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EDITORIAL

Daniel Clarry[*]
Valentin Jeutner[†]
Cameron Miles[‡]

This is the final issue of volume 3 of the *Cambridge Journal of International and Comparative Law*. At the outset, we wish to acknowledge the efforts of the large number of people involved in its publication. This includes the Journal's Managing Editors Jason Allen, Stephanie Mullen, Ana Júlia Maurício, Clara Rauchegger, Joseph Sampson and Matthew Windsor, as well as the individual Editors who contributed their time and effort. It further includes, prominently, Sidney Richards, without whose continued publication and layout expertise this issue could not have been realised. We also wish to thank the members of the Academic Review Board for their ongoing support. Lastly, special thanks are owed to Professor James Crawford AC SC, who has now stood down as the Journal's Senior Treasurer having served in that capacity since its inception. The Journal wishes him all the best for his tenure as a judge of the International Court of Justice at The Hague.

This issue is the second of the regular issues of the Journal for 2014. It proceeds in four parts. The first is a collection of general pieces dealing with aspects of international and comparative law. In the first place, Kate Miles engages in a in-depth discussion of the history of international investment law, uncovering its origins in the mercantile environment of the 16th century and the advent of the state-supported trading company. Miles draws on the research she conducted during the preparation of her book, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*, published in 2013 by Cambridge University Press and launched at the CJICL Annual Conference in May 2014. Miles is followed by three articles that emerged from papers also given at that Conference. Tom Gerald Daly examines the topic of regional integration between Europe and Latin America in the context of human rights and wider judicial dialogue, identifying a distinct Latin

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American conceptualisation of these fields that goes beyond post-national order in the European mold. Maria Papaioannou tackles similar themes, examining human rights and judicial dialogue within the paradigm of indigenous rights, urging the development of common standards within regional systems through cross-jurisdictional interaction. Seshauna Wheatle considers the provocative topic of comparative law and the *jus gentium*, examining the transnational passage of constitutional principles to fill legal vacuums in different jurisdictions, particularly in post-conflict societies. Wheatle is critical of such a project, arguing that the unthinking transplantation of foreign legal ideas without opportunity for domestic modification and reflection may render such principles vulnerable to the post-modern claims of ethnocentricity in comparative law. Finally, Elmar Widder engages in a comparative analysis of the right to challenge witnesses between various human rights jurisdictions. Widder concludes that parallels emerge between different international and regional bodies notwithstanding differing emphases, such that a uniform test for the exclusion of witnesses may in the future be possible.

The second part of this issue contains a 12-article symposium tackling the issue of transitional constitutionalism. Edited by Jason Allen, this symposium aims to stimulate discussion on the role of constitutions in processes of political and legal change, especially in post-conflict and post-revolutionary societies. It does this from various doctrinal and theoretical perspectives and across a number of jurisdictions surveyed by Allen in his comprehensive introduction, to which the reader is referred for further information.

The third and fourth part of this issue contains two book reviews and two case notes. The first review by one of the present Editors-in-Chief concerns Kate Miles' *The Origins of International Investment Law*. The second review, by Jasmine Moussa, concerns Lawrence Boisson de Chazourne's new book, *Fresh Water in International Law*, a timely contribution to the international law of watercourses as the world grows ever more dependent on scarce natural resources. Two case notes follow. The first, by Frederike Kollmann and Jan Martin Hoffman, concerns the recent landmark decision on satisfaction by the European Court of Human Rights in *Cyprus v Turkey*. The second, by Elizabeth Whitsett, contains a comment on the WTO Appellate Body's equally significant decision in the *EC – Seals* case, in which vital depth was provided to the public morals exception as it appears under the WTO covered agreements.

At this point, there is little to do but to pass control of the CJICL to the next generation. At the time of writing, Naomi Hart and Ana Júlia Maurício have been kind enough to accept custody of the Journal for volume 4. We are glad to be able

to leave the Journal in such good hands and we wish the new Editors-in-Chief well for their future endeavours.

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INTERNATIONAL INVESTMENT LAW AND UNIVERSALITY: HISTORIES OF SHAPE-SHIFTING

Kate Miles[*]

Abstract
The following article was first presented as an address at the annual conference of the Cambridge Journal of International and Comparative Law on 10 May 2014. It concerns themes developed in detail in Dr Miles' book, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*, published by Cambridge University Press in 2013.

The theme for this year's conference, universality and the cosmopolitan nature of international law, involves questions with which the international community has been engaged for some time. Indeed, the tendency to invoke our own tradition, whatever that may be, as representative of the universal, has a long history. In highlighting this propensity, scholars have drawn attention to individual historical examples, from the Roman Empire onwards and, in particular, have articulated the invocation of universality in the translation of European tradition into international law.[1] It is now, of course, well recognised that the universal application of rules of international law was primarily a result of the commercial and political expansionism that occurred during imperial activity in the nineteenth century.[2] Additionally, a further period of 'universalisation' of international law was experienced through decolonisation in the mid-twentieth century.[3] The enduring significance of this for the nature of international law, however, is the subject of divergent opinion; as is the purpose, meaning, and

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[1] Martti Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 *EJIL* 113, 114. In particular, Koskenniemi refers to Roman law, Christianity, the 'humanity' of the Enlightenment, Vitoria, Grotius, Weber, science and capitalism, and modernity and globalisation; see also, for example, Eve Darian-Smith and Peter Fitzpatrick, *Laws of the Postcolonial: Law, Meaning and Violence* (1999).

[2] Koskenniemi, above n 1; Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harv IJL* 1; David Kennedy, 'International Law and the Nineteenth Century: History of an Illusion' (1997) 17 *Quinnipiac LR* 99.

[3] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011) 29–30.

implications of persistent appeals to the universal in international law.[4] What is evident from contemporary discourse, to which this conference contributes, is that such issues not only remain of importance and require further excavation, but also still generate controversy and strongly-held views.

In the context of international investment law, the debate surrounding universality has its own layer of significance. Advocates of traditional modes of high-level investment protection and international arbitration have long appealed to the universality, neutrality, and objectivity of these rules and their dispute settlement fora.[5] Such traits are often held up as evidencing the legitimacy of investor-state arbitration as a system and as a means by which disputes can be divorced from what is referred to as 'the politicised environment' of the host state. And, most recently, such appeals to universality have found form in associations with global administrative law, in which investor-state arbitration has been framed as the very embodiment of the rule of law.[6]

Ostensibly, there should be little concern in such a proposition. Indeed, who could object to the 'neutral', the 'universal', the 'objective'? And that is, perhaps,

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[4] Ibid; Pierre-Marie Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi' (2005) 16 *EJIL* 131.

[5] See, for example, Jan Paulsson, 'Universal Arbitration: What We Gain, What We Lose' (2013) 79 *Arbitration* 184; I F I Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA* (ICSID, 1993); J W Yackee, 'Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality' (2009) 32 *Fordham ILJ* 1550; see the discussion in Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009) 27–9; see also the discussion in Serg Puig, 'No Right Without a Remedy: Foundations of Investor-State Arbitration' in Zachary Douglas, Joost Pauwleyn & Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Practice into Theory* (2014) 235, 243–6; see also the views in Todd Weiler & Thomas W Wälde, 'Investment Arbitration under the Energy Charter Treaty in the Light of New NAFTA Precedents: Towards a Global Code of Conduct for Economic Regulation' (2004) 1 *TDM* 1.

[6] See for example, Weiler & Wälde, above n 5; Stephan W. Schill, 'Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law' (2006) *IILJ Working Paper 2006/6* (Global Administrative Law Series) <http://iilj.org/publications/documents/2006-6-GAL-Schill-web.pdf> [accessed 25 August 2014]; Benedict Kingsbury & Stephan Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2009) *IILJ Working Paper* 2009/6 (Global Administrative Law Series) <http://www.iilj.org/publications/documents/2009-6.KingsburySchill.pdf> [accessed 25 August 2014]; Daniel Kalderimis, 'Investment Treaty Arbitration as Global Administrative Law: What This Might Mean in Practice', in Chester Brown & Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (2011) 145; Charles T. Kotuby, '"Other International Obligations" as the Applicable Law in Investment Arbitration' (2011) 14 *Int'l Arb LR* 162, 164; Andrea Rocha Postiga, 'The Emergence of Global Administrative Law as a Means of Transnational Regulation of Foreign Direct Investment' (2013) 10 *Brazilian JIL* 171.

the intent of the invocation. It also constitutes, however, the platform from which the enquiry in this article moves. Rather than taking claims to universality and neutrality in the investment field at face value, it would seem they require a more in-depth evaluation; one that engages with the broader circumstances, their historical context, and the critical legal theory scholarship on universality more generally. Certainly, consideration of postcolonial theory and the history of international investment law can throw a different light on current appeals to the universal and attempts to frame international investment law as global administrative law. With this in mind, then, this article explores both past and present claims to universality and neutrality, the constructed nature of doctrines, the emergence of regimes, and the dynamics of challenge and response visible within international investment law. The thread running through my arguments, linking these components, is that with respect to international investment law, claims to universality are really about claiming legitimacy in the face of challenge.

1 Revisiting the Emergence of International Law

It is uncontroversial to point to the European origins of international law. It is more contentious, however, to reflect on the significance of this for international law in the twenty-first century and to draw out the role of colonialism in shaping its doctrines.[7] This territory has been well-traversed by the work of scholars such as Antony Anghie and Lauren Benton, in which that inherent nexus has been fully articulated.[8] The emergence of international law is depicted as a chaotic process of 'repetitive assertions of power and responses to power'[9] and one in which the engagement of European states with non-European peoples through the prism of colonialism was central, rather than incidental, to the forming of core doctrines of international law.[10] In particular, Anghie maintains that legal doctrines, such as that of sovereignty, were moulded so as to address the problem of 'civilising the uncivilised world', bringing the non-European 'into the universal civilisation of Europe'.[11]

[7] See for example, the arguments put forward in Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27 *Third World Quarterly* 739.

[8] Ibid; see also Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004); see also Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (2002).

[9] Benton, above n 8, 10–11.

[10] Anghie, above n 8, 2–8; Anghie, above n 7, 741–2.

[11] Ibid; Anghie, above n 8, 2–8.

It is, of course, somewhat unnecessary to restate that under the doctrine of sovereignty all sovereign states are equal. However, when its nineteenth century conceptual framework is considered, the implicit assumptions set within the doctrine become apparent.[12] 'Sovereignty' within nineteenth century international law not only denoted sovereign power and governance in the European sense of the word, but was also understood as adherence to a particular form of European civilisation and society.[13] In the application of the doctrine to non-European societies, such peoples were regarded as not meeting the 'civilisation' and 'society' criteria and were therefore categorised as 'not sovereign'.[14] And, in this way, what Anghie terms a 'dynamic of difference' was enabled, resulting in:[15]

> [T]he endless process of creating a gap between two cultures, demarcating one as 'universal' and civilised and the other as 'particular' and uncivilised, and seeking to bridge the gap by developing techniques to normalise the aberrant society.

International law, then, was the tool through which that universal system of demarcation could be established and legitimised, cementing the 'civilised' and 'uncivilised' designations within the law.[16] Without the legal status of a sovereign entity within a system that had been declared universal, non-European societies were not legally 'visible' on the international stage. It flowed from this that they also did not have the legal capacity to object to their categorisation, nor to its consequences of subjugation and dispossession.[17]

There were, however, inconsistencies in this mode of engagement. At times, the prescribed lack of sovereignty enabled acquisition through conquest and seizure or the expanded doctrine of *terra nullius*; on other occasions, indigenous

[12] Anghie, above n 7, 745; Martii Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001) 5, 70–5; see the writings discussed in Koskenniemi, such as Henri Bonfils and Paul Fauchille, *Manuel de droit international public* (2nd edn, 1898) 17–18; see also, for example, the writings of John Westlake, *Chapters on the Principles of International Law* (1894) 141; see also James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (1883).

[13] Anghie, above n 8, 2–8; Anghie, above n 7, 741–2, 745; see the writings at the time of theorists such as Westlake, above n 12, 141.

[14] Koskenniemi, above n 12, 70–5; Anghie, above n 7, 741–2, 745.

[15] Anghie, above n 8, 4.

[16] Anghie, above n 7, 741–2; Koskenniemi, above n 12, 126–30; Peter Fitzpatrick, 'Terminal Legality: Imperialism and the (De)composition of Law', in Diane Kirby & Catharine Colebourne (eds), *Law, History, Colonialism: The Reach of Empire* (2001).

[17] Anghie, above n 7, 745.

peoples were treated as possessing sovereignty for they entered into treaties ceding sovereignty to the European party.[18] The seeming contradiction of upholding the legal nature of treaties entered into with rulers, tribes, chiefs, and peoples to whom sovereignty was simultaneously denied posed an obvious problem of logic.[19] It could, of course, be viewed as a reflection of the realities and limits of empire, in which variegated levels of jurisdiction were asserted, or it could be seen as a disingenuous manipulation of rules to ensure outcomes that serve one set of interests. In any case, what it certainly illustrates is the chaotic, variable, and often improvised nature of international law at the time.[20] Inconsistencies were accommodated and various forms of jurisdictional pluralism were the norm in the engagement of empire. It was more a fluid and ongoing process of exchanges, shifting shape as circumstances required.[21]

In the positivist account of international law, however, its emergence was painted almost as a serene act of inevitability—the extension of a fully developed, stable, sophisticated and universal legal system to govern international relations across the board.[22] Again, this particular framing was very much tied in with the 'civilising mission' of the nineteenth century so that not only was the universalising of European law and civilisation taken as self-evident, but the virtue in that mission was as well.[23] That sense of the self-evident persisted through this constructed *fait accompli* presentation of European law and civilisation as universally applicable international law. It allowed a wilful closing of the eyes to the problematic aspects of logic, the value-laden and self-serving nature of its principles, the innate linking with the objectives of colonialism, the brutality inflicted, and the reality of an unruly process of engagement through assertion, challenge, and response that was the emergence of international law as a system.

Comprising part of the lineal narrative of the history of international law, it was also the same intellectual approach that enabled the categorisation of gradations of civilisation amongst nations and the bestowing of sovereignty on those that 'progressed' to achieve the requisite standard of civilisation

[18] Ibid, 745; Anghie, above n 8, 69–72.

[19] Anghie, above n 8, 69–80.

[20] See the discussion on imperial order and the inconsistent approach to international law and sovereignty in P G McHugh, '"A Pretty Gov[ernment]!": The "Confederation of United Tribes" and Britain's Quest for Imperial Order in the New Zealand Islands during the 1830s', in Lauren Benton & Richard J Ross (eds), *Legal Pluralism and Empires, 1500–1850* (2013) 233, 234–6.

[21] Ibid; see generally Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (2009).

[22] Anghie, above n 8, 3–6.

[23] Ibid; Koskenniemi, above n 12, 5, 70–5.

as determined by, and on terms set by, European states.[24] It was a form of reductionism that simplified and sanitised the realities of universalising international legal rules. And, in the nineteenth century, this allowed the recurrent presentation of an established, complete, and uncontested system of international law even as it was in the midst of a messy and very much contested process of creation. The appeals to the universal nature of those legal rules were part of that assertion of legitimacy in the face of opposition and uncertainty. It is interesting to note that as these historical circumstances have become more widely appreciated, the positivist response has shifted substance but maintained its approach. Smoothing over the uncomfortable, it is not uncommon to find this era and the reality of international law's emergence treated now as simply a matter of historical fact with no further significance.[25] Amounting to little more than a statement of 'it is what it is', there is an abdication of responsibility and a shrug of indifference embodied within such an approach, whilst, simultaneously, not appearing to endorse the activities of the era.

To say that histories of international law will inevitably reflect the historian is, of course, as applicable to positivist accounts as to any other narrative. The historian's framework, vocabulary, objectives, and lens will shape the history presented.[26] The process is shot through with complexities and contradictions of its own. In particular, Koskenniemi directs our gaze to the pitfalls of imagining that our concerns are those of the historical era we are exploring.[27] For this reason, Koskenniemi argues, it is all the more important to adopt a contextual reading of international law, examining the actual purpose of the writings, the concerns of the period, and the political, economic and cultural influences operating on the actors at the time.[28] But all the while, not, in the process, losing sight of the critical approaches that explore the implications of those contexts, the role law played as a facilitator of commercial and political objectives, and the unexpected narratives that can emerge through this process.[29] What is clear, even at this point in the enquiry, is that, despite claims to the contrary, international law itself is not neutral nor is it the purveyor of objective, universal truths.[30] What

[24] See the discussion in Koskenniemi, above n 12, 70–5.

[25] See the discussion of this tendency in Anghie, above n 8, 109.

[26] Martii Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View' (2013) 27 *Temple ICLJ* 215, 230.

[27] Ibid, 226–7. As an example, Koskenniemi describes current tendencies to describe Vitoria as 'an activist in human rights' although he advocated the burning of heretics.

[28] Ibid, 226–9.

[29] Ibid, 229–32, 238–40.

[30] See the discussion in Pahuja, above n 3; see also Anghie, above n 8; see also Jason A Beckett, 'Rebel

that means for international investment law and its appeals to the universal is the question for the next section of this article.

2 Historical Perspectives on International Investment Law

I have written elsewhere on the origins of international investment law.[31] Here, although I draw on aspects of that work, my focus is on the specific application of those theories to the question of universality and its use within international investment law, both past and present. These stories are, of course, intertwined with the emergence of international law more generally. The translation of European inter-state rules and principles into international law is also the story of the global expansion of European trading and investment activities from the seventeenth to early twentieth centuries.[32] The practices and principles developed during this era were designed to enable and protect those European commercial and political interests—and a core part of that process was the repeated asserting of the universal nature of rules of international trade and investment law.

2.1 Cementing Conceptualisations

The assertion of legal authority regarding property, investments and trading rights in this early period was as chaotic and improvised as any other setting within the activities of empire.[33] As mentioned above, the imperial context not only entailed inconsistent levels of territorial control, but also constituted tumultuous spaces for legal contestation and the dissemination of international law. Against this background, disputes over property took on an added significance that went well beyond their immediate local context.[34] At a profound level, then, seemingly disparate individual skirmishes and cases in local and imperial fora

Without a Cause? Martti Koskenniemi and the Critical Legal Project' (2006) 7 *German LJ* 1045, 1047–8.

[31] Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (2013).

[32] M Sornarajah, *The International Law on Foreign Investment* (3rd edn, 2010) 19–21; Charles Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (1985) 12–21.

[33] See the discussion of the improvised nature of legal arrangements in an imperial context in McHugh, above n 20, 234–6.

[34] Benton, above n 8, 10–11, 22–3.

contributed to that contest for jurisdictional control, retention of power, and, perhaps, most significantly, for the fundamental conceptualisations that would go on to form prevailing legal, commercial and political approaches in the colonial context.[35] This was simultaneously also to play a crucial role in the emergence of international law as a universally applied legal regime.[36]

The establishing and cementing of multi-layered authority of this nature involved numerous parallel strategies. And with respect to the emergence of foreign investment protection law, the methods were varied. On one level, this entailed the construction of legal doctrine and its assertion as existing law, the conclusion of agreements such as 'friendship, navigation and commerce' treaties, and the establishment of areas of extraterritorial jurisdiction. Commercially, it included the pursuit of concessions and the securing of trading posts. Politically, the spectrum ranged from the use of diplomatic pressure to military intervention, the colonial annexation of territory, and the imposition of capitulation treaties.[37] These devices are, of course, all inter-related and the categorisation into legal, commercial and political is somewhat artificial. In essence, the sum of these individual practices was an interactive process of feeding into each other, with interests and objectives shaping the law and the legal rules, in turn, shaping conceptualisations. Interestingly, it was the repetition of these modes of interaction that not only reinforced expectations of conduct, but would also contribute to the development of customary international law.[38]

In fact, the emergence of modern international rules on trade and investment out of such practices was very much a dual process of assertion and creation. Despite customary international law on investor protection not yet being fully formed or settled, capital-exporting states claimed it as such and firmly asserted the legitimacy of those particular practices within international law.[39] The impact of those reiterated assertions would be far-reaching. Indeed, with an appreciation of the importance of each of these strategies to the overall process, it can be

[35] Ibid.

[36] Ibid.

[37] Sornarajah, above n 32, 19–21, 180–1; Lipson, above n 32, 12–21; Nico Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (1997) 173–5.

[38] Benton, above n 8, 25–7.

[39] See, for example, the disputes surrounding *The United States and Paraguay Navigation Company Claim*, extracted in J B Moore, *A History and Digest of the International Arbitrations to which the United States has been a Party*, vol 2 (1898) 1485, 1865; *Britain (Finlay) v Greece* (1846) 39 BFSP 410; *Delagoa Bay Railroad Arbitration*, extracted in Moore, above n 39, 1865; *Britain v The Kingdom of the Two Sicilies* (1839–1840) 28 BFSP 1163–242; *Venezuelan Arbitrations*, extracted in Jackson H Ralston, *Venezuelan Arbitrations of 1903* (1904).

seen that the repeated assertions of host state obligations, and the appeals to the legitimacy of actions taken to enforce them, contributed so significantly to the solidifying of those assertions as universally applicable rules of international law. Within both the formal colonial context and that of 'informal empire' in the eighteenth and nineteenth centuries, this reiteration and consolidation took place in multiple sites of contestation. Within formal colonial frameworks, uneasy pluralities of political and legal authority operated in incremental ways so as to support institutional resolutions. Legal conflicts over property embodied contests of authority on a smaller, more localised, scale, which, in affirming the legitimacy of extraterritoriality and principles of protection for foreigners' property, reinforced regimes at a wider level.[40] Outside that formal context, several doctrines of international law, contested incidents, and cases stand out in particular, such as, the doctrine of diplomatic protection of alien property and the cases that applied it,[41] the nineteenth century rejection of the Calvo Doctrine, the Soviet Union challenge following World War I, and the Mexican expropriations of the 1930s. Before discussing these matters, however, there is an even earlier influence on the form of modern international investment law that ultimately emerged—the major trading companies of the seventeenth century.

2.2 The Dutch East India Company, Grotius and International Law

Seventeenth century merging of imperialist and commercial objectives marshalled in the entirely new entity that was the trading company imbued with sovereign powers. This novel approach saw the founding of, for example, the Dutch East India Company (*VOC*),[42] the English East India Company, and the French East India Company.[43] It is well known that these companies not only pursued commercial interests, but also advanced the political goals of their home

[40] Benton, above n 8, 2–3, 17–27, 211–16.

[41] Such as the *Delagoa Bay Railroad Arbitration*, extracted in Moore, above n 39, 1865; *Venezuelan Arbitrations of 1903*, extracted in Jackson above n 29; *Britain (Finlay) v Greece* (1849–1850), 39 BFSP 410; *Britain v The Kingdom of the Two Sicilies* (1839–1840), 28 BFSP 1163.

[42] In Dutch, the Company's name was the Verenigde Oostindishe Compagnie, or 'the United East India Company', hence it being known as the VOC; see *Die Staten General der Vereeniche Nederlanden, Octrooi van de*, 20 March 1602 (*Charter of the VOC, Granted by the States-General of the United Netherlands*, 20 March 1602).

[43] *Compagnie Française des Indes Orientales* was founded in 1664, chartered by Louis XIV, 28 May 1664. With respect to the East India Company, see *Charter Granted by Queen Elizabeth to the Governor and Company of Merchants of London, Trading into the East-Indies*, 31 December 1600; *Letters Patent Granted to the Governor and Company of Merchants of London, Trading into the*

states. To that end, they were granted authority to conduct military operations, establish trading posts, acquire territory, conclude treaties, found and govern settlements, and carry out judicial functions.[44] What is, perhaps, not quite so well appreciated is the impact they had on international law. Empowering companies to operate on the international stage in this way clearly created a new type of legal actor and this in itself necessitated the design of new international legal doctrine. But it also generated the development of new international rules in a less obvious fashion, most notably in the collaboration of the VOC and Hugo Grotius.

Grotius has been, at times, described in the past as 'the father of international law'.[45] However, he was not an entirely disinterested theorist. Rather, Grotius had his objectives and intended audience firmly planted in the immediate concerns of the day and he was, at times, directly engaged by the VOC to devise legal arguments validating their activities and bolstering their claims to property and territory.[46] Accordingly, founding treatises were written and core doctrines expounded that were, indeed, favourable for both state and Company. In particular, *De Mare Liberum* (freedom of the high seas) asserts that no state may claim exclusive rule over the sea.[47] Together with *De Jure Praede* (the law of prize and booty),[48] *De Mare Liberum*, which was originally chapter twelve of *De Jure*

East-Indies, 3 April 1661; The East India Company has also been known as the English East India Company and the British East India Company. To avoid confusion with other trading companies, I adopt the term 'English East India Company'. However, its formal name from 1600–1708 was the Governor and Company of Merchants of London, Trading into the East-Indies, and from 1708–1873, the United Company of Merchants of England Trading to the East Indies.

[44] M F Lindley, *Acquisition and Government of Backward Territory in International Law* (1926) 94. See also the discussion in Claudia Schnurmann, 'Wherever Profit Leads Us, to Every Sea and Shore…: the VOC, the WIC, and Dutch Methods of Globalization in the Seventeenth Century' (2003) 17 *Renaissance Studies* 474, 477–80; Janet McLean, 'The Transnational Corporation in History: Lessons for Today?' (2004) 79 *Indiana LJ* 363, 368–9.

[45] See, for example, Hamilton Vreeland, *Hugo Grotius: Father of the Modern Science of International Law* (1917).

[46] Letter of Jan ten Grootenhuys, merchant and VOC shareholder, younger brother of the VOC director Arent ten Grootenhuys, and liaison between Grotius and the VOC, 15 October 1604, commissioning the formal defence of Van Heemskerck's seizure of the Santa Catalina, translation in Hugo Grotius, *Commentary on the Law of Prize and Booty* (edn Liberty Fund, 2006; 1608) 545–7; see also Ileana M Porras, 'Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius' *De Iure Praede*—The Law of Prize and Booty, or "On How to Distinguish Merchants from Pirates"' (2006) 31 *Brooklyn JIL* 741, 742–3, 744–7; Martine Julia van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies (1595–1615)* (2006).

[47] Hugo Grotius, *The Free Sea* (edn Liberty Fund, 2004; 1609).

[48] Grotius, above n 46. Completed in 1608, Grotius' manuscript, *De Jure Praede*, remained

Praede, was written against the backdrop of the Dutch conflicts with Portugal, Spain and England. In particular, they were designed to counter claims by these competitor nations to areas of the sea that would have led to the exclusion of the Dutch from valuable ocean trading routes and to justify military incursions into non-European territories to establish or protect commercial interests. It was also a means to thwart the purported trading monopolies of the Portuguese in the East Indies and assert a 'right to trade' approach of universal application, key statements of which include:[49]

> 1. Access to all nations is open to all, not merely by the permission but by the command of the law of nations.
>
> [...]
>
> 3. Neither the sea itself nor the right of navigation thereon can become the exclusive possession of a particular party, whether through seizure, through a papal grant, or through prescription (that is to say, custom).
>
> 4. The right to carry on trade with another nation cannot become the exclusive possession of a particular party, whether through seizure, through a papal grant, or through prescription (that is to say, custom).

More specifically, the propositions in these texts also verified the legality of the seizure by the VOC of a Portuguese ship, the *Santa Catarina*, and its tremendously valuable cargo:[50]

> [T]he war which is being waged by the Dutch East India company against the Portuguese, the former owners of the captured vessel, is a just war; and the seizure of the prize in question was therefore entirely just [...]

unpublished until 1868, when it was first published in Latin, translated by H G Hamaker, then published in English in 1950.

[49] Grotius, above n 46, 300–1; see also Porras, above n 46, 802–4; Anghie, above n 1. See also the discussion in April Carter, *The Political Theory of Global Citizenship* (2001) 28; Vincent C. Loth, 'Armed Incidents and Unpaid Bills: Anglo–Dutch Rivalry in the Banda Islands in the Seventeenth Century' (1995) 29 *Modern Asian Studies* 705, 718–20.

[50] Grotius, above n 46, 388; Porras, above n 46; Martine Julia van Ittersum, 'Hugo Grotius in Context: Van Heemskerck's Capture of the *Santa Catarina* and its Justification in *De Jure Praedae*' (1604–1606)' (2003) 31 *Asian Journal of Social Science* 511.

Porras has argued that the construction of international legal doctrine in this way effectively treated the protection of commerce as a matter of national identity, the threat to which was a legitimate basis to wage war.[51] Such an association enmeshed the private commercial interests of traders and foreign investors with those of the state in a particularly overt fashion and it established that fusion within the law itself.

This was at a formative stage in the development of international law and the theories devised could not have amounted, at the time, to little more than assertions of the law, in much the same way as a barrister in the modern context asserts the position of his or her client. Indeed, van Ittersum has gone so far as to say that Grotius' contemporaries would not have recognised nor agreed with his summation of the law.[52] However, the propositions were presented as existing law and were treated as such by the states it suited to do so. This also had a profound impact on the direction international law would take both in general and as pertaining to the treatment of foreign investors. Reflecting Grotius' theories, that close alignment between the state and private commerce continued to find form in the translation of European trading and investment principles into universal rules of international investment law, most obviously in the nineteenth century development of the doctrine of diplomatic protection of alien property.

2.3 Assertion, Challenge and Response in the Nineteenth and Twentieth Centuries

The process of replacing the many and varied inter-nation legal regimes in existence in the seventeenth and eighteenth centuries with a universal system of international law based on European conceptualisations of property and private commerce was inarguably a complex and lengthy one.[53] Aspects of this interactive process of challenge and response have been highlighted above, although, in the context of this article, it is a necessarily brief discussion. Exploring the perseverance of this contest into the nineteenth century, however, is also central to understanding objections to claims to universality in the twenty-first. Accordingly, I turn now to a critical period in which the enmeshed

[51] Porras, above n 46, 802–804.

[52] Grotius, above n 46, see Van Ittersum's Introduction at, xviii.

[53] See Benton, above n 8, 10–11; Anghie, above n 8, 32–3, 115; Lipson, above n 32, 16, 20–1; Sornarajah, above n 32, 19.

state and trader/investor of Grotius' theories reappeared as the doctrine of diplomatic protection and elicited the challenge that was the Calvo Doctrine.

2.3.1 Diplomatic Protection and the Calvo Doctrine

International rules on the protection of foreign investors and their property emerged in the nineteenth century within an area of law known as the diplomatic protection of aliens.[54] This established an international minimum standard of treatment afforded to foreigners when abroad, a breach of which gave rise to a right of home state intervention.[55] At its core, the doctrine articulated the notion that an injury done to a foreign national was an injury to their state and that this, in turn, entitled the state to respond on their national's behalf.[56] It was, of course, in any literal sense, a conceit. But the doctrine not only reflected the protective responsibilities of a state to its citizens, it also fused the activities and interests of state and investor at a fundamental level within the law. Substantively, the international minimum standard encompassed a range of protections, including the prohibition on uncompensated expropriation of foreign-owned property.[57] Following a breach of this nature, the aggrieved state could respond in a number of ways. It was entitled to do nothing at all, leaving the investor with no recourse, limit itself to diplomatic protest, or send in its warships.[58] The particular course of action adopted largely depended on the wider political and commercial circumstances of the incident, but there is no doubt that the doctrine was, at times, used as grounds for political intervention and military incursion into the host state.[59] What became known as 'gunboat diplomacy' was very much a part of the nineteenth century response strategy under the doctrine of diplomatic protection to interference with the interests of

[54] James Crawford, *Brownlie's Principles of Public International Law* (8th edn, 2012) 611.

[55] Edwin Borchard, *The Diplomatic Protection of Citizens Abroad* (1915) 25–29, 39; Clyde Eagleton, *The Responsibility of States in International Law* (1928) 3, 6, 22.

[56] Crawford, above n 54, 607; Sornarajah, above n 32, 18, 121. Building on the works of Grotius, Emmerich de Vattel expressed the theory in the eighteenth century in his influential text, *The Law of Nations* (1758) (translation) 136: '[w]hoever ill-treats a citizen injures the State, which must protect that citizen'.

[57] Lipson, above n 32, 53; Borchard, above n 55, 493–556; B A Wortley, *Expropriation in Public International Law* (1959) 33–5; Isi Foighel, *Nationalization: A Study in the Protection of Alien Property in International Law* (1957, reprinted 1982).

[58] Borchard, above n 55, 439–56; Lipson, above n 32, 53; Wortley, above n 57, 58.

[59] Sornarajah, above n 32, 36–9; Schrijver, above n 37, 177–78.

foreign investors.[60] And, in this way, the harming of private commerce had again been constructed as a legal basis on which to justify warfare against other states.

Appeals to the doctrine and the international minimum standard can be seen throughout this period in diplomatic correspondence,[61] arbitral awards and disputes,[62] the writings of theorists,[63] and the practice of states.[64] For example, the assessment put forward by Borchard is fairly typical of the era:[65]

> The establishment of the limit of rights which the state must grant the alien is the result of the operation of custom and treaty, and is supported by the right of protection of the alien's national state. This limit has been fixed along certain broad lines by treaties and international practice. It has secured to the alien a certain minimum of rights necessary to the enjoyment of life, liberty and property, and has so controlled the arbitrary action of the state.
>
> [...]
>
> International law is concerned not with the specific provisions of the municipal legislation of states in the matter of aliens, but with the establishment of a somewhat indefinite standard of treatment which the state cannot violate without incurring international responsibility. The state's liberty of action, therefore, is limited by the right of other states to be assured that a certain minimum in this respect will not be overstepped. A stipulation in treaties or municipal statutes to the effect that the state is not responsible

[60] Sornarajah, above n 33, 36–9; Miriam Hood, *Gunboat Diplomacy 1895–1905: Great Power Pressure in Venezuela* (1975) 189–92.

[61] See, for example, the correspondence between Secretary of State Baynard and Connery, 1 November 1887, *Compilation of Reports of Committee on Foreign Relations, US Senate* (1887) 751, 753: If a Government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name, and would afford no protection either to states or to individuals. It has been constantly maintained, and also admitted by the Government of the United States, that a Government cannot appeal to its municipal regulations as an answer to demands for the fulfilment of international duties.

[62] See, for example, *Britain (Finlay) v Greece* (1849–1850) 39 BFSP 410; see also Correspondence concerning the *Sicilian Sulphur Monopoly Case* found at *Britain v The Kingdom of the Two Sicilies* (1839–1840) 28 BFSP 1163.

[63] Borchard, above n 55, 39.

[64] See, for example, the actions of Germany and Britain in bombarding Caracas in 1902 in response to Venezuela's refusal to consent to international arbitration to settle claims arising out of civil unrest during 1898–1902.

[65] Borchard, above n 55, 39.

> to aliens to any greater extent to nationals has never prevented international claims where the minimum has been considered as violated, nor can the state's international obligations be avoided or reduced by provisions of municipal law, or by the fact that it violates the rights of its own citizens.

Contrary to the impression created by these writings, awards, and practices, however, this approach had not gone uncontested.[66] It is particularly interesting to note that although the international minimum standard was asserted by capital-exporting states as an already existing, universally applicable rule of international law, this was, in fact, the time of its formation and it was not universally accepted as law. A competing rule had been devised and asserted by host states—the Calvo Doctrine.[67] During the nineteenth century, Latin America had felt the full brunt of the doctrine of diplomatic protection, experiencing military incursions and bombardments from naval gunboats to protect alien property. There was also a sense amongst those states on the receiving end of such measures that the rule was periodically used as a premise for political interference and control.[68] The development of the Calvo Doctrine was in direct response to this vulnerability.[69] For that reason, its essence challenged the legality of the invocation of diplomatic protection and put forward the alternative proposition that: 'Aliens should be afforded no more than the same treatment as nationals and must limit themselves to filing claims in the local judicial system'.[70]

Despite the vigorous lobbying from advocates such as Calvo and the diplomatic assertions of these propositions by Latin American states, the Calvo Doctrine did not find acceptance as a rule of international law. In an interesting dis-

[66] See the discussion in Schrijver, above n 37, 177–78; Kenneth J Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 *UC Davis JILP* 157, 159–60.

[67] One of the most prominent advocates of this position was the Argentinian lawyer and legal scholar Carlos Calvo, after whom the doctrine is named. He completed a six volume treatise, *Le Droit International Théorique et Pratique*, first published in 1868, and then five editions later, in its final form in 1896.

[68] Lipson, above n 32, 76–77; Schrijver, above n 37, 177–178; Donald Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (1955) 5, 12–13, 30; Inter-American Bar Association, 'Report of the Third Conference of the Inter-American Bar Association, August 1944' (1944) 26 *J Comp Leg & Int'l L* 55, 57–8.

[69] Shea, above n 68, 5, 12–13; Lipson, above n 32, 76–7; Sornarajah, above n 32, 36–7, 120–3.

[70] Shea, above n 68; Frank Griffith Dawson & Ivan L Head, *International Law, National Tribunals, and the Rights of Aliens* (1971) 15.

cussion on the interactive nature of the emergence of international law, Arnulf Becker Lorca contends that the work of non-Western jurists such as Calvo:[71]

> [I]nternalised the categories of classical international law, and ultimately used them in order to change, in the direction of equality, the rules of international law applicable *vis-à-vis* their polities. Their reinterpretation of the central elements of classical international law—positivism, absolute sovereignty and the standard of civilization—progressively achieved the inclusion of non-Western states within the regime of autonomy and equality. Thus, the doctrinal appropriation of semi-peripheral jurists transformed international law.

Becker Lorca suggests that Calvo's reinterpretation of the rules rendered his efforts a success and contributed to a form of universalising of international law through its appropriation and internalising by Calvo and other semi-peripheral jurists.[72] Becker Lorca's reading of the nineteenth century experience of international law does reflect the more nuanced and complex legal relationships that, in fact, inhabited imperial spaces in non-Western nations. Contrary to his assessment of Calvo's contribution, however, the attempt, in that case, was not at all successful in reshaping the law. Calvo appropriated and reinterpreted the rules of international law—but his reinterpretation did not influence the substance of the law on diplomatic protection of foreign-owned property. Rather, the Calvo Doctrine was resoundingly rejected by those in a position to confer legal authority on the propositions. And in rebuffing Calvo's attempt to participate in the shaping of international legal doctrine, the European, British and American legal communities responded to the challenge with the firm reassertion of their views of the law and the reiteration of its universality and neutrality, that is, the asserted 'traditional' position of the international minimum standard, with a particular emphasis on its universal application and assumptions that only through the impartiality of an international forum could aliens be assured of fair treatment in a dispute.[73]

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[71] Arnulf Becker Lorca, 'Universal International Law: Nineteenth Century Histories of Imposition and Appropriation' (2010) 51 *Harv ILJ* 475, 475.

[72] Ibid, 482, 490–4, 525–8. In particular, Becker Lorca states at 526 that 'Calvo was remarkably successful'.

[73] Shea, above n 68, 20; see, for example, Borchard, above n 55, 39; see also Edward Borchard, 'The "Minimum Standard" of the Treatment of Aliens' (1940) 38 *Mich LR* 445, 452–461; see

The development of the doctrine of diplomatic protection of alien property, the challenge embodied in the Calvo Doctrine, and the subsequent reassertion of the capital-exporting states' position as settled law was a process by which one perspective became entrenched as law through the repetitive rejection and quashing of alternatives. And when it is viewed through a long-range historical lens, it can be seen that this episode was not exceptional. Rather, it was part of an historical pattern of undulating assertions of power and challenges to power that have characterised not only the emergence of international investment law, but its evolution throughout the twentieth century and into the twenty-first—including current assertions of legitimacy through universality.

2.3.2 Twentieth Century Challenges

In turning to the twentieth century, my argument is that significant attempts were made at various points throughout this period to challenge the assertion that the international rules on foreign investment protection were well-settled. These included the early twentieth century agrarian reforms of Mexico and the Soviet Union, postcolonial nationalisations, and the founding of the New International Economic Order (*NIEO*). Again, in my view, these conceptual 'rebellions' should not be considered in isolation, but, rather, as forming part of concerted host state resistance to the prevailing system, emerging and re-emerging in an interactive process with capital-exporting states. And on each occasion, these challenges were met with the reassertion of capital-exporting states' stance as universal.

Such challenges manifested in the widespread land seizures launched across the Soviet Union, Hungary, Poland, and other Eastern European states at the end of World War I and by Mexico in the 1930s.[74] It was claimed that as the seizures had taken place within general programmes of social and economic reform, those public interest objectives altered their character and classification. That context, it was argued, needed to be taken into account and required recognition within

also Institute of International Law, *Regulations Respecting the Responsibility of States by Reason of Damages Suffered by Aliens in Case of Riot, Insurrection or Civil War*: *Recommendation*, Session of Neuchatel, 10 September 1900: 'The Institute of International Law recommends that states should refrain from inserting in treaties clauses of reciprocal irresponsibility. It thinks that such clauses are wrong in excusing states from the performance of their duty to protect their nationals abroad and their duty to protect foreigners within their own territory'.

[74] Lipson, above n 32, 65–70, 77; Josef L Kunz, 'The Mexican Expropriations' (1940) 5:1 *NYU School of Law Contemporary Pamphlets Series* 25; John H Herz, 'Expropriation of Foreign Property' (1941) 35 *AJIL* 243, 252, 258–9.

the law through the creation of a new category of taking—'nationalisation' rather than confiscation or expropriation.[75]

As a proposition, it was, perhaps unsurprisingly, rejected by home states, their investor nationals, arbitral tribunals, and legal commentators.[76] In essence, the protests reiterated that the rules were clear and universal and could not be determined or modified by reference to the domestic law, policy, or social conditions of the host state. Such responses were then taken as evidence of the reaffirmation of the pre-war rules.[77] Crucially, however, the actions of the host states were not considered as possessing a norm-creating character and did not constitute law-making 'practice of states', unlike those of the home states.

Considered by whom? A significant question. The importance of the identity of those empowered to do the 'considering' and the bestowing of legal authority on one proposition over another should not be underestimated. It was, of course, a self-appointed authority derived from the repetitive nineteenth century assertions of capital-exporting states. And, in much the same way as the validity of the Calvo Doctrine had been dismissed in the nineteenth century, so too were these early twentieth century attempts to participate in the development of the rules of international investment law. Had the rules been reshaped to take account of the perspective of host states, this could, perhaps, have imbued them with a truly universal quality, representative of a blending of positions. The opportunity, however, was not taken and, in the face of such a strident challenge to the legitimacy of the prevailing system, hollow incantations emphasising the universal application of the rules were again held out instead.

