance, borrowing and diffusion. Certain texts, including the U.S. Constitution, became very influential on subsequent constitutions.[7] Choices made by accident or chance can have profound influence, and this is true of both inclusions and omissions. The U.S. Constitution provides for details on how treaties are adopted, but is silent on withdrawal from treaties.[8] While subsequent national constitutions have a good deal of detail on how treaties are adopted, and sometimes on the status of treaties vis-à-vis domestic law, relatively few (roughly 20 percent) say anything about revocation or withdrawal.[9] This might simply reflect optimism that treaties will be enduring, but more likely it reflects a drafting convention that developed early on in the history of constitution-making.

An even smaller number of constitutions—some 19 percent historically—make reference to customary international law or the law of nations. These references can range in detail. Only a small minority (8 percent) explicitly provide for monism, in the sense that customary international law is directly applicable in the domestic legal order.[10]

Two other aspects of the relationship of international and constitutional law deserve mention. First, there is an increasing trend to refer to or incorporate specific international treaties into the national constitution. Fully one quarter of national constitutions adopted after 1948 make reference to the Universal Declaration of Human Rights in their text.[11] These references can range from a mere passing statement to an explicit commitment to uphold the vales in the Declaration. Other human rights treaties, such as the American Convention of Human Rights, and especially the African Charter on Human and Peoples' Rights, are commonly referenced and even incorporated as either directly binding or as rules to guide interpretation.[12] The complicated configuration that results, with some treaties incorporated through a constitution, others left to ratification by an elected legislature, and others perhaps incorporated through judicial doctrines, makes the old monist-dualist dichotomy seem simplistic, and invites new ways to characterize the relationships between domestic and international law. Most importantly, the constitutional

[5] Data on file with author from Comparative Constitutions Project.

[6] Tom Ginsburg et al., Writing Rights (forthcoming 2018).

[7] George Athan Billias, American Constitutionalism Heard Round the World 1776–1989 (2009).

[8] Laurence Helfer, *Exiting Treaties*, 91 Va. L. Rev. 1579 (2005).

[9] Data on file with author from Comparative Constitutions Project.

[10] *See, e.g.*, Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl No. 1/1930, as last amended by Bundesverfassungsgesetz [BVG] BGBl No. 138/2017, art. 9.1 (Austria) ("The generally recognized rules of international law are regarded as integral parts of Federal law.").

[11] Data on file with author from Comparative Constitutions Project.

[12] *See, e.g.*, 2010 Constituição da República de Angola [Constitution], art. 12. ("The Republic of Angola shall respect and implement the principles of the United Nations Charter and the Charter of the Organisation of African Unity.") and art. 26 ("Constitutional and legal precepts relating to fundamental rights must be interpreted and incorporated in accordance with the Universal Declaration of the Rights of Man, the African Charter on the Rights of Man and Peoples and international treaties on the subject ratified by the Republic of Angola.").

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incorporation of treaties squeezes the space for foreign relations law, as regulatory discretion may be limited by the very document that empowers particular national actors with their basic authority.

Another aspect of international relations is war. There is a good deal of variation in the allocation of war powers in national constitutions.[13] The most common approach is to divide authority between an executive that declares war and a legislature with the power to approve the declaration.[14] This approach was self-consciously avoided by the American Founding Fathers, notwithstanding the dangerous international environment that motivated their constitutional convention. Instead, they allocated the power to declare war to Congress, leaving the President with the power to command the armed forces. The functional defects of their choice have led to various workarounds, crystallizing in the debates over the War Powers Resolution in the 1970s.[15] Outside the United States, an important global trend has been to give the legislature the power to approve the actions of the executive as commander in chief. There are interesting regional variations: constitutions in the relatively peaceful region of Oceania say little about war, whereas those in Latin America and the Middle East provide much more detail.[16] And there are also variations by regime type: semipresidential regimes tend to say a lot about war, whereas parliamentary ones do not.

The topic of war powers illustrates the diffusion dynamic in writing constitutions. Since World War II, formal declarations of war are very rare, and have little legal effect on the international plane, yet constitution-makers dutifully continue to provide for them. The world's youngest generally-recognized country, South Sudan, grants the President the power to declare war.[17]

All these variations suggest that constitutions are important documents for structuring foreign relations law. They are not, of course, the only source of that body of law, but they are important in allocating powers. This invites positive and normative inquiries into comparative foreign relations law, including: What drives variation across time and space? What types of designs are more functional for particular political circumstances or to advance particular values? Does legislative involvement in war-making have consequences for war policy?[18] Should treaty powers mirror the domestic order of lawmaking? What consequences flow with alignment or mismatch of legislation and treaties? When do states incorporate customary international law, and does it matter? We are only beginning to answer these and other questions about comparative foreign relations law, and comparative constitutional law has a good deal to offer in terms of how we approach them.

Substitutes and Complements

One way to organize the inquiry is to think about international institutions as either substitutes or complements for domestic ones.[19] In investment, for example, a country with both credible domestic institutions and credible international commitments would presumably be even more attractive as an investment site than a country that was defective on either dimension. In this case, international arrangements complement domestic ones. In other areas, an international agreement can substitute for domestic law. The U.S. case of *Missouri v. Holland*, in which an international treaty to protect migratory birds served to bypass limits on domestic legislation, illustrates the substitution dynamic.[20]

[13] Tom Ginsburg, *Chaining the Dogs of War: Comparative Data*, 15 Chi. J. Int'l L. 139 (2014).