The dynamics were repeated decades later during and following the process of decolonisation. What should have been a period of meaningful participation and universalisation of international law as well as prosperity for postcolonial states, implementing policies to rebuild their economies and further their own interests, in many cases, became a source of disillusionment.[78] In seeking to reclaim

[75] Kunz, above n 74, 26–27; Nicholas R Doman, 'Postwar Nationalization of Foreign Property in Europe' (1948) 48 *Col LR* 1125.

[76] Borchard, above n 73; Kunz, above n 74, 9–16; International Law Association, *Report of the Protection of Private Property Committee* (1926); Harvard Research in International Law, 'Responsibility of States' (1929) 23 *AJIL Supp* 133, Art 2.

[77] Kunz, above n 74, 9–16; ILA, above n 76; Borchard, above n 73; Alwyn V Freeman, 'Recent Aspects of the Calvo Doctrine and the Challenge of International Law' (1946) 40 *AJIL* 121.

[78] Karen Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1997–1998) 16 *Wisconsin ILJ* 353, 362; Benjamin J. Richardson, 'Environmental Law in Postcolonial Societies: Straddling the Local–Global Institutional Spectrum' (2000) 11 *Colorado JIELP* 1, 2.

control over essential natural resources, newly independent states found themselves facing investor claims as a result of attempts to revisit concession contracts or to nationalise operations central to the economy.[79] The response to this new form of political risk to investments made under colonial regimes was twofold—a reassertion of the traditional position through arbitral jurisprudence, interpreting principles in an overly supportive fashion and creating new legal doctrine; and the construction of new international regimes for investor protection.

Presented with arguments that postcolonial states were free to reassess concession contracts granted during colonial administration, a series of arbitral tribunals preferred the reasoning of capital-exporting states and their investor nationals and adopted a newly constructed doctrine, the 'internationalised contract', and a selective use of the acquired rights doctrine.[80] In a novel move, it was argued that the governing law of the concession contract was the 'international law of contracts' or that the concession contract constituted a form of economic development agreement or 'quasi-treaty', to which applying the law of the host state would be inappropriate.[81] And this approach was then also tied in with a particular application of the rules on acquired rights.

Traditionally, acquired rights held by foreign nationals are not absolute. They are granted by the host state and, correspondingly, can also be withdrawn.[82] However, the reasoning put forward in support of concession holders ran along the lines that all states are subject to the rules of international law and the transition from colonial administered territory to independent state did not alter that basic condition.[83] The newly independent state had assumed the rights and

[79] See, for example, the following notable disputes *Petroleum Development Ltd v The Sheikh of Abu Dhabi* (1951) 18 ILR 144; *Anglo-Iranian Oil Co (UK v Iran)*, ICJ Reports 1952 p 93; *Ruler of Qatar v International Marine Oil Co* (1953) 20 ILR 534; *Texaco Overseas Petroleum Co & California Asiatic Oil Co v Government of the Libyan Arab Republic* (1975) 53 ILR 389; see also the discussion in R B Lillich, 'The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack' (1975) 69 *AJIL* 359; Francesco Francioni, 'Compensation for Nationalisation and Foreign Property: The Borderland Between Law and Equity' (1975) 24 *ICLQ* 255, 260–2.

[80] See the authorities referred to above n 79.

[81] For a contemporary discussion of the rationale for the doctrine of the 'internationalised contract', see Lord Arnold McNair, 'The General Principles of Law Recognized by Civilised Nations' (1957) 33 *BYIL* 1, 4; see, for a critique of this approach, Anghie, above n 8, 226–35; see, for example, the reasoning in *Petroleum Development Ltd* v. *The Sheikh of Abu Dhabi*, above n 79, 144, 149; see also *Ruler of Qatar v International Marine Oil Co*, above n 79.

[82] Crawford, above n 54, 628–9.

[83] See, for example, the views expressed in Philip C Jessup, 'Non-Universal International Law' (1973) 12 *Col JTL* 415; see also the discussion in Matthew Craven, *The Decolonisation of International Law: State Succession and the Law of Treaties* (2007) 84–6.

obligations of the former entity and that included any acquired rights held by foreign investors.[84] This was interpreted to mean that postcolonial states were required to comply with the conditions of contracts entered into whilst under colonial administration, effectively placing the rights of the investor before the sovereign rights of the new state to review those acquired rights.[85] It was an interpretation that validated the assertion of non-retractable concession rights, one described in *Brownlie* as 'unsatisfactory'.[86] Essentially, the approach taken in cases such as *Petroleum Development Ltd v The Sheikh of Abu Dhabi*,[87] *Ruler of Qatar v International Marine Oil Co*,[88] and *Texaco Overseas Petroleum Co & California Asiatic Oil Co v The Government of the Libyan Arab Republic*[89] was a form of 'arbitral-law-making', preferring one set of propositions over another, emphasising the well-established and universal nature of the rules, not to be modified to take account of the new postcolonial setting—but which were, in fact, given a creative interpretation, modifying their meaning and application to support the position asserted by investors and their home states.

Re-emergent challenges to investment rules continued during this period with an increasing number of postcolonial nationalisations and the more general calls for reforms to international economic frameworks that would go on to form the movement embodied in the NIEO.[90] Echoing the nineteenth century attempts to reshape investment rules through the Calvo Doctrine, the NIEO proposed modified rules that better represented the interests of postcolonial and capital-importing states.[91] In particular, the asserted rules included the principle of permanent sovereignty over natural resources, an 'appropriate' compensation standard or, in some instances, compensation assessed under national laws, and

[84] Anghie, above n 8, 213–14.

[85] Ibid, 211–16; see also the discussion in C G Weeramantry, *Nauru: Environmental Damage Under International Trusteeship* (1992) 307–12.

[86] Crawford, above n 54, 628–9.

[87] *Petroleum Development Ltd v The Sheikh of Abu Dhabi*, above n 79.

[88] *Ruler of Qatar v International Marine Oil Co*, above n 79.

[89] *Texaco Overseas Petroleum Co & California Asiatic Oil Co v Government of the Libyan Arab Republic*, above n 79.

[90] Jagdish N Bhagwati, 'Introduction', in Jagdish N Bhagwati (ed), *The New International Economic Order* (1977) 1.

[91] Anghie, above n 8, 235, 312–13; Burns H Weston, 'The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth' (1981) 75 *AJIL* 437, 437–9; James Thuo Gathii, 'Third World Approaches to International Economic Governance', in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (2008) 255.

domestic law as the applicable law determining investment disputes.[92] The response to these challenges was to dismiss them as 'politicising' investment disputes and, again, to reassert the traditional. But in a new shape that sought to develop a more systematic approach to ensuring the universal nature of investor protection – the pursuit of bilateral investment treaties and the creation of the International Centre for the Settlement of Investment Disputes (*ICSID*).[93]

The creation of ICSID within the auspices of the World Bank was set against a particularly charged political backdrop, emerging out of an impasse in attempts to conclude a multilateral treaty on investor protection. Capital-exporting states had seen a multilateral treaty as the answer to the political risk and legal uncertainty following decolonisation, but failed to secure the agreement of host states to the high-level substantive investment protection measures proposed.[94] It is, perhaps, unsurprising that we again see appeals to the universal and the neutral emerging in the face of such strident resistance and challenge to the legitimacy of the system as a whole. Emphasising the need for 'depoliticisation' of investment disputes and pointing to the neutrality of international arbitration, the General Counsel of the World Bank, Aron Broches, proposed the creation of an international dispute settlement forum as distinct from the substantive standards.[95] The assertion that only an international setting could be relied upon to apply universal rules and ensure a neutral, depoliticised, and fair hearing for a foreign investor was quite explicit. In this regard, it is interesting to note the express association between investor-state arbitration and the rule of law right at the development of the mechanism:[96]

> But I have no doubt that [ICSID's] adoption would constitute a significant step forward toward the establishment of the Rule of Law in international investment.

[92] *Declaration on Permanent Sovereignty over Natural Resources*, GA Res 1803 (XVII) (1962) 15; *Declaration on the Establishment of a New International Economic Order*, GA Res 3201(S-VI) (1974), para 4.

[93] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159; Anghie, above n 8, 236–7; see the discussion in Ibironke T Odumosu, 'The Law and Politics of Engaging Resistance in Investment Dispute Settlement' (2007) 26 *Penn State ILR* 251, 255.

[94] Newcombe & Paradell, above n 5, 19–20; Gus van Harten, *Investment Treaty Arbitration and Public Law* (2007) 19–23.

[95] Shihata, above n 5; Aron Broches, 'Settlement of Investment Disputes: 1963 Address to the World Conference on World Peace through Law', in Aron Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (1995) 161.

[96] Ibid, 163.

Indeed, depoliticisation was the rationale for ICSID and held up as a core basis for the legitimacy of the novel system it introduced—investor-state arbitration. In this way, the rhetoric in linking universal rules, international arbitration, 'fairness', and 'the rule of law' was perpetuated, as was the practice of rejecting legal views with which capital-exporting states disagreed as not neutral, universal, objective, or in accordance with the rule of law.

Furthermore, despite decrying the need for neutrality and depoliticisation, the politics were quite clear. Because of ICSID's original purpose and the circumstances out of which it emerged, this international investment legal framework is, in fact, profoundly political, but in a form that benefits foreign investors. In this regard, the comments of Broches following the conclusion of the text for the ICSID Convention are particularly illuminating:[97]

> Quite obviously any agreement dealing with problems of foreign investment is politically sensitive. Attempts in this area made in the United Nations had never reached the take-off point because of political opposition. It was our hope that in the more businesslike atmosphere of the governing bodies of the Bank it would be possible to discuss the problem on the merits and without extremes of ideological debate, especially because, whatever the variety of views among the Bank's membership on social and economic problems, it does not include the Soviet Union and the other countries of the Eastern bloc.

In the discourse surrounding the establishing of ICSID, its legitimacy was presented as self-evident. Framing the position of host states in a derogatory way as 'political' rather than legal and emphasising the 'business-like' objectivity of capital-exporting states and of the World Bank, together with assertions that it would enhance the rule of law, inherently cast ICSID as a legitimate construct. The corresponding inference being that reticence towards international arbitration and the ICSID framework was suspect and illegitimate. It claimed universality and inclusiveness, while, at the same, excluded objecting states and divergent perspectives from the sphere of legitimacy. It was out of this politico-legal process of assertion and response that the modern architecture for international investment dispute settlement was constructed. And at each crucial juncture in which

[97] Aron Broches, 'Development of International Law by the International Bank for Reconstruction and Development' (1965) 59 *ASIL Proc* 33, 35.

space could have been made for a form of international investment law that better accommodated the host state position, it was instead rejected, ironically, amid claims to universality.

2.4 A Concluding Note on the Twenty-First Century

At the close of this paper, I want simply to draw your attention to a trend in recent years to frame investor-state arbitration as a component of 'global administrative law'. With increasing prevalence, twenty-first century advocates of the prevailing system of high-level investment protection and international arbitration have been pointing to its universality and objectivity.[98] There is also currently a tendency to describe investor-state arbitration as the epitome of the rule of law, good governance, and neutrality and to ascribe to this phenomenon the term 'global administrative law'.[99]

Global administrative law is said to comprise the rules, practices, and institutions that operate at an international level and entails the examination of those forms of regulation and governance.[100] It is largely concerned with procedural matters such as transparency, public participation, and review that implicate questions of legitimacy and governance models. Investor-state arbitration is, indeed, part of that web of administrative functions and entities at both domestic and international levels that have been performed for decades.[101] Fundamentally, this is nothing new. The nature of these administrative activities in the twenty-first century does not constitute a radical departure from previous decades. So, to assign a particular label to these series of interactions and institutions as 'global administrative law' has implications that go beyond the fact of these occurrences. Susan Marks has described this as the 'power of naming'.[102] Attaching a label and

[98] Paulsson, above n 5; Yackee, above n 5, 1551–2, 1570; Weiler & Wälde, above n 5; Jan Paulsson, *The Idea of Arbitration* (2013) 189, 259, 291.

[99] See, for example, Schill, above n 6; Weiler & Wälde, above n 5; Kingsbury and Schill, above n 6; Kalderimis, above n 6; Kotuby, above n 6; Postiga, above n 6; Gus Van Harten & Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 *EJIL* 121.

[100] Benedict Kingsbury, Nico Krisch & Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *L & Contemp Probs* 15; Daniel C Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115 *Yale LJ* 1490; Benedict Kingsbury, Nico Krisch, Richard B Stewart & Jonathan B Wiener, 'Global Governance as Administration—National and Transnational Approaches to Global Administrative Law' (2005) 68 *L & Contemp Probs* 1; see also Ming-Sung Kuo, 'Taming Governance with Legality? Critical Reflections upon Global Administrative Law as Small-C Global Constitutionalism' (2011) 44 *NYUJILP* 55.

[101] Van Harten & Loughlin, above n. 99.

[102] Susan Marks, 'Naming Global Administrative Law' (2005) 37 *NYUJILP* 995.

constructing a new conceptual framework through which to view familiar entities changes what is being observed.[103] The global administrative law project, as it is termed, is problematic on this and other levels.[104] As Marks points out:[105]

> In his book *On the Name,* Jacques Derrida asks what happens when one gives a name: does one give then? One does not offer a thing, one delivers nothing, and still something comes to be. Precisely a new noun phrase like global administrative law seems to create a thing. It seems to bring an object into being, with a solidity and even a monumentality that risks putting in the shade disputes over process, agency, and orientation.

There has certainly been an inordinate amount of excitement generated by this 'new thing', yet not 'new thing', embodied in global administrative law. But what precisely is it that we now see? And to what end?

In the context of investor-state arbitration, the issue, as I see it, is whether this new global administrative law label contributes to a legitimising of the system, simply by association with the terminology, just at the time when that system is again facing challenges of legitimacy.[106] In other words, it is very difficult to maintain that there are problems with a system of dispute resolution that is framed as, in itself, being the embodiment of the rule of law, good governance, and

[103] Ibid.

[104] New York University, School of Law, established a Global Administrative Law Research Project, out of which the 'global administrative law' emerged. See the project website at <http://www.iilj.org/gal/> [accessed 25 August 2014]. See also the critique that the conceptualisation of global administrative law as procedural disconnects the rules and activities of international entities from substantive rules and the human rights, environmental, and economic needs of developing states, in B S Chimni, 'Co–Option and Resistance: Two Faces of Global Administrative Law' (2005) 37 *NYUJILP* 799.

[105] Marks, above n 102, 996.

[106] For a discussion on the concern of the legitimacy of investor-state arbitration, see Susan D Franck, 'The Legitimacy Crisis in Investment Law and Arbitration: Privatising Public International Law through Inconsistent Decisions' (2005) 73 *Fordham LR* 1521; see generally, Michael Waibel et al (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (2010); see the critique on the system in, for example, Philippe Sands, 'Searching for Balance: Concluding Remarks; Colloquium on Regulatory Expropriations in International Law' (2002) 11 *NYUELJ* 198; and also in M Sornarajah, 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration', in Karl P Sauvant (ed) *Appeals Mechanism in International Investment Disputes* (2008) 39; and in Kyla Tienhaara, 'What You Don't Know Can Hurt You: Investor-State Disputes and the Protection of the Environment in Developing Countries' (2006) 6 *Global Environmental Politics* 73.

neutrality. The appeals to universality contained within labelling investor-state arbitration as global administrative law are couched within familiar terms—a neutral forum, safely removed from the 'politicised' environment of the host state, in which universal rules can be applied, reviewing the conduct of the state against objective standards.

The framing of investor-state arbitration in this way is rather reminiscent of the rationale for asserting the need for the international minimum standard in the nineteenth century and the creation of ICSID in the twentieth. And so we see once again, where there is a challenge to the traditional mode of investor protection, we find a reassertion of it. This time, in the form of situating investor-state arbitration within a global administrative law framework. Being able to claim 'universal', 'neutral' and 'objective' as traits does enhance the legitimacy of a system and the claims of investor-state arbitration to these attributes are not without a purpose. Indeed, I am very much of the view that it represents yet another manifestation of the patterns that have been around for a long time. Patterns of assertions, challenge, and reassertion of the traditional. Different forms; same dynamic. Again, in the name of upholding a universal system.

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BABY STEPS AWAY FROM THE STATE: REGIONAL JUDICIAL INTERACTION AS A GAUGE OF POSTNATIONAL ORDER IN SOUTH AMERICA AND EUROPE

Tom Gerald Daly[*]

Abstract
This paper explores the difference between 'universality', 'cosmopolitanism' and 'internationalisation' by contrasting judicial dialogue and community in Europe and South America; two regional constellations which include national orders, regional human rights systems and the legal orders of regional integration projects. By focusing on the relatively underdeveloped and fragmented nature of regional integration, judicial dialogue and community in South America, the paper emphasises that the region does not simply replicate the European experience. Law and the courts in South America have not 'stepped away' from the state to the same extent, with the result that the region cannot be characterised as a postnational order in the European mould.

Keywords
Postnational order, judicial dialogue, judicial community, Europe, South America

1 Introduction

In Europe's 'postnational constellation'[1] of interlinked national, supranational and international human rights legal orders a true regional community of courts exists. Apex national courts are not only *required* to regularly apply exogenous norms and to engage in mutual cooperation, but are also increasingly wont to *voluntarily* refer to foreign and European jurisprudence and to engage in transnational networks for exchanging case-law and discussing common issues.

From a distance South America appears similar, with a regional constellation including domestic orders, the Inter-American human rights system and the legal

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[1] Kuhm uses the term to describe the global order, but it is an equally apt description of the European regional order. See: M Kuhm, 'The Best of Times and the Worst of Times: Between Constitutional Triumphalism and Nostalgia' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (2010) 201.

orders of regional integration projects. In the wave of democratisation since the late 1970s, many states have also experienced an 'internationalisation' of constitutional law and 'judicialisation' of politics; with a tendency to accord constitutional status to international human rights law, and with the Inter-American Court of Human Rights in particular providing a lodestar to national courts carving out a new role for themselves at the centre of the constitutional system. Like Europe, there is a familiar sense of law, and courts, stepping away from the State.

However, there are vital differences between South America and Europe which merit analysis; not only to avoid mischaracterising the South American context as merely replicating the European experience, but also to add to our overall understanding of the relationship between 'universality', 'cosmopolitanism' and 'internationalisation'. By exploring the relatively underdeveloped and fragmented nature of regional integration, judicial dialogue and community in South America this paper emphasises that law and courts in the region have not 'stepped away' from the state to the same extent as observed in Europe, with the result that the region cannot be characterised as a postnational order in the European mould.

Finer-grained analysis of the South American context is pursued by briefly contrasting the 'universalist' Argentine Supreme Court with its 'sovereigntist' Brazilian counterpart; the former appearing more open to internationalisation than the latter, which combines a strong tradition of cosmopolitanism with a marked resistance to sharing normative supremacy with any international court—a stance now alien to Europe, but also different to that found in the United States.

2 Setting the Scene

Recent decades have witnessed an ever expanding literature on the shift of law from the nation state, both in the global arena and the regional sphere. At the global level, the tectonic forces of globalisation in the legal, regulatory and economic spheres have led scholars to question whether sovereignty as a principle is dead in international politics,[2] or needs to be re-worked to have any enduring purchase as an organising principle in the pursuit of world order.[3] Law, long

[2] See: K Sietzy, 'Is Sovereignty Dead as a Principle in International Politics?' <http://www.academia.edu/ 3584274/Is_Sovereignty_Dead_as_a_Principle_in_International_Politics> [accessed 20 December 2014].

[3] See: T Jacobsen, CJG Sampford & R Chandra Thakur (eds), *Re-envisioning Sovereignty: The End of Westphalia?* (2008).

bound to the notion of the state, has been loosed from its conceptual moorings, with the language of international law—the 'law of nations'—expanding to accommodate new terminology: a *ius gentium'*,[4] 'humanity's law',[5] *'lex pacificatoria'*[6] and even 'global law';[7] all identifying jurisgenerative processes that transcend the state, or non-state centres of gravity for the elaboration of legal frameworks. In the European context the trend is even more striking: we have become inured to the notion of legal pluralism, with a diminution of the state's status as privileged producer of law.

Courts have played a central part in this phenomenon (or, related phenomena). There now exists a significant body of scholarship on the role of courts in the unfolding reality of regional integration, international regime construction, and the development of international law in the broadest sense, as well as the challenges for courts in addressing horizontal and vertical tensions and threats of international law fragmentation generated by these processes.[8] The proliferation of international courts, judicial machinery of regional integration projects and other adjudicative bodies has required a reconceptualisation of what a court is, and what is expected of judges.[9] Domestic courts, for their part, have become expected to act as partners in a shared endeavour to apply international law and supranational law, whether by voluntarily receiving international human rights norms, directly applying supranational law, or acting as 'international courts' in discrete domains (e.g. universal criminal jurisdiction).

Against the operatic setting of the existing literature this paper has a rather modest objective: to compare the nature of judicial dialogue and community in

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[4] J Waldron, 'Foreign Law and the Modern *Ius Gentium'* (2005) 119 *Harvard LR* 129.

[5] R Teitel, *Humanity's Law* (2011).

[6] C Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (2008).

[7] N Walker, *Intimations of Global Law* (2014).

[8] A-M Slaughter, AS Sweet & JHH Weiler (eds), *The European Court and National Courts: Doctrine and Jurisprudence* (1998); K Nyman-Metcalf and I Papageorgiou, *Regional Integration and Courts of Justice* (2005); M Forowicz, *The Reception of International Law in the European Court of Human Rights* (2010); N Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship* (2011); A Rosas, E Levits & Y Bot (eds) *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (2012); N Boschiero, T Scovazzi, C Pitea & C Ragni (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (2013); A Føllesdal, B Peters & G Ulfstein, *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (2013); K Dzehtsiarou, T Konstadinides, T Lock & N O'Meara (eds), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR* (2014).

[9] See: D Terris, C Romano & L Swigart, *The International Judge: An Introduction to the Men and Women who Decide the World's Cases* (2007).

the regional contexts of South America and Europe in order to draw out the stark differences between the two, and the differing diminution of the state, in each context.

2.1 Universality, Cosmopolitanism and Internationalisation

The concepts of universality, cosmopolitanism and internationalisation interact in the regional context in a different manner than the global context, especially when viewed from the perspective of national courts.

Universality, denoting the equal and indiscriminate application of international law across national legal systems and across discrete international regimes, is both strengthened and challenged in regional contexts containing integration projects and regional human rights regimes. Such regional regimes tend to prise open the 'black box' of the domestic legal order to a much greater extent than traditional international law, with its limited tools of *ius cogens*, treaties and conventions: national courts face not only the binding norms of international law—the impact of which depends both on the status accorded to international law in the domestic order, and the stance of national courts themselves—but also binding norms and judgments of regional courts, which further narrow the parameters of domestic courts in interpretation of the law. Although these regional orders on rare occasions clash with overarching international law norms,[10] the predominant effect is to enhance the penetration of international law in the domestic context by building on existing international agreements, amplifying the binding effect of international norms, and requiring greater interaction with international courts.

Cosmopolitanism, on the other hand, denotes a sense of identification and connection across geographical space through shared norms or aspirations, proceeding from a position of *voluntariness*. Analysis of cosmopolitanism in the courts tends to focus largely on the increasing propensity of domestic courts

[10] Epitomised by the *Kadi* saga that pitted EU law against binding UN Security Council resolutions: Case C–402/05 P and C–415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, Judgment of the Court (Grand Chamber) [2008] ECR I–6351 (*Kadi I*); and Case C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others v Yassin Abdullah Kadi*, Judgment of the Court (2013) (*Kadi II*). In the area of regional human rights the circumscribed right to consent for indigenous communities concerning the exploitation of indigenous lands recognised by the Inter-American Court of Human Rights diverges from the more expansive right enshrined in the 2007 UN Declaration on the Rights of Indigenous Peoples, which has no adjudicative machinery of its own. See: *Saramaka People v Suriname* (2008) IACtHR Ser C No 172.

to voluntarily cite foreign jurisprudence in seeking solutions to domestic legal problems, but also analyses the capacity for voluntary transnational judicial interaction to create and uphold international law.[11]

If universality can be characterised as a principle and cosmopolitanism as primarily a worldview or methodology, internationalisation is best viewed as a *process*, underpinned and sustained by the interactive relationship of both. It is evidently often spurred outwith the courts; clear examples being the strong influence of international law on constitution-making in states of the 'third wave' of democratisation since the 1970s and the longstanding and increasing transplantation of law and legal institutions (e.g. civil codes, juries). However, courts are central actors: although political actors play a core role, the trajectory and success of regional integration projects, the status of international law in the domestic order, states' capacity to engage in transnational and pan-regional cooperation and the friction generated between orders hinges, in large part, on judges, with the lines between universality and cosmopolitanism—what is *required* versus what is *desired*—tending to become blurred at times.

2.2 Judicial Dialogue and Community

With the above as the overall backdrop, the meaning of judicial dialogue and community can be analysed in greater detail. In her seminal 2003 article, Anne-Marie Slaughter described the growing interaction between courts worldwide as a 'global community of courts', with two dominant strands: constitutional cross-fertilisation through increasing citation by constitutional courts of the jurisprudence of courts in other countries, amounting to a form of transnational judicial dialogue; and active cooperation and occasional conflict between national courts addressing transnational litigation in cross border disputes.[12]

Slaughter painted a picture of the 'self-aware' construction of a community based on participation in a 'common judicial enterprise', which tends to cut across state boundaries: international courts becoming less deferential to traditional conceptions of state sovereignty; the notion of 'judicial comity' usurping the 'comity of nations' as the guiding principle of transnational judicial cooperation;

[11] See generally: A-M Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard ILJ* 191; M Kirby, 'Transnational Judicial Dialogue: Internationalisation of Law, and Australian Judges' (2008) 9 *MJIL* 171; M Schor, 'Mapping Comparative Judicial Review' (2008) 7 *Wash U Glob Stud LR* 257; M Waters, 'Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law' (2005) 93 *Geo LJ* 487.

[12] Slaughter, above n 11.

and courts given leeway by national governments to create their own regimes for cooperating in the resolution of transborder disputes.[13]

This view has been subjected to criticism, not least on the basis that 'dialogue' is an inapposite metaphor, both conceptually and empirically, for much of the interaction between judges worldwide; particularly the growing worldwide citation of the case-law of a small cohort of prestigious constitutional courts. Face-to-face meetings and international judicial conferences remain perhaps the only clear examples of true dialogue.[14] The metaphor of 'global community', on the other hand, can also be a little vague; tending to hide the fact that transborder judicial interaction is much more intense in some regions, and between certain courts, than others.[15]

For the purposes of this paper, regional judicial interaction is viewed as a spectrum, from weak interaction ('community') to strong interaction ('dialogue'), incorporating case-law citation, voluntary cooperation in transnational litigation, mandatory cooperation under formal regimes (e.g. preliminary references by national courts to supranational courts and mutual cooperation between national courts), and finally, judicial networking, including face-to-face interaction.

3 Regional Differences; or, Why South America is Not Europe

This section explores the different nature of judicial dialogue and community in South America, compared to Europe, by reference to three central differences: the nature of regional integration projects; the nature of the regional human rights protection system; and the nature of regional judicial networks. It is worth emphasising that no normative argument is being advanced that one region is better than the other; and in particular, no argument that South America should emulate the European experience. First, a brief commentary on the European context.

[13] Ibid, 192–3, 213.

[14] See: DS Law & WC Chang, 'The Limits of Global Judicial Dialogue' (2011) 86 *Wash LR* 523.

[15] This is also, to some extent, true of notions such as a 'global judicial network'. See: MA Jayatilake, 'The Global Judicial Network: Towards New Hope for Development, Democracy and Equality in the Global Era' (2009) 21 *Sri Lanka JIL* 137.

3.1 The European Experience in Brief

The European experience of an evolving postnational order has been well rehearsed elsewhere and need not detain us for very long. At its core are two separate and parallel, but interlinked, projects—the European Convention on Human Rights system and the European Union (*EU*)—which have developed in tandem, whose interaction has become increasingly intense, and which have transformed the nature of judicial dialogue and community in Europe.[16]

The European Convention system began with establishment of the Council of Europe in 1950 by ten states and adoption of the European Convention on Human Rights, ratified in 1953. Established in 1959, the European Court of Human Rights, after a gradual march of progress in its early decades, truly hit its stride in the 1980s, and became the sole adjudicative organ of the Convention system in the reforms of 1998, with jurisdiction over a vastly expanded membership following the accession of post-Communist and post-Soviet states. Today, the Convention exerts a strong influence on national legal orders through the requisite domestic 'incorporation' of the Convention, and use of the European Court's case-law as a legal standard for State activity and judicial interpretation of domestic law.

The EU began with establishment of the European communities in 1958 by six member states, with a permanent Court of Justice from the outset, which has been a central actor in the construction of the bloc's legal order. In a succession of landmark decisions, the Court characterised the community as an autonomous legal order transcending public international law, asserted the doctrines of the primacy and direct application of community law, and pre-emption, and calibrated the balance of powers between community organs.[17] The Court thereby 'constitutionalised' the community's founding treaties and transformed national courts, private sub-state actors and citizens into agents of integration in a constructive enterprise that was not within the full control of the member state governments. The Court's case-law has underpinned, and been formally approved by, a series of treaties; culminating in the present Union, which, under the Treaty of Lisbon[18] lays claim to a vast range of competences.

With the rise of these regimes national courts have become 'European' courts, in the sense that they apply EU law and request definitive interpretations of

[16] This paper does not consider other post-war European organisations without judicial architecture such as the Organisation for Economic Co-operation and Development (*OECD*).

[17] See: D Tamm, 'The History of the Court of Justice of the European Union Since its Origin' in A Rosas, E Levits & Y Bot (eds) *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (2012) 9.

[18] Treaty on the Functioning of the European Union, 26 October 2012, OJ C 326 (*TFEU*).

EU law from the Court of Justice under the preliminary reference procedure[19]; and when they apply norms of the European Convention on Human Rights. The Court of Justice and the European Court of Human Rights, in turn, are now often viewed as 'constitutional' courts, as the judicial arms of the 'constitutionalised' order of the EU and the European Convention system, which has been characterised as 'a constitutional instrument of European public order (*ordre public*)'.[20] The two separate regional orders have engaged in extensive cooperation to minimise divergences in their separate bodies of law. The ultimate step—accession of the EU itself to the European Convention system—is currently being worked out,[21] although the Court of Justice's judgment of 18 December 2014 has been described as a 'bombshell' rendering accession 'very difficult, if not impossible'.[22]

These developments in the post-war decades have gradually acclimatised domestic apex courts to the sharing of judicial supremacy. In the EU they are required to operate in a pluralist context where neither they nor the Court of Justice can control the overall legal space.[23] Threats arising from profound normative conflict, epitomised in the German Federal Constitutional Court's line of *Solange* case-law[24] which asserted the Court's role as ultimate guardian of fundamental rights as against the Court of Justice, have not derailed the supranational train and courts in newer member states, strongly influenced by German law,[25] have adopted a 'relatively balanced attitude' toward European integration and the principle of supremacy of EU law.[26] At the same time, a progressive expansion of EU competences, particularly the aim of creating an Area of freedom, security and justice, has required increasingly intense engagement between national courts across the bloc, through mutual cooperation

[19] TFEU Art 267.

[20] *Loizidou v Turkey* [1995] ECtHR App No 15318/89 (GC), para 75.

[21] A helpful overview is offered in K Dzehtsiarou, T Konstadinides, T Lock & N O'Meara (eds), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR* (2014).

[22] See: S Douglas-Scott, 'Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice' (*UK Const L Blog*, 24 December 2014) <http://ukconstitutionallaw.org> [accessed 24 December 2014].

[23] See: S Douglas-Scott, 'Justice and Pluralism in the EU' (2012) 65 *CLP* 83.

[24] Judgment of 29 May 1974, 37 BVerfGE 271, 14 *CMLR* 540 (*Solange I*); and Judgment of 22 October 1986, 73 BVerfGE 339 (*Solange II*).

[25] See: AF Tatham, *Central European Constitutional Courts in the Face of EU Membership: The Influence of the German Model in Hungary and Poland* (2013).

[26] D Piqani, 'Constitutional Courts in Central and Eastern Europe and their Attitude towards European Integration' (2007) 1 *EJLS* 1, 20.

and mutual assistance in transnational cases, concerning criminal matters (e.g. extradition) and civil matters (e.g. child protection). In the European Convention context it has been suggested that a 'fruitful dialogue has developed between the Strasbourg institutions and domestic courts whose respective case law mutually support and enrich each other'[27] and the Strasbourg Court has shown itself willing to accommodate and respond to occasional challenges to its jurisprudence by domestic courts.[28]

These regional developments have been accompanied by a dramatic proliferation of judicial networks, particularly since 2000. In the EU a number of formal networks have been established to pursue EU justice goals, such as the European Judicial Network (*EJN*),[29] as well as other organisations aimed at fostering a greater sense of judicial community, such as the Network of Presidents of Supreme Judicial Courts of the EU and the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU (*ACA-Europe*).[30] A host of other organisations aiming to connect judges across the EU and the European Economic Area (*EEA*) operate outside the formal aegis of the EU.[31]

Within the Council of Europe there are three key networks, with a strong focus on constitutional courts: the Conference of European Constitutional Courts (*CECC*); the Consultative Council of European Judges (*CCJE*); and the Venice Commission's Joint Council on Constitutional Justice, which gathers together representatives of each constitutional court across the 47 member states. Beyond this, European courts participate in global networks based on a shared language,[32] networks that are looser in nature[33] and ad hoc groupings that link

[27] D Shelton, *The Regional Protection of Human Rights* (2010) 20.

[28] See: W Thomassen, 'The vital relationship between the European Court of Human Rights and national courts' in SI Phlogaitēs, T Zwart & J Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism Into Strength* (2013) 96.

[29] The EJN was created by the Joint Action 98/428 JHA of 29 June 1998 to fulfill recommendation 21 of the Action Plan to Combat Organised Crime.

[30] See: <http://www.network-presidents.eu> [accessed 1 January 2015] <http://www.aca-europe.eu/index.php/en> [accessed 1 January 2015].

[31] These include the Association of European Competition Law Judges (*AECLJ*), the Association of European Administrative Judges (*AEAJ*), the European Association of Labour Court Judges, the EU Forum of Judges for the Environment, and the European Judges and Prosecutors Association.

[32] The principal organisations are the hispanophone Ibero-American Conference of Constitutional Justice, the lusophone Conference of Constitutional Jurisdictions of the Portuguese-Speaking Countries (*CJCPLP*) and the francophone *Association des Cours Constitutionnelles ayant en Partage l'Usage du Français* (*ACCPUF*).

[33] These would include the European Association of Judges (*EAJ*) and its parent organisation, the International Association of Judges (*IAJ*), and other bodies such as the International Association

smaller groups of states.[34]

Contrary to the suspicions of some scholars[35] the present author, from personal experience working at the Supreme Court of Ireland,[36] can attest that these are neither collusive networks, like some sort of judicial *illuminati*, nor confined to mere small talk. Rather, they are open about their integrative agendas and do foster dialogue on substantive issues, and a pan-regional sense of community, by facilitating regular meetings of judges; conferences on selected themes; databases which collect national case-law under one roof and make foreign case-law more accessible; ongoing information exchange; thematic questionnaires; and even an EU-wide judicial exchange programme. The formal EU bodies and the Venice Commission lead the pack, being the best-resourced and with the most extensive networks and activities. Indeed, in the EU context, 'judicial integration' can run ahead of state-driven integration: it has been observed, for instance, that member state disagreement on the harmonisation of national law in order to create a regional area of security, freedom and justice has been partly 'balanced' by the activity of judicial networks.[37]

What exists, then, is a prismatic epistemic community of national and regional courts, involved in overlapping enterprises which, despite occasional friction, can be said to constitute a common endeavour. This is true, at least, of EU member states—Council of Europe member states outside the EU occupy a different position. The next three sections explore the South American context, which differs in many respects.

3.2 Regional integration in South America

A core difference between Europe and South America is the lack of any true equivalent of the European Union in the latter region. Although regional political integration projects date to the post-independence climate of the

of Supreme Administrative Jurisdictions (*IASAJ*).

[34] For example, the Franco-British-Irish Judicial Committee, which links judges from the three states.

[35] Law & Chang, above n 14, 535–6.

[36] The author was Executive Legal Officer to the Chief Justice from 2006 to 2011, a role with a significant international relations focus, including attending international judicial conferences, acting as liaison officer to various bodies, such as the Venice Commission's Joint Council on Constitutional Justice, and designing study programmes for visiting judges.

[37] M Magrassi, 'Reconsidering the Principle of Separation of Powers: Judicial Networking and Institutional Balance in the Process of European Integration' (2011) 3 *Contemp Read L & Soc Just* 159.

nineteenth century,[38] economic integration bodies only appeared in the 1960s. The first project, the pan-regional Latin American Free Trade Association (*LAFTA39*) established in 1960, was a failure, dominated by the larger economies and producing few benefits for smaller economies.[39] Abandoned by four northwestern states in 1966 (Bolivia, Colombia, Ecuador and Peru) to form the Andean Pact in 1969 (becoming the Andean Community (*CAN*) in 1996[40]), it was finally replaced by the Latin American Integration Association (*ALADI*)[41] in 1980, a more enduring organisation which focuses on assistance for less developed economies as well as free trade.[42] In the Southern Cone MERCOSUR (the Common Market of the South[43]) was established in 1991 to foster a free trade area between Brazil, Argentina, Paraguay and Uruguay, with Venezuela joining in 2012 and Bolivia currently in the accession process.

Although a number of other integration projects have emerged with differing memberships, purposes, and political leanings (e.g. the Pacific Alliance[44]), the Andean Community and MERCOSUR remain the key bodies given that they are the longer-established organisations and are the key components of the new region-wide integration project, the Union of South American States (*UNASUR*). Effectively an integration agreement between the two blocs enshrined in a Constitutive Treaty of 2008,[45] if successful UNASUR would integrate all hispanophone states and Brazil in South America. As such, it marks the first fully-fledged attempt at pan-regional integration, though still operating within the looser, overarching framework of ALADI.[46]At present, UNASUR's

[38] See: J Bennett, 'The Union of South American Nations: The New(est) Regionalism in Latin America' (2008-2009) 32 *Suff Transn'l LR* 103, 104.

[39] Ibid, 108–9.

[40] See: <http://www.comunidadandina.org> [accessed 1 January 2015].

[41] See: <http://www.aladi.org/> [accessed 1 January 2015] The current members are Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela.

[42] Bennett, above n 38, 110–1.

[43] Mercado Común del Sur, or in Portuguse, Mercado Comum do Sul. See: <http://www.mercosur.int/msweb/portal%20intermediario> [accessed 1 January 2015].

[44] Alianza del Pacífico, <http://alianzapacifico.net/en> [accessed 1 January 2015]. Members: Chile, Colombia, Mexico and Peru. The Bolivarian Alliance for the Peoples of Our Americas (*Alianza Bolivariana para los Pueblos de Nuestra América, ALBA*) only includes two South American states: Bolivia and Venezuela. All other member states are Central American and Caribbean states.

[45] Adoption of the Constitutive Treaty was preceded by two key measures: reciprocal acceptance by each bloc of the other's members as associate members in the early to mid 2000s, and establishment of the South American Community of Nations (*SACN*) by the Cusco Declaration in 2004, which was superseded by UNASUR.

[46] Bennett, above n 38, 123ff. The text of the Constitutive Treaty is accessible at: <http://www.una-

institutional development is in its infancy, and its aims are pursued largely through the two constituent blocs which remain the only regional projects with judicial architecture in place.[47]

MERCOSUR's judicial machinery languishes at a low level of institutional development, reflecting the development of MERCOSUR as a whole, which remains wedded to intergovernmentalism—or even more narrowly, 'interpresidentialism'.[48] The Argentine and Brazilian presidents act as the 'natural hegemons', with Uruguay and Paraguay overshadowed and Venezuela a wild card thrown into the mix; all harbouring different visions for the integration project.[49] This has stifled the development of MERCOSUR institutions. A quasi-executive body[50] established in 2003 and a parliament with 'quasi-legislative powers' established in 2005[51] have been largely inactive. Adjudicative organs established in 2002 consist of ad hoc arbitration tribunals and an appellate arbitral body, the Permanent Review Court (*Tribunal Permanente de Revisión*), with the power to issue decisions in disputes as well as advisory opinions on MERCOSUR norms when requested by member states, MERCOSUR organs or member state supreme courts. However, these have been similarly inert.

MERCOSUR member states have been slow to accept the Permanent Review Court's jurisdiction[52] and, to date, recourse to these bodies has been rare. The Court has been reluctant to impose sanctions where violations of community law are found, and even where sanctions are imposed, they are ignored due to the absence of any meaningful enforcement mechanisms.[53] Even if the situation

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sursg.org/uploads/0c/c7/0cc721468628d65c3c510a577e54519d/Tratado-constitutivo-english-version.pdf> [accessed 1 January 2015].

[47] That said, the possibility of a pan-regional UNASUR court has been debated since 2008 and the new Secretary-General of UNASUR, Ernesto Samper, has indicated a desire to create a Regional Criminal Court to try transnational crimes, which may prove to be the first step in a UNASUR court system. See 'New Unasur Secretary-General Ernesto Samper to Fight Inequality and Insecurity', Telesur, available at: <http://www.telesurtv.net/english/news/Unasur-Head-Ernesto-Samper-Pledges-to-Empower-the-Region-20140904-0078.html> [accessed 1 January 2015].

[48] RA Porrata-Doria Jr, 'MERCOSUR at Twenty: From Adolescence to Adulthood' (2013) 27 *Temple ICLJ* 1, 16.

[49] Ibid, 16ff.

[50] The Committee of Permanent Representatives (*COREPER*) is composed of the president and one additional representative from each member state.

[51] The MERCOSUR parliament (*PARLASUR*) replaced the Joint Parliamentary Commission; Porrata-Doria Jr, above n 48, 26–8.

[52] Uruguay was the first full state party to accept the Court's jurisdiction in 2007, followed by Argentina and Paraguay in 2008, and Brazil in 2012.

[53] Porrata-Doria Jr, above n 48, 33.

was more positive, the Permanent Review Court is a judicial institution in the loosest sense and is a rather amorphous entity, with membership changing from case to case, and members enjoying mandates of no more than two years, leaving little chance to construct a supranational legal order through a consistent body of jurisprudence. Interpretation of MERCOSUR rules and their relation to national law remains the province of national courts, with no uniform approach to the task.[54] As a result, MERCOSUR cannot be considered a supranational legal order in any meaningful sense.

The Court of Justice of the Andean Community is somewhat different. The Andean Community modeled its institutional structure much more closely on the European Community (now Union), creating the Court in 1984 to adjudicate suits concerning the direct application of community law, state noncompliance with community law, preliminary references by national courts seeking interpretation of community law and challenges to the validity of decisions or actions of community institutions; the founding treaty referring expressly to the doctrine of direct effect, and implicitly, its corollary—the supremacy of community law.[55]

However, various tweaks afforded greater protection to national sovereignty: in particular, the Court's jurisdiction was limited to consideration of the meaning of community law and it was prohibited from considering the facts of the cases before it, leaving less scope for the expansive rulings that had become a hallmark of the European Court of Justice. Although the Andean Court in its jurisprudence expressly asserted the foundational doctrines of direct effect and supremacy, and the nature of the community as an autonomous legal order, it never took the additional step of 'constitutionalising' the founding treaties, has been much more tolerant of state deviations from community law, and did not follow the European Court's expansion of the pre-emptive force of community law. This has left states considerably more freedom to legislate in areas within the Community's competence, in comparison to EU member states.[56]

As regards the Court of Justice's relationship with national courts, it has placed weaker constraints on national judges in interpreting community law, adopting a more deferential posture than the European Court of Justice.[57] Perhaps most importantly, whereas community law in Europe was constructed on the basis of national courts' willingness to refer provocative and fundamental

[54] See S Fazio, *The Harmonization of International Commercial Law* (2007), 106.

[55] KJ Alter, L Helfer and O Saldías, 'Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice' (2012) 60 *AJCL* 629, 631–8.

[56] Ibid, 650ff.

[57] Ibid, 658–9.

questions of law to the European Court of Justice, leading to an unprecedented partnership of national and international judiciaries, this is not the case in the Andean context: some 90% of the references to the Court of Justice concern technical questions regarding the Andean Community's intellectual property law, and national judges appear reluctant to refer questions outside this narrow sphere.[58]

Thus, although the Andean Court is billed as the 'third most active international court'[59] in terms of its docket size (after the European Court of Justice and the European Court of Human Rights), its operation has not led to an expansive body of supranational law and the relationship between national courts and the Court of Justice is very limited, with national courts ceding little supremacy to their Andean cousin.

For all the similarities, then, and the presence of various features reminiscent of the European context, domestic courts in South America continue to burn much more brightly in the regional constellation than the adjudicative bodies of the regional integration projects.

3.3 The Inter-American Human Rights System

Compared to the regional integration courts discussed above, the Inter-American system for the protection of human rights has been significantly more successful.

The Inter-American system, like the European Convention system, is a post-war creation. Beginning with the creation of the Organization of American States (*OAS*) and proclamation of the American Declaration of Human Rights (*ADHR*) in 1948, the system owes its development in large part to a process of legal and institutional mimesis, looking to the European experience for inspiration. While its institutional development has lagged somewhat behind that of the European system, with the Inter-American Commission on Human Rights established in 1959, followed by the Court in 1978, the system is now at a level of significant maturity. The Inter-American Court of Human Rights, like the European court, represents the apogee of an incremental process of institutional development and is tasked with the interpretation of a lynchpin regional normative instrument for the protection of human rights—the American Convention on Human Rights (*ACHR*) adopted in 1969.

[58] LR Helfer & KJ Alter, 'The Andean Tribunal of Justice and its Interlocutors: Understanding Preliminary Reference Patterns in the Andean Community' (2009) 41 *NYUJILP* 871.

[59] Alter, Helfer & Saldía, above n 56, 629.

However, the Inter-American system is far from a mere facsimile of the European system. Of particular relevance for present purposes, unlike the European system, the Inter-American system continues to operate with a non-judicial Commission and a judicial Court. In addition, acceptance of its jurisdiction was a relatively slow process, with only eight states accepting its jurisdiction by 1985, 12 by 1990, and 20 of the current 23 member states by 2000. With the US and Canada declining to accept its jurisdiction it remains essentially a court for Latin America. Also, unlike the European system, individuals may not petition the Court directly; cases may be referred by the Commission, or by the State where it disputes a Commission decision against it.

As a result, the Court's jurisprudential output, though significant, is much more modest than that of the European Court: it did not issue its first decision in a contentious case, *Velásquez Rodriguez v Honduras*,[60] until 1987, and the number of merits decisions per year issued by the Court was low until the turn of the century, hitting double digits as recently as 2004 and since then tending to vary between approximately 10 and 20 decisions annually. However, to date the Court has issued almost 200 decisions in contentious cases, as well as 20 advisory decisions, and various observers point to a rapid growth in the Court's case-load as a sign of the success and maturation of the Court and the Inter-American human rights system as a whole, with the number of cases on the Court's docket almost doubling in the past decade.[61]

Moreover, though modest in size, the Court's jurisprudence has had a significant impact across the region from the outset. In particular, faced from its early years with cases involving severe and widespread human rights violations—often the legacy of the authoritarian regimes across the region until the 1980s—it has no margin of appreciation doctrine like that of the European Court, which permits the latter to adopt a deferential posture towards national governments in certain cases. It has also evinced a tendency towards a 'monist' approach in some decisions, collapsing the boundary between international and domestic law. The most notable example is its landmark decision of 2001 in *Barrio Altos v Peru*[62] concerning the application of amnesty laws to the killing of civilians by a State-controlled death squad, in which the Court held the domestic amnesty law to be incompatible with the American Convention and to be devoid of legal

[60] *Velásquez Rodríguez v Honduras* (1988) IACtHR Ser C No 4.

[61] See: D García-Sayan, 'The Inter-American Court and Constitutionalism in Latin America' (2010) 89 *Tx LR* 1835; AA Cançado Trindade, 'The Developing Case Law of the Inter-American Court of Human Rights' (2003) 3 *HRLR* 1, 1.

[62] *Barrio Altos v Peru* (2001) IACtHR Ser C No 87.

effect.[63]

Notwithstanding the Inter-American Court's more assertive posture toward domestic courts, the literature suggests a 'harmonic resonance' [64] between the two, with a widespread willingness on the part of constitutional courts in states such as Argentina, Colombia, Peru and Uruguay to give effect to the decisions of the Inter-American Court,[65] not only concerning amnesty laws, but issues as diverse as free speech, workers' rights, the rights of indigenous peoples and the right to due process.[66] A number of scholars suggest that the Inter-American Court's jurisprudence has revitalised national judiciaries. García-Sayan, for instance, asserts:

> Increasingly, the highest courts of several countries of the region are taking inspiration from the Inter-American Court's jurisprudence and supplementing, in a conceptual manner, their national circumstances with certain developments of the Inter-American Court. [67]

Indeed, various constitutional courts (e.g. Colombia and Peru), inspired by the French doctrine of *'bloc de constitutionnalité'*,[68] have through their case-law elevated international human rights norms to constitutional status; conceiving constitutional law and certain international human rights norms—particularly Inter-American norms—as forming a coherent and combined set of standards for judicial review.[69] Even the Chilean Constitutional Court, which eschews the formal doctrine of a 'block of constitutionality', 'reflexively' uses Inter-American jurisprudence to reinterpret domestic law.[70]

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[63] D Rodríguez-Pinzón, 'The Inter-American human rights system and transitional processes' in A Buyse & M Hamilton (eds), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (2011) 244.

[64] Ibid, 257.

[65] See: García-Sayan, above n 62; B Tittemore, 'Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes Under International Law' (2006) 12 *Sw J L & Trade Am* 429, 449ff.

[66] See: L Bugorgue-Larsen & A Úbeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (R Greenstein, tr; 2011).

[67] García-Sayan, above n 62, 1836–7.

[68] The doctrine derives from a 1971 decision of the Constitutional Council (*Conseil Constitutionnel*) that held the Declarations of Rights of 1789 and 1946 may be used as standards for constitutional interpretation, alongside the Constitution of 1958.

[69] See: ME Góngora Mera, *Inter-American Judicial Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America Through National and Inter-American Adjudication* (2011).

[70] See: ibid, 139; M Torelly, 'Transnational Legal Process and Constitutional Engagement in Latin

Yet, state compliance with the Court's decisions is considerably lower than European compliance patterns[71] and only gradually improving.[72] The support of key OAS member states is also often lacking: the regional hegemon, Brazil, was among the last to submit to its supervision[73] and a lack of financial support has tended to adversely affect the system's effectiveness, requiring the EU on occasion to step into the budgetary breach.[74] The Court was dealt a significant blow in 2012 with Venezuela's denunciation of the American Convention on Human Rights, which freed it from the Court's jurisdiction; a move which had been actively urged by the Venezuelan Supreme Court.[75] In addition, as discussed below, the Supreme Federal Court of Brazil appears to hold a decidedly frosty stance toward the Inter-American Court which has dulled the impact of Inter-American jurisprudence in South America's most populous state.

The Inter-American human rights system, as a result, is a success story, but a qualified one. Although it has enhanced judicial dialogue and a sense of a common enterprise across the region concerning judicial protection of human rights it has been fully operational for a much shorter period than the European Court, and operates in a less stable setting than the European Court which, despite threats from Westminster and an overwhelming docket, enjoys higher compliance levels and institutional security.

America: How do Domestic Constitutional Regimes deal with International Human Rights Law?' (Society of Legal Scholars Graduate Conference on Latin American Law and Policy, Oxford, 7 March 2014) 31.

[71] See: M Tan, 'Member State Compliance with Judgments of the Inter-American Court of Human Rights' (2005) 33 *Int'l J Leg Info* 319.

[72] See: DA González-Salzburg, 'Complying Partially with the Judgments of the Inter-American Court of Human Rights' (Society of Legal Scholars Graduate Conference on Latin American Law and Policy, Oxford, 7 March 2014).

[73] Brazil was one of the last members of the Organisation of American States (*OAS*) to ratify the Inter-American Convention on Human Rights (in 1992) and to accept the jurisdiction of the Inter-American Court of Human Rights (in 1998). See: C MacDowell Santos, 'Transnational Legal Activism and the State: Reflections on Cases Against Brazil in the Inter-American Commission on Human Rights' (2007) 7 *IACmHR Ann Rep* 29, 36.

[74] See: V Rodriguez Rescia and MD Seitles, 'The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique' (2000) 16 *NYLSJHR* 593; JL Cavallaro & SE Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102 *AJIL* 768, 782–3.

[75] See: A Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornell ILJ* 493, 500.

3.4 Judicial Networks

In line with the above, formal judicial networks in South America are less developed than those in Europe.

Reflecting the lack of any judicial architecture in the embryonic infrastructure of UNASUR, there does not appear to be any judicial network operating under its aegis. More surprising is the apparent absence of any such network for the Andean Community. In the MERCOSUR context there is a Permanent Forum of the Supreme Courts of the trading bloc,[76] established in 2004 and with headquarters in Brasília, which facilitates yearly and ad hoc meetings of judges as well as a judicial exchange programme for member states of MERCOSUR and associated states.[77] Maria Ângela Jardim de Santa Cruz Oliveira, an official at the Brazilian Supreme Court, paints a positive picture of the permanent forum as linking courts and fostering development of procedure at the Permanent Review Court.[78] However, its activity appears to be quite limited given the inertia of the MERCOSUR organs themselves and there is, at best, a faint echo of the use of judicial networks in Europe to balance member state disagreement on harmonising national laws. In addition, it appears aimed at linking the national courts, with little focus on fostering links with the Permanent Review Court itself, and is organised by the Brazilian Supreme Court rather than MERCOSUR itself.[79]

There do not appear to be any judicial networks in the OAS targeted at judges, with the most important OAS network for legal cooperation focused on ministers of justice and attorneys general.[80] In addition, the membership of the Inter-American Court, unlike that of the European Court of Human Rights (for good or ill), does not include a judge for each member state but a fixed number of seven judges, which leaves fewer national 'judicial ambassadors' for the Court

[76] The body is formally known as the 'Permanent Forum of Supreme Courts of Mercosur countries for judicial matters relevant to Latin-American integration, with a specific emphasis on Mercosur'. See: MA Jardim de Santa Cruz Oliveira, 'Judicial Diplomacy: The Role of the Supreme Courts in Mercosur Legal Integration' (2007) 48 *Harvard ILJ Online* 93, 95 <http://www.harvardilj.org/wp-content/uploads/2011/05/HILJ-Online_48_Oliveira.pdf> [accessed 1 January 2015].

[77] See: <http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfCooperacao_en_ us&idConteudo=188385> [accessed 1 January 2015].

[78] Jardim de Santa Cruz Oliveira, above n 76.

[79] The judicial exchange programme is named after a Brazilian supporter of Pan-Americanism: 'the Joaquim Nabuco exchange program for judges and judicial servants within Mercosur and Associate States'.

[80] The Hemispheric Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition. See: <http://www.oas.org/Juridico/mla/en/> [accessed 1 January 2015].

across the region. There is, for instance, no judge from Argentina, Paraguay, Ecuador or Bolivia on the current Court, although the use of ad hoc judges may offset this somewhat.[81] Further, unlike the European Convention system, which has enjoyed the normative ballast provided by the European Union (and its previous iterations), the Inter-American system has not evolved in partnership with a sister regional integration project, and unlike the intense engagement between the Luxembourg and Strasbourg courts, the Inter-American Court in San José appears to have few meaningful links with the courts of the regional integration bodies.

The main regional network for the region under the 'Venice Commission' system[82] is the Ibero-American Conference of Constitutional Justice, which includes most hispanophone states in Latin America, along with Andorra, Portugal and Spain. However, its activity appears to consist mainly of an annual conference.[83]

Besides these bodies, courts in South America tend to be members of bodies that transcend the region: Brazil, for example, is the only South American member of the Conference of Constitutional Jurisdictions of the Portuguese-Speaking Countries (*CJCPLP*); and Brazil and Chile are the only South American members of the Venice Commission and its Joint Council on Constitutional Justice. Brazil has also fostered a Forum of Supreme Courts of BRIC states (Brazil, Russia, India, China), which is at least as developed as the MERCOSUR forum,[84] and also hosted the second congress of the Venice Commission-backed World Conference of Constitutional Justice in 2011.[85] Indeed, Brazil appears to be the regional leader in the field of 'judicial diplomacy'; as a complement to its vigorous international diplomacy aimed at enhancing the state's stature and power at both the regional

[81] The current justices are from Brazil, Colombia, Costa Rica, Chile, Peru, Uruguay and Mexico. The Court's rules of procedure since 2001 have allowed respondent states to appoint ad hoc judges for cases in which there is no judge of the respondent State's nationality. See M Feria Tinta, '"Dinosaurs" in Human Rights Litigation: The Use of *Ad Hoc* Judges in Individual Complaints before the Inter-American Court of Human Rights' (2004) 3 *LPICT* 79, 79.

[82] The Venice Commission has been a key driver in the establishment and linking of regional judicial networks worldwide, such as the Conference of Constitutional Control Organs of the Countries of New Democracy (*CCCOCND*) and the Union of the Arab Constitutional Councils and Courts (*UACCC*), as well as the global constitutional court network, the World Conference on Constitutional Justice (*WCCJ*).

[83] See: <http://www.cijc.org/Paginas/Default.aspx> [accessed 1 January 2015].

[84] See: <http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfCooperacao_en_us&id Conteudo=160010> [accessed 1 January 2015].

[85] See: <http://www.venice.coe.int/wccj/wccj_e.asp> [accessed 1 January 2015].

and global levels.[86]

In comparison to the European context, then, there appear to be significantly fewer judicial networks in South America; and, in particular, little formal networking between national courts and regional international courts. This is not to say that there is *no* regional judicial community in South America but simply, that it is of a different order to the intense and overlapping community found in the EU.

4 Taking a Closer Look: The Supreme Courts of Argentina and Brazil Compared

Thus far, it appears that judicial interaction within the Inter-American human rights system is the most marked example in South America of law and courts transcending state boundaries, and the evolution of a true epistemic community. A quick comparison of two South American supreme courts allows a deeper exploration of this regime, to achieve a more fine-grained understanding of universality, cosmopolitanism and internationalisation in the region.

4.1 The Supreme Court of Argentina: Swinging between Universalism and Cosmopolitanism

In a region where constitutions commonly accord constitutional rank to international human rights law the Constitution of Argentina has taken an unusual route. Constitutional reforms in 1994, little over a decade after the collapse of military rule, left the nineteenth-century constitutional provisions on fundamental rights *in situ* but amended Article 75(22) to accord express constitutional status to nine international and regional human rights treaties, without incorporating them textually.[87] The doors of the constitutional order, it seemed, had been thrown open to universal norms.

[86] See: M Herz, 'Brazil: Major Power in the Making?' in TJ Volgy, R Corbetta, KA Grant & RG Baird (eds), *Major Powers and the Quest for Status in International Politics: Global and Regional Perspectives* (2011) 160ff.

[87] The nine treaties are: (i) The American Declaration of the Rights and Duties of Man (*ADHR*); (ii) the Universal Declaration of Human Rights (*UDHR*); (iii) the American Convention on Human Rights (*ACHR*); (iv) the International Covenant on Economic, Social and Cultural Rights (*ICESCR*); (v) the International Covenant on Civil and Political Rights (*ICCPR*); (vi) the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of All Forms of Racial Discrimination (*ICERD*); (vii) the Convention on the Elimination of All Forms of Discrimination Against Women (*CEDAW*); (viii) the Convention

Scholars have noted the potential of the reforms to effect a dramatic transformation of the constitutional order: national courts would become 'the domestic transmission belt',[88] transporting international human rights norms to individual cases in a context where, not only the American rights instruments, but the entire normative framework of the Inter-American human rights system had been 'internalised'; introducing a 'paradigmatic shift'[89] concerning the domestic courts' stance towards the decisions of the Inter-American Commission and Court by according constitutional recognition to the binding nature of the Court's judgments;[90] and possibly transforming the Inter-American organs into 'appellate-like tribunals'.[91]

Certainly, from 1995 the Supreme Court, having equivocated in its previous jurisprudence concerning the precise status of international human rights law,[92] appeared to move toward greater recognition of the Inter-American Court's jurisprudence. The Supreme Court not only recognised that the jurisprudence of the Inter-American Court should guide it in interpreting the ACHR, but further, that even case-law concerning other States might be seen as binding. This is seen to full effect in the Court's *Simon*[93] decision of 2005, in which the Court invalidated Argentina's amnesty laws in compliance with long-standing Inter-American jurisprudence in the area.[94]

However, the *Simon* decision also laid bare enduring uncertainty concerning the precise nature of the change effected by the 1994 reforms to the status of international human rights law.[95] A majority of the judges hitched their wagon to international norms, including *ius cogens* and human rights treaties, arguing that the 1994 reforms would require, at times, exceptions to the Constitution

Against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments (*CAT*); and (ix) the Convention on the Rights of the Child (*CRC*).

[88] JK Levit, 'The Constitutionalization of Human Rights in Argentina: Problem or Promise?' (1999) 37 *Cornell JIL* 281, 329.

[89] DA Gonzalez-Salzburg, 'The Implementation of Decisions from the Inter-American Court of Human Rights in Argentina: An Analysis of the Jurisprudential Swings of the Supreme Court' (2011) 15 *SUR-IJHR* 113, 114.

[90] Ibid, 121.

[91] Levit, above n 88, 329–30.

[92] The Supreme Court's jurisprudence suggested until 1992 a general rule that later norms (whether national or international) supersede earlier ones, and, from 1992, that such treaties lay somewhere between statute law and the constitution.

[93] Simon, Julio Hector y otros, 328 Fallos 2056 (2005).

[94] Gonzalez-Salzburg, above n 89, 121.

[95] See: NP Sagüés (tr K Rosenn), 'An Introduction and Commentary to the Reform of the Argentine National Constitution' (1996) 28 *U Miami Inter-Am LR* 41.

to be recognised or 'bubbles' in the constitution into which the Court would insert external norms—in the instant case, invalidation of the amnesty law to facilitate prosecution of former military actors necessitated contravention of the constitutional principle against retroactivity in criminal law. However, as José Elias has noted, the justices failed to elaborate any firm criteria for doing so.[96] The precise status of international human rights law in Argentina's constitutional order—and by extension, the case-law of the Inter-American Court—was thus left rather opaque.

Indeed, as Damián González-Salzburg has observed, the Court's case-law on the binding nature of Inter-American Court decisions against Argentina has been quite inconsistent, with the Supreme Court emphasising in 2004 the need to subordinate itself to decisions of the Inter-American Court due to the binding nature of the latter's judgments, but handing down decisions since then that directly contravene those of the Inter-American Court, and, at times, even ignoring the Court's case-law in its reasoning. Although it appears to be slowly returning to its 2004 stance in its more recent decisions it is unclear whether it will succumb to yet another 'jurisprudential swing'.[97]

The Argentine context, then, may look at first glance like an extreme example of internationalisation, with the full reception of universal international norms and regional norms into the domestic order, and the voluntary recognition of Inter-American case-law as binding. However, it is best described as a sort of cosmopolitanism, with the Supreme drawing on Inter-American norms only when this suits its purposes and declining to do so when this tends to frustrate its desired outcome.

4.2 The Supreme Federal Court of Brazil: A Sovereigntist Cosmopolitanism

The 1988 Constitution of Brazil, adopted to replace the authoritarian text of 1969, is 'the most stunning'[98] example of the tendency of some South American states to incorporate both the spirit and text of international human rights treaties. Article 5 of the Constitution enshrines a vast range of justiciable civil and political rights, and social and economic rights; textually incorporating all but one of the rights

[96] See: JS Elias, 'Constitutional Changes, Transitional Justice, and Legitimacy: The Life and Death of Argentina's "Amnesty" Laws' (2008) 31 *Hastings ICLR* 587, 628–44.
[97] Gonzalez-Salzburg, above n 89, 121–4.
[98] Levit, above n 88, 294, 298 (fn 80).

enumerated in the International Covenant on Civil and Political Rights (*ICCPR*) and the American Convention on Human Rights (*ACHR*).[99]

This approach served to 'domesticate' international human rights law rather than elevate such law in the constitutional order. Until 2004 international human rights treaties were accorded sub-constitutional status, with the Supreme Court generally applying the 'later in time' (*lex posterior*) rule, allowing treaties to be superseded by subsequent domestic legislation. However, a constitutional amendment of 2004 (No 45/2004) enhanced the status of international human rights treaties, amending Article 5 of the Constitution to hold that international human rights treaties and conventions approved by a supermajority of Congress (i.e. by three-fifths of those voting, in two rounds) are equivalent to constitutional amendments; the move appearing to reflect a political desire to 'internationalise' the constitutional order.

In a 2008 judgment the Supreme Court had the opportunity to address the precise nature of the reform in a case concerning a direct clash between provisions of the constitution and the ACHR regarding the imprisonment of debtors.[100] As Gustavo Ferreira Santos notes, the vote of Justice Gilmar Mendes examined the issue in the most depth, seeking to consolidate the Court's jurisprudence to date on the relationship between constitutional law and international law, and acknowledging the global tendency toward 'internationalisation' of constitutional law.[101] Justice Mendes recognised that simply following the 'later in time' rule, would be problematic, allowing international treaties to be superseded by domestic legislation. However, as regards the constitutional amendment of 2004, he made a clear distinction between international treaties adopted *before* and *after* the amendment came into force. While the latter would attain constitutional status, the former would be accorded an intermediate status; supralegal but sub-constitutional, and therefore not subject to the 'later in time' rule, but still subject to compliance with the Constitution.[102] In doing so, Justice Mendes eschewed the adoption of a 'block of constitutionality' doctrine akin to that of other South American constitutional courts, and urged by a minority of justices in the case.[103]

[99] An English translation of the Federal Constitution is available on the Venice Commission's CODICES database: <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm> [accessed 2 November 2013].

[100] RE 349703 (3 December 2008).

[101] GF Santos, 'Treaties X Human Rights Treaties: A Critical Analysis of the Dual Stance on Treaties in the Brazilian Legal System' (2013) 15 *EJLR* 20, 28.

[102] Ibid, 29.

[103] See: AM Maués, 'Supra-legality of International Human Rights and Constitutional Interpreta-

A central result of the decision was to limit the impact of the Inter-American system in the domestic order, given that Brazil had ratified the ACHR in 1992—long before adoption of the constitutional amendment of 2004. It forms part of a discernible pattern in the Court's jurisprudence toward keeping Inter-American jurisprudence at arm's length. The Supreme Federal Court, in stark contrast to courts in neighbouring states, very rarely refers to Inter-American Court jurisprudence,[104] has never used it as an interpretive standard in judicial review, and has handed down decisions which conflict with established Inter-American jurisprudence.[105] Further, despite being a key actor in 'judicial diplomacy' with supreme courts of MERCOSUR states, BRIC states and European states, the Supreme Federal Court has not fostered any links with the Inter-American Court.

This, it must be emphasised, is unlike the opposition in certain quarters of the US Supreme Court to the citation of foreign jurisprudence. Indeed, the Supreme Federal Court has become progressively more open to citing a wide range of external jurisprudence over the past three decades, moving from an overwhelming focus on the US Supreme Court and the Federal Constitutional Court of Germany to embrace other courts, including the European Court of Human Rights, without any controversy.[106]

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tion' (2013) 18 *SUR–IJHR* 205.

[104]Da Silva notes that in a review of 138 decisions of the Court, not one made reference to the Inter-American Court's case-law. See: Santos, above n 101, 26–7. Analysis by the present author of a selected list of the Supreme Federal Court's most important decisions, provided on the Court's website (the majority of which were decided after Brazil's acceptance of the Inter-American Court's jurisdiction in 1998) similarly reveals occasional citations of American, German, Spanish, Italian and European Court of Human Rights jurisprudence but no citation of Inter-American Court jurisprudence. See: <http://www.stf.jus.br/portal/jurisprudenciaTraduzida/jurisprudenciaTraduzida.asp> [accessed 1 January 2015]. That is not to say that the Supreme Court never cites Inter-American Court jurisprudence—see, for example, the Court's heavy reliance on a Consultative Opinion of the Inter-American Court concerning diploma requirements for journalists, in RE 511.961 (17 June 2009). However these are rare occasions and do not address the status of such jurisprudence or form part of any systematic approach of the Supreme Court toward such jurisprudence.

[105]In its April 2010 decision on the validity of Brazil's 1979 Amnesty Law the Supreme Court refused to invalidate the law in line with Inter-American Court jurisprudence: ADPF 153 (29 April 2010). Six months later, the Inter-American Court held that certain provisions of the Amnesty Law, in precluding the investigation and punishment of severe human rights violations, are incompatible with the American Convention and have no legal basis; *Gomes Lund and others ('Guerrilha do Araguaia') v Brazil* (2010) IACtHR Ser C No 219.

[106]In his review of 138 decisions of the Court, da Silva found no less than 80 references to decisions of the US Supreme Court and 58 references to case-law of the Federal Constitutional Court of Germany. See: Santos, above n 102, 26–7. Expansion of the Court's range of reference is

It is this strong tradition of citing foreign jurisprudence which leads one to surmise that the Court' resistance to citing the case-law of the Inter-American Court is based on a resistance to being *bound* by another judicial body; a conclusion bolstered by the Court's apparent reluctance to share judicial supremacy with other international adjudicative bodies. For example, in 2007, the Appellate Body (*AB*) of the World Trade Organisation (*WTO*) found Brazil's ban on imports of re-treaded tyres, from which MERCOSUR members were exempted, to constitute arbitrary treatment in violation of the General Agreement on Trades and Tariffs (*GATT*). However, in 2009, in seeming contravention of that decision, the Supreme Court upheld the import prohibition as constitutional, declaring that any decision to import re-treaded tyres in Brazil (including from MERCOSUR) is unconstitutional and emphasising its position as having the final say in the matter.[107]

Thus, despite political moves to internationalise the Brazilian constitution and the Court's clear openness to external jurisprudence, the Supreme Federal Court appears wedded to what might be termed a 'sovereigntist' approach, with the Court as gate-keeper of the domestic order in a more traditional conception of the division of domestic and international law than that of its neighbours. Given Brazil's status as the regional hegemon it is tempting to liken this scenario to the unthinkable prospect of the Federal Constitutional Court of Germany declining to foster any relationship with the European Court of Human Rights, but it suffices to simply observe that it is a far cry from anything seen in the European context, where occasional friction between national courts and regional courts occurs in a general context of mutual respect, cooperation and recognition.

5 Conclusion: Baby steps away from the State

The overall point of this brief *tour d'horizon* of judicial dialogue and community in South America is that our sense of the twilight of the state is ultimately a matter of perspective. From Berlin, Bratislava or Birmingham, law and the

evidenced in its 2012 decision on abortion in cases of anencephaly, in which the Court cited not only decisions of the constitutional courts of Germany, Italy, Spain and the US, but also the European Court of Human Rights and the UN Human Rights Committee. See ADPF 54 (12 April 2012).

[107] ADPF 101 (24 June 2009). An overview of the case is provided in 'General Overview of Active WTO Dispute Settlement Cases Involving the EU as Complainant or Defendant and of Active Cases Under the Trade Barriers Regulation' (European Commission) 7–8 <http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134652.pdf> [accessed 8 November 2013].

courts appear to be striding away from the state, with the centrality of the state diluted in a complex cocktail of supranational law, regional human rights law and international law. From Brasília, Bógota or Buenos Aires—and certainly, for that matter, Beijing, Brisbane, Bishkek or Bombay—the diminution of the state is far less pronounced.

This conclusion, it should be emphasised, is not based on any form of statist nostalgia, nor any denial of the general global trend toward legal orders that transcend the state, but on the reality of regional integration in South America and the state of development of judicial dialogue and community when they are probed beyond their surface similarities to the European experience. Law and the courts may be stepping away from the state in South America. However, these have been, to date, no more than baby steps.

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HARMONIZATION OF INTERNATIONAL HUMAN RIGHTS LAW THROUGH JUDICIAL DIALOGUE: THE INDIGENOUS RIGHTS' PARADIGM

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Abstract
This paper explores the increasing frequency with which regional human rights courts have made cross-references to the decisions of their counterparts in other regions. It asks whether this practice indicates that international human rights law is becoming more 'universal' and the possible impacts of this outcome. It focuses specifically on recent jurisprudence concerning indigenous rights. Analysing points of convergence and divergence between regional courts, the paper advocates an interregional judicial dialogue which would produce a harmonised and universal interpretation and implementation of human rights standards.

1 Introduction

Fragmentation[1] and constitutionalization[2] have been regarded as two contradictory discourses in international law.[3] Furthermore, regionalization of human rights protection and proliferation of judicial organs have been considered to hinder consistency of human rights norms. Given that truth lies somewhere in between, this paper discusses harmonization of human rights norms through judicial interpretation by regional courts in indigenous rights cases. It first demonstrates the multiplication of regional human rights courts and their law-making function in general, and then turns to the case of indigenous peoples. It concludes that a dialectic interpretation of indigenous rights has been developed through regional jurisprudence. In this context, inter-regional judicial dialogue advances

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[1] International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682, 13 April 2006.

[2] J Klabbers, A Peters & G Ulfstein (eds), *The Constitutionalization of International Law* (2009).

[3] H G Cohen, 'From Fragmentation to Constitutionalization' (2011) 24 *Pacific McGeorge Global Business & Development Law Journal*; UGA Legal Studies Research Paper No 11–14, <http://ssrn.com/abstract=1974550> [accessed 28 March 2015].

coherence of international human rights law, which could be regarded as a sign of constitutionalization, but not of its *telos*.

2 Regional Judiciaries in the Field of Human Rights

In the post-war era, the pursuit of peace was based upon international cooperation and unity through the realization of common ideals. Consequently, regional organizations emerged or were reformed with a view to 'bring states into closer association'[4] and establish a common public order.[5] In this context, human rights gained paramount importance. After all, the proclamation of fundamental rights under the United Nations Charter and the adoption of the Universal Declaration of Human Rights (*UDHR*) had marked 'the internationalization of human rights and the humanization of international law'.[6] Apart from the political factors which enabled European cooperation, the UN's inaction led to decentralized action and the enforcement of human rights through regional instruments.

From a more theoretical perspective, the fragmentation of international law and the development of specialized or self-contained regional regimes enhanced the multiplication of regional human rights courts. Even though the International Criminal Court for the Former Yugoslavia (*ICTY*) has noted that 'every tribunal is a self-contained system',[7] there is no legal system which functions in isolation.[8]

Judicial proliferation has been questioned as to whether it has any positive impact,[9] and regarded as a 'systemic problem',[10] whereas various concerns have

[4] Statute of the Council of Europe, 5 May 1949, 87 UNTS 103, Preamble, para 5.

[5] *Austria v Italy,* ECmHR App No 788/60, 11 January 1961, 18, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115598> [accessed 28 March 2015].

[6] T Buergenthal, 'The Normative and Institutional Evolution of International Human Rights' (1997) 19 *HRQ* 703.

[7] *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, IT-94-1-AR72, 2 October 1995), 11.

[8] In this regard, Judge Guillame, using the words of English poet John Donne, comments on the proliferation of international courts that: 'No man is an island, entire of itself. Every man is piece of the continent, a part of the main'. G Guillame, 'The proliferation of international judicial bodies: The outlook for the international legal order' (Speech delivered at the Sixth Committee of the General Assembly of the United Nations, 27 October 2000), <http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1> [accessed 28 March 2015].

[9] T Buergenthal, 'Proliferation of International Courts and Tribunals: Is It Good or Bad?' (2001) 14 *LJIL* 267.

[10] B Kingsbury, 'Foreword: Is the proliferation of International courts and tribunals a systemic problem?' (1999) 31 *NYUJILP* 679.

been raised on the universality and coherence of international law.[11] Case law reflects such inconsistencies on the interpretation and implementation of international law in different courts. The case of *Loizidou v Turkey*,[12] for example, has been criticized as being inconsistent with the jurisprudence of the International Court of Justice (*ICJ*) on treaty interpretation.[13]

Without disregarding these issues, international courts have responded to international concerns to strengthen the rule of law. Regional human rights regimes echo international human rights norms as enshrined in UDHR and later the International Covenant on Civil and Political Rights (*ICCPR*) and the International Covenant on Economic, Social and Cultural Rights (*ICESCR*). Given that international covenants served as the model for regional ones, the conventional framework is, to a large extent, reproduced with minor adjustments as analyzed subsequently.

2.1 The Regional Institutional Framework in a Comparative Perspective

Starting with Europe, which had suffered severely because of the disastrous World Wars I and II, the establishment of the Council of Europe resulted in the formation a human rights system within a year. The European Convention on Human Rights (*ECHR*) created a framework for European human rights protection and stands as its cornerstone. From the very beginning, it became apparent that human rights protection would be a dead letter without the necessary supervisory mechanisms.[14] To ensure the observance of the Convention, two organs were set up: the European Commission of Human Rights (*ECmHR*) and the European Court of Human Rights (*ECtHR*).[15] The Commission could be either be informed on alleged breaches of the Convention by member states, or receive

[11] See P Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1999) 31 *NYUJILP* 791, 791-792; J I Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 *RCADI* 162; R Higgins, 'Respecting Sovereign States and Running a Tight Courtroom' (2001) 50 *ICLQ* 121, 121–122.

[12] *Loizidou v Turkey* (1995) ECtHR Ser A 310.

[13] K Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions' (2001) 5 *Max Planck UNYB* 67, 81.

[14] As Bradley notes, 'the Court gives flesh and blood to the bare bones of the Convention': A Bradley, 'Introduction: The need for both international and national protection of human rights – the European challenge', in S Flogaitis, T Zwart & J Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism Into Strength* (2013) 1, 3.

[15] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222, Art 19.

petitions from victims—individuals, groups and NGOs—against member states which have recognized the Commission's competence to do so.[16] Its main task was to secure a friendly settlement of the matter between the parties; otherwise the case would be referred to the European Court of Human Rights. The Council of Europe's Protocol No 11 (1998) reformed this rather complex structure, replacing the Commission and its filtering competence with a single European Court of Human Rights.

The significant role of the ECtHR in the field of human rights protection is undisputed. Two key achievements should be highlighted in particular. First of all, the accession of the vast majority of European states, including Russia and Turkey, to the Convention, establishes a European area with common human rights standards in and between member states. Secondly, the individual gains an active role as it has *locus standi* in front of the Court. This led to a significant increase in the number of applications to the ECtHR and gave rise to further institutional improvements. Protocol No 14 (2010) introduced new admissibility criteria with a view to address the increase in the Court's workload and backlog. Further, the newly adopted Protocol No. 15 underlines the principle of subsidiarity, whereas Protocol No. 16 will enable national courts to seek advisory opinions in the context of cases pending before it relating to the interpretation or application of the rights and freedoms defined in the ECHR or the protocols thereto. Although this envisages a wider role for the ECtHR similar to the European Court of Justice (*ECJ*), the figures are discouraging since only 29 states have signed Protocol No. 15, of which only 10 states have ratified it.[17] There is, at present, a sign of reluctance towards future constitutionalization of the human rights in the ECHR.

The Organization of American States (*OAS*) followed the European example, albeit with a delay, through the adoption of the American Convention on Human Rights (*ACHR*) in 1969.[18] The larger number of rights in the ACHR—the inclusion of economic, social and cultural rights in particular—reflects the regional particularities,[19] apart from which the institutional structure is quite similar to the ECHR. Two organs are entrusted with the supervision of the

[16] ECHR Arts 25 and 26.

[17] Council of Europe,'Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms CETS No 213', <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=213&CM=7&DF=23/02/2015&CL=ENG> [accessed 28 March 2015].

[18] J Rehman, *International Human Rights Law: A Practical Approach* (2003).

[19] See T Buergenthal, 'The American and the European Conventions on Human Rights: Similarities and Differences' (1980–1981) 30 *Am U LR* 155, 156.

conventional framework, namely the Inter-American Commission of Human Rights (*IACmHR*) and the Inter-American Court of Human Rights (*IACtHR*). The Commission is vested with the same competences as the ECtHR, including the friendly settlement of petitions brought by any person, group of persons or NGOs containing denunciations or complaints of violation of the ACHR by a State Party,[20] examination of inter-state communications,[21] or otherwise transfer cases to the IACtHR. Despite statutory limitations on the IACtHR's power to review cases, steps have been made for procedural improvements through the revision of Rules of Procedure of the respective organs in order to streamline their work and strengthen the status of the petitioner.[22] However, the American system follows the 'two–tier structure'[23] that existed in the European system before 1998.

Last but not least, the Organization of African Unity adopted the African (Banjul) Charter on Human and Peoples' Rights in 1981.[24] This instrument is innovative as it adapts to the African social reality and adds group rights to its protective regime. Unlike the other regional conventions, the Banjul Charter is limited to the creation of the African Commission on Human and Peoples' Rights (*ACmHPR*) as the only competent organ to ensure its implementation and address communications and/or complaints by states and non-state actors.[25] In 1998, the OAU adopted a Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights with a view to enhance the efficiency of the African Commission. The relationship between the two organs is explicitly clarified under Article 2 of the Protocol which specifies their complementary function. Under Article 5 of the Protocol, states, the African Commission, African intergovernmental organizations, as well as NGOs and individuals may have *locus standi* to bring a case before the Court upon a state's prior acceptance.[26]. The Protocol came into force on 25 January 2004 and the Court officially started its operation in 2006, even though

[20] American Convention on Human Rights, 22 November 1969, 1144 UNTS 123, Art 44.

[21] ACHR Art 45.

[22] J M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2003) 17–18.

[23] L Burgorgue-Larsen, 'The Indirect Contentious Jurisdiction of the Court', in L Burgorgue-Larsen & A Ubeda de Torres (eds), *The Inter-American Court of Human Rights: Case Law and Commentary* (2011) 25, 28.

[24] African Charter on Human Rights and Peoples' Rights (Banjul Charter), 28 June 1981, 1520 UNTS 217.

[25] See V O Orlu Nmehielle, *The African Human Rights System: Its Laws, Practice, and Institutions* (2001).

[26] As of October 2012, only five countries have made such a Declaration. Those countries are Burkina Faso, Ghana, Malawi, Mali, and Tanzania. The African Union Commission, 'The African

it delivered its first judgment in 2009. In the meantime, the Assembly of the African Union decided on the merger of its Human Rights Court and the Court of Justice,[27] due to considerations about the availability of resources,[28] and legal certainty.[29] The Protocol on the establishment of a single court, namely the African Court of Justice and Human Rights, was adopted in July 2008. Since then, only five states have ratified it.[30] In addition, a Draft Protocol is under preparation with a view to amend the 2008 Protocol.[31] The draft expands the Court's jurisdiction, reaffirms the complementary relationship between the Court and the African Commission on Human and Peoples' Rights and changes its nomenclature to 'African Court of Justice and Human and Peoples Rights'. Apparently, the African human rights system has entered into a legal labyrinth, but the Ariadne's Thread is missing.[32] The outcomes of these amendments remain uncertain as the ratification of different legal instruments is required in order to render the new Court operational and effective. Thus, the role of the Commission remains crucial given its competencies in the field.

Thus, this analysis shows that regional human rights protective regimes are structured alike. Furthermore, the complementarity between each Commission and its respective Court denotes the unified procedure followed and their shared competences in the field which strengthens the value and impact of relevant case

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Court on Human and Peoples' Rights', <http://www.au.int/en/organs/cj> [accessed 28 March 2015].

[27] African Union Assembly, *Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union*, AU Doc Assembly/AU/Dec.83(V), July 2005.

[28] O Elias, 'Introductory Note to the Protocol on the Statute of the African Court of Justice and Human Rights' (2009) 48 ILM 334.

[29] 'An integrated pan-African court offers opportunities for developing a unified, integrated, cohesive, and hopefully, indigenous jurisprudence for Africa. Years later, this jurisprudence will be used as a yardstick for determining 'whether or not one can talk of a regionally peculiar corpus of African international law'. K Kindiki, 'The Proposed Integration of the African Court of Justice and the African Court of Human and Peoples' Rights: Legal Difficulties and Merits' (2007) 15 *Af JICL* 145.