[14] *Id.*

[15] 50 U.S.C. 1541–48 (1973).

[16] Ginsburg, *supra* note 13, at 151.

[17] 2011 Constitution art. 101 (S. Sudan).

[18] Tom Ginsburg, *War and Constitutional Design* (manuscript) (suggesting that the answer is yes).

[19] Eli Salzberger & Stefan Voigt, *Choosing Not to Choose: When Politicians Choose to Delegate Powers*, 55 Kyklos 281 (2002).

[20] Missouri v. Holland, 252 U.S. 416 (1920).

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That treaties and legislation were distinct instruments was an assumption of the American founders. As Alexander Hamilton put it in *Federalist 75*:

> The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws, and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other … . They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign.

This view led to a novel design for the treaty power, distinct from the legislative process. The framers, however, did not anticipate the possibility of one being used to substitute for the other.

The example of *Missouri v. Holland* illustrates that in federal countries, in particular, international arrangements can have profound consequences for the internal balance of power as between the national and state level governments. This has been a powerful theme of U.S. foreign relations scholarship and practice, and it remains a major issue in American politics, as states pursue policies on climate change, immigration, and other issues that are at odds with those of the federal government.[21] Substitution facilitates reallocation of power, with profound normative consequences for constitutional law and theory.

In particular, the availability of international substitutes suggests the possibility of strategic behavior in choosing to use one or the other.[22] While from a democratic point of view, one might think that we ought to fear bypassing democratic institutions for international ones, there are countervailing considerations. Because they bind the state itself rather than the government of the day, international commitments may be more difficult to revise or escape. This makes them more credible as commitment devices, allowing the people's representatives to potentially achieve more than can be done through domestic legislation. Giving up control can actually help people to achieve things they otherwise might not be able to.

There are also, as has been oft observed, issues of scale. Public goods can be produced at a variety of levels, and there are certain things a people might want that can *only* be obtained through international cooperation. Climate regulation, international security, and free trade are all goods that the democratic state cannot achieve on its own. To the extent that constitutions allow international cooperation, they may allow the achievement of democratically demanded goals, even as they bypass the machinery of democratic control.

The strategic analysis, however, suggests that this functional story might be too good to be true. Besides serving as complements and substitutes, shifts from one lawmaking device to another allow for the aggrandizement of some actors over others—perhaps most commonly, the aggrandizement of executive power over legislative power.

A full elaboration of the possibilities of complements and substitutes is beyond the scope of this short essay. But it is important to note that whether something is perceived as a complement or substitute might vary with political attitudes. Europeans tend to be more comfortable with international delegations and supranational government than do, say, Americans or Japanese. Advocates of executive power will not worry as much about reallocations as will supporters of Congress.

Furthermore, we are in an era of populist backlash against international commitments in many countries. Populism is a complex phenomenon, with myriad causes, but one theme that unites its various exponents is a distrust of elites, including foreign policy elites. The call for a return to democracy invites closer scrutiny of international arrangements. Might this herald a slowdown of such arrangements? Or a fundamental reallocation of

[21] Daniel Abebe & Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 Vand. L. Rev. 723 (2013); Michael J. Glennon & Robert D. Sloane, Foreign Affairs Federalism: The Myth of National Exclusivity (2016).

[22] Rachel Brewster, *The Domestic Origins of International Agreements*, 44 Va. J. Int'l L. 501 (2004).

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authority to make commitments in the first place? These questions are now salient in ways that was not the case even just a few years ago.

Comparative Constitutional Law and Foreign Relations Law

Comparative constitutional law has experienced something of a renaissance in recent years.[23] It has advanced through a mix of positive and normative inquiry, focusing on different sites of legal production and activity. How might its experience as a field inform the development of comparative foreign relations law?

A comparative constitutional perspective would first explore the distribution of institutions, rules, and interpretations across countries. We lack basic data on foreign relations law in many countries, and learning about the arrangements and their operation is a first step.[24] Next, we would search for an account of variation. Why is it that countries differ in their institutional arrangements and doctrine? What is the role of functional considerations, as opposed to mimicry, in the diffusion of institutions? Do ideas, culture, or political traditions explain variation? Finally we would like to understand the consequences of different arrangements. Are particular foreign relations schemes "better" for dealing with particular kinds of problems or political environments? What normative advice would we give a new country just writing a constitution? All these questions are central to comparative constitutional studies and must be asked about foreign relations law as well.

Another relevant consideration is methodological. Comparative constitutional studies has proceeded, to some degree, by ignoring disciplinary boundaries and drawing on relevant knowledge wherever it is found. It has also been willing to expand the focus beyond courts as the only source of legal knowledge, and to complement judicial studies by looking at legislatures and popular movements as sources of constitutional norms and understandings. This broad methodological pluralism has paid dividends, and might be pursued as well in the foreign relations field.

Foreign relations law occupies a liminal space between international law and domestic law. This space has become crowded and complicated in recent years, and requires a sophisticated approach to organize and understand. A comparative constitutional lens can help in that effort, which will require a sustained research program involving many jurisdictions. The time has come to launch it.

[23] Ran Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law (2014).

[24] Pierre-Hugues Verdier & Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation*, 109 AJIL 514 (2015).

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