[30] Benin, Burkina Faso, Congo, Libya and Mali. See African Court Coalition, 'Ratification Status: Protocol on the Statute of the African Court of Justice and Human Rights', <http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=87:ratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7:african-union&Itemid=12> [accessed 28 March 2015].

[31] *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, AU Doc Exp/Min/IV/Rev.7, 15 May 2012, <http://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf> [accessed 28 March 2015].

[32] In Greek mythology, Ariadne's Thread connotes the means that guides one out of the labyrinth.

law.

2.2 Development of Human Rights Law through Judicial Dialogue

Regional human rights courts are significantly different from international judicial organs, whose main responsibility is the peaceful settlement of legal disputes.[33] As the ECtHR noted in *Loizidou v Turkey*:

> The International Court is called on *inter alia* to examine any legal dispute between States that might occur in any part of the globe with reference to principles of international law. The subject-matter of a dispute may relate to any area of international law. In the second place, unlike the Convention institutions, the role of the International Court is not exclusively limited to direct supervisory functions in respect of a law-making treaty such as the Convention.[34]

Regional courts stand as the guardians of human rights protection. Their task is not only to ensure the observance of the engagements,[35] or the fulfillment,[36] of commitments undertaken by the contracting parties, but also to secure the 'common interest'.[37] As Judge Cançado Trindade notes 'the interpretation and application of human rights treaties have been guided by considerations of a superior interest or *ordre public* which transcends the individual interest of State Parties'.[38] Hence, judicial organs foster uniform implementation of human rights on a wider scale.

Judicial organs are further entrusted with the interpretation and application of the constitutive convention.[39] This signifies derogation from absolute legal

[33] See for instance the Statute of the International Court of Justice, 26 June 1945, 33 UNTS 993, Art 36.

[34] *Loizidou v Turkey*, above n 12, para 84.

[35] Convention for the Protection of Human Rights and Fundamental Freedoms (*ECHR*), 4 November 1950, 213 UNTS 221, Art 19; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 9 June 1998, 1001 UNTS 45, Art 3.

[36] American Convention on Human Rights (*ACHR*), 22 November 1969, 1144 UNTS 123, Art 33.

[37] *Capital Bank AD v Bulgaria*, No 49429/99, ECtHR 2005, para 78–79; *Rantsev v Cyprus and Russia*, No 25965/04, ECtHR 2010, para 197.

[38] A A C Trindade, *The Access of Individuals to International Justice* (2011) 83.

[39] ECHR, above n 35, Art 32; ACHR, above n 36, Art 3(1) para 1; Rules of Procedure of the Inter-American Commission on Human Rights, 1 August 2013, Art 62(3).

positivism, since interpretation 'gives meaning to norms and generates legal normativity'.[40] The general and often abstract wording of conventional provisions further enhances the need for judicial interpretation as it illustrates the content, scope and limitations of rights,[41] while at the same time developing conventional rules.[42] For instance, even though there is no provision on the right to environment under the ECHR, it has been held to be protected within the meaning of Article 8 of the ECHR—the right to respect for private and family life[43]—in the course of progressive jurisprudence. As a result, judicial lawmaking seems inextricably linked a court's function.[44]

Judicial interpretation follows the general rules on treaty interpretation under the Vienna Convention on the Law of Treaties.[45] Emphasis is also placed on present-day standards[46] which reflect the evolutive features of international law. To this end, the ECHR[47] and ACHR[48] are regarded as 'living instruments' which adapt to current realities. Regional consensus has a vital role in this process

[40] I Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012) 17.

[41] For instance, see Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9, where the right to education contained therein has been reviewed on various occasions. In *Leyla Şahin v Turkey*, No 44774/98, ECtHR 2004, para 137, the ECtHR noted that institutions of higher education can't be excluded from the scope of the Protocol. The limits of the right were drawn in *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, para 5: '[The limits of the right to education] by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals. It goes without saying that such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention'.

[42] *Ireland v United Kingdom* (1978) ECtHR Ser A No 25, para 154.

[43] *Tatar v Romania*, No 67021/01, ECtHR 2009.

[44] See A von Bogdandy & M Jacob, 'The Judge as Law-Maker: Thoughts on Bruno Simma's Declaration in the Kosovo Opinion', in U Fastenrath et al (ed), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011) 824.

[45] A Ubeda de Torres, 'The optional contentious jurisdiction of the Court', in L Burgorgue-Larsen & A Ubeda de Torres (eds), *The Inter-American Court of Human Rights: Case Law and Commentary* (2011). See also *Blake v Guatemala* (1997) IACtHR Ser C No 7, para 21.

[46] G Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer'(2010) 21 *EJIL* 509.

[47] *Tyrer v United Kingdom* (1978) 2 EHRR 1, para 35. See also G Letsas, 'The ECHR as a Living Instrument: Its Meaning and its Legitimacy', in A Føllesdal, B Peters & G Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (2013).

[48] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999) IACtHR Ser A No 16, paras 114–15.

as an element of shared interest and common standards within its respective regime emanating from an intra-regional perspective.

Apart from regional perceptions, interpretation follows universalistic approaches,[49] as enshrined in the Vienna Declaration (1993)[50] according which 'all human rights are universal, indivisible and interdependent, and interrelated'.[51] In this context, the African Charter is not only innovative but also revolutionary. Article 60 and 61 enables the ACmHPR to draw lessons through the practice of other human rights organs when reviewing a case. Therefore, the ACmHPR endorses international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other UN instruments and those adopted by African countries in the field of Human and Peoples' Rights, as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the State Parties to the African Charter are members.

Similarly, both the ECtHR and the IACtHR follow general interpretation methods. Regional courts should 'take into account developments in the *corpus juris gentium* of international human rights law over time and in present-day conditions',[52] as 'an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation'.[53] In this regard, the regional courts tranform 'global soft law into regional hard law'.[54]

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[49] In *Purohit v The Gambia*, the African Commission affirms that: 'In interpreting and applying the African Charter, the African Commission relies on its own jurisprudence, and as provided by articles 60 and 61 of the African Charter, on appropriate and relevant international and regional human rights instruments, principles and standards. The African Commission is, therefore, more than willing to accept legal arguments with the support of appropriate and relevant international and regional human rights instruments, principles, norms and standards taking into account the well recognized principle of universality.' *Purohit v The Gambia,* ACmHPR Comm No 241/2001, paras 47–48.

[50] UN General Assembly, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23, 12 July 1993.

[51] Ibid, para 5.

[52] *Mary and Carrie Dan v United States* (2002) IACtHR Report No 75/02, para 96. See also the following ECHR cases that include cross-references: *Tryer v United Kingdom* (1978) 2 EHRR 1; *Marckx v Belgium* (1979) 2 EHRR 330; *Loizidou v Turkey*, above n 12.

[53] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971 p 16, 31.

[54] G L Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 *EJIL* 101, 111.

However, the use of inter-court dialogue as an interpretative tool is complementary in nature serving as a guide for international practice. After all, given that international law is a consent–based system, the transplant of legal interpretations of other regional systems would contravene this general principle.[55]

Despite criticisms that 'judicial dialogue between regional tribunals is to some extent a monologue',[56] as reference to African case law is scarce, such claims are not well-founded. Taking into consideration the organizational and operational features of each judicial system, the vast case law of the European and American regional Courts apparently offers a plethora of interpretative guidelines regarding a wide variety individual rights which served as interpretative guidelines for the African one. On the other hand, the African Commission shied away in developing rights where there was little concrete international jurisprudence.[57] Consequently, the development of human rights case law in each legal system defines the limits of intercourt dialogue.

In practical terms, the ECtHR has referred to the Inter-American human rights system in more than 50 cases regarding general practice or interpretation of particular human rights—e.g. enforced disappearances, exhaustion of domestic remedies, death penalty, torture, right to life, domestic violence etc.[58]—and vice versa. Likewise, the ECtHR has also taken African case law into consideration, although in a rather limited number of cases—e.g. the case of *Sitaropoulos and Giakoumopoulos v Greece* on political participation.[59] The African jurisprudence is also cited in Concurring or Dissenting Opinions as in the cases of *De Souza Ribeiro v France*,[60] *Konstantin Markin v Russia*,[61] *Hirsi Jamaa v Italy*.[62] These three judgments were all handed down by Judge Pinto de Albuquerque, which signifies the role of judges in this regard. On the other hand, the American-African interaction is intensive with dense cross-references in the relevant case law, especially

[55] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Preamble.

[56] M Killander, 'Interpreting Regional Human Rights Treaties' (2011) 7 *SUR IJHR* 145, 154.

[57] *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa*, IWAGIA (Copenhagen) and ACHPR (Banjul) (2005) 72.

[58] See European Court of Human Rights, *Research Report: References to the Inter-American Court of Human Rights in the case law of the European Court of Human Rights*, 2012, <http://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf> [accessed 28 March 2015].

[59] *Sitaropoulos and Giakoumopoulos v Greece*, No 42202/07, ECtHR 2012, paras 30–31.

[60] *De Souza Ribeiro v France*, No 22689/07, ECtHR 2012.

[61] *Konstantin Markin v Russia*, No 30078/06, ECtHR 2012.

[62] *Hirsi Jamaa v Italy*, No 27765/09, ECtHR 2012.

in the case of indigenous rights.

Thus, regional courts base their interpretation on a universal grammar, namely international law, which enhances coherence[63] allowing them to 'operate within the same dialectic and reach compatible conclusions'.[64] Accordingly, indigenous rights jurisprudence is analyzed in the following section from a comparative perspective, with a view to affirm the harmonization of human rights standards though judicial dialogue.

3 The Curious Case of Indigenous Rights

Indigenous rights are placed in the spotlight in this article for various reasons. First, indigenous people represent distinct groups and in particular, communities, peoples and nations which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[65]

Secondly, standard-setting is underway, leaving room to 'legalization of indigenous rights through human rights jurisprudence'.[66] Last, but not least, indigenous rights have been much debated in the course of inter-regional dialogue. Accordingly, the analysis in this article assesses current practice with a view to draw lessons and identify prospects and challenges in this field.

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[63] D Pulkowski, 'Universal International Law's Grammar' in U Fastenrath, R Geiger, D Khan, A Paulus, S von Schorlemer & C Vedder (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (2011) 154.

[64] Ibid, 183.

[65] J R M Cobo, *Study on the Problem of Discrimination against Indigenous Populations*, UN Doc E./CN.4/Sub.2/1986/7/Add.4, 1986, para 379.

[66] G Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights' (2011) 22 *EJIL* 165, 199.

3.1 The struggle for indigenous rights protection

Indigenous people had been traditionally deprived of rights or status, which enabled the legitimization of colonialism.[67] Nevertheless, the humanistic approach of the UN Charter brought about various international initiatives for the protection of human rights. The International Labour Organization (*ILO*) was innovative in the field of indigenous protection, with the General Conference adopting the Indigenous and Tribal Populations Convention in 1957,[68] under which protection was laid upon integration of these populations to national community. The Convention was revised in 1989 by Convention No 169.[69] The 'integration principle' was replaced by a participatory model based upon self-identification and respect. Both instruments gained little attention whereas the latter numbers only 22 ratifications.

Although the protection of the indigenous entered the UN agenda during the decolonization process, an international agreement was reached in 2007 with the adoption of the UN Declaration on the Rights of Indigenous Peoples by the General Assembly.[70] The Declaration establishes a universal framework of minimum protection and recognizes individual and collective rights.[71] Further, it reaffirms that indigenous individuals are entitled without discrimination to all human rights recognized in international law, whereas indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.[72] In other words, each member of the group

[67] For an overview on these developments from Vitoria, to Grotius, Oppenheim and the UN, see S J Anaya, *Indigenous Peoples in International Law* (2000) 9–71.

[68] Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 26 June 1957, 328 UNTS 247.

[69] Indigenous and Tribal Peoples Convention, 27 June 1989, 1650 UNTS 383.

[70] United Nations Declaration on the Rights of Indigenous Peoples (*UNDRIP*), GA Res 61/295, 13 September 2007. The UN Declaration was adopted by a majority of 143 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). It is worth noting that the US, Canada and New Zealand have recently expressed their consent to the Declaration.

[71] As Sicilianos notes, the Declaration reflects the erosion of the traditional distinction between individual and group rights and the syneresis of the various phases of the development of international law of human rights in light of the differentiation and empowerment of actors of those rights. L A Sicilianos, *The Human Dimension of International Law: Interactions between General International law and Human Rights* (2010) 334.

[72] UNDRIP, above n 70, Preamble and para 19. See also B G Ramcharan, 'Individual, Collective and Group Rights: History, Theory, Practice and Contemporary Evolution' (1993) 1 *International Journal on Minority and Group Rights* 27, 42.

carries with him/her the individual rights into the group, on top of what the group enjoys in its collectivity.[73] In spite of the legal value of 'soft law' instruments,[74] the Declaration not only advances indigenous protection but also crystallizes international practice.[75]

Indigenousness is closely linked with numerous characteristics and affinities, which confers a distinct identity and includes a common history, linguistic tradition, territorial connection and political outlook.[76] Thus, Judge Ziemele in his partly dissenting opinion in the *Handolsdalen Sami Village v Sweden* criticizes the majority's reasoning in that case for disregarding the indigenousness of the group despite analyzing their distinct characteristics.[77]

In the absence of a binding legal instrument, indigenous protection rests upon international human rights law and the legalization of their rights through human rights jurisprudence.[78] In this respect, 'classic individual rights have been re-read to accommodate communal perspectives in ways that challenge rigid dichotomies between the individual and the group within human rights law',[79] even though

[73] *Kevin Mgwanga Gunme v Cameroon* (2003) ACmHPR Comm No 266/03, para 176 ('The Commission deduces […] that peoples' rights are equally important as are individual rights. They deserve, and must be given protection').

[74] 'En somme, la soft law n' est ni du non-droit ni une lex imperfect. Elle n'est pas non plus toujours et nécessairement un droit en gestion, car il peut s'agir également d'un droit different, ou d'une variété de droit qui remplit une fonction différente de celle du droit limite; non pas le droit du justicier ou du gendarme, mais celui, plus discret et malléable, de l'architecte social': G Abi-Saab, 'Cours général de droit international public' (1987) 207 Hague *Receuil* 213.

[75] For instance, UNDRIP, above n 70, Art 3 recognizes the right to self determination, in accordance with Art 46 of the UN Charter. As the ACmHPR has noted, self-determination is exercised within national boundaries, with respect to sovereignty and territorial integrity: *Katangese Peoples' Congress v Zaire* (1995) ACmHPR Comm No 75/92, para 6. See also E Stamatopoulou, 'Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples', in S Allen & A Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (2010) 394, 411.

[76] See *Kevin Mgwanga Gunme v Cameroon*, above n 73, para 179.

[77] In *Handolsdalen Sami Village v Sweden*, No 39013/04, ECtHR 2010, para 7, the Court considered the characteristics of Sami habitants noting that the Sami have, since ancient times, inhabited the northern parts of Scandinavia and the Kola Peninsula. Originally living by hunting, fishing and collecting, the Sami activities changed over time to concern mainly reindeer herding. Their historical use of the land has given rise to a special right to real estate, the reindeer herding right (*renskötselrätten*). Due to lack of any public legal status of the villages as such, the Court assessed the case on an individual base (ECHR Art 6: right to fair trial), disregarding their special status as indigenous people.

[78] Pentassuglia, above n 66.

[79] G Pentassuglia, 'Indigenous Groups and the Developing Jurisprudence of the African Commission on Human and Peoples' Rights: Some reflections' (2010) 3 *UCL Human Rights Review* 150,

'transposing communal principles of indigenous people into an individualistic rights framework is not a task to be taken lightly'.[80]

The right to lands traditionally owned, occupied or used by the indigenous[81] is indicative. Land disputes of this kind call for a reconceptualization of individual rights in accordance with the particular needs of indigenous peoples on a case-by-case basis.[82] As Pentassuglia notes, property to land lies at 'the intersection of a critical understanding of possession and title and material and spiritual connection' as well as the exercise of traditional livelihoods.[83] For this reason, violation of land rights would even entail risk to economic, social and cultural development, the right to property, integrity of their persons, enjoyment of cultural rights and protection of tradition values.[84]

These critical remarks are discussed further in the context of interregional dialogue and its role in developing law below.

3.2 Indigenous rights discourse within interregional dialogue

Judicial dialogue has enabled the integration of international standards in regional systems as well as the harmonization between different regional systems. Besides, regional framework applies 'with due regard to the particular principles of international human rights law governing the individual and collective

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[80] T Antkowiak, 'Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court' (2014) 35 *U Pa JIL* 113.

[81] See *Bakweri Land Claims Committee v Cameroon* (2004) ACmHPR Comm No 260/02.

[82] *Yakye Axa Indigenous Community v Paraguay* (2005) IACtHR Ser C No 125, paras 146 & 217 (*Yakye Axa*).

[83] Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights', above n 66, 171. See also *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) IACtHR Ser C No 79, para 149 (*Mayagna*); *Maya Indigenous Communities in the Toledo District v Belize* (2004) IACmHR Report No 40/04, para 114.

[84] *ACmHPR v Kenya* (2011) ACmHPR Comm No 006/2012 (Order of Provisional Measures) paras 23–5. The African Commission instituted proceedings against Kenya for alleged serious and massive violations of the African Charter against the *ogiek* community of the Mau forest as it had issued an eviction notice with a view to create a reserved water catchment zone. The Commission ordered provisional measures as it found that the situation was one of extreme gravity and urgency, as well as there being a risk of irreparable harm. It unanimously ordered the respondent to reinstate the restrictions imposed on land transactions and refrain from any act that would or might irreparably prejudice the main application before the Commission.

interests of indigenous peoples'.[85] Common principles and standards have been formulated through extensive jurisprudential cross-references and incorporated in international instruments, such as the Declaration of Indigenous Rights. In this context, emphasis is put on the case *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*[86] as it stands as a typical example of intercourt dialogue summarizing the basic principles of indigenous protection.

3.2.1 Indigenous peoples as actors

Indigenous rights are conferred to peoples as collective subjects of international law and not only as members of such communities or peoples. Inter-American case law refers extensively to the UDHR, the 2007 Declaration, as well as the African legal framework.[87] As a result, states have a duty to guarantee the juridical personality of individual members of a community, which is evidently necessary for their enjoyment of other rights,[88] and recognize the juridical capacity of the members of the indigenous people to fully exercise these rights in a collective manner.[89]

Legal personality allows indigenous communities to enforce existing rights. In *Indigenous Community Yakye Axa v Paraguay*, the IACtHR stated that:

> Indigenous communities, under Paraguayan laws, are no longer just a factual reality to become legal entities with the capacity to fully enjoy legal rights vested not only in its individual members, but in the community itself, that is endowed with its own singular

[85] *Mary and Carrie Dann v United States*, above n 52, para 131; *Maya Indigenous Communities of the Toledo District v Belize* (2004) IACtHR Report No 40/04, para 98.

[86] The complaint was filed by the Centre for Minority Rights Development (*CEMIRIDE*) with the assistance of Minority Rights Group International (*MRG*) and the Centre on Housing Rights and Evictions (*COHRE*) (which submitted an *amicus curiae* brief) on behalf of the Endorois community. Kenya was accused of evicting the indigenous community from their ancestral lands, failing to adequately compensate them for the loss of their property, disrupting the community's pastoral enterprise and violating their right to practice their religion and culture, as well as the overall process of development of the Endorois people. *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (2010) ACmHPR Comm No 276/2003 (*Endorois*).

[87] *Kichwa Indigenous People of Sarayaku v Ecuador* (2012) IACtHR Ser C No 245, para 231.

[88] *Endorois*, above n 86, para 162, quoting *Saramaka People v Suriname* (2007) IACtHR Ser C No 172, para 168 (*Saramaka*).

[89] Ibid.

> existence. Legal personality is the legal mechanism granting them the necessary status to enjoy certain fundamental rights, such as the right to hold title to communal property and to demand protection against any breach thereof.[90]

Consequently, the indigenous gain a primary role in the realization of their rights as they have evolved from victims to 'actors of their own future'.[91]

3.2.2 Self-determination

Self-determination is an 'evolving force'[92] in the context of indigenous protection. Although originally related to the decolonization process, it has gained a broader scope within indigenous rights protection and contains principles of self-identification and autonomy. The indigenous are entitled to determine their political status and freely pursue their economic, social and cultural development, and have the right to autonomy or self-government.[93] Self-identification is a precondition for the exercise of that right. In determining indigenous status for individual members as well the group as a whole, the African Court on Human and Peoples' Rights (*ACtHPR*) has transposed the IACtHR's criteria, such as the particular social, cultural and economic characteristics, the special bonds with their ancestral territories and the existence of internal determination, even partially,[94] by their own norms, customs, and/or traditions.[95] The sacred relationship of the community with their lands has been also a crucial element in defining indigenous communities, and as an indispensable element to full enjoyment of their cultural and religious rights.[96]

The distinctiveness of the group is not eroded by individual conduct. The fact that some individual members of the indigenous people may live outside of the traditional territory and in a way that may differ from the rest has no affect for the group as a whole, nor can it be used as a pretext to deny the people their right to juridical personality.[97]

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[90] *Yakye Axa*, above n 82, para 83.
[91] J Gilbert, *Indigenous Peoples' Land Rights under International Law* (2006) 198.
[92] Ibid, 248.
[93] UNDRIP, above n 70, Arts 3–5.
[94] Self government and internal determination is an inherent right as proclaimed in the Declaration: ibid, Arts 4–6.
[95] *Saramaka*, above n 88, para 84.
[96] *Endorois*, above n 86, para 156.
[97] Ibid, para 162.

Jurisprudence, thus, affirms that self-determination and autonomy set the framework within which indigenous peoples can be featured as a distinct group and their rights can be realized.

3.2.3 The duty to protect

States have a general duty to ensure the realization of rights and their unimpeded enjoyment. Positive measures, whether legislative, judicial or administrative, are therefore addressed not only against the acts of the State party itself, but also against non state actors. In *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria,*[98] the ACmHPR noted that the Government of Nigeria had facilitated the destruction of the Ogoniland,[99] as it had allowed private actors to devastatingly affect individuals as well as the Ogoni Community as a whole[100]. In assessing state responsibility, ACmHPR considered the relevant practice of other regional tribunals, namely the ECtHR[101] and IACtHR,[102] and highlighted the state's duty to protect from damaging acts that may be perpetrated by private parties.

Protection of indigenous peoples often entails special legal measures of protection, and measures to ensure effective participation of the members of

[98] *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (2001) ACmHPR Comm 155/96, para 48 (*Ogoni*). The case concerned the involvement of the military government of Nigeria in oil production through the State oil company which has caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People.

[99] Ibid, para 58.

[100] Ibid, para 67. See also F Coomans, 'The Ogoni Case before the African Commission on Human and Peoples' Rights' (2003) 52 *ICLQ* 749; C A Odinkalu, 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights' (2001) 23 *HRQ* 346–7.

[101] *X and Y v Netherlands* (1985) ECHR Ser A 91.

[102] *Velàsquez Rodrígeuz v Honduras* (1988) IACtHR Ser C No 4.

such communities,[103] in order to safeguard their physical and cultural survival.[104] Even though states tend to contest such measures as discriminatory, regional courts have applied international and regional standards, noting that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination.[105] After all, the principle of non-discrimination is the corollary of the principle of equality.[106] In order to eliminate substantive discrimination, States parties are under the obligation to adopt special safeguards to attenuate or suppress conditions that perpetuate discrimination, provided that they represent reasonable, objective and proportional means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved. Special protection is attributed to members of such vulnerable communities as the only means to guarantee the full exercise of their rights,[107] to provide equality under the law,[108] and address historical and present day injustices and inequalities.[109]

Protection should, thus, reflect the particular conditions of the indigenous peoples, reflect their economic and social situation,[110] and also be effective, which implies adequate enforcement. In *Sawhoyamaxa Indigenous Community v*

[103]On the non-discriminatory effect of special measures, see especially, United Nations Human Rights Committee, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, UN Doc CCPR/C/21/Rev.1/Add.5, 8 April 1994; United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation 23: Rights of indigenous peoples*, UN Doc A/52/18, 18 August 1997, para 4; UN Committee on Economic, Social and Cultural Rights (*CESCR*), *General Comment No 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/20, 2 July 2009; CESCR, *General Comment No 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (Article 3)*, UN Doc E/C.12/2005/4, 11 August 2005; CECSR, *General Comment 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (Article 15, paragraph 1(c), of the Covenant)*, UN Doc E/C.12/GC/17, 2006.

[104]*Saramaka*, above n 88, paras 85 & 103.

[105]Ibid, para 196. The ACmHPR explicitly referred to the ECtHR case *Connors v United Kingdom*, No 66746/01, ECtHR 2004, and the following IACtHR cases: *Saramaka*, above n 88; *Moiwana v Suriname* (2005) IACtHR Ser C No 124; *Yakye Axa*, above n 82; *Mayagna*, above n 83.

[106]J Clifford, 'Equality' in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (2013) 426.

[107]*Endorois*, above n 86, para 197, quoting *Yakye Axa*, above n 82, para 163.

[108]See *Saramaka*, above n 88, para 85; *Mayagna*, above n 83, paras 148–149 & 151; *Indigenous Community Sawhoyamaxa v Paraguay* (2006) IAtCHR Ser C No 146, paras 118–121 & 131 (*Sawhoyamaxa*); *Yakye Axa*, above n 82, paras 124, 131 & 135–137.

[109]*Endorois*, above n 86, para 149.

[110]*Endorois*, above n 86, para 197; *Yakye Axa*, above n 82, citing *Sawhoyamaxa*, above n 108.

Paraguay, Paraguay had adopted a quite advanced legal framework of protection but did not have effective measures to promote and enforce the laws. The Court ruled that the state shall enact into its domestic laws within a reasonable time all the legislative, administrative or other measures necessary to enforce rights as well as to establish a mechanism to claim restitution of the ancestral lands of the members of indigenous communities. After all, international law gives real protection to human rights and imposes on the state the duty to give flesh and bone to 'paper rights'.

3.2.4 Freedom of religion

In *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, the complainants alleged religious violations such as denial of access to religious sites within the game reserve. The ACmHPR adhered to the position of the UN Human Rights Committee,[111] affirming that 'freedom of conscience and religion should, among other things, mean the right to worship, engage in rituals, observe days of rest, and wear religious garb',[112] and that the Endorois spiritual beliefs and ceremonial practices constituted a religion.[113]

Religion practice is inextricably linked to ancestral lands in which religious sites are situated. Traditional land is of fundamental religious significance and is an inherent part of the exercise of religious practices and beliefs. Guided by the IACtHR's jurisprudence,[114] the ACmHPR acknowledges that expulsion from traditional lands:

> [I]nterfered with the Endorois' right to religious freedom and removed them from the sacred grounds essential to the practice of their religion, and rendered it virtually impossible for the community to maintain religious practices central to their culture and religion.[115]

[111] United Nations Human Rights Committee, *CCPR General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, UN Doc CCPR/C/21/Rev.1/Add.4, 30 July 1993.
[112] *Endorois*, above n 86, para 165
[113] Ibid, para 168.
[114] *Loren Laroye Riebe Star, Jorge Alberto Baron Guttlein and Rodolfo Izal Elorz v Mexico* (1999) IACmHR Report No 49/99; *Dianna Ortiz v Guatemala* (1997) IACmHR Report No 31/96.
[115] *Endorois*, above n 86, para 171.

Such restrictions are not only illegitimate in the absence of any significant public security interest or other justification, but also constitutes a disproportionate measure,[116] and manifestly violates freedom of religion.

This case shows that inter-court dialogue advances indigenous religious protection in general. Moreover, it specifies its content, recognizing access to ancestral land as a significant element of religious freedom.

3.2.5 Property rights and indigenous communities

International rights have an autonomous meaning under international human rights law, which supersedes national legal definitions,[117] and individual rights are redefined in the context of indigenous people. The broad conception of property rights in relation to indigenous peoples is developed through regional jurisprudence and has been reaffirmed in the *Endorois* case, where the ACmHPR held that 'the rights, interests and benefits of [indigenous] communities in their traditional lands constitute "property" under the Charter and that special measures may have to be taken to secure such "property rights"'.[118]

Even in the absence of registered titles,[119] possession of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property.[120] Indigenous land rights imply the right of ownership rather than mere access, as '[o]nly *de jure* ownership can guarantee indigenous peoples' effective protection'.[121]

Summing up common standards as co-formulated in the course of inter-regional cross references, the Commission affirmed that:

> (1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official

[116] Ibid, para 173.

[117] *Endorois*, above n 86, para 185, citing *Mayagna*, above n 83.

[118] In particular, the ACmHPR cites the case of *Dogan v Turkey*, in which the Court held that the notion 'possessions' (in French: *biens*) in Article 1 has an autonomous meaning which is certainly not limited to ownership of physical goods; certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions' for the purposes of this provision. *Dogan v Turkey*, No 8803-8811/02, 8813/02 and 8815-8819/02, ECtHR 2004, paras 138–139 (*Dogan*).

[119] *Endorois*, above n 86, para 188, citing *Dogan*, above n 118, paras 138–139; *Endorois*, above n 86, para 190, citing *Mayagna*, above n 83, paras 140 & 151.

[120] Ibid.

[121] *Endorois*, above n 86, paras 204–5, quoting *Saramaka*, above n 88, para 110.

> recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights.[122]

In this regard, the unlawful eviction of the indigenous from their ancestral land and destruction of their possession, even when it serves public need, constitutes a violation of right to property if limitations of the said right were not 'proportionate to the legitimate aim pursued'.[123] Forced eviction also entails violations of the right to adequate housing which is inherent in property rights.[124] In addition, it constitutes a violation of the right to life as the living conditions of the community are incompatible with the principles of human dignity.[125]

Finally, restrictions of land rights of indigenous people require prior consultation and compensation in order to be legitimate. Incorporating the criteria formed in *Saramaka v Suriname, Moiwana v Suriname*,[126] the ACmHPR set out three guarantees the attainment of which ensures the survival of indigenous in this situation: effective participation of indigenous people in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan; reasonable benefit for the indigenous from any such plan within their territory; and a prior environmental and social impact assessment. In the light of an extensive overview of regional case law with regard to compensation on loss of land, the ACHPR concluded in the *Endorois* case that the

[122] *Endorois*, above n 86, para 209.

[123] *Endorois*, above n 86, paras 214–15, citing *Handyside v United Kingdom* (1976) ECtHR Ser A No 24, para 49.

[124] *Endorois*, above n 86, para 191, citing *Ogoni*, above n 98, referring to CESCR, *General Comment No. 7, The right to adequate housing (Article 11 (1) of the Covenant): forced evictions*, UN Doc E/1998/22, 20 May 1997, para 4. *Endorois*, above n 86, para 202, citing *Akdivar v Turkey*, No 21893/93, ECtHR 1996.

[125] *Endorois*, above n 86, para 216, citing *Yakye Axa*, above n 82.

[126] *Endorois*, above n 86, para 227.

Endorois people as a distinct people have suffered a violation of their property rights.[127]

3.2.6 The right to culture

With regards to cultural rights allegations, the ACmHPR affirms that human rights requires both respect for, and protection of, religious and cultural heritage essential to indigenous' group identity, including buildings and sites such as libraries, churches, mosques, temples and synagogues.[128] To this end, it follows the UN Human Rights Committee's interpretation of land resources manifestly linked to indigenous culture and their particular way of life. By restricting access to ancestral lands, the state denies the community access to an integrated system of beliefs, values, norms, mores, traditions and artifacts,[129] thus violating the right to culture.

3.2.7 The right to natural resources and development

The right to natural resources is defined in relation to the right of property as interpreted in the American system. The ACmHPR follows the reasoning of IACtHR in the *Saramaka* case to denote violations of indigenous rights in the absence of free disposal of their wealth and natural resources in consultation with the state,[130] and subsequently, the obligation to make restitution and compensate as discussed above.

The right to development is also interrelated to land resources. As in the cases of *Saramaka* and *Yakye Axa*, the ACmHPR demonstrates that the loss of ancestral lands without prior consultation affects their access to a traditional means of substance and natural resources hindering their development and threatening their very existence.[131]

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[127] Ibid, paras 233–8.

[128] Ibid, para 241.

[129] Ibid, para 250.

[130] The ACmHPR applied the reasoning of the *Saramaka* case, noting that the State has a duty to consult with them, in conformity with their traditions and customs, regarding any proposed mining concession within Saramaka territory, as well as allow the members of the community to reasonably participate in the benefits derived from any such possible concession, and perform or supervise an assessment on the environmental and social impact prior to the commencement of the project. *Endorois*, above n 86, para 266.

[131] *Endorois*, above n 86, paras 269–98.

4 Concluding Remarks

The *Endorois* case indicates the extent and importance of inter-court dialogue in developing a common understanding and protection standards in the case of indigenous rights. In this context, various considerations arise: what lessons can be drawn by using an indigenous paradigm? Are we moving towards constitutionalization of international law?

Although international law is far from achieving a constitutionalist order, legal norms are subject to judicial interaction. Accordingly, judicial interpretation enables the development of common standards within regions systems. This work depends greatly on the attitude of judges and international lawyers and on their ability to transpose international and regional law in their respective cases.

The analysis in this article demonstrates that, in today's totally interconnected world, judicial dialogue enhances the uniform interpretation of indigenous rights, promotes common standards and strengthens unity of law. According to Klein, 'constitutionalization in public international law suggests that international law and its suborders have reached a degree of "objectivity" in order to limit state sovereignty like a constitutional order'.[132] In that regard, cross-references between regional human rights bodies are indicators of harmonization of human rights law, if not constitutional features of international law.

[132] T Kleinlein, 'Constitutionalization in International Law' (2012) 231 *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* 703, 703.

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COMPARATIVE LAW AND THE *IUS GENTIUM*

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Abstract
Constitutional principles are sometimes invoked in adjudication as a bridge to foreign law. This article argues that a cosmopolitan approach, such as that advocated by Jeremy Waldron through his *ius gentium* theory, is useful in accounting for the use of constitutional principles by courts insofar as the commonality of language and methodology surrounding the use of constitutional principles is connected to societal and institutional needs. The article argues that constitutional principles often serve as a connection to foreign law because the principles are applied as representations of a societal need for order and stability. At the same time, the article cautions that transnational judicial dialogue is impacted by compartmentalisation and divergence. Consequently, arguments for a *ius gentium* must be more cautious and nuanced. As a step in this direction, the article proposes two ideas for modifying the *ius gentium* theory: conceiving of the *ius gentium* as an emerging but not yet fully realised system and characterising the *ius gentium* as a convergence of methodology rather than substantive norms.

1 The Concept of the *Ius Gentium*

Legal principles are often invoked in adjudication as a bridge to foreign law and occupy an important space in the discourse on the existence of cosmopolitan norms. Jeremy Waldron taps into cosmopolitan theory by arguing that the use of foreign law in adjudication is part of the expression of 'laws common to all mankind', identifying universal legal principles as part of this *ius gentium*.[1] The principles that contribute to the *ius gentium* are those that 'emerge from consensus in the legal world', consensus that is largely indicated by 'convergent currents of foreign statutes, foreign constitutional provisions, and foreign precedents'.[2] These principles are therefore identified by their characteristic of commonality or universality.[3] Waldron draws on Gaius's idea that countries governed by laws 'use partly their own laws and partly laws common to all mankind to

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[1] J Waldron, *Partly Laws Common to All Mankind* (2012).
[2] Ibid, 3, 68.
[3] Ibid, 28.

govern themselves'[4] and identifies the *ius gentium* as a body of positive law that particularly applies to relations between the individual and government and also sometimes to relations between private individuals.[5] Thus, as a substantive matter, the concept of *ius gentium* has special relevance human rights and constitutional norms, and the use of constitutional and human rights principles. As a methodological matter, the *ius gentium* theory is developed largely from comparative engagement between state legal institutions, including courts.

The cosmopolitan viewpoint is indeed useful in accounting for the use of constitutional and human rights principles by courts insofar as the commonality of language and methodology surrounding the use of such principles is connected to elemental social and institutional instincts. This article notes that there are common threads that permeate transnational judicial use of constitutional principles, particularly a theme of order and stability. However, a broader analysis of transnational judicial engagement presents a picture which is more nuanced than that presented by Waldron. This analysis is critical in light of the significant role played by judicial references to foreign law in the identification of the *ius gentium*. Judicial citations of foreign law are not only crucial to understanding the development of the *ius gentium*, they are also central to Waldron's motivation for expounding the *ius gentium* theory. The theory is used to justify and defend judicial references to foreign law. It seeks to accomplish this justificatory goal by maintaining that as lawyers, we are engaged in a common legal enterprise and are seeking to apply common principles to local settings, and that in looking to foreign laws, judges learn more about the application of those common principles. It becomes crucial then to interrogate the extent of commonality of the enterprise.

This article maintains that we must pay sufficient regard to the influence of historical and cultural divisions that compartmentalise the jurisdictions engaged in transnational judicial dialogue. This compartmentalisation and the divergence that results from it require that arguments for the *ius gentium* be more cautious and nuanced. Two alternative proposals are therefore advanced for adding more complexity to the *ius gentium* theory. The first proposal is that a *ius gentium* is emerging but it is not a current reality. The second is that to the extent that a *ius gentium* does exist, it is more accurately characterised as a convergence of methodology rather than one of substantive norms.

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[4] Ibid, 3-4.

[5] Ibid, 28.

2 Principles that Travel Well

The central defining characteristic of principles is that they are norms which may be applied with varying degrees of weight.[6] It is partly this flexibility that permits principles to function as tools of transnational legal analysis. In particular, principles often serve as a connection to foreign law when they are applied as representative of a basic societal need for order. When used in this way, the principles 'travel well', to borrow an analogy employed by William Twining. The notion of travelling well speaks to the transferability of a concept across different jurisdictional, cultural and other contexts. In this sense, principles that are evoked as expressions of basic needs or inclinations are perfect candidates for norms that have achieved consensus in the legal world. The concept of principles that travel well is supported by way of illustration by cases that raise questions regarding the validity of legislation passed and institutions constituted in a manner and form that contradict the formal requirements of the Constitution. This is the scenario presented by cases that I will refer to as 'legal vacuum' cases—cases in which there is a serious threat of a substantial gap in the normative order of a jurisdiction. The designation 'legal vacuum' is not meant to be descriptive of the circumstances actually in existence at the time of the case. Rather, the term is applied here to refer to the spectre of such a vacuum arising depending on the legal and constitutional response to the lack of constitutional conformity. This includes post-revolution circumstances which arose in Grenada and Fiji, and the interesting case of the failure by the Canadian province of Manitoba to obey constitutional requirements for the bilingual publication of laws.

Legal vacuum cases represent an understanding of principles such as the rule of law and necessity that extend beyond local and cultural boundaries. Such cases not only use principles that have been accepted throughout constitutional democracies, they also reflect elemental social, institutional, and state inclinations towards order and stability. Those inclinations are so basic, particularly in legal vacuum cases, that they would generate broad-scale support across jurisdictions. In fact, there is an interesting connection between the legal vacuum cases and Waldron's defence of the use of foreign law: the idea of moral necessity. Waldron's argument is that if we suppose that there is something useful to learn from foreign law, particularly about basic rights, then it is a necessity to consult such foreign material in order to arrive at more intelligent and accurate

[6] R Dworkin, *Taking Rights Seriously* (1977) 26; R Alexy, *A Theory of Constitutional Rights* (J Rivers, tr; 2002) 48-57; Waldron, above n 1, 64.

decision-making about rights. The consultation of foreign law, in this sense, contributes to the accuracy and fairness of the decision-making exercise.[7] This moral necessity 'does not evaporate with the absence of a democratic basis for giving weight to foreign precedents or *ius gentium* principles.'[8] In a similar sense, in emergencies (circumstances in which there is an urgent threat to the legal order),[9] when it is necessary that a decision be made for the common good, and there is no opportunity to use the proper democratic procedures, the decision can nonetheless be defended on the grounds of the moral necessity of the circumstances.

There is evidence of cross-jurisdictional consensus on the necessity of the stability and continuity of the legal order in cases from jurisdictions as diverse as Fiji, Canada and Grenada. This elemental need for order has long been recognised through constitutional provision for the exercise of executive and legislative powers during times of emergency and in justifications for extraordinary state action taken in exceptional situations. Thus, John Ferejohn and Pascale Pasquino maintain that emergency powers 'have long been thought to be a vital and, perhaps, even an essential component of a liberal constitutional—that is, a rights-protecting— government.'[10] The aim of such power is 'fundamentally *conservative*'; it is to resolve the threat to the system 'in such a way that the legal/constitutional system is restored to its previous state.'[11] The necessity of providing for exceptional or emergency situations is well-acknowledged, despite disagreement about the ultimate factual resolutions of such situations.[12]

The well-known *Reference re Manitoba Language Rights*[13] case decided by the Supreme Court of Canada is pivotal in this discussion, partly because the court made explicit the elemental needs identified in this article. Section 133 of the Constitution Act 1867 and s 23 of the Manitoba Act 1870 required that all the Records and Journals of the Houses of the Parliament of Canada and of the

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[7] T Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (2010) 7-8.

[8] Waldron, above n 1, 154.

[9] J Ferejohn & P Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2004) *2 IJ Con L* 210, 210.

[10] Ibid, 211.

[11] Ibid, 210.

[12] For a recent proposal on the best responses to emergency situations, see D Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (2006).

[13] *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867 (Manitoba Language Rights Reference or Reference re Manitoba Language Rights)* [1985] 1 SCR 721. (*Reference re Manitoba Language Rights)*

Legislatures of Quebec and Manitoba, and the Acts of the Parliament of Canada and of the Legislatures of Quebec and Manitoba, be printed and published in both English and French. The Manitoba Act 1870 is entrenched as part of the Constitution of Canada by virtue of s 52(2)(*b*) of the Constitution Act 1982. Yet, in 1890, the Manitoba Legislature enacted the Official Language Act 1890 (Manitoba), providing that Manitoba statutes need only be enacted and published in English. Subsequently, Manitoba ceased publication of French versions of its records, journals and legislation. In an effort to seek a comprehensive ruling on the legal status of English-only laws, the federal government sent a reference to the Supreme Court of Canada, asking the Court to determine, *inter alia*, whether the language requirements of s 133 of the Constitution Act 1867 and s 23 of the Manitoba Act 1870 were mandatory, and if so, whether Manitoba legislation that were not printed and published in both English and French were invalid by reason of s 23 of the Manitoba Act 1870. The court answered both questions in the affirmative, but on the second question, it clarified that 'the invalid current Acts of the Legislature will be deemed temporarily valid for the minimum period necessary for their translation, re-enactment, printing and publication.'[14] Thus, despite the clear unconstitutionality, the court nonetheless declared that the laws should be observed as temporarily valid in order to avoid a legal vacuum in the province.

The continuity of positive law was at the heart of the decision of the Canadian Supreme Court in the *Manitoba* case. This was reflected in the Court's assertion that the presence of the rule of law as a 'fundamental postulate' of the Constitution meant that the court had a ground on which to base its decision to declare the temporary validity of the Manitoba legislation.[15] As the court put it, '[t]he rule of law requires the creation and maintenance of an actual order of positive laws to govern society'.[16] The maintenance of the positive legal order was perceived as essential to 'avoiding a legal vacuum in Manitoba and ensuring the continuity of the rule of law'.[17] Consequently, a 'declaration that the laws of Manitoba are invalid and of no legal force or effect would deprive Manitoba of its legal order and cause a transgression of the rule of law'.[18] This led to the conclusion that 'otherwise invalid acts may be recognised as temporarily valid in order to preserve

[14] Ibid, para 157.
[15] Ibid, para 63.
[16] Ibid, para 60.
[17] Ibid, para 67.
[18] Ibid, para 68.

normative order and the rule of law'.[19]

The nature of continuity which was discussed in this aspect of the judgment was quite elemental. It was recognition of the need for humans in any society to be governed by norms to guide behaviour and contribute to a system of social control. It is, in a word, *elementary* to the very existence and survival of the society. In societies governed by law, *legal norms* are particularly essential in maintaining social control and an ordered society. A state as a legal community cannot exist or survive without the existence of laws to condition inter-individual relationships and the relationships between the individual and the state.[20] This sentiment was made explicit in the *Manitoba* case, the Canadian Supreme Court stating that the rule of law recognises that 'law and order are indispensable elements of civilised life'.[21] The elemental nature of the concern for securing normative order through the rule of law placed the issue faced by the court in a global context and indicated that the issue was not restricted to a provincial or national perspective. This globalized perspective was reflected in the Supreme Court's references to judicial decisions in Cyprus and Pakistan on the validity of unconstitutional statutes. In those foreign judgments, the courts invoked the doctrine of state necessity to validate otherwise unconstitutional legislation. The Canadian Supreme Court approvingly commented that '[t]he cases on the necessity doctrine […] point to the same conclusion: the courts will recognise unconstitutional enactments as valid where a failure to do so would lead to legal chaos and thus violate the constitutional requirement of the rule of law'.[22] Since the preservation of a legal order would be essential to the survival of any state, this internationalised the issue in the *Manitoba* case and helped to justify the incorporation of foreign judicial decisions into the court's reasoning.

An internationalised issue is part of the crux of the response to 'localist' objectors to judicial comparativism in constitutional cases. The localist objection posits that constitutional adjudication in any jurisdiction must be grounded in the constitutional culture or constitutional identity of the nation in question.[23] The argument is that the national locale is central to the interpretation of the requirements of the constitution and foreign law is accordingly irrelevant. If an issue can be construed as a global issue, the argument from constitutional locale

[19] Ibid, para 103.
[20] H Kelsen, 'Law, State and Justice in the Pure Theory of Law' (1947–1948) 57 *Yale LJ* 377, 380.
[21] *Reference re Manitoba Language Rights*, para 64.
[22] Ibid, para 104.
[23] C Saunders, 'The Use and Misuse of Comparative Constitutional Law' (2006) 13 *Ind J Glob Leg Stud* 37.

recedes in importance. However, in legal vacuum cases where the preservation of normative order becomes a central factor, the issue extends beyond local boundaries, the localist objection loses force and there is a stronger case for the relevance of foreign law.

The necessity of preserving law and order, which was at the basis of the *Manitoba* decision, has influenced judges in post-revolution jurisdictions to rely on similar legal principles and to engage in reasoning similar to that employed by the Supreme Court in *Manitoba Language Rights*. Such was the case in *Mitchell v DPP*, the facts of which it is useful to set out in some detail. The circumstances of the *Mitchell* case arose in the aftermath of a revolution in Grenada, a usually peaceful 'small island in the Eastern Caribbean'.[24] A *coup d'état* was staged in March 1979 by the New Jewel Movement, the opposition party to the then ruling Grenada United Labour Party. The 'bloodless revolution' led to the establishment of the People's Revolutionary Government (*PRG*) in 1979, led by Maurice Bishop, who assumed the position of Prime Minister of Grenada. The PRG suspended the Constitution of Grenada in 1973 and promulgated a set of People's Laws; the existing local courts were abolished as were appeals to the Judicial Committee of the Privy Council. A new Supreme Court consisting of a High Court and a Court of Appeal was created by People's Laws Nos 4 and 14. The PRG was overthrown in October 1983, when Maurice Bishop and some of his Ministers were murdered. Following the murders, a Revolutionary Military Council assumed power, which lasted for approximately one week, whereupon their reign was terminated when the island was invaded by forces from the United States of America, along with forces from some Caribbean states. The Governor General of the country then issued a proclamation declaring a state of emergency and declaring that he would exercise executive authority until a government was elected pursuant to the Constitution. The declaration also stated that 'existing laws' (including People's Laws Nos 4, 14, and 84, which established the new judicial system) would continue in force. Constitutional government returned when the Constitution of Grenada Order 1984 was published, which provided that the Constitution of 1973 was in force with the exception of some specified provisions, and a new Parliament was elected in December of 1984. The first Act passed by this new parliament in 1985 confirmed the validity of the laws passed during the PRG rule when the Constitution had been suspended.

The appellants in the case were charged with the murders of Maurice Bishop and other ministers of the PRG and were awaiting trial in the High Court. The

[24] [1986] LRC (Const) 35, 41 (Haynes P) (CA Grenada) (*Mitchell v DPP*).

indictment against them was filed in September 1984, before the resumption of government under the Constitution. They applied to the High Court challenging the High Court's competence to hear the charge, on the ground that the court was established by the PRG under People's Laws Nos 4 and 14 and that since that government was invalid, those laws were invalid and hence the High Court itself as it was then constituted was invalid. Nedd CJ, sitting on the bench of the High Court, dismissed the application, holding that while the PRG was not the *de jure* government, the laws passed by it validly established the Supreme Court.[25] The appellants then appealed to the Court of Appeal of Grenada. The issues raised on appeal included whether the PRG was the *de facto* government of Grenada, whether the PRG achieved *de jure* status before it was overthrown, whether People's Laws Nos 4 and 14 were valid, and whether the court had jurisdiction to hear the appeal before it.

The majority of the Court of Appeal held that there was insufficient evidence before it to decide whether the PRG had achieved *de jure* status. However, the court also held that People's Laws Nos 4 and 14 were validated under the law of necessity, and therefore the Supreme Court (including the Court of Appeal itself) was validly constituted.[26] Haynes P indicated that one of the maxims from which the doctrine of necessity is derived is that stated by Bacon: 'that the preservation of the state is the supreme law (*salus populi suprema lex*)'.[27] Based on this understanding, the President of the Court of Appeal listed five conditions for the operation of the doctrine of necessity, the first among these being that an imperative necessity must arise because of the existence of exceptional circumstances not provided for in the Constitution, for immediate action to be taken to protect or preserve some vital function of the State. Simeon McIntosh, a respected Caribbean legal academic, criticised the Court's application of the doctrine of necessity to the case on the basis that the circumstances before the court did not constitute an 'emergency' within the meaning required by the necessity doctrine because the doctrine only applies to unconstitutional acts performed by a constitutional state.[28] He also based his criticism on the argument that 'it is only a court that is itself already validly constituted that would have jurisdiction' in the case.[29] McIntosh's latter criticism—regarding the validity of

[25] The Chief Justice's decision was given ten days after the Constitution of Grenada Order 1984, which reinstated the Constitution of 1973.
[26] *Mitchell v DPP*, paras 73-4, 88-94, 120.
[27] Ibid, para 76.
[28] S McIntosh, *Kelsen in the Grenada Court: Essays on Revolutionary Legality* (2008) 28.
[29] Ibid, 37.

the court—certainly indicates a logical flaw in the decision. However, a court before which this issue is raised must decide; that is a critical distinction between judicial practice and legal theory. As the Court recognised, it was imperative for it to give a reasoned decision that would provide guidance and certainty in the face of disorder.

The commonality of concern for maintenance of law and order was again on display in the use of the doctrine of necessity in successive cases in Fiji, in which the courts referred to the *Mitchell* judgment and adopted most of the conditions of the necessity test enumerated by the Grenadian Court of Appeal.[30] The Parliament of Fiji was subject to an armed invasion and coup in May 2000, the Prime Minister and other ministers being taken hostage. The President declared a state of emergency, appointed a free minister to act as Prime Minister, and under s 59(2) of the Constitution, prorogued Parliament for six (6) months. The acting Prime Minister then resigned. The military commander assumed executive authority as head of an interim military government, made decrees suspending parts of the Constitution and decrees that holders of constitutional offices and organs of government, including courts (other than the Supreme Court) should continue to operate. He installed an interim civilian government and an interim President without first consulting the Prime Minister (who had by that time been released), in accordance with s 90 of the Constitution. The applicant, a farmer who claimed to have lost rights by the suspension of his constitutional rights, issued an originating summons in the High Court, seeking a ruling that the 1997 Constitution was still in force as the supreme law. Gates J in the High Court held that the declaration of a state of emergency was valid under the doctrine of necessity, but that necessity could not be invoked to justify a purported abrogation of the Constitution by the establishment of a new extra-constitutional regime. Therefore, the interim civilian government was not legally established and the Constitution of 1997 remained in force, with the result that the applicant's claim succeeded on most points. The Court of Appeal dismissed the government's appeal—employing different reasoning to arrive at the conclusion that the interim civilian government was invalid—but upheld the legality of many of the military commander's acts under the doctrine of necessity. Again, as in the Grenadian and Canadian cases, the primary concern was with what actions and steps were necessary for the 'ordinary orderly running of the

[30] *Prasad v Republic of Fiji* [2001] 2 LRC 743 (Fiji CA) (*Prasad v Fiji*); *Qarase v Bainimarama* [2008] FJHC 241. See M Head, 'The Doctrines of Necessity and Revolution: A Critical Review of *Republic of Fiji Islands and Attorney General v Prasad*' (2001) *Australian ILJ* 259; N W Barber, 'State Necessity and Revolutionary Legality in Fiji' (2001) 117 *LQR* 408.

State'.[31] Despite the distinction between the results of *Mitchell* and *Prasad*, there was a common motivating factor of preventing anarchy. In fact, though the Court of Appeal in *Prasad* held that the Constitution remained the valid supreme law, its ruling ensured that there was no legal vacuum by upholding the legality of many acts of the military commander and by permitting the Acting President, who had been appointed by the military, to remain in office for a limited period. Again, therefore, the court's decision ensured the maintenance of law and order, despite the violation of the formal requirements of the Constitution.

In all of these cases, the reader may also have noticed strong institutional undertones. One aspect of the institutional implications relates to the institutional legitimacy of the court in ruling on the issues before it. However, the primary institutional concern is that of the preservation of the validity of essential state organs. This was central to the *Mitchell* case, where the validity of the court itself was being challenged, prompting Peterkin JA to refer to 'the impossible situation which could and would arise without the presence of a Court in Grenada'.[32] Likewise, in explaining why it was necessary to deem that the Acts of the Legislature of Manitoba were temporarily valid, one of the concerns highlighted by the Canadian Supreme Court was that of the legitimacy of the institutions of the province. In holding that the rule of law demanded the declaration of temporary validity, the court summarised the potential impact on the institutions of government in the province of Manitoba if the Acts of the province were invalidated with immediate effect:

> The situation of the various institutions of provincial government would be as follows: the courts, administrative tribunals, public officials, municipal corporations, school boards, professional governing bodies, and all other bodies created by law, to the extent that they derive their existence from or purport to exercise powers conferred by Manitoba laws enacted since 1890 in English only, would be acting without legal authority.[33]

The validity of the Legislative Assembly of Manitoba would itself have been open to doubt if the court had not proceeded to grant temporary validity to the English only laws. While the Manitoba Legislature was validly established by the Manitoba Act 1870, subsequent to 1890, English only laws had been

[31] *Prasad v Fiji,* 774, quoting *Madzimbamuto v Lardner-Burke* [1968] 3 All ER 561, 579 (Lord Pearce).
[32] *Mitchell v DPP*, para 121 (Peterkin JA).
[33] *Reference re Manitoba Language Rights*, para 56.

passed relating to the franchise and the composition of the Legislature. This raised the prospect that not only would a legal vacuum exist, but the Legislature would lack the institutional legality to fill this vacuum.[34] For these institutional reasons, along with the potential impact on the substantive law of the rights and obligations arising under unilingual Acts passed after 1890, the court concluded that 'declaring the Acts of the Legislature of Manitoba invalid and of no force or effect would, without more, undermine the principle of the rule of law'. Hence, the Court invoked the rule of law not merely to preserve the authority of the positive laws, but also to ensure the maintenance of institutional authority to generate and implement the laws of the state.

The constitutional principles called upon by the courts in these cases (necessity and the rule of law) fit neatly into the notion of cosmopolitan norms because these principles, as used in the cases above, are concepts that provide a direct link to basic societal needs. Thus, they are principles and concepts that 'travel well' because they are so intimately connected to the elemental needs of society.[35] What the courts responded to in the cases discussed above was not simply analysis of national laws and national circumstances; they responded to universally recognised necessities. Thus, whatever the disputes among academics and judges about the exact contours of the doctrine of necessity, it is generally agreed that it renders lawful or valid acts which are 'necessary to peace and good order'.[36] Similarly, despite the ongoing and complex debates regarding the content of the rule of law, it is universally accepted that it requires, at a minimum, the existence of laws.[37] This element of universality in turn facilitates and justifies references to foreign law. From this perspective, we do see principles functioning in a way that suggests there is some merit in Waldron's *ius gentium* analysis. However, as discussed below, there is much more to the use of constitutional and human rights principles, some of which would not be classified as principles that travel well. Further, there are other inter-jurisdictional dynamics that must inform our analysis in order to give a more accurate account of the implications of transnational judicial discourse.

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[34] P Hogg, 'Necessity in a Constitutional Crisis' (1989) *15 Mon LR* 253, 255.

[35] See W Twining, 'Have Concepts, Will Travel: Analytical Jurisprudence In a Global Context' (2005) 1 *Int'l J L Con* 5.

[36] *Texas v White* (1868) 74 U.S. (7 Wallace) 700, 733; Head, above n 28, 268.

[37] P Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *PL* 467; A L Young, 'The Rule of Law in the United Kingdom: Formal or Substantive?' (2012) 6 *Vienna J Int'l Const L* 259; T Bingham, *The Rule of Law* (2010).

3 *Legal* Decision-Making?

The use of principles in legal vacuum cases appear to be attempts to identify and glean the *core* elements of the state and the constitution by 'dig[ging] down to the level of constitutional theory'[38] to apply the *core* of foundational principles of the constitution. So, for instance, if in a case such as *Reference re Manitoba Language Rights*, a principle is used to ensure the maintenance of laws in a jurisdiction, this is a core application of the rule of law, universally accepted, that the rule of law requires that there must exist a positive order of laws. So while there may be controversy surrounding the court's resolution of the facts of the case, it is unlikely that there would be debate surrounding the court's statement that the rule of law demands that there must be laws. Similarly, despite its potential for substantial effect on the legal, political, and social structures of the state, the doctrine of necessity has generally been recognised as one of ancient vintage and, in fact, was relied upon by an English court as early as 1672.[39] Indeed, Glanville Williams identified twelve maxims justifying the doctrine of necessity[40] and he justified its place in the law, noting that:

> 'The law' is not a body of systematised rules enacted as a whole and fixed for all time. Judges have always exercised the power of developing the law, and this is now recognised to be a proper part of their function. 'The law', in a word, includes the doctrine of necessity; the defence of necessity is an implied exception to particular rules of law.[41]

With respect to the Grenadian Court of Appeal's judgment in *Mitchell*, though McIntosh criticised the court's ruling, his critique was based on his view that the Court 'misconstrued the doctrine'[42] and not on the ground that the doctrine itself was an illegitimate tool of judicial decision-making. Importantly, it has been noted by Mark Stavsky, commenting on the use of the doctrine of necessity in Pakistan, that '[i]f narrowly and carefully applied, the doctrine constitutes an affirmation of the rule of law'.[43] Indeed, the Supreme Court of Canada stated

[38] *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539, 584.
[39] *Manby v Scott* (1672) 1 Lev 4. See also M Stavsky, 'The Doctrine of State Necessity in Pakistan' (1983) 16 *Cornell ILJ* 341, 342.
[40] G Williams, 'Defence of Necessity' (1953) 6 *CLP* 216.
[41] Ibid, 224.
[42] McIntosh, above n 28, 28.
[43] Stavsky, above n 39, 344.

in the *Manitoba* case that 'the doctrine of necessity is not used in these cases to support some law which is above the Constitution; it is, instead, used to ensure the unwritten but inherent principle of rule of law which must provide the foundation of any constitution.'[44]

It is also crucial to acknowledge that in legal vacuum cases, the court plays a secondary role in ascribing validity to legislation under an understanding that it is 'necessary' to do so. The secondary role of the court is key to an assessment of the institutional legitimacy of the court's decision-making in such cases.[45] Therefore, in these cases, the central factual circumstance is that the legislature and/or executive of the jurisdiction promulgated acts that would, in ordinary circumstances, be invalid; the primary legal actors are the elected branches of state. It is only subsequently that the court becomes involved, when asked to legally acknowledge the necessity of the exceptional acts and to confer partial (that is, temporary) or complete validity on the prior legislative or executive acts.

Despite the universally accepted necessity of providing for emergencies, there remain doctrinal and institutional difficulties regarding courts' approach to such circumstances. One persistent question provoked by the legal vacuum cases is whether the decision-making that occurs in such cases is actually appropriately denoted 'judging' or 'legal decision-making' or more accurately characterised as decisions primarily motivated by practicality or political (necessity).[46]

Considering the *Manitoba* case, while the court determined that the rule of law was an applicable principle in the case, the rule of law could have led the court in opposite directions. First, it could have been applied as a requirement that the court and other institutions obey the text of the Constitution, which prescribed that, in order to be valid, the laws enacted must be bilingual. The result of such an application of the rule of law would be the immediate nullity of the unilingual laws. A conflicting application of the rule of law—the one chosen by the court—was that the rule of law requires an order of positive laws. As shown above, the result of this application was the (temporary) validity of the laws. The question therefore arises of what factors resulted in the court's choice of the latter application of the rule of law. It is certainly plausible to propose that the choice between the two applications of the rule of law was motivated by political or practical considerations that are outside the scope of legal norms. A decision-making process that takes into account such considerations challenges

[44] *Reference re Manitoba Language Rights Reference*, para 105.
[45] Cf Hogg, above n 34, 262, 263.
[46] Head, above n 30, 259–60.

the legitimacy of the court's judgment as a *legal* judgment.

4 Divergence and Dilution

Despite the common threads of transnational law that unite the legal vacuum cases, empirical and critical analysis of a wider array of judicial decisions also demonstrate that the influence of history creates regional and national distinctions that must be taken into account. While some underlying instincts may be common to the point of being universal, the transnational judicial development of principles diverge along fault lines influenced by history, institutional development, and pedagogical and educational patterns.

4.1 Methodology

Thus, while there is an underlying strain of cosmopolitanism, it is limited by historical, institutional and doctrinal factors that must be appreciated in our understanding of the methodology and implications of the judicial use of principles. Thus, unsurprisingly, discourse occurs heavily within constitutional networks, which share a common language and/or a common legal heritage.[47] This does not mean there is no exchange between networks, but it does mean that there is much more discourse and legal exchange on the *intra*-network level than the *inter*-network level, and this must affect the content and application of the principles recognised by respective judicial institutions.

A further nuance that must influence our analysis is the dimension of discursive power which not only contributes to the existence of regional and sub-regional pockets of transnational discourse, but also significantly affects the *content of norms* and the *relative normative influence* of jurisdictions. We must squarely confront the questions whether if there are laws common to all mankind, who plays a role in determining the content of these laws, and what is the extent of the role played by different countries? While Waldron cautions us not to make the mistake of thinking the issue is 'global uniformity', he nonetheless posits that '[t]o a large extent, we treat law more like a science—as a *global enterprise of which we partake*—than like a national costume or some aspect of the culture we would put on show to establish our distinctiveness.'[48] The central notion of

[47] D Law & M Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *Cal LR* 1163; W Chang & J Yeh, 'Internationalization of Constitutional Law' in M Rosenfeld & A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) 1165, 1173–6.

[48] Waldron, above n 1, 5 (emphasis added).

a 'global enterprise of which we partake' must be interrogated by examination of the evidence provided by actual judicial citations in the context of history and geopolitical dynamics. Acknowledging that a substantial avenue through which we partake in the exercise of the law is through judicial reasoning and decision-making, and that judicial references to foreign law play a significant role in the *ius gentium* theory, we must take account of the imbalances in the transjudicial discourse. The imbalances are evidenced by empirical data.

Empirical evidence of citations of foreign precedent by the Australian High Court between 2000 and 2008, shows that UK and US authorities account for over 80 percent of citations, with Canada being the third most frequently cited and New Zealand the fourth.[49] Canada tells a similar tale, with the USA and the UK comprising over 88 percent of the citations to foreign precedents in constitutional cases decided by the Supreme Court of Canada between 1982 and 2010. Australia and the European Court of Human Rights earned third and fourth places, respectively.[50] Part of accounting for these figures is that there is a tendency to cite jurisdictions that are former members of the British Empire, share a common law tradition or speak a common language. Thus, this is partly a function of the fact that judicial dialogue tends to occur within regions and within the same legal (and linguistic) family. The legal family ties are particularly heightened in the common law.[51] There is a perception of the common law as a unified whole, which is reflected in judges speaking to the desirability of convergence and even unity within the common law, particularly within regional groups of common law jurisdictions. Lord Bridge stated in *Bennett v Horseferry Road Magistrates' Court*:

> Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots.[52]

[49] C Saunders & A Stone, 'Reference to Foreign Precedents by the Australian High Court: A Matter of Method' in T Groppi & M Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (2013) 13, 33–4.

[50] G Gentili, 'Canada: Protecting Rights in a "Worldwide Rights Culture", An Empirical Study of the Use of Foreign Precedents by the Supreme Court of Canada (1982–2010)' in T Groppi and M Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (2013) 39, 57–9.

[51] E Örücü, 'Comparative Law in British Courts', in U Drobnig & S van Erp (eds), *The Use of Comparative Law by Courts* (1999).

[52] [1994] 1 AC 42, 66 (HL).

The Judicial Committee of the Privy Council has also encouraged regional unity within common law jurisdictions, stating approvingly in an appeal from the Caribbean state of Belize that the Judicial Committee's decision 'will bring Belize into line with other Commonwealth countries of the Caribbean'.[53]

Waldron does acknowledge the legal family critique of claims of a legal consensus and universalism, but issues the rejoinder that a 'self-referential starting point does not preclude the possibility of projection unto an unfamiliar environment'. He encourages us to accept that *ius gentium* is still valuable despite that it develops unevenly, 'in fits and starts'. The difficulty that remains, even accepting this encouragement, is that as compartmentalised as the discourse is, it is more accurate to perceive *ius gentium* as emerging but not truly existing as a current system. There is as yet no global system and it is more accurate to see a global system as a possibility in the future but not a reality at present.

A further level of scrutiny that should be undertaken is to account for the fact that even within legal families, there are imbalances in transnational citations. Within the common law system, some former members of the British Empire are referenced with remarkably higher frequency than others. During the period 1982–2010, the Canadian Supreme Court made only five references to Indian case law and 4 to Caribbean case law, compared with 81 references to Australian and 32 to New Zealand case law.[54] In the Australian High Court, from 2008–2008, there were no references to the Commonwealth Caribbean and only 15 Indian references compared with 317 for Canada and even 36 for the European Court of Human Rights.[55] The limited reciprocity in cross-referencing between jurisdictions also undermines claims that there is true transnational *dialogue*. For example, it has been observed that while the Canadian Supreme Court and the South African Constitutional Court cite each other, the latter cites the former approximately three hundred times more often than *vice versa*.[56]

There are several practical factors that likely contribute to these imbalances. One of the more apparent factors is the relative *volume* of case law generated by comparator jurisdictions; for instance, the Supreme Court of Canada produces more constitutional and human rights rulings, in terms of sheer numbers, than for instance, the Caribbean Court of Justice. But that cannot be the sole explanation when we consider that the Indian Supreme Court, for instance, also generates a

[53] *Vasquez v R* [1994] 1 WLR 1304, 1314 (PC).
[54] Gentili, above n 48.
[55] Saunders & Stone, above n 47.
[56] Chang & Yeh, above n 45, 1176.

high volume of case law,[57] yet the Indian Supreme Court is cited with much less frequency than the Canadian Supreme Court. A further practical consideration is that of 'documentary access' to case law emanating from some jurisdictions. Other practical factors include institutional affiliation with educational facilities in the more developed states[58] and functional resource-based considerations that encourage states to consult the judicial record of jurisdictions that have already addressed difficult issues in hard cases.

Beyond practical considerations, there are broader influence-based factors such as the fact that there may be more pedagogical value in referring to judgments of older democracies, and the perception that some jurisdictions are more 'developed' and therefore have greater reputational currency. Accordingly, some of the power imbalance is a function of relative global influence that extends beyond law, and is reminiscent of geopolitical imbalances that occur in normative legal systems that involve the interaction of multiple jurisdictions in a global setting.[59] Thus, there is not only a problem of documentary access in relation to various jurisdictions, but also documentary influence.

There is some acknowledgment of the issue of reciprocity in citations by Waldron. He briefly discusses citations among Commonwealth jurisdictions, pointing to Commonwealth jurisdictions citing each other, but makes three analytical errors. First, in speaking of 'the Commonwealth', he falls into a familiar pattern of limiting the Commonwealth almost exclusively to Australia, New Zealand and Canada. Of course, the Commonwealth of Nations is a much broader, more diverse group, with a host of potentially constitutionally significant case law. It is true that sometimes there is less to be gained from referring to developing nations that have not confronted some of the problems facing more developed countries in fields such as commercial or contract law,[60] but this does not account for or justify neglect of literature from developing countries on constitutional issues. Secondly, commenting on the citation by other Commonwealth countries of the United Kingdom, Waldron maintains that 'the citations go in both directions'. However, he does not adequately address

[57] See N Robinson, 'A Quantitative Analysis of the Indian Supreme Court's Workload' (2012) 10 *J Emp Leg Stud* 570.

[58] See references to the influence of intellectual tradition in *Hinds v R* [1977] AC 195, 212 (PC).

[59] See e.g. N Krisch, 'International Law In Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) *16 EJIL* 369; P Singh, 'From "Narcissistic" Positive International Law to "Universal" Natural International Law: The Dialectics of "Absentee Colonialism"' (2008) 16 *Af JICL* 56.

[60] Waldron, above n 1, 200.

the critiques regarding the frequency of citations by the UK courts of other Commonwealth countries, and regarding which other Commonwealth countries are most frequently cited. In short, he does not sufficiently address the question of the extent of reciprocity in citations. Thirdly, Waldron does not raise the question whether a significant proportion of the citations by UK courts to other Commonwealth countries are actually references to the judgments of the Privy Council and therefore indicative of citations to a Bench that substantially overlaps with members of the UK House of Lords.[61]

The discussion regarding which jurisdictions are engaged in the dialogue and the extent and character of their engagement affects at least three issues. This discussion most clearly impacts the issue of who creates these norms (who are the *norm-makers*) because even if these norms are understood to arise in societies generally, if we assert that they are distinct from natural law, we must acknowledge the existence of norm-makers and engage in discourse identifying norm-makers and characterising their influence in the process of norm creation.

Second, the extent of engagement of jurisdictions also affects the content of the norms. We must accept some of the critiques of legal and cultural relativism, by acknowledging that the meaning of some norms and concepts are shaped by the legal and cultural space from which the norms emanate and to which they apply.[62] Accordingly, the exclusion or marginalisation of particular states within transnational discourse means that the perspectives of their legal and social frameworks will also have little or no impact on the developing norms. Conversely, the frameworks of states that are actively engaged will be more heavily reflected in the norms identified in the cosmopolitan arena. The result is not that we should accept legal and cultural relativism wholeheartedly, but that we should seek to recognise some truth in relativist critiques of comparativism and cosmopolitanism.

This calls for heightened self-awareness on the part of those engaged in comparative analysis. From the postmodernist perspective, the comparative exercise is critiqued on the basis that comparatists (whether practitioners or academics) approach their work from their own cultural frameworks. Postmodernists maintain that the comparatist's cultural framework affects the epistemological choices, functional analysis and normative reasoning of comparative work. The impact of framework bias means that the dominant cultural framework is exalted in comparative studies and there is an iterative process of exclusion of 'the other' cul-

[61] See J Bell, 'Comparative Law in the Supreme Court 2010-11' (2012) *1 CJICL* 20, 23.
[62] Singh, above n 59; Twining, above n 33.

ture(s). This sort of critique is familiar and, indeed, understandable where multiple jurisdictions interact within a transnational or global setting. Thus, as international law has been assailed by complaints of eurocentricity and asymmetry between the global north and south, comparative law has been subjected to similar critique.[63] Indeed, the empirical data presented above demonstrates that some of this critique is justifiable, as there is an imbalance in favour of the global north and west and marginalisation of the global south and east. The comparatist, must, in response, cultivate a high level of consciousness of her cultural influences, her methodological choices and the relationship between her research and the dominant political and cultural climate.[64] In short, the comparatist must be self-aware and acknowledge her own cultural framework. To the extent that she advances claims of universalism while brushing aside concerns of hermetic and imbalanced engagement, she is signalling that for her, the 'legal world' is represented by those jurisdictions that fit within her own cultural framework.

This self-critical approach is all the more important where there are cosmopolitan or universalist goals within the comparatist's work. Such goals broaden the field of study and simply make it harder to achieve accurate conclusions, and a cosmopolitan or universalist outlook heightens the probability of dominance of the discourse by the prevailing cultural framework. The *ius gentium* theory, as presented by Waldron, fails to be sufficiently self-conscious and self-critical. The current defence of the theory misses the opportunity to acknowledge, interrogate and account for the imbalances in comparative engagement.

Third, we should also question whether the engagement factor affects the objects of the norms, that is, to whom they should apply. If there is no equal engagement in the norm-making process, then arguably the norms are not accurately characterised as part of a *ius gentium* either in their creation or in their application. Now, it might be claimed by defenders of Waldron's theory that the *ius gentium* does not perceive jurisdictions as constituents; that individuals are the true constituents, and that the concerns regarding state engagement are misplaced or overblown. This rejoinder, is however, unconvincing. While individuals may be the constituents of a *ius gentium*, in the current framework it is state institutions that represent, speak for, and create norms for, individuals. Indeed, institutional context is a crucial element in constructing an account

[63] J T Gathii, 'International Law and Eurocentricity' (1998) *9 EJIL* 184; A Gupta, 'Constitutional Pluralism, a Recent Trend in International Constitutional Law: European Origins and the Third World Concerns' (2011) 36 *S Af YIL* 37, 52.

[64] H Schwenke & A Peters, 'Comparative Law Beyond Post-Modernism' (2000) *49 ICLQ* 800, 829–30.

of transnational law, even a cosmopolitan account of transnational law.[65] It is through legal and political institutions that individuals participate in the cosmopolitan space envisioned by the *ius gentium* theory.

These are all salient questions which ought to affect our assessment of whether nations are engaged in reciprocal or true dialogue. The imbalances discussed above undercut the *commonality* of the norms that would form part of the *ius gentium* and undermine the claim that the enterprise is truly *global*. To sustain the claim of the global enterprise and the *ius gentium*, these issues must be confronted in detail. Moreover, assuming the usefulness of citing foreign law, particularly as a technique to improve the accuracy and fairness of decision-making, imbalanced judicial discourse adversely affects the benefits of judicial comparativism as it diminishes the perspectives that inform judicial decision-making. If one function of comparativism is to enable courts to treat like cases alike, imbalanced engagement severely undermines this objective, as it distorts the pool of 'like cases'.

One proposal for addressing these issues is to acknowledge that while a *ius gentium* is in the process of development, it has not yet emerged as a fully fledged system of law. This proposal would address criticisms regarding the compartmentalised and imbalanced nature of current transnational judicial discourse. It is recognition of the reality that 'much of the transnationalisation of law and legal relations is taking place at sub-global levels'.[66] This approach maintains the overall theme of moving beyond the state but is more realistic in its description of the current models of transnational dialogue. Moreover, describing *ius gentium* as emerging has the advantage of being more modest than Waldron's theory, but does not foreclose the possibility that the *ius gentium* as described by Waldron may one day exist. It admits of this possibility and even encourages it, by urging a more self-aware and culturally sensitive process of comparative reasoning and comparative scholarship.

4.2 Principles

A further issue relating to the usefulness of the *ius gentium* theory is the dilution of principles operating in a cosmopolitan space. Principles tend to be capable

[65] For instance, Vlad Perju's articulation of cosmopolitan dimensions of constitutional law is largely institutionalist: V Perju, 'Cosmopolitanism and Constitutional Self-Government' (2010) *8 IJ Con L* 326, 328–30.

[66] W Twining, 'Globalisation and Comparative Law' in E Orücü & D Nelken (eds) *Comparative Law: A Handbook* (2007) 69.

of flexible application since they 'do not operate in an all-or-nothing fashion' and can be applied with varying degrees of weight.[67] It is partly the level of generality of principles that makes them particularly attractive in comparative judicial exchanges. The universalistic nature of constitutional principles such as, for instance, the rule of law and separation of powers at a high level of abstraction means that their invocation does not, ipso facto, threaten the commitment to the particular values and local conditions of the state in question. However, courts use foreign citations relating to principles in a variety of ways, depending on the perspectives of the judges in the case, the textual arrangements of the constitution, and the social and political circumstances of the society. This may include a decision by the court to reject a particular understanding of the principle as articulated by another jurisdiction. For example, in *R v Kirby, ex parte Boilermakers' Society of Australia* the Australian High Court referred to US law on the requisite separation of powers between state institutions, but indicated that the division in the Australian constitution 'is a division of powers whose character is determined according to traditional British conceptions'.[68] For the High Court, articulating this division 'according to traditional British conceptions' meant that, while the operation of the separation of powers principle in the US required separation of the executive and the legislature, in Australia 'difficulties as between executive and legislative power are not to be expected'.[69]

The argument from abstraction and vagueness is a familiar critique of the articulation of principles as norms and the use of principles in judicial decision-making.[70] Thus, for instance, Raz objects that '[p]rinciples, because they prescribe highly unspecific acts, tend to be vaguer and less certain than rules'.[71] Larry Alexander is similarly unconvinced by the model of principled decision-making, arguing that legal principles combine the worst features of pure moral reasoning and decision-making by precedent rules. In Alexander's account, if legal principles are not moral principles, the court cannot disregard all past decisions that it deems morally wrong, as that would undermine the coherence within the legal system. Yet, despite these constraints, legal principles do not possess the 'compensating settlement value of decision-making according

[67] Dworkin, above n 6, 24, 35.
[68] (1956) 94 CLR 254, para 13
[69] Ibid.
[70] J Raz, 'Legal Principles and the Limits of Law' (1972) *81 Yale LJ* 823; L Alexander, What are Principles, and Do They Exist? (*San Diego Legal Studies Paper* No 13-119, 2013) <http://ssrn.com/abstract=2277787 or http://dx.doi.org/10.2139/ssrn.2277787> [accessed 1 January 2015].
[71] Raz, above n 70, 841.

to rules' because principles 'tend to be more vague and more dependent on value-laden terms than posited rules that prescribe results for future cases' and because the process by which competing principles should be weighed is elusive.[72]

These critiques are heightened when the principles have to be diluted in order to be relevant in a cosmopolitan arena. When principles are proposed as part of the *ius gentium*, they exist at such a high level of abstraction that this raises the question whether it is accurate or meaningful to characterise them as norms. The point here might not be so much to reject these principles *in toto*; the rule of law, or a doctrine of necessity, or a requirement for separate or divided powers, for instance, have the capacity to be norms. The principles might exist as norms within national jurisdictional boundaries but when they are transposed to the cosmopolitan level, they become so general that they lose the quality of norms. It is crucial to the *ius gentium* theory that the body of principles that connect the nations of the world are not *natural law*, but global *legal norms*. The difficulty is that the attempt to present these principles as global or universal makes them particularly vulnerable to the critique that they are nothing more than expressions of morality or expressions of natural law.[73]

A proposal for responding to the generality problem is that we should redirect our focus from trying to identify these principles as part of a *ius gentium* and instead identify cosmopolitan methodologies for legal decision-making. This reframing would address the critique regarding the dilution of the principles as norms. It would engage with the ongoing conversation about convergences in techniques of decision-making, such as discourse about the expansion of the use of concepts such as proportionality, the growth in citations of foreign law and the use of principles in arguments and legal reasoning. Such trends in decision-making techniques traverse many borders and they lead to a more modest claim regarding the similarities in devices and frameworks for legal decision-making, rather than a claim regarding the content of substantive norms. It changes the conversation from one about content of principles to the role that principles and other decisional devices play in judicial decision-making.

[72] L Alexander & E Sherwin, 'Judges as Rule Makers' in D E Edlin (ed), *Common Law Theory* (2007) 27, 44-5.

[73] See, regarding principles as nothing more than moral principles, Alexander, above n 70.

5 Conclusion

The concept of need is a central aspect of the above discussion of the cosmopolitan account of the transnational judicial use of constitutional principles. Societies need order, and in the aftermath of revolutions or other departures from regular democratic constitutional processes, there remains a need for laws to forestall a legal vacuum. Need also plays a role in the explanation of the proliferation of norms that transcend national boundaries. One commentator notes that as we engage in more trade, transactions and communications across national and continental boundaries, 'we have more need for law that transcends national and cultural borders along with us. And as the great challenges of our age [...] have become global, we are forced to become global ourselves and develop a legal framework that allows us to address these problems in an adequate way'.[74] Thus, there is a need for global law, conceptualised as a 'point of convergence' for legal systems. It is partly this need that cosmopolitanism in general and Waldron's thesis regarding the *ius gentium*, in particular, seek to satisfy. However, this article has sought to show that while there is some convergence on central, core applications of constitutional principles relating to basic needs, there are complexities arising from history, legal traditions and geopolitical dynamics that affect the process of transnational engagement, and the content of the principles that form part of the *ius gentium*.

What emerges is that advancing a theory of *ius gentium* using (constitutional and human rights) principles runs the risk of magnifying the Achilles' heels of both comparative law and reasoning by principles. With respect to reasoning by principles, the *ius gentium* theory may serve to further highlight the abstract and vague nature of principles, fuelling the fire of sceptics who doubt the normative value of legal principles. The comparative enterprise is made more vulnerable to the post-modernist critique that comparatists pursue an 'agenda of sameness' while paying insufficient regard to the cultural frameworks of the lawmakers of the various jurisdictions studied.[75] Perhaps even more damaging is that the *ius gentium* theory marginalises justifiable critiques of the ethnocentricity of the comparatist.

[74] R Lesaffer, 'The Lighthouse of Law' (2012) 17 *Tilburg LR* 153, 154.

[75] V Grosswald Curran, 'Cultural Immersion, Difference and Categories in U.S. Comparative Law' (1998) 46 *AJCL* 43, 61.

To respond to these critiques, it is critical to develop an approach that preserves the underlying usefulness of a *ius gentium* theory while adding more nuance to its description. Accordingly, we can reconceptualise the *ius gentium*, either by describing it as emerging but not current reality, or by reframing it as a system of converging methodologies but not substantive norms.

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THE RIGHT TO CHALLENGE WITNESSES – AN APPLICATION OF STRASBOURG'S FLEXIBLE 'SOLE AND DECISIVE' RULE TO OTHER HUMAN RIGHTS

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Abstract
The ECtHR's Grand Chamber judgment in the case of Al-Khawaja and Tahery initiated a tremendous amount of literature appertaining to the question of the extent to which the accused's right to confrontation can be limited. A large number of scholars commented on the implications for the rights of the accused, including recommendations that the Court should focus more on the underlying principles for the restriction of this right. This article will leave the latter questions aside and concentrate on a more practical issue by comparing the doctrinal nuances of Strasbourg's Grand Chamber judgment—which are regarded as a convergence of common and civil law traditions—with cases in other regional human rights jurisdictions, i.e. the UN Human Rights Committee and the Inter-American Court of Human Rights. Is the right to confrontation restricted more, or perhaps less, in other jurisdictions and is there a clear line? This article provides the reader with the necessary background information on the new doctrinal elements on the restrictions of the right to confrontation, which have been established by Strasbourg's Grand Chamber. It then uses these elements such as '*necessity*' and '*counterbalance*' and scrutinises cases of other human rights jurisdictions under these lenses. The results will show whether or not other human rights bodies would have decided differently if they had used the ECtHR's yardstick for their decisions.

Keywords
Fair trial, confrontation, right to have witnesses examined, counterbalance, corroboration of evidence

1 Introduction

The volume of literature *apropos* the extent to which an accused's right to confrontation can be limited, has been augmented and exacerbated[1] following

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[1] See e.g., Laura Hoyano, 'What Is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial' (2014) 1 *Crim LR* 4; Liz Heffernan, 'Hearsay in Criminal Trials: The Strasbourg Perspective' (2013) 49 *Irish Jurist* 132; Jane Elliott-Kelly, 'Case Comment: Al-Khawaja and Tahery v United Kingdom' (2012) 1 *EHRLR* 81; Antje Du Bois-Pedain, 'Artikel 6 Abs. 3

the judgment of the Grand Chamber in *Al-Khawaja and Tahery v UK.*[2] Before this verdict was delivered, the so-called 'sole and decisive' rule was previously thought of as a safeguard for the accused, making a conviction impossible in cases where an uncontested statement was the 'sole or the decisive' piece of evidence for a conviction. Scholarship recommended that the European Court of Human Rights (*ECtHR*) 'engage more with the principles underlying the rights of the defence in order to provide a more coherent basis for […] the right to challenge witness evidence'.[3] This article, however, will leave these underlying principles aside, apart from the paragraph about the implications, and focus on more practical matters. Stimulated by global communication, the area of evidence and proof has developed norms of 'increasing generality in theory and in practice';[4] therefore, this paper is intended to review the possible outcomes of applying the flexible 'sole and decisive' rule to other human rights jurisdictions. To this end, it is necessary to regard the decision of the Grand Chamber in *Al-Khawaja and Tahery v UK* (*Al-Khawaja [GC]*) as the convergence of law and practice between the adversarial and inquisitorial procedure, providing a formula for the practical application of the right to challenge witnesses. Before this practical application can take place, however, it is first necessary to explore where the UN Human Rights Committee and Inter-American Court of Human Rights have drawn their lines on confrontation. Only then can the ECtHR's new formula be applied to the facts of the other human rights jurisdictions. Finally, there will be a conclusion as to whether the results in other jurisdictions would look vastly different if *Al-Khawaja* [GC] were applied. In other words, this article considers the limitations of the right to confrontation by using the flexible 'sole and decisive' rule—established in *Al-Khawaja* [GC]—as a yardstick against which to measure cases outside the Council of Europe's jurisdiction, in particular, the UN Human Rights Committee and the Inter-American Court of Human Rights. The outcome demonstrates whether other human rights bodies would have decided in a different way if they had used Strasbourg's yardstick to arrive at their decisions. First of all, however, the reader needs to be provided

lit. d EMRK und der nicht verfügbare Zeuge: Weist der modifizierte Lucà-Test den Weg aus der Sackgasse?' (2012) 3 *Onlinezeitschrift für Höchstrichterliche Rechtsprechung zum Strafrecht* 120 <http://www.hrr-strafrecht.de/hrr/archiv/12-03/index.php?sz=8> [accessed 12 December 2015].

[2] *Al-Khawaja and Tahery v UK* [2011] ECtHR App Nos 26766/05 & 22228/06 [GC].

[3] John D Jackson & Sarah J Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (2012) 366.

[4] Ibid, 387, citing Johannes F Nijboer, 'Current Issues in Evidence and Procedure – Comparative Comments from a Continental Perspective' (2009) 6 *International Commentary on Evidence*.

with a sound introduction to the case history of *Al-Khawaja* [GC].

2 Background information

Surrounded by political tensions, the UK Supreme Court had declined to follow Strasbourg's first judgment of 2009,[5] in which the ECtHR required a strict application of the 'sole and decisive' rule. The UK's answer to the first *Al-Khawaja and Tahery* judgment was expressed in *R v Horncastle*.[6] Therefore, the case of *Al-Khawaja and Tahery* finally ended up at the Grand Chamber. On reflection and with regard to Imad Al-Khawaja, the Grand Chamber concluded that the strong corroborative evidence of the victim's (ST) friends (BF and SH) was accepted as a counterbalancing factor.[7] More importantly, there was a further statement of another complainant: VU. This witness described the alleged assault very similarly and thus played a major role. Having previously been rejected as corroborative evidence in the first judgment, the Grand Chamber took VU's statement into consideration as a counterbalancing factor.[8] The latter was probably the significant difference when compared to Mr Tahery's complaint. In Tahery's case, there was no corroborative evidence which could have counterbalanced the restriction to confrontation. According to the Grand Chamber, the 'defence was not able to call any other witness to contradict the testimony provided in the hearsay statement'.[9]

As a result, the ECtHR has finally overthrown its strict interpretation of the 'sole and decisive' rule rather than applying it inflexibly. The reasoning of Strasbourg was that it had to consider the procedures as a whole or, to use the terminology of *Al-Khawaja* [GC], that it was necessary to carry out an overall assessment of the case.[10] Put differently, the long history of a strict application of the 'sole and decisive' rule[11] has now been transformed into a more flexible rule and the so-called minimum standard of Article 6(3)(d) is not an absolute anymore—although it still must be considered as a strong safeguard. Whilst scrutinising the safeguards to ensure fairness and the right to confrontation,

[5] *Al-Khawaja and Tahery v UK* [2009] ECtHR Nos 26766/05 & 22228/06.
[6] *R v Horncastle* [2010] 2 AC 373.
[7] *Al-Khawaja and Tahery v UK* [2011] ECtHR Nos 26766/05 & 22228/06 (GC), para 156.
[8] Ibid.
[9] Ibid, para 162.
[10] Ibid, para 118.
[11] See e.g. *Isgrò v Italy* (1991) ECHR Ser A No 192; *Doorson v The Netherlands* (1996) ECHR Ser A No 501; *Lucà v Italy* [2001] ECtHR App No 33354/96; *A L v Finland* [2009] ECtHR App No 23220/04.

the Grand Chamber required the application of the three key terms: 'necessity', 'sole or decisive' and 'counterbalance'.[12] These keywords were considered as an algorithm of three levels in order to provide a fair outcome for cases in which the witness could not testify in court.

Regarding 'necessity', it is still the general rule that all evidence must be produced in the presence of the accused 'at a public hearing with a view to adversarial argument'.[13] Hence, every evaluation as to the admission of a witness statement which cannot be confronted at trial should be carried out with utmost care. National courts are advised not to be tempted to grant these exceptions too easily. The justification for the non-attendance of a witness at trial requires a narrow interpretation based on the specific reason for the witness' absence. An assessment as to the grounds of the absence, such as death or fear, is thus indispensable.

The significance of the evidence, i.e. whether it is regarded as 'sole or decisive' represents the second step in the assessment of whether or not the restriction of the right to confrontation was lawful. The Grand Chamber still pleads for a procedure of the most searching scrutiny where a conviction is 'based solely or decisively on the evidence of absent witnesses'.[14] As regards to the definitions of 'sole and decisive', it can be held that 'sole' should be used in the sense of the 'only evidence against an accused', whereas 'decisive'—in the context of the Convention—'should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case'.[15] In addition, the test requires an examination of whether or not the chances of a conviction would recede and whether an acquittal advances without the evidence.[16]

If evidence has been considered as 'sole or decisive', the last question would be whether or not there are sufficient factors to counterbalance the detriment to the defence. Counterbalancing factors can be corroborative statements which are not subject to any collusion. Again, the dichotomy lies in the assessment

[12] *Al-Khawaja and Tahery v UK* [2011] ECtHR Nos 26766/05 & 22228/06 (GC), para 152.

[13] Ibid, para 118.

[14] Ibid, para 147.

[15] Ibid, para 131. The exact wording of the Grand Chamber reads as follows: '[t]he word "decisive" should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive.'

[16] Ibid.

of the uncontested statement and the supporting evidence. Remember, the supporting evidence still needs to be sufficient to counterbalance the restriction of the confrontation at the third level of the assessment. Not every case may be as clear-cut as in *Al-Khawaja* [GC]. Hence, counterbalancing factors include a 'fair and proper assessment of the reliability' of, for example, corroborative statements.[17] The judges' obligation to warn the jury of the dangers when relying on such statements is probably a lesser factor in the test. As one could see in the Grand Chamber judgment, it was generously overlooked in Al-Khawaja's case, whereas, in Mr Tahery's it did not serve as a sufficient counterbalance at all.[18]

Defence counsel in the *métier* of criminal law may disagree with the ECtHR's Grand Chamber judgment. On the other hand, it does not give a *carte blanche* to restrict the right to confrontation endlessly without serious reasons. How this new application of the test would look in other jurisdictions is set out in the following paragraphs.

3 The UN Human Rights Committee

The right to confrontation is embedded in Article 14(3)(e) of the ICCPR and its wording is similar to that of the European Convention. As in the developing jurisprudence of the ECtHR, the UN Human Rights Committee (*HRC*) faced questions regarding the 'necessity' of restricting the right to confrontation, particularly when witnesses were absent. Furthermore, the HRC also saw the need to place an obligation on state parties to prove their efforts in providing defendants with an opportunity to confront witnesses. In addition to the cases in which grave violations against the right to confrontation and other fair trial requirements took place, as for example in *Toshev v Tajikistan*,[19] the Committee also dealt with Communications from which one can draw parallels with ECtHR cases.

What is understood as the so-called 'necessity' to restrict in Strasbourg played a major role in *Dugin v Russian Federation*. In this Communication, the national

[17] Ibid, para 147.

[18] Ibid, para 164.

[19] Human Rights Committee, *Views: Communication No 1499/2006*, 101st sess, UN Doc CCPR/C/101/D/1499/2006 (30 March 2011) 9, para 6.6 (*Toshev v Tajikistan*): 'the court has failed to ensure the presence and the questioning of important witnesses; […] Mr Iskandarov was kept unlawfully isolated at the premises of the Ministry of Security and confessed guilt under threats of physical reprisals there, in the absence of a lawyer, and that his complaints on this subject were disregarded'.

courts gave 'very considerable weight' to the statement of a key witness who was not subject to examination at trial.[20] The state party, however, could not prove its efforts to summon this witness for the trial procedures.[21] As a result, the HRC was not provided with a plausible explanation as to why it was necessary to restrict the accused's right to examine witnesses and thus concluded that there was a violation.[22] Interestingly, even if the Human Rights Committee did not mention the term 'necessity' explicitly, there are some visible similarities in comparison to Strasbourg's case law concerning the efforts of state parties that are required to guarantee the right to confrontation.

A further case in which the state party did not prove a necessary restriction as to why the complainant was not allowed to question a key witness is *Koreba v Belarus*. In this case, the applicant was not allowed to be present at the proceedings whilst one of the prosecution's main witnesses was testifying. The HRC decided on a clear breach of equality of arms in the sense of Article 14(3)(e), stressing the importance of 'ensuring an effective defence'[23] in guaranteeing that the accused and his counsel could cross-examine the prosecution's witnesses. Furthermore, the defence should be given 'the same legal power of compelling the attendance of witnesses relevant for the defence' as are available to the prosecution.[24] The latter was confirmed in *Litvin v Ukraine*, a case in which the complainant's son was denied the opportunity 'to call and examine several important witnesses that testified during the preliminary investigation and confirmed, *inter alia*, his alibi'.[25] In a similar vein, one could also mention the case of *Larrañaga v Philippines*,[26] a case in which a judge cut short the defence's cross-examination of the main prosecution witness[27] and refused to hear the remaining defence witnesses. As one would have expected, the Committee finally concluded on a violation of Article 14(3)(e).

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[20] Human Rights Committee, *Views: Communication No 815/1998*, 81st sess, UN Doc CCPR/C/81/D/815/1998 (5 July 2004) para 9.3 (*Dugin v Russian Federation*).

[21] Ibid: '[w]hile efforts to locate Chikin [the witness] proved to be ineffective for reasons not explained by the State party'.

[22] Ibid.

[23] Human Rights Committee, *Views: Communication No 1390/2005*, 100th sess, UN DOC CCPR/C/100/D/1390/2005 (25 October 2010) 8, para 7.5 (*Koreba v Belarus*).

[24] Ibid.

[25] Human Rights Committee, *Views: Communication No 1535/2006*, 102nd sess, UN Doc CCPR/C/102/D/1535/2006 (19 July 2011) 14, para 10.4 (*Litvin v Ukraine*).

[26] Human Rights Committee, *Views: Communication No 1421/2005*, 87th sess, UN Doc CCPR/C/87/D/1421/2005 (24 July 2006) (*Larrañaga v Philippines*).

[27] Ibid, para 2.5.

Having proved that there is a certain requirement for 'necessity' at the HRC, the article will now render a comparison between the HRC's Communication of *Rouse v Philippines* and the ECtHR's case of *Al-Khawaja* [GC]. Indeed, the case of *Rouse v Philippines* seems to be made for the purposes of this article. Besides the questions about the arbitrariness of admitting evidence within national courts, this case also touched upon the issue of restricting the right to confrontation, particularly relating to Strasbourg's 'sole and decisive' rule. The applicant was accused of alleged sexual relations with an under-aged male referred to in the case as GD. The alleged victim, who was the sole eyewitness of the alleged crime, did not testify in court. The HRC finally saw a violation of the applicant's right to confrontation because 'considerable weight was given to that witness' out of court statement'[28] and the accused had no opportunity to cross-examine the alleged victim. Considering the fact that the evidence in this case was 'sole or decisive' and following the flexible interpretation of the *Lucà* test,[29] one might even think that a lawful conviction could have been possible on first sight. Indeed, there are similarities between *Al-Khawaja* [GC] and *Rouse v Philippines*; for example, in both cases the key witnesses were not subject to cross-examination, neither at pretrial nor at the trial stage. Furthermore, supporting statements of other witnesses were available in both cases. Yet, there are differences related to the so-called 'necessity' and 'counterbalance' between the two cases.

Firstly, there could be concern as to the diligence of the state party in securing the alleged victim's appearance at court in the case of *Rouse v Philippines*. Admittedly, there are cases in which witnesses cannot be located but in the present case, however, the government did not give any explanations as to how it tried to locate the alleged victim or his parents. Hence, one of the questions could be: were the grounds for the non-appearance of the witness really unavoidable?[30] In the example of *Al-Khawaja* [GC], this question was irrelevant: the witness had died before the trial started, thus her appearance was factually impossible.

Secondly, in *Rouse v Philippines* as in *Al-Khawaja* [GC], a third party gave a witness statement alleging a similar criminal allegation concerning the accused as to the present one. In the case of *Rouse*, it was a young adult who affirmed that he had engaged in sexual activities with the accused one day before the accused's arrest. The difference, however, rests on what has been confirmed in the two cases: in *Rouse v Philippines*, the third party giving the statement could not shed

[28] Human Rights Committee, *Views: Communication No 1089/2002*, 84th sess, UN Doc CCPR/C/87/D/1089/2002 (25 July 2005) para 7.5 ('*Rouse v Philippines*').

[29] *Lucà v Italy* [2001] ECtHR App No 33354/96.

[30] The Criminal Justice Act 2003 (UK), for example, requires such an element in s 116(2)(d).

any light on the accusations against the applicant. The accused was charged with child abuse but the witness giving the statement was an adult. The court's finding that the third party witness 'looks like a minor'[31] may be an indication but cannot be regarded as a fact. On the other hand, in the case of *Al-Khawaja* [GC], the witness VU made descriptions of another alleged assault with strong similarities. Hence, the strength of the corroborative evidence in *Al-Khawaja* [GC] was far more applicable to support the accusation than it was in the case of *Rouse*. In addition, all of the persons providing supportive evidence were subject to cross-examination in *Al-Khawaja* [GC] which was, on the contrary, not the case in *Rouse*. Notwithstanding the turmoil regarding the admissibility of evidence which may be considered peripheral to the body of the trial in *Rouse*, one can see that the new, more flexible doctrine applied by Strasbourg would have led to the same outcome in *Rouse*, even though at the time the HRC's reasoning was more focused on the weight of the out of court statement.[32]

3.1 Evaluation

There are parallels to be drawn between the cases of the HRC and the ECtHR. Both institutions stressed the need for diligence on the part of state parties to ensure the presence of key witnesses at trial. In cases of impossibility, whether factual or legal, both institutions tried to measure the influence of hearsay statements with the outcome. Whereas Strasbourg named it the 'sole and decisive' rule, the HRC described it as 'considerable weight was given to [...] [an] out of court statement'.[33] The interesting point here is that the HRC's approach and the approach taken by Strasbourg do not contradict each other, regardless of whether or not the *Lucà* test is applied flexibly or inflexibly. The comparative illustration of *Al-Khawaja* [GC] with *Rouse* shows that the conclusions would be identical. As a result, it can be held that there is an element of convergence between the two institutions in the area of the right to confrontation and its limits.

4 The Inter-American Court of Human Rights

In the American Convention, the right to confrontation can be found in Article 8(2)(f). It is regarded as one of the due guarantees of the right to a fair trial and

[31] *Rouse v The Philippines*, UN Doc CCPR/C/87/D/1089/2002, para 2.10.
[32] Ibid, para 7.5.
[33] Ibid.

ensures the examination of witnesses present in court. It is, however, not absolute and certain restrictions might apply. There may be situations in which the lives of witnesses or the judiciary are endangered, and consequently there may be limitations to the right to confrontation. One of the most widespread examples is when the defendant himself, or those acting on his behalf, intimidate witnesses in order to escape conviction. In such a situation, his or her rights to confrontation should be waived, as was confirmed in Strasbourg's case of *Al-Khawaja* [GC].[34]

To this end, the Inter-American Commission on Human Rights (IACmHR) determined some 'ineffectiveness of criminal proceedings'[35] when '[t]hose responsible for human rights abuses sometimes ensure their impunity by threatening or attacking those who might contribute to a sanction against them'.[36] Nonetheless, the latter should not automatically lead to 'faceless" justice systems',[37] *id est* anonymous witnesses, which would, in turn, threaten the basic idea of 'adequate due process guarantees'.[38] In its report on the domestic situation in Colombia, the IACmHR had to deal with exactly such a dichotomy and 'expresse[d] its most serious concern regarding the lack of due process rights for defendants'[39] if Colombia did not 'take all measures necessary to ensure the safety of witnesses'.[40] In some cases, for instance, one witness provided incriminating evidence under several code names which led judges to believe that different witnesses had testified similar facts and, as a result, corroborated one another's testimony.[41] Such a development is, of course, unacceptable.

Returning to one of the crucial points of this article, namely the assessment of cases with the flexible *Lucà* test as a meter, it can be held that there is a general agreement to restrict the right to confrontation, especially when the interests of witnesses or victims are at stake.[42] The IACmHR pointed out that it was important to grant the witnesses' anonymity in such cases, 'without compromising a defendant's fair trial rights'.[43] Hence, the Commission established similar prerequisites such as 'necessity' and 'counterbalance'. Regarding anonymous witnesses, for

[34] *Al-Khawaja and Tahery v UK* [2011] ECtHR Nos 26766/05 & 22228/06 (GC), para 123.
[35] IACmHR, *Third Report on the Human Rights Situation in Colombia* (26 February 1999) Chapter V, para 67.
[36] Ibid.
[37] Ibid, para 121.
[38] Ibid.
[39] Ibid, para 127.
[40] Ibid, Recommendation 5.
[41] Ibid, para 125.
[42] IACmHR, *Report on Terrorism and Human Rights* (22 October 2002) para 251.
[43] Ibid.

example, one could interpret the Commission's description of 'necessity' as the 'sufficiency of the grounds for maintaining a particular witness's anonymity',[44] including the reliability of their statements. Furthermore, the IACmHRreferred to the European case of *Doorson*[45] which concerned the 'sole and decisive' rule in cases where witnesses testified anonymously. In the latter case, the Strasbourg court stressed the importance of judges being aware of the identity of those anonymous witnesses and that it was crucial for the defence to challenge the evidence of these witnesses, even if the applicants did not know their identity.[46] The most significant similarity, however, is that the Inter-American Commission used a similar wording[47] to underline what has been called the 'sole and decisive' rule in Strasbourg and which had been rigorously applied until *Al-Khawaja* [GC]. The lack of recent case law within the area of the Inter-American Court may leave a little gap with regard to the latest interpretation of the 'sole and decisive' rule which has now become more flexible at the ECtHR. On the other hand, the Commission Report on Terrorism clearly shows a basic conformity of the application of the right to confrontation. As a result, one can determine that Strasbourg's case law may be more explicit. The fundamental structures of the two jurisdictions, however, remain similar.

4.1 Evaluation

In all three jurisdictions, ECtHR, HRC and the Inter-American institutions, there is common agreement that, in some cases, a restriction of the right to confrontation is not incompatible with the right to a fair trial *per se*. Furthermore, the assessment of the right to confrontation has revealed that the new flexible interpretation of the ECtHR's 'sole and decisive' rule does not contradict the cases of the Inter-American Court of Human Rights; although the latter does not provide us with similar cases on which the yardstick of *Al-Khawaja* [GC] can be applied. As a result, the basic framework of Strasbourg and San José regarding confrontation rest in the same intersection, however there are no conclusions as clear cut as in the previous assessment of the Human Rights Committee in *Rouse v Philippines*.

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[44] Ibid.

[45] *Doorson v The Netherlands* (1996) ECHR Ser A No 501, paras 66–83.

[46] Ibid.

[47] See IACmHR, *Report on Terrorism and Human Rights* (22 October 2002) para 251: 'and the significance of the evidence in the case against the defendant, in particular whether a conviction may be based solely or to a decisive extent on that evidence'.

5 Theoretical and practical implications

The idea of a flexible interpretation of the 'sole and decisive' rule also raised questions about 'fairness'. Ronald Dworkin's thoughts on evidence and procedure suggest that a criminal trial needs to be 'decided by striking "the right balance" between the interests of the individual and the interests of the community as a whole'.[48] If a procedure leads to a conviction of the innocent and an acquittal of the guilty, the individual will suffer from what Dworkin calls 'moral harm'.[49] In order to avoid this 'moral harm', which is to be distinguished from 'bare harm',[50] the accused is said to have two genuine rights: first, he or she is entitled to the right that a majority of the society establishes a trial procedure which puts a 'proper valuation on moral harm in the calculations that fix the risk of injustice'.[51] Second, however high this level may be, it needs to be applied equally. Dworkin describes it as a procedure which holds the community to a 'consistent enforcement of its theory of moral harm'.[52] Each of the latter two rights may act as a trump over the balance between the gains of society or the individual and hence, a middle ground emerges. This middle ground is the *terrain* in the centre of two radical edges: one consists of a complete denial of procedural rights (supreme accuracy), and the other promotes procedural rights.

The judgment of *Al-Khawaja* [GC] was a definitive shift towards more accuracy rather than promoting procedural rights. Moreover, it is probably fair to mention that *Al-Khawaja* [GC] contains some inconsistencies, which have not necessarily clarified the issues of restricting the right to confrontation. Having read the judgment, one still awaits the answer as to *why* Strasbourg deemed it necessary to allow a flexible application of the 'sole and decisive' rule. As Liz Heffernan comments, a breach of the so-called minimum right of Article 6(3)(d) does 'not invariably undermine the fairness of the trial'.[53] But does the Court explain *why* such a limitation may be justified? Not necessarily. The dissenting opinions of judges Sajó and Karakaş express the conflict of interest in more detail. As they describe it, the issue at stake is 'the relationship between

[48] Ronald Dworkin, *A Matter of Principle* (1985) 73.

[49] Ibid, 80; Dworkin regards moral harm also as the 'injustice factor'.

[50] Ibid: 'bare harm' is the harm 'a person suffers through punishment, whether that punishment is just or unjust—for example, the suffering or frustration or pain or dissatisfaction of desires that he suffers just because he loses his liberty or is beaten or killed—and the further injury that he might be said to suffer whenever his punishment is unjust, just in virtue of that injustice'.

[51] Ibid 92.

[52] Ibid 90.

[53] Heffernan, above n 1, 140.

the fundamental human rights of the accused and society's legitimate interest in imposing punishment—after a fair trial'.[54] The important question for them seems to be whether the counterbalancing factors of the flexible 'sole and decisive' rule can 'absorb or undermine specific individual rights which are defined in the Convention'.[55] According to the judges, in the administration of justice, the right to confrontation was fundamental to guarantee the fair trial and balancing these rights—as had been done in *Al-Khawaja* [GC]—would give the prosecution 'a clear advantage'.[56] Furthermore, the judges criticise the absence of a clear explanation as to how 'fairness can still be achieved if one of the fundamental rights is deprived of its essence'.[57]

While the judges plead for a clear line and vote in favour of an inflexible application of the 'sole and decisive' rule, the author is not necessarily against its flexible application. It would, however, be more than useful for the ECtHR to explain *why* such a flexible approach is regarded as helpful and finally, *why* it can enhance the fairness of trial proceedings. Whilst the argument for excluding unreliable evidence appears to be stable, one must, on the other hand, also admit the argument for the exclusion of probative evidence in case the 'sole and decisive' rule is strictly applied. An out-of-court statement may depict important and probative evidence which would automatically be excluded in cases where the witness had died before the trial and would not be subject to confrontation. The most popular and dramatic example is the dying victim telling the police officer the name of the murderer in the very last moments before passing away.

Establishing the truth is a reasonable goal which should be, or at least try to be, achieved.[58] However, establishing the truth at the expense of minimum human rights raises questions as to whether this is the method for reaching fairness in a trial. Whilst the legal rhetoric decides whether a defendant should, under certain circumstances, accept limitations to confrontation, one needs to bear in mind *what* the purpose of minimum human rights is. In the dissenting opinions of Judges Sajó and Karakaş, minimum rights are described as equalling the imbalance between the state and the citizen.[59] Generally, everybody desires

[54] *Al-Khawaja and Tahery v UK* [2011] ECtHR Nos 26766/05 & 22228/06 (GC) (Sajó and Karakaş JJ).
[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] It is agreed that there are epistemological difficulties to find out the exact truth in a trial.
[59] *Al-Khawaja and Tahery v UK* [2011] ECtHR Nos 26766/05 & 22228/06 (GC) (Sajó and Karakaş JJ).

the principal objective of a criminal process to be the acquittal of the innocent and the conviction of the guilty.[60]

To conclude, the author can indeed understand the concerns of Judges Sajó and Karakaş as well as Judge Richardson warning words quoted by Lord Bingham.[61] Furthermore, it is agreed that both in the interests of justice and in order to detect and prosecute crime, society should never agree to a position where witnesses can be absent at trial and enjoy anonymity at the same time. In any case, the right to confrontation should serve as a definitive guarantor to protect against a defendant's wrongful conviction; yet it should not bar the accused from a deserved penalty. In 2011, Professor Damaška indicated that '[t]he accuracy of factual determinations' was no longer a high priority, at least not in legal scholarship on the European continent.[62] According to him, procedural justice had gained at the expense of its antipode 'accuracy'. Imagining procedural rights as a road, and accuracy as the destination, Damaška described the situation as follows: '[t]he road to the destination seems to be becoming more important than the increasingly uncertain destination itself'.[63] The Grand Chamber judgment of *Al-Khawaja* reversed this trend, and the flexible 'sole and decisive rule' brings 'accuracy' back into play. Finally, it is up to society to choose either to grant minimum standards and acknowledge misuse in certain cases or, to aim for a strict and narrow procedure based on impartial and unbiased thinking, which needs to be given some flexibility in the most difficult cases.

6 Conclusion

Various parallels can be drawn between the cases of the European Court of Human Rights, the Human Rights Committee and the Inter-American institutions. All three jurisdictions stress the need for diligence on behalf of state parties to ensure the presence of key witnesses at trial but also the protection of witnesses under certain circumstances. As regards Strasbourg's flexible application of the *Lucà* test in comparison to the HRC's case of *Rouse v Philippines*, it can be held that the comparison revealed a similar outcome. In terms of the ECtHR's flexi-

[60] *R v Horncastle* [2010] 2 AC 373, 433.

[61] *Al-Khawaja and Tahery v UK* [2011] ECtHR Nos 26766/05 & 22228/06 (GC) (Sajó and Karakaş JJ). Richardson J's words in *R v Hughes* [1986] 2 NZLR 129, 147 are quoted in the dissenting opinion, but can also be found in *R v Davis* [2008] 1 AC 1128, 1139.

[62] Mirjan Damaška, 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals' (2011) 36 *NC J of Int'l L & Comm Reg* 365, 369-70.

[63] Ibid, 370.

ble test in comparison with the Inter-American Court of Human Rights, the two jurisdictions show some basic mirror images, though there was no comparable case in which the arithmetic exercise of the flexible interpretation could be calculated consistently until the end. Therefore, the final result which can be drawn for both institutions, the HRC and the Inter-American institutions, is that they could adopt Strasbourg's doctrine in future cases. So far, there have not been any contradicting results to the new 'sole and decisive' rule established by the ECtHR. Whether or not the HRC and the Inter-American Court are finally willing to follow this approach, however, remains to be seen.

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WHAT IS TRANSITIONAL CONSTITUTIONALISM AND HOW DO WE STUDY IT?

J.G. Allen[*]

1 Introduction

It is a great pleasure to introduce this Symposium on transitional constitutionalism. The papers present a thorough and topical investigation into the role of constitutions and constitutionalism surveying a number of jurisdictions across the globe. With our call for papers on 'transitional constitutionalism', we hoped to gather a comparative investigation of constitutional change, and the role of constitutions and constitutionalism in processes of legal and political change. The call for papers was intentionally broad: it was not restricted, for example, to post-conflictual settings, nor was it couched in terms of transnational constitutionalism or transitional justice. Nor did we seek comparative case studies of substantive constitutional laws only. Rather than being structured by type and length, the Symposium is organised by category: the first part contains analyses focused primarily on a single jurisdiction, while those in the second part take either a broader comparative or a thematic approach. In this Introduction, I give an overview of the papers as they are presented, before moving on to suggest a methodology for studying transitional constitutionalism as a field of enquiry at the nexus of legal theory, political philosophy, and international law.

In keeping with the comparative and international focus of the Journal, the papers collected here explore whether general or universal principles of 'constitutions' exist as a feature of political organisation that warrant the suffix constitutional*ism*. We would not describe the Third Reich as a 'constitutional' legal order, let alone a 'constitutionalist' legal order, because it was characterised by absolute, arbitrary rule. On the other hand, it is coherent to talk about the 'constitution of the Third Reich'. To this extent we must be careful with the concept of constitutionalism, because it may assume too much. But certainly it points to a *de minimis* concept of legality as a characteristic of the

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politico-legal order in study, and to a basic normative commitment by scholars of constitutionalism to certain values of regularity, structure, stability over time, and, perhaps, rationality.

Constitutions play a number of roles in the life of a political community: Cass Sunstein explains the 'constitutive' function of forming and delimiting the community itself; the 'expressive' function of articulating its collective identity, common aspirations and values; the 'prohibitive' function of setting the bounds of private right and public power; and the 'authoritative' function of erecting apparatuses of government, creating and describing the institutions around which group life is organised, and investing individuals and bodies with 'public' power.[1] As a complex network of shared institutions, social practices, and symbols, we can understand a constitution as a set of statuses and functions that organise the common life of an organised political community with a degree of stability over time. To this extent, a constitution is something that a state 'is' as much as something that a state 'has'[2]—an observation which already broadens our focus from an analysis of written documents to a study of the way in which communities order their life together according to fundamental rules.

The comparative study of constitutionalism is a study of one or more institutional orderings as a window on the basic logical structure of constitutions and their function in the life of a political community. That is, the particular institutions that order the life of any given body politic invite a search for universal principles of political organisation. Constitutional declarations and other documents themselves are typically couched in universalist, timeless language—they are full of 'fundamental principles' and 'self-evident truths', but it is difficult to judge to what extent concepts such as the 'Rule of Law' are conceptually inherent to the notion of 'constitutionalism' and to what extent they embody contingent principles shared by some constitutions only. Part of the comparatist's task is to sift the parochial from the universal—and at all costs to avoid conflating the two. This is done with the eventual aim of a general constitutional jurisprudence, at least on the level of finding a general methodology and lexicon, that strives towards commensurability.

1.1 Overview of Papers

The Symposium features a strong Middle East and North Africa (*MENA*) focus. This focus is certainly warranted, as the first two decades of this century have

[1] C Sunstein, 'On the Expressive Function of Law' (1996) 144 *U of Pa LR* 2021.

[2] See C Schmitt, *Verfassungslehre* (1993) 4.

been defined by the MENA region and its relationship with the 'West'. The first decade was defined by events set in motion on 11 September 2001, including the US-led invasion of Afghanistan and Iraq, and the second has been characterised by the repercussions of the so-called Arab Spring. Both 9/11 and the Arab Spring were constitutional events, evident from the growth in interest in emergency powers and the 'exception' following the former,[3] and the changing geo-political landscape in the region following the latter. However, a number of non-MENA jurisdictions are also represented, as are themes of truly universal relevance. Unfortunately, other significant developments such as the deepening rift between the European Union and Russia and their respective relationship to Ukraine, are not included in the Symposium.

1.1.1 *Jurisdictional investigations*

To begin the Symposium, Iain McLean and Scot Peterson examine the situation in the United Kingdom following the 2014 referendum on Scottish independence. McLean and Peterson examine the themes of permanence and flexibility in constitutions, and explore the ramifications of the reaffirmation of the Union between England and Scotland, treating some of the more problematic aspects with sensitivity to their historical background and the politics behind the United Kingdom's constitutional settlement. Following the referendum, they observe, the UK is at a constitutional moment, and whatever the outcome of the processes of devolution now set in train, 'the last vestiges of Diceyanism have gone.' Looking to the future, we may see a federal United Kingdom with an entrenched, justiciable fundamental law, based in part on the relationship between its constituent nations.

This is followed by Carlos Bernal's exploration of the Colombian Constitutional Court's 'replacement doctrine', which reflects the same tension between constitutional permanence and flexibility. Bernal explores a solution to the 'transitional dilemma' presented by transitional justice mechanisms in the framework of a permanent constitution. The dilemma is that, if the process of transition is successful, the permanence of the constitution is undermined, but if the permanent constitution prevails, it will stymie processes of transitional justice such as amnesty for political crimes that are important to a post-conflictual society. Bernal endorses the Court's reasoning, and suggests how the tension between the values of a permanent constitution and the value of transitional justice might be

[3] See e.g. the work of Bruce Ackerman and Oren Gross, and a general resurgence of interest in the work of Schmitt on the 'state of exception' ('*Ausnahmezustand*').

reconciled by reference to an emerging body of transnational and international principles.

Sylvie Delacroix examines the difficult journey towards Palestinian statehood and the fragmentary sources of Palestinian law, including declarations by various revolutionary bodies, international law, Israeli law, Ottoman law, Lebanese, Jordanian, and Syrian law, and customary *urf*. Further, she explores some difficult questions in Palestinian constitutional politics—whether statehood is the best avenue for guaranteeing the rights of all Palestinians, many of whom, living in the diaspora, would be excluded from membership in this new legal entity, whether it would achieve meaningful self-rule, and whether some communal 'federal solution' sharing Jerusalem would not in fact be more in harmony with the regional structure that existed before the dismantlement of the Ottoman Empire and the beginning of the Mandate.

Renad Mansour re-examines the role of international recognition and *de jure* sovereignty in state-building, using the example of Iraqi Kurdistan. His analysis of the legal criteria for state recognition, and how they square with the empirical reality, gives us pause to examine the juncture and disjuncture between theory and practice, particularly relating to the creation of states and the status of non-state actors. It also provides insight into an apparently effective path to statehood: putting *de facto* state-building before *de jure* international recognition; that is the opposite, perhaps, of the Palestinian route in which primary efforts have been directed towards recognition.

Next, Antonios Kouroutakis examines the roadmap to a new constitution for the Federal Republic of Somalia. Somalia has been counted as the paragon of a 'failed state' since the civil war and the demise of the Barre government in 1991. Koutoutakis reviews the drafting process and the provisions of the new constitution, identifying some problems with the speed of the drafting and enactment, ambiguous formulation of the federal structure and the place of *Shari'a* within the hierarchy of legal norms, and the relative novelty of democratic institutions in Somali society.

To conclude the first part, Katrín Oddsdottír recounts her experience as a member of Iceland's constitutional drafting body, which utilised information and communications technology including social media to 'crowd-source' a draft proposal for the nation's basic law. Unfortunately, the draft was shelved by the Icelandic Parliament shortly after completion, and its status remains uncertain despite popular support in a non-binding referendum. Her account provides a fascinating insight into a 'constitutional moment' in one of the world's smallest and most organic political communities. It also provides an inside view

of ground-breaking drafting techniques that have attracted significant interest around the world.

1.1.2 *Comparative and thematic investigations*

The second part of the Symposium commences with Matthew Kennedy's investigation of constituent power. The very first function of a constitution, broadly defined, is to create (or recreate) the political community it is supposed to govern. But what is a 'People', how is it created, and why does it possess anything like a *pouvoir constituent*? And how do we conceive of the relationship between 'the People' and the body of persons that actually exercises constituent power, for example a constitutional assembly? Hans Lindahl has observed that this leads to a paradox: *pouvoir constituent* is always in some sense a *pouvoir constitué*.[4] Kennedy illustrates the paradox of constituent power by reference to recent questions of secession, following Lindahl's solution to the paradox, argues that we can understand the reflexive nature of the 'People' through an appreciation of the nature of constitutional declarations as a category of speech act that creates features of social reality.

Next, Francesco Biagi reviews recent constitutional reforms in the Moroccan and Jordanian monarchies as examples of 'surviving constitutionalism'. By this he means constitutionalist reforms intended to shore up the continued existence of essentially autocratic regimes, rather than to promote liberal democratic constitutionalism in its own right. By reference to past experience, Biagi concludes that instrumental reforms of this nature often result in substantive 'constitutionalisation' over time.

Every process of reform has a goal or purpose, and presumably we study other constitutions to copy those elements that lead to success. But how do we do this? Lorianne Updike Toler presents a methodology for mapping the constitution-making process, breaking it down into four sequential phases each comprising a number of parts. Such a methodology, she suggests, is necessary to compare constitutional processes meaningfully past traditional case-studies of one or two jurisdictions, and to make the findings of such studies available to their audience, in this case, the Libyan Constitutional Drafting Assembly. She presents an application of her methodology to 18 historical constitution-making processes

[4] H Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood', in M Loughlin and N Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 9; H Lindahl, 'The Paradox of Constituent Power: The Ambiguous Self-Constitution of the European Union' (2007) 20 *Ratio Juris* 485.

and offers some preliminary observations about crafting a process likely to result in successful constitutional transition in any given case.

A qualitative measure of domestic constitutions is, increasingly, their respect for norms derived from international law. Giulio Bartoloni presents a comprehensive and detailed survey of constitutions from around the world to determine whether a uniform approach to international law can currently be said to exist in domestic constitutions. This is long overdue following the 1989 fall of the Berlin Wall and the successive 'waves' of democratisation that have followed.[5] Bartolini concludes that a current tendency can be observed, which is to attribute a significant formal role to sources of international law in domestic constitutions, subject to certain caveats and qualifications.

In a similar vein, Anicée van Engeland examines the tension between Islamic law, 'Muslim customary law' and international human rights law, advancing the thesis that a pluralist framework and a 'new hermeneutics' of the *Shari'ah* based on Islamic notions of the common good can reconcile apparent tensions between them. This is a challenging thesis that raises fundamental questions about whether religious law and international human rights law—both natural law systems—can be reconciled conceptually, even if their content is rendered identical. It is also an excellent example of constitutional theory engaging directly with Islamic political philosophy on its own terms—something we must all do increasingly if we are to understand the complex political processes defining current events.

2 Law as institutional fact: a methodology for studying political and legal transition

In this section, I propose a methodology for addressing comparative constitutional theory, and justify some of its assumptions about the concept of law and the nature of normative order generally. I see four requirements for such a methodology: first, it must be analytically rigorous and consistent with a plausible conception of law. Secondly, it must not only provide an essential explanation of 'law' and 'the state', but also it must provide a practical methodology for understanding processes of transition. Mariano Croce characterises law as a 'venue'

[5] See S P Huntington, *The Third Wave: Democratisation in the Late Twentieth Century* (1993); M S Olimat, 'The Fourth Wave of Democratisation' (2008) 25 *American J of Islamic Social Sciences* 17.

in which 'subjects can renegotiate social reality',[6] and our methodology must explain how, at the level of the individual and the group, one social reality comes to replace another through the mechanism of juridical acts such as constitutional declarations.

Thirdly, it must be broad enough to account for the spectrum of political organisation and normative institutions we observe, without shoehorning facts into *a priori* categories. Most people live much closer to pre-, post-, sub-state normative institutions such as tribes and churches than they do to the nation state, and in the decades since the Second World War supra-state institutions have assumed increased importance. Particularly in phases of constitutional transition, these institutions come to fill any void left by the state—from United Nations peacekeeping missions or religious customary law filling the void in a 'failed state', non-state law breaks through weak or unpopular state institutions. Fourthly, and related to this point, the methodology must not only be pluralistic but also general. In this respect, comparative and international law is still relatively Eurocentric, especially insofar as the majority of scholars in these fields take the state as an axiomatic departure point. The nation state is the product of a very European historical experience, and seeing the world through statist eyes can distort our view considerably.

The methodology I present draws heavily on the work of John Searle and Neil MacCormick. In essence, it offers a refinement of H L A Hart's concept of law as a union of primary and secondary rules in a 'rule of recognition', posing law as a system of what Searle calls 'status functions' and 'deontic powers'. Status functions create 'institutional facts', and the result is a conception of law as a system of institutional facts.

2.1 John Searle's theory of status functions and deontic powers

Searle's social ontology rests on a fundamental distinction between 'brute' and 'institutional' facts noted by G E M Anscombe:[7] brute facts exist by themselves and can be described by reference to the laws of chemistry and physics. Institutional facts, on the other hand, are created by the social practice of

[6] M Croce, *Self-Sufficiency of Law* (2012), xix. Unfortunately, I commenced my reading of Croce's fascinating book too late to incorporate any substantial discussion of his thesis in this Introduction.

[7] See GEM Anscombe, 'On Brute Facts' (1958) 18 *Analysis* 69; see also J Searle, *Making the Social World* (2010) 10.

a community and can be explained not by the laws of the natural sciences but by reference to 'collective intentionality' between individuals: 'We can't make it rain by getting together and agreeing that it's raining, but if we agree in a certain way that something is money, then it is money.'[8] A building is a 'church' because it is regarded as such by a community; a certain church is regarded as a 'cathedral' for the same reason, and the Bishop of Rome is the 'Pontiff' for the same reason again. All of these institutional facts are products of collective intentionality conferring a status on a person or object in order for it to perform some social function such as providing a means of exchange, housing worship, or presiding over the global community of the faithful.

An institutional fact takes the logical structure of what Searle calls a 'status function'—a special status conferred on a person or object through which it can perform a function it could not perform in virtue of its physical properties alone. For example, a wall serves its function because of its physical properties, whereas a 'boundary' wall only does so because it has the recognised function of delineating one property from another among a community of persons.[9] Status functions are created by declaration, which is a species of performative utterance that simultaneously expresses belief of a state of affairs, and creates that state of affairs (thus featuring a reflexive 'mind<–>world direction of fit').[10] Searle expresses the logical structure of status functions formulaically in the proposition that a status function is created by the recognition or acceptance by two or more people that X (i.e. a person or object) 'counts as' Y (i.e. a status function) in C (i.e. defined circumstances) and their making a status function declaration to that effect.[11]

Status functions perform these functions via the mechanism of 'deontic powers'. By this, Searle claims that those who accept or recognise a status function have non-prudential, desire-independent reasons for action that operate on them as self-perceived choosing agents. If I recognise a wall to be a 'boundary', I have reasons not to climb over it, even though I physically could, and even though I have powerful prudential reasons for wanting to. Likewise, my recognition of the status function of 'President' gives me reasons to act in act in a certain

[8] J Searle, 'Is Just Thinking Enough?' (New York Review of Books, 24 February 2011) <http://www.nybooks.com/articles/archives/2011/feb/24/just-thinking-enough/> [accessed 15 February 2015].

[9] See Searle (n 7) 94.

[10] Ibid, 38, 99.

[11] See ibid, ch 3; see also R Tuomela, 'Collective Acceptance, Social Institutions, and Social Reality' (2003) 62 *American J of Economics and Sociology* 123.

way *vis-à-vis* the person designated as such, whether observing form of address, obeying his directives, or feeling myself bound by his commissives (i.e. a declaration of war or a peace treaty with a foreign government).

The process of creating a status function by declaration is described by Thomas Hobbes in *Leviathan*: Hobbes' sovereign is an 'artificial Man' made by 'Pacts and Covenants' that is composed of individuals organised into a corporate entity. Individuals enter into political union by making a declaration that they will count the acts of a representative as their own on the condition that others declare likewise.[12] This body politic is 'personated' or represented by an individual or assembly, but it is a group-entity, as suggested by the well-known frontispiece to *Leviathan*.[13] In virtue of their declaration, all are obliged to obey the commands of the sovereign.

2.2 Neil MacCormick's institutional legal theory

Building on the concept of institutional facts, Neil MacCormick presents an institutional theory of law that provides an excellent approach to the comparative study of constitutional law.[14] Systems of law are 'institutional normative orders'. According to MacCormick and other institutional legal theorists,[15] we can understand legal systems as systems of institutional facts and the norms they create. MacCormick uses a different set of terms to Searle, but MacCormick's 'institutional normative order' is fundamentally a system of status functions and deontic powers. Communities create institutions such as 'parliaments', 'presidents' and 'citizens', each inured with an inherent deontology: parliaments are created to promulgate laws, presidents are created to administer them, and 'citizens' are created to standardise the rights and duties of the human individual as the basic unit of the legal system.[16] Recognising the status function logically

[12] T Hobbes, *Leviathan* (1651: R Tuck ed, 1996) 120-1.

[13] Abraham Bosse's etching in the first edition of *Leviathan* features the sovereign's torso composed of over 300 faces in the style of Guiseppe Arcimboldo. Ibid, 9.

[14] See e.g. N MacCormick, 'Law as Institutional Fact' (1974) 90 *LQR* 102; N MacCormick, 'Norms, Institutions, and Institutional Facts' (1998) 17 *Law and Philosophy* 301; N MacCormick, *Institutions of Law* (2007); see also N MacCormick and O Weinberger, *An Institutional Theory of Law* (1986).

[15] In particular, see DW Ruiter, *Institutional Legal Facts* (1993) and *Legal Institutions* (2001); see also K Culver and M Giudice, *Legality's Borders: An Essay in General Jurisprudence* (2010).

[16] In relation to the distinction between the rights of 'man' and the rights of the 'citizen', see G Agamben, 'We Refugees' (1995) 49 *Symposium* 114, 116; see also G Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1995: tr D Heller-Roazen, 1998).

entails the deontic power: I cannot accept that a wall constitutes a boundary without accepting the suite of deontic powers inherent in the idea of boundary.

The deontic powers—rights, powers, and immunities, and the duties, liabilities, and disabilities to which they correspond—are inherent in the institutions themselves,[17] and in this light we should recognise legal systems as 'institutional normative orders' that may be studied systematically according to their basic logical structure:

> The law of a modern state is indeed an institutional order of great and bewildering complexity [...] Yet behind the complexity, it is possible to discern simplicity. A state has, as such, a constitution. This is a complex of explicit rules, implicit rules, and conventions, that essentially establish three types of institutional agencies, namely, of course, judiciary, legislature, and executive.[18]

These constitutive rules, in turn, involve rules determining who exercises the powers of these 'offices' and how they are appointed, what powers they can exercise in which circumstances, and how they lose or transfer the authority of their office.[19] What results is a positivistic methodology—we approach the existence of any given legal system as a matter of fact—but as a social fact this entails a strong 'hermeneutic' appreciation for the subjective recognition of meaning in the construction of law.[20] For Hart, the normative force of law is generated in the mental disposition of this body of officials. MacCormick posits a more complex notion of constitutive rules, and acknowledges that the community that generates law is broader than Hart's officialdom, but the 'engine' of law's normativity in this respect is the same.

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[17] See J Searle, 'How to Derive "Ought" from "Is"' (1964) 73 *The Philosophical Review* 43.

[18] N MacCormick, 'Norms, Institutions, and Institutional Facts' (1998) 17 *Law and Philosophy* 301, 326.

[19] Ibid, 326. D W Ruiter, 'Structuring Legal Institutions' (1998) 17 *Law and Philosophy* 215 explains that legal institutions are structured with the use of 'constitutive', 'institutive', 'consequential', and 'terminative' rules governing these questions, as well as 'content' and 'invalidating' rules. See also A Ross, 'On the Concepts "State" and "State Organs" in Constitutional Law' (1957) 5 *Scandinavian Studies in Law* 113.

[20] MacCormick however identifies himself as a 'post-positivist' as his theory is not necessarily consistent with the separation thesis as stated for example by Joseph Raz. See N MacCormick, *Institutions of Law* (2007) 278-9.

2.3 An institutional theory of constitutional transition

This gives us an analytical approach to understanding notions like the 'state', 'government' and 'constitutions': a state is a complex of status functions, of persons recognised to 'count as' presidents and constables and of things recognised to 'count as' coats of arms and war monuments, which give us reasons as members of the political community to obey the commands of presidents and salute flags. This suggests an interpretation of Martin Loughlin's somewhat cryptic characterisation of the state as a 'scheme of intelligibility':[21] institutional facts are the product of symbolism and representation. The notion of the state provides the key to interpret the meanings attributed to persons and objects by a political community for the purposes of ordering its group life, and the constitution of a state is the combination of status functions and deontic powers that structure it.

Understanding a constitution in this way, we can use the concept of institutional facts to understand the mechanics of constitutional *transition*. For example, the *cippi* of the Roman *pomerium* were originally built along the line of the Servian wall. Over time, the wall came to be recognised as a spiritual boundary with all sorts of ritual implications. The *pomerium* had the function of delineating magistrates' jurisdiction, the right to wear certain symbols of office, and the right to bear arms, among many other things. (For this reason, the assassination of Julius Caesar took place in Pompey's Theatre, outside the *pomerium*.)[22] Nobody today feels compelled to remove their military dress and don the toga of a civilian when crossing the line, let alone to surrender their weapons, because no community exists that still regards the status function of the *pomerium* or the Roman citizen as an extant institutional fact. These rituals have lapsed. In contrast, other communities have maintained quite similar rituals over an even longer period of time.

More recent, and even contemporary, changes can be understood in the same manner as status functions gaining and losing acceptance in the relevant community. Following the French Revolution, for example, status functions of such as 'Estates General' lapsed into desuetude, and new status functions such as 'citizen' and 'National Convention' gained currency. For example, Charles Beudant explains: 'revolution of 1789 broke the ties that bound the individual to the state; it opened thereby an era of individualism: this is the all the spirit of the Declaration of the rights of man.'[23] The logical structure of any constitutional

[21] M Loughlin, *The Foundations of Public Law* (2010) 205.
[22] S B Platner, *A Topographical Dictionary of Ancient Rome* (T Ashby ed, 1929) 392.
[23] C Beduant, *Droit Indivduelle et l'État* (1891) 4; author's translation.

transition can be understood in terms of status functions coming or ceasing to be recognised or accepted within a community, or in terms of the deontic powers accepted to inhere in old status functions changing. Often, this happens according to the glacial flow of custom and tradition, and appears less as the product of intentional recognition or acceptance and more as the organic 'spirit' of the community concerned. At other times, it happens in a sharp, punctuated manner pursuant to a conscious process of reform or a revolution.

In modern terms, most processes of constitutional transition seek to overlay an old, often fragmented and pluralistic institutional reality with a new, often uniform one. In this process, old institutions can persist or go underground only to break through and impose themselves on the newly declared institutional landscape; likewise, new institutions can fail to take root or work as well as anticipated. Perhaps most frequently, old and new institutional orders operate side-by-side until they find a mutual accommodation or hybridise. The deontic content of status functions will differ between communities, and individuals will disagree over their exact content. Where this disagreement is too severe, it will undermine the collective intentionality of the subjects and therefore undermine the existence of the relevant status functions as institutional facts.

2.4 A Searleian approach to the internal and external perspective

According to Searle, institutional facts are *ontologically subjective*—i.e. they only exist insofar as they are believed to exist by people. They are, however, at the same time *epistemically objective*—i.e. I can describe them as a matter of objective fact even if I do not believe in them. Their existence is dependent on the subjective recognition or acceptance by *some* people that X counts as Y in the circumstances, but this need not be universal. This insight is Searle's answer to what he regards as 'several centuries of confusion about the distinction between objectivity and subjectivity.'[24] The relation of the non-believer to the institutional fact would then appear to be somewhat like Hart's 'external perspective'. This is an enviable insight for the scholar of comparative law and general jurisprudence. We can study another normative order on the basis that it constitutes an objectively existing system of institutional fact, cognisant that the status functions which make it up exert deontic powers over its subjects, for whom it exists subjectively. This is particularly essential, if we wish to adopt a 'hermeneutic' approach that

[24] J Searle, *Consciousness and Language* (2002) 22.

gives appropriate weight to the meaning attached to a social practice by its subjects without attempting to abandon our own conceptions of reason and objectivity entirely.

2.5 An illustration: the advent of Shari'ah in pre-Islamic Arabia

Several of the contributions to this Symposium touch on Islamic law, Muslim customary law and their relation to state law. Islamic law is a historical example of 'constitutional transition' of some importance. As J P Berkey explains, pre-Islamic Arabian society was 'characterised by assumptions and attitudes that Islam would eventually seek, explicitly or implicitly, to overcome.'[25] Traditionally, tribal and clan identities were paramount in Arab society. The political community founded by Mohammed amounted in certain respects 'less to a rejection of tribalism than to a supra-tribal confederation',[26] but the competition between the old and new status functions provides an excellent historical illustration of the mechanics of transition.

The earliest Muslims were Arabs and members of particular Arab tribes, and 'an individual's social position depended first and foremost on those ties of kinship which bound him to an overlapping network of families, clans, and tribes.'[27] As a result, their descendants retained ethnic and kin-group loyalties alongside the newer claims of faith. But many of these came to be displaced by a new system in which the status function of the community of believers took precedence. The process took place over the lifetime of Mohammed through successive declarations recorded primarily in the *Qur'an* and *hadith*. As Berkey explains, numerous Koranic verses demand a rejection of blood ties in favour of those of faith, and 'eventually the primacy of the bonds of personal commitment to the faith group would (more or less) prevail.'[28]

Some of the old status functions subsisted for some time, and some subsist to this day. Others were in direct competition with those of the new political order and were replaced within the lifetime of the first Muslim generation. The Charter of Medina, for example, creates the status functions of 'believers'

[25] J P Berkey, *The Formation of Islam: Religion and Society in the Near East 600-1800* (2003) 67.
[26] Ibid.
[27] Ibid.
[28] Ibid.

and 'disbelievers',[29] and the 'community of believers' or *ummah*.[30] These status functions entail different deontic powers that cut across the duties and obligations of the old system: the *ummah* is to act corporately against those who slay a believer, for example, 'even if he be the son of one of them,'[31] in express contradiction of the pre-Islamic blood feud laws. According to Berkey, Islam eventually 'moved decisively away from the Arabian and tribal context. In doing so, it either suppressed or minimised many pre-Islamic values, assumptions, and institutions that had carried over into Islam, such as tribal loyalty and a severely restricted notion of political leadership, or revalorised them.'[32] In the Searleian model, we can understand this as creation of new status functions, the destruction of old ones or their revision to include different deontic powers. This framework is particularly useful for studying jurisdictions in which traditional, religious, or customary law plays a complementary or competitive role to state law.

3 Conclusion

With this substantive introduction to the Symposium, I sought to present an approach to comparative constitutional theory which is workable across jurisdictions, which provides an adequate framework for contemporary and historical comparisons, and which does not require too many *a priori* assumptions about the nature of law, the state, or substantive principles of constitutionalism. Whether or not the MacCormickian 'institutional' conception of law is accepted as a definitive account of law, law's normativity, and its relation to other forms of normative order, it provides a methodology that is well adapted to studying questions of constitutional transition. In particular, it helps us to grasp a number of current problems in comparative constitutional theory, such as the constitution of political community, the personality of non-state entities (and the status of the norms they generate), and the interaction between state and non-state normative orders. Further, it encourages openness to a pluralistic

[29] The earliest documents use two terms—*mu'umin* and *muslimun*—both of which mean roughly 'one who trusts' or 'believes', but with possibly different connotations concerning their relationship to the *ummah*—for analysis see RB Sarjeant, 'The *Sunnah Jami'ah*, pacts with the Yathrib Jews, and the *Tarim* of Yathrib: analysis and translation of the documents comprised in the so-called 'Constitution of Medina'' (1978) 41 *SOAS Bulletin* 1, 13, 18.

[30] On the various meanings of *ummah,* see FM Denny, '*Ummah* in the Constitution of Medina' (1977) 36 *J of Near Eastern Studies* 39.

[31] Charter of Medina, Art 4b in Sarjeant, above n 29, 19.

[32] Berkey, above n 25, 68.

enquiry, because it puts 'law' into a broader genus of socially generated facts. It is my hope that this Symposium will stimulate further collaboration in this subject area, both in the Journal and more widely.

Finally, I would like to thank the authors who have contributed their scholarship to this issue, and the efforts of my fellow editors in gathering and presenting the Symposium.

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TRANSITIONAL CONSTITUTIONALISM IN THE UNITED KINGDOM

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Abstract
The UK's transitional constitution dates to 1707, when two conceptions of constitutionalism—parliamentary sovereignty and popular sovereignty—were bound together under a single government of Great Britain. Three members of one family, John MacDonald MacCormick, Professor Sir Neil MacCormick and Iain MacCormick, were instrumental in creating an environment in which it continues to change in the present day. The constitution that was proposed for Scotland in the context of the 2014 referendum included positive elements that may influence the development of the constitution of the UK, now that Scotland has chosen, at least for the short term, to remain in the union.

Keywords
Devolution, Scotland, Transitional Constitutionalism, Act of Union

1 Introduction

According to Joseph Raz, two characteristics of a constitution in the 'thick sense' are that it is *stable*, at least in aspiration, and that it is *entrenched*, that is, more difficult to change than other laws.[1] Transitional constitutions fall short of the first requirement, because they are explicitly intended to be temporary. The UK constitution falls short of the second, at least according to traditional constitutional theory, because no law is different from any other law. In the famous words of A.V. Dicey, '[N]either the Act of Union with Scotland nor the Dentists Act, 1878, has more claim than the other to be considered a supreme law.'[2]

The Scottish referendum held on 18 September 2014 provides additional evidence, if any were needed, that bringing about an equilibrium in the UK's constitution will continue to be difficult (if not impossible) until the second requirement

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[1] See J Raz, 'On the Authority and Interpretations of Constitutions: Some Preliminaries' in L Alexander *Constitutionalism: Philosophical Foundations* (2001).

[2] A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, [1914] 1982), 78.

is met and the myth of constitutional parliamentary sovereignty has been abandoned. In this article we argue that the problem of parliamentary sovereignty has historically been and remains particularly acute in the relationship between Scotland and the rest of the UK (rUK), although other nations can feel its bite. Historically this problem has been most visible in Scotland in the relationship between church and state.

Once this general problem is recognised, solutions become easier to identify as well. What we argue is needed is an adjustment in democracy so that some items are taken off the normal political agenda and debate about them takes place only *in extremis*. Once structural matters, roughly the 'rules of the game', have been decided in a relatively permanent way, then other, distributional matters can be decided democratically without threatening vulnerable, marginal constituencies. Harold Lasswell defines politics as 'who gets what, when and how'.[3] Who gets what, when, focuses on distributional issues; how they get it is a question of constitutional law and has implications for matters as important as the West Lothian Question, defined and discussed below. We begin with a tribute to a family of constitutional iconoclasts, who helped to found the movement for Scottish independence.

2 A Founding Family

A key family to Scottish nationalism and therefore also to transitional constitutionalism in the UK are John MacDonald MacCormick (1904–61) and his sons Iain Somerled MacDonald MacCormick (1939–2014) and (Donald) Neil MacCormick (1941–2009). We give short biographical sketches below.

2.1 John MacDonald MacCormick

John MacCormick founded both the National Party of Scotland (NPS) and later the Scottish National Party (SNP) when he merged the NPS with the Scottish Self-Government Party, better known as the Scottish Party. The Scottish Party was essentially unionist, but its programme included reforming the empire and devolving home rule to Scotland, and its membership included prominent Scots such as Andrew Dewar Gibb, the Duke of Montrose and Sir Alexander MacEwan.[4] Radicals in the NPS favoured republicanism and independence, and

[3] H D Lasswell, *Politics: Who Gets What, When, How* (1936).

[4] C Kidd, *Union and Unionisms: Political Thought in Scotland, 1500-2000* (2008), 284-97.

MacCormick expelled them in order to succeed with the merger.[5] Although the new SNP was supposed to gain credibility from the grandees of the Scottish Party, it failed to win a seat in Westminster until 1945, when it briefly held one during the wartime truce among the major parties. After 1945, it had to wait until 1967, but it has been continuously represented in the UK Parliament since then.

John MacCormick had greater success with other projects, such as the Scottish convention and assembly that endorsed home rule and drafted the Scottish covenant, which evoked the Solemn League and Covenant (1643) and promoted the idea of a Scottish parliament within the United Kingdom. In addition, he was the petitioner in *MacCormick v. Lord Advocate* [1953] SC 396, which challenged the present queen's power to adopt the title Elizabeth II, when there had been no Elizabeth who was monarch of the nation since the union of the crowns in 1603. By this argument, Elizabeth should have been Elizabeth II of England and Elizabeth I of Scotland. Although the case seemed relatively silly even at the time and the arguments failed to convince the judges, it did elicit important *obiter dicta* from Lord President Cooper, which are frequently quoted in current constitutional debates:

> [T]he Treaty [of Union between Scotland and England] and the associated legislation, by which the Parliament of Great Britain was brought into being as the successor of the separate Parliaments of Scotland and England, contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations that the provision shall be fundamental and unalterable in all time coming, or declarations of a like effect. I have never been able to understand how it is possible to reconcile with elementary canons of construction the adoption by the English constitutional theorists of the same attitude to these markedly different types of provisions.[6]

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[5] R J Finlay, 'MacCormick, John Macdonald (1904-1961)' in *Oxford Dictionary of National Biography* (2004).

[6] *MacCormick v Lord Advocate* [1953] SC, 411. Jeffrey Goldsworthy argues that this picture of the Scottish parliament is inadequate. J D Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (2001), 165-73; *Parliamentary Sovereignty : Contemporary Debates* (2010), 270-72. We note his argument but side with Lord President Cooper and the MacCormicks on the issue. The key part of Cooper's *obiter* does not depend on any assumption about the pre-1707 Scottish Parliament.

This is a powerful and historically valid argument. It may be argued that it has never had any practical consequences. It was delivered in passing, in a court that had already held against John MacCormick on other grounds. Possibly Cooper was able to be so bold just because nothing was at stake. More recent attempts to give the 'sovereignty of the Scottish people' some bite have gotten nowhere as matters of law: for instance, during the debate in early 2012 as to which Parliament had the right to commission an independence referendum with legal force. However, as Professor Aileen McHarg commented during that debate: '[Is the independence referendum] a renegotiation of Scotland's place within the union on behalf of the sovereign Scottish people (the union state narrative)?... [This] narrative ... has considerable political resonance within Scotland (whatever its historical or legal plausibility).'[7] First Minister Alex Salmond had evidently read Professor McHarg's comment when he repeatedly cited the 'sovereign will of the Scottish people' in the first 2014 referendum debate. Challenged by Better Together leader Alistair Darling as to why the remaining UK should allow an independent Scotland to share the pound sterling after independence, the First Minister's reply was that it was the sovereign will of the Scottish people that that should happen.

According to John MacCormick, sovereignty in Scotland belongs to the people. The Scottish Parliament had always been subject to the sanction of community assent, and it could not convey to the parliament of Great Britain or of the UK more power than it had itself. The UK parliament could not enjoy any greater powers than the parliament of Scotland had done, and it was 'limited by the entrenched clauses in the Treaty which had created it.'[8]

2.2 Professor Sir Neil MacCormick

Donald Neil MacCormick was referred to by his middle name in order to distinguish him from his cousin the broadcaster Donald MacCormick. He held the Regius Chair of Public Law and the Law of Nature and Nations at the University of Edinburgh.[9] He was a prominent member of the Scottish National Party, served as an SNP Member of the European Parliament and was important

[7] A McHarg, 'Comment' on A Tomkins, *The Scottish Parliament and the Scottish Referendum*, 12 January 2012, at http://ukconstitutionallaw.org/2012/01/12/adam-tomkins-the-scottish-parliament-and-the-independence-referendum/#comments [accessed 30 September 2014].

[8] J MacDonald MacCormick, *The Flag in the Wind; the Story of the National Movement in Scotland* (1955), 188-90.

[9] N Walker, Sir (Donald) Neil (1941-2009) in *Oxford Dictionary of National Biography* (2013).

in a number of cross-party initiatives in Scotland, including the Claim of Right of 1989. This, although not supported by MacCormick's party, was an important step toward devolution, realized in the Scotland Act 1998. Its title echoed the Scottish Claim of Right (1689), a more radical version of the English Bill of Rights of the same year.[10] Neil MacCormick was also responsible for successive revisions to a draft constitution for Scotland and argued that an independent Scotland would automatically be a part of the European Union.[11]

MacCormick worried,

> [I]f all legal or political power is concentrated at the level, say, of a single assembly with complete power over all matters in a large territory, then decisions affecting localities within the whole are as much subject to majority decision by the totality as decisions which have a broader, or even a holistic, scope. But the majority of the totality may be at odds with the majority in any particular locality.[12]

His vision was of a new legal order; in firmly established constitutional traditions he believed that multiple powers of the state were divided and that they could be subdivided further and assigned to new entities like the European Union or to subordinate entities like Scotland on a permanent, or at least indefinite, basis.

2.3 Iain MacCormick

Iain MacCormick is the only one of the three MacCormicks to have served as an MP in Westminster. During the parliamentary campaigns of the early 1970s Scots voters knew that North Sea Oil would be coming in, and banners claiming 'It's Scotland's Oil' were used successfully by the SNP, which gained its largest number of Westminster seats to date (11) in the election of October 1974. Iain MacCormick had served as an SNP MP for Argyllshire from February of that year, when the SNP broke through to 7 seats, and he continued to do so until 1979. That year Scotland held a referendum on devolution which was supported by 51.62% of those voting. Nevertheless, it failed to reach the 40% threshold

[10] R Mitchison, *Lordship to Patronage: Scotland, 1603-1745* (reprinted ed 2003), 117.

[11] N MacCormick, *Questioning Sovereignty : Law, State, and Nation in the European Commonwealth* (1999), 204.

[12] Ibid, 134. See also N MacCormick, 'The English Constitution, the British State, and the Scottish Anomaly' (1998) 101 *Proceedings of the British Academy* 289.

that had been imposed by Labour backbenchers, and the Labour government fell when the SNP withdrew its support. In the meantime Iain MacCormick had pushed through the Divorce (Scotland) Act 1976 (c. 39), which had been blocked by Conservatives, who could resort to the more relaxed laws south of the border when their marriages failed.[13] Following the SNP's and Iain MacCormick's own defeat in 1979, he went on to become a Scottish founder of the Social Democratic Party, a reaction against the Labour Party's radicalization during the previous ten years. He never held political office again. But on 18 September 2014 he insisted on going to the polls to vote in person in the independence referendum despite being seriously ill. He died the following day.

John, Neil and Iain MacCormick showed that the UK is caught on the horns of a dilemma. Traditional forms of Diceyan parliamentary sovereignty bar parliament from passing laws that bind a future parliament (say, to respect Scottish political institutions) any more than any other laws (like the Dentists Act). If that principle holds, then sub-populations in the UK, like the Scots, are under the constant threat that they may be treated unequally and potentially unfairly by other, larger groups, as Neil MacCormick recognized. The only satisfactory solution to that problem for a nationally defined group is independence. If the policy alternatives are absolute, then the alternative to a constant threat from parliamentary sovereignty is to secede from the sovereign power. However, once the absolute character of parliamentary sovereignty is moderated, as Neil MacCormick proposed, then it becomes possible to have gradations of sovereignty on both sides and to have multiple legal orders.[14] And the minority can have guarantees that its jurisdiction will be respected. That is exactly what devolution does.

3 The Mixed Character of the UK Constitution

Parts of the UK constitution meet Raz's requirement for entrenchment, even though they may not meet another of his requirements, justiciability.[15] As Lord President Cooper pointed out in his judgment quoted above, parts of the Treaty of Union and the associated acts dictate that certain rules will apply 'in all time coming'. These include the existence of the Court of Session and High Court

[13] 'Iain MacCormick', *The Telegraph* (22 September 2014)

[14] Compare M Malik, *Minority Legal Orders in the UK: Minorities, Pluralism and the Law* (2012).

[15] J Raz, On the Authority and Interpretations of Constitutions: Some Preliminaries' in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (2009) 153.

of Justiciary (subject to regulations for the better administration of justice) and inferior courts; the promise 'that no alteration be made in laws which concern private right' (except for 'evident utility of the subjects within Scotland'); the existence of the universities and colleges of St Andrews, Glasgow, Aberdeen and Edinburgh; and the 'true Protestant religion' and the form and purity of worship in use within the church and 'the government of the church by kirk sessions, presbyteries, provincial synods and general assemblies'.[16]

Although Lord President Cooper differentiated between English and Scottish jurisprudence in this respect, some English constitutional statutes also include similar language, and English constitutional theorists therefore ignore the same elementary canons of construction. The Bill of Rights, for example, contains individual rights (to be free from cruel and unusual punishment and to petition the government, for example) and includes the following clause:

> [A]ll and every the particulars aforesaid shall be firmly and strictly holden and observed as they are expressed in the said Declaration And all Officers and Ministers whatsoever shall serve their Majestyes and their Successors according to the same in all times to come.[17]

According to this statute, ministers and officers of the crown cannot act in violation of these rights, 'in all times to come'. The quest for stability and certainty is not as alien to British or even to English law as some might like to claim.

Other provisions of the UK constitution, however, are explicitly transitional. The preamble to the Parliament Act 1911 provides,

> [W]hereas it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis, but such substitution cannot be immediately brought into operation:
>
> And whereas provision will require hereafter to be made by Parliament in a measure effecting such substitution for limiting and defining the powers of the new Second Chamber, but it is expedient to

[16] Union with Scotland Act 1706, 6 Ann. c. 11; Union with England Act 1707, Acts of the Parliament of Scotland (APS) xi 406 c. 7, Records of the Parliament of Scotland (RPS) 1706/10/257 (16 January 1707), available at www.rps.ac.uk [accessed 17 October 2014].

[17] Bill of Rights 1688, 1 Will. & Mary sess. 2 c. 2.

> make such provision as in this Act appears for restricting the existing powers of the House of Lords …[18]

In some sense this transitional constitutional provision has failed, as no popular second chamber has been brought in to operation in the past century. Nevertheless, based upon the temporary character of the restriction on the Lords' powers, Unionists proposed that George V withhold the royal assent from the Government of Ireland Bill because the House of Commons had been turned into a 'Revolutionary Committee'.[19] These arguments were put to rest by the Appellate Committee of the House of Lords in *R (Jackson) v Attorney General*.[20]

Somewhere between these two poles of stability and fugacity, Scotland's current constitutional status is one of incremental entrenchment. The 1997 Scottish referendum decisively supported devolution by a vote of 74.29% with a 60.43% turnout, which would have met the threshold requirement imposed in 1979. The Scotland Act 1998 (c. 46) granted devolved powers to a Scottish parliament to be established at Holyrood. The Scots constructed a building at an eventual cost of £414 million and have held elections in 1999, 2003, 2007 and 2011. Members of the Scottish Parliament (MSPs) have legislated independently on issues as vital to the nation as health care, education and infrastructure; and in 2005 powers over Scottish railways were devolved from Westminster. Disagreements between Westminster and Holyrood concerning their respective jurisdiction—that is, which matters were devolved and which reserved—can be decided by the UK Supreme Court, but to date no such dispute has reached it.[21]

Under the Scotland Act 2012,[22] further powers will be devolved. Most importantly these include a withdrawal from 10 pence of every pound of income tax, with a corresponding reduction in the block grant calculated under the Barnett Formula. This transfer is intended to increase the financial accountability of the Scottish Parliament by forcing it to set a Scottish rate and making it responsible at the margin for deciding between taxing and spending. In spring 2014, before the referendum was held, the Scottish Labour Party proposed to increase this to 15 pence, and the Scottish Conservative and Unionist Party

[18] Parliament Act 1911, 1 & 2 Geo. 5 c. 13, Preamble.

[19] I McLean, *What's Wrong with the British Constitution?* (2010) 104.

[20] [2005] UKHL 56. See A L Young, 'Hunting Sovereignty: Jackson v Her Majesty's Attorney-General' [2006] *Public Law* 187.

[21] Scotland Act 1998, §§ 33, 35, Schedule 6.

[22] I McLean, G Lodge & J Gallagher, *Scotland's Choices: The Referendum and What Happens Afterwards* (2nd ed, 2014) Table 3.2.

proposed to devolve income tax entirely, including both the rate of tax and the bands where it increased (although not the personal allowance).[23]

When nations have been part of the UK and its empire in the past, the first step toward independence has frequently been statutory. Following Lord Durham's report in 1839,[24] British colonies were granted self-government in Australia and Canada. In Australia, the process began in 1850, when parliament passed the Australian Constitutions Act, which separated the colonies of Victoria and New South Wales, granting them a legislative council with a majority of elected members.[25] Remaining connections between Australia and the Westminster parliament (although not between Australia and the monarchy) were eliminated in 1986, when all of the Australian states, the Australian parliament and the UK parliament passed identical acts granting Australia self-government.[26]

In 1867 parliament passed the British North America Act, forming a federation of the provinces of Canada (later Ontario and Quebec), New Brunswick and Nova Scotia and granting them some democratic autonomy (the executive and the appointment of the upper house of the legislature remained with the crown).[27] That Act, now referred to as the Constitution Act 1867 in Canada, was patriated into the constitution when the Westminster Parliament passed the Constitution Act 1982.[28] Conversely, in the context of Scottish independence, Lord Hope of Craighead has argued that the precedents for granting independence lie with the Solomon Islands Act 1978 (c. 15) and the Trinidad and Tobago Independence Act 1962, 10 & 11 Eliz. 2 c. 54. According to Lord Hope, it is up to Westminster to *grant* nations independence within a legal framework.[29]

How, if at all, can one reconcile the independence of former colonies with parliamentary sovereignty? In the 1930s, the focus was on the Statute of Westminster:

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[23] Scottish Labour Devolution Commission, 'Powers for a Purpose: Strengthening Accountability and Empowering People' (2013), para 361, available at http://www.scottishlabour.org.uk/campaigns/entry/devolution-commission [accessed 30 September 2014]; Scottish Conservatives, 'Report of the Commission on the Future Governance of Scotland' (2013), 13 (available at http://www.scottishconservatives.com/2014/06/strathclyde-commission-scotland-full-powers-income-tax/ (accessed 30 September 2014).

[24] Report on the Affairs of British North America from the Earl of Durham (3) HC PP 1839 xvii, 1.

[25] Australian Constitutions Act 1850, 13 & 14 Vict. c. 59.

[26] Australia Act 1986 (Cth) (No 142 of 1985); Australia Act 1986 (UK) (c. 2).

[27] 30 & 31 Vict. c. 3.

[28] Canada Act 1982 (c. 11).

[29] House of Lords Select Committee on the Constitution, 'Inquiry into Scottish Independence: Constitutional Implications for the Rest of the UK' (2014), 60 available at http://www.publications.parliament.uk/pa/ld201314/ldselect/ldconst/188/188.pdf (accessed 17 October 2014).

> No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.[30]

Here, the UK is promising that before it legislates for dominions like Canada and Australia it will request and obtain the consent of the dominion: as happened with both the Canada Act 1982 and the Australia Acts 1986. Lord Sankey wrote of this section:

> It is doubtless true that the power of the Imperial [*i.e.* Westminster] Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired; indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard section 4 of the Statute. But that is theory and has no relation to realities.[31]

So, too, with Scotland. Section 28(7) of the Scotland Act says that the section, which grants to Scotland the power to make laws, 'does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.' The constitutional scholar Anthony Bradley has written, '[A]s a matter of strict law, Westminster retains full capacity to amend or repeal the Scotland Act and may do so at any time, without any prior procedure such as a referendum of the Scottish Electorate being necessary.'[32] This is why the dilemma that the MacCormicks identified matters to Scotland. Anthony Bradley has also written, 'Westminster retains full capacity to legislate on any aspect of Scotland's affairs, whether or not they are within Edinburgh's legislative competence, but [echoing Lord Sankey,] as a matter of political practice Westminster will legislate on devolved matters only with the approval of the Scottish Parliament.'[33]

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[30] Statute of Westminster 1931, 22 & 23 Geo. 5 c. 4, § 4.

[31] *British Coal Corp v The King* [1935] AC 500.

[32] A Bradley, 'The Sovereignty of Parliament—Form or Substance?' in J L Jowell and D Oliver (eds), *The Changing Constitution* (2011), 53.

[33] Ibid. This 'political practice' is reinforced by the Sewel Convention and by the rules, including the standing orders in the Holyrood parliament that guide its operation. See Report of the Commission on Scottish Devolution, 'Serving Scotland Better: Scotland and the United Kingdom in the 21st Century' (June 2015), paras 1.159-1.166, 1.170-1.171, 2.17-2.18.

The dilemma remains. In strictly legal terms, Scottish law is subordinate to the majoritarian decision-making process in Westminster, even if, according to Lord Sankey and Anthony Bradley, those decisions are practically constrained by 'reality' and 'political practice'. But what assurance do the Scots have that the reality of political practice will not change, or be slowly undermined by future Westminster parliamentary majorities? It has happened before, as we discuss below.

4 The Problem of Religious Freedom and Religious Establishment

Following the flight of James II and VII in 1688, the so-called Glorious Revolution began with convention parliaments in England and Scotland, which both invited William of Orange and his wife Mary to reign. William and Mary assumed the English throne on 12 February 1688/89, but the Scottish throne was not offered until 11 April, and on different terms. Succession planning depended upon William having children, either with his wife Mary or with another queen, or upon Mary's sister Anne doing so. None of them did, so the succession was uncertain.[34] The English passed the Act of Succession in 1701, establishing the Hanoverian succession (which meant the crown passed to George I via his mother, Sophia, electress of Hanover) without consulting the Scots. Meanwhile, the Scots had embarked upon the romantically conceived but disastrous Darien Expedition to establish a colonial presence in Central America. Its failure was a result of poor planning (few knew what the geography would be like), bad strategy (the nearby Spanish colonies were held by William's ally in his European wars) and William's interdict of finance from London. It resulted in the loss of £153,631 by the Scots—estimated to be one-fourth of the nation's capital stock.[35] Finally, the English Parliament was forced to accept concessions to the Scots in order to finance William's military campaign in Europe, but it retaliated with the Alien Act, which restricted trade in cattle, linen and coal: 'a naked piece of economic blackmail designed to bring the Scottish Parliament swiftly to the negotiating table'.[36]

[34] J Hoppit, *A Land of Liberty?: England, 1689-1727* (2002), 37. Hoppit writes that William's 'health and inclination' were against remarriage—an allusion to William's rumoured homosexuality.
[35] I McLean and A McMillan, *State of the Union* (2005), 39-41.
[36] T M Devine, *The Scottish Nation, 1700-2000* (1999), 3.

The events of 1707 have been examined in detail elsewhere, but the Scots were not defenceless when they came to the bargaining table. Amongst other things, they could credibly threaten to offer the Scottish throne to the Stuarts, and they did so with an Act for the Security of the Kingdom, which held out the possibility that the union of the English and Scottish crowns might be at risk.[37] The best evidence that they actually exercised this leverage was the concessions that they were able to extract in the treaty, including the preservation of the Scottish legal system, universities and church.[38] However, once the union was complete, the English Parliament's commitment to preserve the church was not as credible as Scotland's threat had been in the Union negotiations. In March 1710, the House of Lords decided *Greenshields v Lord Provost and Magistrates of Edinburgh*,[39] which permitted an episcopal minister to conduct services in Edinburgh—across the street from the High Kirk (St Giles); and the following year Parliament passed the Scottish Episcopalians Act 1711,[40] legally authorising such services. These abrogated the treaty provision that 'presbyterian government' would be 'the only government of the church within the kingdom of Scotland'. The *coup de grâce* was delivered that same year, when parliament passed the Church of Scotland (Patronage) Act, which restored the ability to appoint clergy to lay patrons, rather than kirk sessions and presbyteries.[41] The act implicitly repealed the Act concerning Patronages,[42] thereby violating the commitment that the 'government' of the Church would 'remain and continue unalterable'.

Lord Rodger of Earlsferry points out that although church leaders argued that the Patronage Act was incompatible with the guarantees of the Treaty of Union, Scottish lawyers and judges of the time did not challenge it.[43] But Lord Rodger's point is a broader one. When the London-based judiciary and courts breached the promises in the treaty, they created an environment that led to the Disruption of 1843, which was the culmination of 'the most sustained challenge to its authority which the [Scottish] Court of Session has ever faced'.[44] From 1711 until 1784 the General Assembly sent protests to Parliament, arguing that the Patronage Act

[37] APS xi 136 c. 3; RPS 1704/7/68 (5 August 1704).
[38] Text accompanying note 16, above.
[39] [1710] Colles 427, 1 ER 356.
[40] 10 Ann. c. 10.
[41] 10 Ann. c. 21.
[42] APS ix 196 c. c. 53; RPS 1690/4/114.
[43] A Rodger of Earlsferry, *The Courts, the Church and the Constitution: Aspects of the Disruption of 1843* (2008) 5-7.
[44] Ibid, 80.

was a violation of Scottish religious self-determination and should be repealed.[45] During that time, too, numerous divisions occurred in the Scottish Church, first when the Associate Presbytery withdrew from the Church of Scotland, then when the Relief Church withdrew. The Associate Presbytery divided into Burghers and Anti-Burghers, based on whether its clergy could take the Burgher Oath following the rebellion of 1745, and in the early nineteenth century each of those divided into Auld Licht and New Licht sections. At one point in the early 1800s, seven presbyterian denominations existed in Scotland.[46] The biggest division in the Church of Scotland occurred over a measure introduced by a resurgent evangelical wing: the Veto Act, which imposed a congregational veto over the patron's choice of a congregation's minister. After a decade of litigation, in which the courts refused to give effect to the act, in 1843 some one-third of the clergy and between one-third and one-half its members withdrew to form the Free Church of Scotland in the Disruption.[47]

As other markets generally clear, so too with religious markets. If there are too many providers, then they must merge in order to be profitable, or even survive. Between the 1840s, when the Relief Church joined with the New Lichts to form the United Presbyterian Church, and the 1890s, these denominations slowly consolidated until only four or five remained.[48] These included the United Presbyterian Church, the Free Church and the Church of Scotland. When the first two merged in 1900, to form the largest anti-establishment religious denomination in Great Britain, a minority in the Free Church stayed out and sued in the civil courts, arguing that the majority had violated central doctrinal tenets upon which the church had been founded. Although the Scottish courts uniformly supported the Free Church against the dissentient minority, the House of Lords, in its judicial capacity, repeated the mistake that Parliament and the House of Lords had made in 1710-11. They intervened on a point of doctrine and awarded all of the Free Church's assets to a group of twenty-seven congregations and twenty-eight ministers, predominantly in the Highlands and Islands, since

[45] J H S Burleigh, *A Church History of Scotland* (1960) 278-79.

[46] These were the original Church of Scotland, its predecessor, the Reformed Presbyterian Church (the Covenanters, who remained from the time of the Wars of the Three Kingdoms), the Constitutional Associate Presbytery (Auld Licht, Antiburgher); the General Associate Synod (New Licht Antiburgher); the Associate Synod (New Licht Burgher); and Original Burgher Synod (Auld Licht Burgher), alongside the Relief Church.

[47] A O'Neill, 'The Courts, the Church and the Constitution Revisited,' in A S Burrows, D Johnston, and R Zimmermann, *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (2013).

[48] In addition to those mentioned above, the Reformed Presbyterians retained their independence, and the Free Presbyterian Church withdrew from another church when it changed its oath.

known as the Wee Frees.[49] Three government commissions were necessary to sort out the property, and the largest denomination that opposed religious establishment in Scotland was critically wounded.[50] In 1909 formal negotiations began concerning a merger between the new United Free Church and the Church of Scotland.[51] However, prerequisite to this union, legislation was necessary to ensure that the new church would be free from parliamentary or judicial interference.

The 1921 act—the Church of Scotland Act—was the result. It provided in part:

> This Church … [has] the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church, including the right to determine all questions concerning membership and office in the Church, the constitution and membership of its Courts, and the mode of election of its office bearers, and to define the boundaries of the spheres of labour of its ministers and other office-bearers.[52]

This independence went unchallenged until the twenty-first century, when the Appellate Committee of the House of Lords decided *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, which held that Helen Percy, a Church of Scotland minister, could sue the church under the Sex Discrimination Act 1975 (c. 65), notwithstanding the provisions of the Church of Scotland Act 1921.

Lord Rodger, as Lord President of the Court of Session, had decided the case in favour of the Church of Scotland, based upon the fact that Ms. Percy was not employed under a contract. He writes, 'I confess that I was glad to decide the case on that basis and to be relieved of the need to deal with the Church's first argument': that the Church of Scotland deprived the civil courts of jurisdiction.[53] He argues that *Percy* was a significant development in an area of the law which

[49] See *Church and Creed in Scotland: The Free Church Case 1900-1904 and Its Origins* (1988).

[50] Sir John Cheyne, 'Interim Report to the Rt Hon the Marquess of Linlithgow, KT, His Majesty's Secretary for Scotland' P.P. 1905 ci, 727 (Cd 2510); 'Report of the Royal Commission on Churches (Scotland)' P.P. 1905 xxiii, 113 (Cd. 2494); 'Report of the Royal Commission Appointed under the Churches (Scotland) Act, 1905' P.P. 1910 xiii, 343 (Cd. 5061).

[51] J H S Burleigh, *A Church History of Scotland* (1960) 399-400.

[52] Church of Scotland Act 1921, 11 & 12 Geo. 5 c. 29, Schedule Art. IV.

[53] A Rodger of Earlsferry, *The Courts, the Church and the Constitution : Aspects of the Disruption of 1843* (2008) 92.

many people hoped had been settled once for all when Parliament passed the Church of Scotland Act 1921.[54] The lawyer Aidan O'Neill generalises further, in spite of the court's holding in *Percy*:

> [T]he Church of Scotland Act 1921 now regulates the relationship between Church and State in Scotland. … But at times it seems as though the Erastian monist assumptions underpinning only the Anglican settlement have been regarded by the courts (and by our lawmakers) as the sole approach constitutionally open to them.[55]

O'Neill also brings Neil MacCormick back into the picture, referring to Lord Rodger's perspective on *Percy* as that of an 'Insider-Outsider' whose Scottish Presbyterian background had sensitised him to a different 'political theology' from his London-trained judicial colleagues.[56] Drawing on MacCormick's conception of a 'hermeneutic viewpoint', from which a sympathetic but dispassionate observer seeks to understand a legal order different from her own, O'Neill argues that Lord Rodger's respectful treatment of the Church of Scotland in his own judgment in *Percy* arose from his dual identity as a Scot and an internationalist.

As one of us has pointed out, the British Constitution is like a series of train crashes.[57] Since 1840 railway accidents in the UK have been inspected by HM Inspectorate of Railways, whose inspector reports recommend safety improvements to prevent a repetition of the accidents. This series of train crashes over Scottish religious freedom, established (Church of Scotland) and non-established (United Free Church) alike, should not go unmarked when anticipating future Anglo-Scottish relations, as Scotland remains in the continuing United Kingdom. Indeed, as we have both argued elsewhere, the complete solution to this tension between religious belief and the law may require a binding promise to respect religious freedom throughout the UK.[58]

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[54] Ibid, 94.

[55] A O'Neill, 'The Courts, the Church and the Constitution Revisited' in A Burrows, D Johnston, and R Zimmermann, *Judge and Jurist* (2013) 643.

[56] Ibid, 649-51.

[57] I McLean, *What's Wrong with the British Constitution?*, 44; I McLean and C Foster, 'The Political Economy of Regulation: Interests, Ideology, Voters, and the UK Regulation of Railways Act 1844' (1992) 10(3) *Public Administration* 313.

[58] I McLean and S Peterson, 'Entrenching the Establishment and Free Exercise of Religion in the Written UK Constitution' (2011) 9(1) *Int J of Const L* 230.

5 The Problems Posed by the Reaffirmed Union

5.1 A Co-operative Process

Getting Scotland and rUK to where they are now has required cooperation from the governments in both Westminster and Holyrood. In particular, the Edinburgh Agreement of 2012 committed both the Scottish and UK Governments to accepting the result of the referendum, and

> to working together on matters of mutual interest and to the principles of good communication and mutual respect. The two governments have reached this agreement in that spirit. They look forward to a referendum that is legal and fair producing a decisive and respected outcome. The two governments are committed to continue to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom.[59]

Although the agreement had no legal effect on its own, it gained that effect through a statutory instrument.[60] In the Solomon Islands an oil shock made it clear that continued colonial status became financially unfeasible from 1973, and in Trinidad and Tobago, 20 of 30 members of the legislature, who were members of the nationalist People's National Front, pushed for independence. On independence day Princess Margaret read the queen's message relinquishing her rule. However, cooperation in Scotland was not foreordained. Between 1885 and 1918 an overwhelming majority of Irish MPs in Westminster supported Home Rule, but they were unsuccessful. A.V. Dicey, the architect of parliamentary sovereignty in its modern form, abandoned his own doctrine in favour of the view, in opposition to successive Government of Ireland Bills, that those bills could only become law if they were ratified in referenda—and perhaps not even then.[61] That the Generalitat of Catalunya voted in September 2014 to hold a

[59] HM Government and The Scottish Government, 'Agreement between the United Kingdom Government and the Scottish Government on a Referendum on Independence for Scotland' (15 October 2012), Art 30 <http://www.scotland.gov.uk/Resource/0040/00404789.pdf> [accessed 18 October 2014].

[60] Scotland Act (Modification of Schedule 5) Order 2013 (S.I. 2013 No. 242). Confusingly, although this is a Section 30 Order, the reference is not to Article 30, quoted above, but to section 30 of the Scotland Act 1998 (c. 46).

[61] I McLean, *What's Wrong with the British Constitution?* (2010), 142-54.

referendum on secession from Spain has not impressed either the Spanish federal government or the nation's constitutional court.[62]

The Anglo-Scottish experiment with national self-determination has been a more harmonious process so far. The Scottish government published its Scottish Independence Bill in the months before the election, and the interim constitutional provisions in that document have a distinctly Cooperite tone—one that both Lord Rodger and the MacCormicks would have recognized. It is no longer than that masterpiece of Enlightenment lucidity, the constitution of the United States of America. It also shares intellectual history with the US constitution, opening with the statement, 'In Scotland, the people are sovereign.'[63] It thereby repudiates parliamentary sovereignty and embodies the work of Lord President Cooper and Neil MacCormick. At the same time, it set limits to that sovereignty, imbuing the European Convention on Human Rights with constitutional force: much stronger protection than the statutory force the convention enjoys in rUK.[64]

5.2 Institutional Adjustments

Currently a commission is investigating other ways that power can be devolved to Scotland consistently with the 'vow' made by the Westminster party leaders two days before the election. That vow makes the constitution of the UK more of an interim constitution than it has been in decades, if not centuries. Panicked by polls in the weeks before the referendum, which had shown a closer race than actually occurred, all three leaders of the main Westminster parties signed a pledge in the days before the election, which was published in the *Daily Record*, the most widely read Scottish newspaper.[65] It said, 'The Scottish Parliament is permanent and extensive new powers for the Parliament will be delivered by the process and to the timetable agreed and announced by our three parties …'[66]

[62] A Kassam, 'Catalonia Independence Referendum Halted by Spain's Constitutional Court,' *The Guardian* (29 September 2014), <http://www.theguardian.com/world/2014/sep/29/catalonia-independence-referendum-spain-court-vote> [accessed 18 October 2014].

[63] Scottish Government, 'The Scottish Independence Bill: A Consultation on an Interim Constitution for Scotland' (2014), Art 2 <http://www.scotland.gov.uk/resource/0045/00452762.pdf> [accessed 18 October 2014].

[64] Ibid, Art 26(1).

[65] N Blain and D S Hutchison, *The Media in Scotland* (2008), 228. The Murdoch *Scottish Sun* surpasses the *Daily Record* in circulation, but it cannot be called a 'Scottish' newspaper in the pure sense of the term, as it is the Scottish edition of an English paper.

[66] Daily Record, 16 September 2014 <http://www.dailyrecord.co.uk/news/politics/david-cameron-ed-miliband-nick-4265992> [accessed 18 October 2014].

Prime Minister David Cameron appointed Lord Smith of Kelvin, a cross-bench member of the House of Lords, to head the commission to agree on what additional powers would be devolved.

However, in his speech on 19 September, following the Scottish voters' decision to remain in the union, Cameron announced:

> [J]ust as Scotland will vote separately in the Scottish Parliament on their issues of tax, spending and welfare, so too England, as well as Wales and Northern Ireland, should be able to vote on these issues and all this must take place in tandem with, and at the same pace as, the settlement for Scotland.[67]

Interpretations conflict, but this statement appears to make the Scottish Parliament's extensive new powers contingent on agreement about English votes for equivalent matters in England. Numerous difficulties arise from this proposal, which seeks to solve the West Lothian Question ('WLQ'). The WLQ, strictly speaking, asks why MPS (and potentially peers) from one country should vote one way on a policy that affects only that country but be out-voted by MPs from other nations in the UK. Before 1997 WLQs occurred primarily on non-English laws. The Poll Tax, introduced in Scotland only by an act which the majority of Scottish MPs opposed; Welsh church reform, blocked by English MPs (and peers) before 1914; coercion acts in nineteenth century Ireland; and the Patronage Act (Scotland), 1711/12 (discussed above) are all instances of WLQs. Although reform of the Church of England's prayer book in 1927–28, supported by English MPs, was blocked by MPs from outside England where the church is not established, more modern instances of English misfires include four votes on hospital and higher education funding in 2003–04. A growing plurality of people want to see English Votes on English Laws, to curtail or eliminate the risk of this occurring in the future.[68]

Several alternatives are available, but not all are politically feasible. One neat one is to establish regional governments in England, in standard regions that

[67] D Cameron, 'Scottish Independence Referendum: Statement by the Prime Minister' (19 September 2014), <https://www.gov.uk/government/news/scottish-independence-referendum-statement-by-the-prime-minister> [accessed 18 October 2014].

[68] Report of the Commission on the Consequences of Devolution for the House of Commons (2013), at Tables 1 and 4 <http://webarchive.nationalarchives.gov.uk/20130403030652/http://tmc.independent.gov.uk/wp-content/uploads/2013/03/The-McKay-Commission_Main-Report_25-March-20131.pdf> [accessed 18 October 2014].

are roughly equivalent in population and GDP to Scotland, Wales and Northern Ireland. However, this one was scuttled when it was defeated in a referendum in the Northeast of England in 2004.[69] A second alternative is an English Parliament; however, such a legislature would include 85% of the UK's population and would destabilise the union. The McKay Commission, which reported in 2013, proposed a double-count of English MPs: '[T]he determining majority would be that in the overall vote [of all UK MPs], as has always been the case.'[70] However, that vote would be preceded by one in an English Grand Committee, which would have to approve English-only legislation before it could proceed. The report continues, 'But if a government was seen to have failed to attract the support of a majority of MPs from England (or England-and-Wales) for business affecting those interests, it would be likely to sustain severe political damage.'[71]

There are two crucial problems with this proposal. Gladstone recognised the first in the context of Irish MPs remaining in the House of Commons after Home Rule: '[I]t passes the wit of man' to define the territorial scope of a bill.[72] In addition, this is a soft constraint. When parliamentary stakes are high enough, a determined government with tough whips would know that votes on a particular bill are subsumed by noise at election time. The 2003–04 votes on foundation hospitals and tuition fees did not decide the 2005 election.

This leaves a final option: a reduction in the number of Scottish and other nations' MPs, to reduce the likelihood that their votes will be decisive on English laws. This is the option that Gladstone proposed in his abortive 1893 Government of Ireland Bill. Gladstone's caustic colleague Sir William Harcourt retorted that fifty MPs may be as decisive as 100 and that 'you don't get rid of the [interference] any more than the young woman did of the baby by saying it's such a little one'. However, the probability of fifty MPs being decisive is almost always less than half that of 100 MPs being decisive.[73] Thus, Gladstone's 1893 proposal is probably the most realistic one.

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[69] For more information, see <http://www.electoralcommission.org.uk/_data/assets/pdf_file/0008/76994/NEreffullreport.pdf> [accessed 23 October 2014].

[70] McKay Commission, above n 68, para 219.

[71] Ibid.

[72] Gladstone MSS, BL Add. Mss 44672 f. 27, quoted in V Bogdanor, *Devolution in the United Kingdom* (1999) 30. See e.g. R Morris, 'Deliver us from EVEL? – a side-effect of the devolution debate' (20 October 2014) <http://constitution-unit.com/2014/10/20/deliver-us-from-evel/> [accessed 20 October 2014], observing that even the Church of England's Bishops and Priests (Consecration and Ordination of Women) Measure is not purely an English law, because it amends the UK-wide Equality Act 2010.

[73] D Felsenthal and M Machover, *The Measurement of Voting Power* (1998), Ch 2.

5.3 Emergent Fiscal Federalism

The main issue for Lord Smith's commission is how much tax should be devolved; devolution of spending responsibilities is secondary (although spending rather than taxing is the focus of almost all debate). Now that the voters have decided against independence (for the present), the Scotland Act 2012 will come into effect. This means that the Scottish Parliament will become more fiscally responsible. It will have to balance the delights of public spending against the discipline of raising tax to pay for it. The Scottish election campaigns of the future may not repeat those of 2007 and 2011, when every Scottish party promised to tax less and spend more than its rivals. The 2012 Act was constitutionally novel in that it was passed with the approval of both parliaments—in Westminster and Holyrood. Further taxing and spending powers, beyond those in the 2012 Act, will undoubtedly be devolved, as agreed by the Westminster parties in advance of the referendum and now embodied in the 'vow' described above. At a minimum, the devolution of housing benefit and accommodation allowance makes sense in light of the fact that other housing expenditures are devolved.[74]

Fiscal federalism is difficult, because two inconsistent objectives are at issue. On the one hand is self-determination. Local populations may have different priorities. In one geographic area, the population (and its majority political party) may put greater importance on spending, for example, for health, education or infrastructure such as roads or bridges, and in another part of the country low taxes may be more important, for example to attract businesses. But on the other is equity, because this leads to what newspapers refer to as the 'post-code lottery', where benefits or taxes depend upon the seemingly arbitrary criterion of where the boundary is drawn. This difference can seem particularly inequitable when the geographic line seems particularly arbitrary, as when the line divides London councils.

The Calman Commission, whose recommendations were largely adopted in the Scotland Act 2012, distinguished between fiscal policies that should remain UK-wide and those that could be devolved.[75] Devolved taxes have the potential

[74] HM Government, 'The Parties' Published Proposals on Further Devolution for Scotland' (Cm 8946), October 2014, 34-35 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/363236/Command_paper.pdf> [accessed 19 October 2014]. This command paper is simply a reiteration of what has already been promised by the parties independently.

[75] Calman Commission on Scottish Devolution, Scotland Better: Scotland and the United Kingdom in the 21st Century Final Report, 15 June 2009 <http://www.commissiononscottishdevolution.org.uk/uploads/2009-06-12-csd-final-report-2009fbookmarked.pdf> [accessed 19 October 2014].

to add costs to the system, including increased cost of administration by the government and additional compliance costs to individuals and businesses. Calman offered the principle, going back to Adam Smith, that the best taxes to devolve are those on bases that do not move, such as land and unextracted oil. The worst are corporate taxes, as international businesses can instantly pretend to do business in low-tax jurisdictions. VAT may not be devolved within an EU member state.

5.4 How to Make These Decisions

Alan Renwick, in a pamphlet published before the independence referendum, predicted, 'Whether Scots vote "Yes" or "No", the referendum will generate a need for careful thought about major constitutional questions. … The time will be opportune for encouraging a national conversation about the future form of the Union.'[76] He goes on to describe the experiences of other nations with constitutional conventions, including the manner of choosing the representatives, the way that they should be charged with a remit, and the manner of their deliberation. A constitutional convention has been called for by Unlock Democracy, the Electoral Reform Society and the Commons Political and Constitutional Reform Committee. It has also been supported by the Labour, the Liberal Democrats, the Green Party and the United Kingdom Independence Party. And in the week before we write the Conservative Party leader in charge of this question has said that the government would consider these proposals.[77]

Robert Hazell has recently urged caution.[78] First, he argues, if issues like House of Lords reform, devolution and the UK's voting system have proved intractable on their own, they may well be insurmountable in a convention. Second, timing issues will dominate any discussion of how to decide. No convention could take place before the general election scheduled for May 2015, so support for one at this point is cheap talk. According to Hazell's sample, the normal lead-up time to establishing a convention is six months, and if the governing party and other parties engage in preliminary negotiations, that period can extend to two years. How might this fit with the current proposal by the

[76] A Renwick, *After the Referendum : Options for a Constitutional Convention* (2014).

[77] HC Hansard, vol. 586, col. 179, 14 October 2014 (William Hague).

[78] R Hazell, 'You Want a Constitutional Convention? This is What You Need to Think Through First', 8 October 2014, <http://constitution-unit.com/2014/10/08/you-want-a-constitutional-convention-this-is-what-you-need-to-think-through-first/> [accessed 18 October 2014].

Conservatives to hold an in-out referendum on the EU in 2017 and even with the Scottish elections in May 2016?

These questions are not idle ones, although Renwick's argument in support of a carefully chosen convention, with both citizens' and legislators' participating and a broad remit that can be extended, seems plausible and is supported by evidence. Renwick believes that a wide range of issues can be dealt with by a carefully selected group of citizens and legislators, with support from experts, and that outcomes might help resolve difficult questions in UK politics, and not only those relating to Scotland. These could indeed include reform of the House of Lords, the WLQ, and a voting system, which gives the Conservatives just one MP in Scotland despite the fact that they received 20% of the vote there in the last general election.

To return to earlier analogies from this article, cooperation will be necessary if these issues are to be resolved in this way. The process must be more like the one that led up to the referendum and not like the one that nearly led to civil war in 1914, when opponents of Home Rule allowed that anything was permitted in their efforts to keep the Union together. Each of the parties will have to adopt Neil MacCormick's hermeneutic viewpoint if the process is to succeed. It will also be necessary to take note of earlier train crashes, so that lessons can be learned and the potential for another one can be averted. Finally, the myth of parliamentary sovereignty must be abandoned and the ability of Parliament to bind its successors, which dates back at least to 1689 in England and to 1707 in Scotland, must be respected. Only then will the Parliament in Westminster be able to learn the lesson taught by the MacCormicks and Lord President Cooper: that commitments can be useful at protecting those who most desire, and need, protection.

6 Conclusion

The UK is at a constitutional moment.[79] Whatever the outcome, as to which one may be less optimistic than Renwick, the last vestiges of Diceyanism have gone. The Scottish Parliament is embedded in the UK constitution, and future constitutional change in the country will require its assent. More prosaically, fiscal responsibility is on its way, which may put limits on the fantastic promises hitherto made by politicians in parliaments that spend but do not tax. Within weeks of his party's referendum defeat, the Scottish Finance Minister introduced

[79] See B Ackerman, *We the People: Foundations Vol 1* (1991).

Scotland's first new local tax for three centuries – an *ad valorem* tax on property transactions in place of the appalling UK Stamp Duty Land Tax.[80] We take that as a hopeful sign.

[80] Scottish Parliament, Official Report 9 October 2014. <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9570#.VDuiVldvBpQ> [accessed 13 October 2014]. For the appallingness of SDLT, see S Adam, 'Fundamentally flawed', *Financial Times*, 22 February 2013 <http://www.ifs.org.uk/publications/6619> [accessed 20 October 2014].

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TRANSITIONAL JUSTICE WITHIN THE FRAMEWORK OF A PERMANENT CONSTITUTION: THE CASE STUDY OF THE LEGAL FRAMEWORK FOR PEACE IN COLOMBIA

Carlos Bernal-Pulido[*]

Abstract

This article examines a dilemma facing architects of transitional justice processes within the framework of a permanent constitution. According to the dilemma, if the transition is successful the permanent constitution is replaced; if the permanent constitution remains in place, the transition is rendered impossible. The dilemma is illustrated by the 'constitutional replacement doctrine' of the Colombian Constitutional Court, which has held that constitutional amendments (including transitional justice mechanisms) which 'replace' essential principles of the constitution are a species of 'unconstitutional constitutional amendment' and are invalid. There is undeniable logic to this doctrine—a constitutional change which degrades the fabric of a constitution by ousting its underlying principles should require the enactment of a new constitution, rather than a process of amendment. However, applied in a rigid fashion, doctrines of this sort render processes of transitional justice within the framework of a permanent constitution impossible. This in turn presents a major obstacle for both transitional justice and constitutionalism in post-conflict societies. The recent jurisprudence of the Constitutional Court applying the 'replacement doctrine' to the current peace process with the Armed Revolutionary Force of Colombia, however, suggests a middle way: transitional constitutional amendments which might trigger the doctrine are nonetheless constitutional if they are enacted consistently with the international and transnational framework for transitional justice, assessed by means of a balancing test, whereas a strict syllogistic application of the doctrine is called only for in cases of suspected 'abusive constitutionalism'. This article analyzes and endorses the Constitutional Court's revised doctrine. The solution presented here recognizes that, although the design of a successful process of transitional justice is likely to 'replace' the existing constitution with something substantially different, it should be regarded as 'constitutional' if the transitional justice mechanisms only limit essential principles of the permanent constitution in the degree that is required for the adopted mechanisms to achieve their goals. The result is an internationally nuanced notion of 'transitional constitutionalism'.

Keywords

Transitional Constitutionalism, Latin America, Post-conflict Constitutions

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1 Introduction

A process of transitional justice within the framework of an established constitutional order must reconcile an inherent tension between transition and the enduring nature of a permanent constitution: between fidelity to the existing constitution as an authoritative source of binding norms, on the one hand, and fidelity to the imperatives of political change and transitional justice which motivate the process, on the other. This tension gives rise to a dilemma, which we might call the dilemma of transition within the framework of a permanent constitution, or the 'transitional dilemma'. Either the transition is successful but the constitution is not permanent any more, or the constitution maintains its permanent character but renders the transition impossible. If the transition is successful, then it will bring about major political and institutional changes. These changes will, in substance, undermine the permanent character of the erstwhile constitution. By contrast, if the permanent constitution secures a high level of political and institutional stability during the process, it will render it difficult, if not impossible, for the transitional justice mechanisms to achieve their objectives.

According to the UN Secretary-General's definition, the concept of 'transitional justice' refers to a range of 'processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.[1] Through the processes and mechanisms of transitional justice, the political community seeks to overcome a past of severe and systematic violations of human rights, and to 'repair and rebuild' state institutions within the confines of the rule of law.[2] On this basis, transitional justice generally implies radical political change, often leading to a new constitutional framework punctuated from the old.[3] As such, transitional justice processes usually take place within an interim legal framework,[4] designed to ensure the appropriate allocation of responsibility for human

[1] K Annan, United Nations Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General*, UN Doc S/2004/616, 23 August 2004, 4.

[2] JE Méndez, 'Constitutionalism and Transitional Justice', in M Rosendelf & A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) 1270, 1271.

[3] RG Teitel, *Transitional Justice* (2000) 191ff.

[4] Exceptions to this trend are the processes of transition concerning redress practices in established democracies, such as the Apology to Australia's Indigenous Peoples or New Zealand's

rights violations, acknowledgment of the truth, compensation to victims, demobilisation of individuals and groups in conflict, reconciliation, and to bring about the end of an unjust regime.[5] Transitional constitutions, such as the 1993 South African Interim Constitution,[6] provide a framework of this kind.[7] They are provisional and transformative. They support the undertaking of major institutional reforms and afford flexibility for an inclusive negotiation of new constitutional arrangements.[8]

In this respect, a transitional constitution is different from a permanent constitution, which purports to preserve an organised political community in the form already established,[9] and to create stability through its endurance over time.[10] Permanent constitutions are by definition an enduring statement of

Treaty of Waitangi. On these practices, see S Winter, 'Towards a Unified Theory of Transitional Justice' (2013) 7 *Int J Transitional Justice* 225.

[5] On the aims of transitional justice, see, JE Méndez, 'Accountability for Past Abuses' (1997) 19 *HRQ* 255.

[6] For the text, see <http://www.gov.za/documents/constitution/93cons.htm> [accessed 30 July 2014].

[7] Other transitional constitutions are: the Libyan Interim Constitutional Declaration (of 3 August 2011); the Interim Constitution of Nepal (of 15 January 2007); and the Transitional Constitution of South Sudan (of 9 July 2011) – all of which are still valid. See also the Provisional Constitution of the Republic of China (valid from 11 March 1912 to 1 June 1931); the 2011 Provisional Constitution of Egypt (valid from 30 March 2011 to 26 December 2012); the Indian Independence Act 1947 (with regards to Pakistan, until the promulgation of Pakistan's Constitution of 1956); the 1972 Interim Constitution of the Islamic Republic of Pakistan (valid from 17 April to 14 August 1972); the Provisional Constitution of the Confederate States of America (valid from 8 February to 11 March 1861); the Law of Administration for the State of Iraq for the Transitional Period (valid from 28 June 2004 to 15 October 2005); the 1950 Provisional Constitution of Indonesia (valid from 17 August 1950 to 5 July 1959); the Dáil Constitution of Ireland (valid from 21 January 1919 to 6 December 1922); the Interim Constitution of Tanzania (valid from 1964 to 1977); and the Interim Constitution of Thailand (valid from 1 October 2006 to 19 August 2007).

[8] Klare defines transformative constitutionalism as a 'project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law'. See KE Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *S Af JHR* 146, 150.

[9] Sunstein has distinguished between transformative and preservative constitutions. According to Sunstein, 'preservative constitutions attempt to protect long-standing practices that it is feared, will be endangered by momentary passions.' In contrast, 'transformative constitutions attempt not to preserve an idealized past but to point the way toward an ideal future'. See CR Sunstein, *Designing Democracy: What Constitutions Do* (2001) 67-8.

[10] On constitutional endurance, see generally, Z Elkins, T Ginsburg & J Melton, *The Endurance of*

fundamental principles and institutional design intended to protect the political order from change, especially the vagaries of politics and the abuses of public office-holders. Thus, while constitutions may validly be amended, changes that effect a substantial break with an existing constitution can be *prima facie* inconsistent with it. Changes that touch the basic structure of the constitution, or violate its fundamental principles, would replace, rather than amend it.

Transitional justice within the framework of a permanent constitution presents a dilemma precisely because the choice to effect transition by means of constitutional amendment, rather than through a transitional or interim constitution implies an intention *not* to break too radically with the existing constitution. It is up to the architects of a constitutional transition to avoid this dilemma by navigating between constitutional stasis and replacement. One of the most remarkable transitional justice processes in this respect is currently taking place in Colombia. The Colombian Government is carrying out peace negotiations with the only remaining guerrilla group in Latin America, the Armed Revolutionary Force of Colombia or 'FARC'. Not only is this process being brought about without a truce between the Government and FARC, it is occurring within the framework of the 1991 Colombian Constitution, which is not a transitional but a permanent constitution.[11] Rather than introducing an interim or transitional framework, the Colombian government has introduced constitutional amendments to allow negotiations with FARC which, on the face of it, appear to conflict with some of the most basic principles of the permanent Constitution. This article presents the attempt by the Colombian Constitutional Court to mediate this tension in the context of its doctrine against constitutional amendments that displace essential principles of the constitution.

2 The Colombian 'Legal Framework for Peace'

In 2012, the incumbent Government and Congress amended the Colombian Constitution to make provision for peace negotiations with the FARC. Legislative Act

National Constitutions (2009).

[11] The 1991 Constitution is not 'transformative' in respect of the specific challenge of achieving peace between the Government and the FARC. Challenges facing the negotiation process are: the demobilisation of the guerrilla members; the enforcement of criminal laws concerning ordinary offenses; political crimes and human rights violation perpetrated by them; the adjustment of the political system for enabling their future participation; compensation to victims; and acknowledgment of truth.

1/2012, also called the 'Legal Framework for Peace',[12] introduces two new articles into the Constitution. 'Transitory' Articles 66 and 67 create a number of 'exceptional transitional justice mechanisms', comprising grants of power to Congress: (1) to give special treatment to certain illegal groups compared to the remaining participants in the conflict; (2) to create new judicial and extra-judicial procedures for prosecuting crimes, clarifying the truth, and ensuring compensation to the victims; (3) to create a truth commission; (4) to determine discretionary criteria for prioritising criminal prosecution of those 'most responsible' for war crimes and to refrain from prosecuting other offences and offenders; and (5) to deem certain offences 'political', such that their perpetrators can be eligible for future participation in politics. The Articles neither specify a date at which they will expire, nor a precise period within which Congress ought to exercise them.[13] Moreover, the Attorney General has so far interpreted the grant of power concerning the prioritisation of criminal prosecutions as the basis for a new general model of criminal investigation.[14]

The adjectives 'transitory' and 'exceptional' create the impression of a transitional constitutional framework for peace. However, the transitory Articles purport neither to derogate nor interrupt the validity of the essential principles of the Constitution, but to subsist within the framework of the permanent Constitution. *Prima facie*, some of these grants of power appear to be at odds with essential principles of the Constitution, such as the principle of equality and the rule of law. The principle of equality, for example, entrenched in Article 13 of the Constitution, requires equal treatment for all individuals. This is in tension with the first grant of power in Legislative Act 1/2012. The principle of the rule of law, entrenched in Article 1 of the Constitution, requires (among other things) a strict enforcement of criminal laws and the prosecution of all crimes. This is in tension with the fourth empowerment of Legislative Act 1/2012.

This raises difficulties, as the Colombian Constitutional Court has an established 'constitutional replacement doctrine', according to which constitutional amendments inconsistent with the essential principles of the Constitution are

[12] In the Colombian Constitution, a Legislative Act is an Act by means of which the Congress amends the Constitution.

[13] There is one exception: Article 2 of the Legislative Act 1/2012 grants only four years to the Congress for enacting a law determining the selection criteria for prioritising criminal prosecutions. Nonetheless, the Article does not determine what would then happen if the Congress does not enact such a law within that time frame.

[14] See, Directive 01/2012 of the Attorney General Office, <http://www.fiscalia.gov.co/colombia/wp-content/uploads/Directiva-N%C2%B0-0001-del-4-de-octubre-de-2012.pdf> [accessed 19 November 2014].

invalid.[15] The power to amend the Constitution does not include the power to 'replace' it: while amendments can update constitutional rules, they cannot 'denature' essential elements of the Constitution, that is take away or alter their natural qualities or destroy their basic structure. The creation of privileges for members of a specific guerrilla group and immunities to perpetrators of crimes, would appear to denature or destroy the principles of equality and the rule of law, which are essential constitutional principles. This would appear to demand the conclusion that the transitional justice mechanisms are unconstitutional. In fact, Act 1/2012 has been challenged twice in the Colombian Constitutional Court. In Judgments C-579/2013 and C-577/2014, the Constitutional Court upheld the constitutionality of the Legal Framework for Peace, declaring that it did not fall foul of the replacement doctrine.

The issue has deeper theoretical and practical implications, going beyond the Colombian case. Due to the global spread of constitutionalism and constitutional review in general,[16] and of the doctrine of unconstitutional constitutional amendments in particular,[17] it is likely that constitutional courts around the world will be drawn into controversies of this sort in the course of transitional justice processes carried out under the framework of permanent constitutions. Against this background, this paper offers a critical analysis of the way in which the Colombian Constitutional Court attempted to solve the transitional dilemma in Judgments C-579/2013 and C-577/2014.[18]

My aim in this article is to examine the reasoning and outcome of the judgments and explore their relevance for the study of transitional constitutionalism more broadly. Before Judgment C-579/2013, the Constitutional Court applied the constitutional replacement doctrine by means of legal syllogistic reasoning. On this approach, the Court would enquire whether the amendment under review 'denatured' an essential element of the Constitution, for example by derogating an essential principle such as equality. If so, the Court would declare the amendment unconstitutional. In Judgment C-579/2013, the Constitutional Court

[15] On this doctrine, see generally, C Bernal, 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11 *IJ Con L* 339.

[16] See generally, T Ginsburg, 'The Global Spread of Constitutional Review', in GA Caldeira, RD Kelemen & KE Whittington (eds), *The Oxford Handbook of Law and Politics* (2008) 81.

[17] See generally, Y Roznai, 'Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea' (2013) 61 *AJCL* 657.

[18] At the time of submitting this article, the Constitutional Court has only released a seven page press statement concerning the content of the Judgment C-577/2014 but not the judgment as such. I will base my analysis on the press statement.

introduced two innovations in the methodology for applying the constitutional replacement doctrine. First, it engaged in a 'balancing' exercise, rather than syllogistic reasoning, in its application of the doctrine. Secondly, in doing so, the Court balanced the Constitution's essential principles against principles it drew from what might be called the 'international and transnational legal framework for transitional justice'. The aim of this exercise was to determine whether Legislative Act 1/2012 realised the objects of transitional justice enough to justify its degree of encroachment on essential principles of the Constitution. The Court gave a positive answer to this question.

In the sections that follow, I endorse the methodology adopted by the Constitutional Court in Judgments C-579/2013 and C-577/2014 for assessing the constitutionality of transitional justice mechanisms under a permanent constitution. Given that the design of a successful transition will likely imply the 'replacement' of the existing constitution, if the constitutional replacement doctrine is applied rigidly, transitional justice mechanisms will always be held unconstitutional. This renders the application of the constitutional replacement doctrine in a syllogistic fashion unsuitable for the judicial review of transitional justice mechanisms, because this will defeat the project of transition in circumstances where political and institutional change is necessary, for example following conflict or a public loss of confidence in the old regime. Such an application of the doctrine may be appropriate for defending the constitution from abuses of the amending power, for example amendments by an incumbent President or party to stay indefinitely in power or to minimise political or judicial accountability, but not in the context of a legitimate process of transitional justice.

Secondly, I endorse the Court's reasoning that the adoption of transitional justice mechanisms under a permanent constitution is constitutional, provided those mechanisms limit essential principles of the constitution only to a degree proportionate to the degree to which they achieve their aims under the international and transnational legal framework for transitional justice. Constitutional courts can thus play a valuable role in constitutional transitions, providing the forum for a particular form of constitutional dialogue. As such, it is proper for them to assess whether adopted transitional justice mechanisms are suitable, necessary, and proportionate for achieving the specific goals of a constitutional transition. In order to play this role, constitutional courts should adopt an approach similar to that of the Colombian Constitutional Court, balancing the essential principles of the permanent constitution against principles recognised to belong to the international and transnational legal framework for transitional justice, entrenching the goals of transitional justice: stable and lasting peace, reconciliation, and

the end of political conflict. Courts may undertake this evaluation by means of the principle of proportionality.

I support these claims in the following manner. First, I briefly explain the historical background of Colombia's internal conflict. Secondly, I describe the context and the content of Legislative Act 1/2012. Thirdly, I spell out the Colombian replacement doctrine as an example of a species of constitutional doctrine found more widely—the doctrine of 'unconstitutional constitutional amendments'. Fourthly, I analyse Judgments C-579/2013 and C-577/2014, showing that, while the traditional application of the replacement doctrine is not appropriate for evaluating the constitutionality of transitional justice mechanisms, the new approach is suitable to that end. Fifthly, I draw conclusions from the Colombian case and explore the extent to which they can be generalised in other cases of the transitional dilemma. Finally, I spell out why it is justified for constitutional courts to assess transitional justice mechanisms by balancing essential principles of the permanent constitution against basic goals of transitional justice with their source in the international and transnational framework for transitional justice.

3 Historical Background of Colombia's Internal Conflict

Since its independence from Spain in 1810, the political history of Colombia has been dominated by an endless fratricidal war. From the beginning of the nineteenth century until the middle of the twentieth century, war between the members of the two traditional parties, the conservatives and liberals, caused bloodshed on a scale comparable only with that of the Mexican revolution. This critical situation declined in the 1970s, when the parties signed an agreement for alternate power sharing with a formula called the National Front. According to this formula, the President was succeeded by a President from the opposing party. In spite of its benefits, this formula excluded any politics outside the consensus reached by conservative and liberal elites from the political process. This led to the impression, especially on the left wing of politics, that the political claims of the working class, indigenous peoples, and small farmers were excluded by traditional elites invested in the status quo. 'The only difference today between Liberals and Conservatives', wrote Colombian Nobel Prize winner Gabriel García Márquez, 'is that the Liberals go to mass at five o'clock and the

Conservatives at eight.'[19]

The closed nature of the political system during the National Front was conducive to the emergence and consolidation of various guerrilla groups. At the beginning, the guerrillas fought under a kind of leftist political credo, bearing elements of Marxism and Maoism, which they proposed as an alternative to the Conservative-Liberal consensus. As a result, it might be said that the old war continued, but the parties changed their flags. Backed by the United States, the state tried to exterminate the guerrillas, which, on their part, received financial and ideological support from the then USSR and Cuba. Nevertheless, neither side was able to defeat the other. Thousands of deaths of members of the Army and civilians weakened Colombian society for decades. Crucially, the Colombian state has never had a monopoly on power over the whole national territory. The guerrillas have exercised *de facto* military control over some part of the national territory and have survived through different mutations. The most remarkable, following the fall of the Berlin Wall and the demise of the USSR, was the absolute loss of ideological direction, followed by a transformation into a lucrative business of organised crime, kidnapping, and drug trafficking.

Constant attacks by the guerrillas on landowners and the inability of the state to enforce state law in rural areas, gave rise to nationalist paramilitary groups to provide protection. Some of the most powerful of these groups formed the Colombian United Self-Defense Groups (known as AUC because of the initials of this name in Spanish, '*Autodefensas Unidas de Colombia*'). Supported by the landowners, these groups intensively fought the guerrillas. Nevertheless, these groups also deployed a strategy of elimination of civilians who actually or allegedly supported the guerrillas and funded their activities through similar, nefarious means. These developments resulted in outrageous massacres and systematic violation of human rights.

4 Transitional Justice under the 1991 Colombian Constitution

The Constitution of 1991 emerged as a sign of hope against the backdrop of a beleaguered state with armed paramilitaries engaged in outright conflict and exercising *de facto* control over parts of the sovereign territory. The process of its formation was the first that can be considered democratic in the history of

[19] G García Márquez, *One Hundred Years of Solitude* (2006) 248.

Colombia. This was the first constitution that did not represent an imposition by the victor on the vanquished. Representatives of the most heterogeneous groups and classes in Colombian society were able to participate in the formulation of its text. Its main motto was pluralism. The Constitution was designed to open up the political system and to guarantee the political participation of indigenous peoples, the working class, farmers, and members of guerrilla groups, such as the M-19, that demobilised before the election of a Constitutional Assembly in December 1990. In addition, the wide-ranging declaration of socio-economic rights with binding force compelled the state to work actively towards achieving a better level of social justice and distribution of wealth to benefit groups traditionally the subjects of discrimination.[20]

Nevertheless, even under the Constitution of 1991, the state lacked adequate political and military power to eradicate the guerrillas and other illegal groups, such as paramilitary groups. For this reason, two processes of transitional justice have been set in motion. The first began in 2005, the year in which the Congress passed Act 975/2005. This Act (and Judgment C-370/2006 of the Constitutional Court reviewing its constitutionality), along with some other legislation[21] and administrative norms,[22] established mechanisms for rendering the members of paramilitary groups judicially accountable and for enabling their victims to achieve clarification of the truth, compensation, and land restitution. Despite the fact that more than 35,000 members of paramilitary groups have so far demobilised under this process, it has been the target of strong criticism concerning impunity and the insufficiency of mechanisms for ensuring victim reparation and land restitution.[23]

The second process of transitional justice, the subject of this article, was inaugurated by Legislative Act 1/2012. This Act contains an integrated system of transitional justice mechanisms designed to facilitate negotiations between the

[20] This Constitution might accurately be called 'transformative' in relation to its inclusion of socio-economic rights aiming to ensure the satisfaction of basic needs of the least advantaged and vulnerable population. On this transformative dimension of the Constitution, see generally, C Rodriguez Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2010-2011) 89 *Tex LR* 1669.

[21] Particularly Legislative Acts 1424/2010, 1448/2011, and 1592/2012.

[22] Particularly Decree 1290/2008.

[23] For a holistic and comparative assessment of the mechanisms of this first transitional justice process, see, R Uprimny Yepes, MP Saffon Sanín, C Botero Marino & E Restrepo Saldarriaga, *Justicia transicional sin transición? Verdad, justicia y reparación para Colombia* (2006). On the specific challenges of compensation to victims and land restitution, see N Summers, 'Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?' (2012) 25 *Harv HRJ* 219.

state and illegal groups, prevent impunity for serious war-related crimes, and provide guarantees of justice, truth, and compensation to victims. The Act grants, as instruments of transitional justice, five powers to Congress:

(1) An empowerment to give different treatment to the several illegal groups and state actors participating in the political conflict. The Legislative Act grants a competence to the legislature for giving privileges to the members of those guerrilla groups willing to sign a peace agreement.

(2) An empowerment to create judicial and extra-judicial procedures for prosecuting crimes, clarifying the truth, and ensuring compensation to the victims.

(3) An empowerment to create a truth commission, a particular extra-judicial institution whose outputs are recommendations without binding force.

(4) An empowerment to determine selection criteria for prioritising the prosecution of those 'most responsible' for systematically perpetrated crimes against humanity, genocide, and war crimes, and refraining from prosecuting other offences and agents, suspend sentences, and commute criminal penalties for 'extrajudicial sanctions' or 'special arrangements'.

(5) An empowerment to determine what crimes can be deemed as 'political offences' such that their perpetrators will remain eligible for future political participation. Article 3 makes it clear that crimes against humanity and genocide cannot be deemed political offences under this power.

The provisions introducing those empowerments state that these instruments of transitional justice can confer special benefits on members of illegal groups only if they have demobilised, signed a peace agreement, surrendered their weapons, acknowledged responsibility, and if they have contributed to uncovering the truth, the full reparation of the victims, and the release of hostages and minors illegally recruited.

5 The Constitutional Replacement Doctrine

In Judgments C-579/2013 and C-577/2014, the Colombian Constitutional Court had to decide whether the above transitional justice mechanisms were constitutional. Plaintiffs in both cases requested the Court to apply the constitutional replacement doctrine and to hold the Legal Framework for Peace unconstitutional under it. Before undertaking a critical analysis of these judgments, I will briefly explain the constitutional replacement doctrine.

The replacement doctrine is a doctrine of 'unconstitutional constitutional amendment'. Doctrines of this sort rest on two propositions: first, that there are substantive limitations to the power to amend the constitution; and secondly, that constitutional and supreme courts have the competence to review constitutional amendments on substantive grounds, that is, to enforce substantive limitations on the amending power.[24] Doctrines of unconstitutional constitutional amendments have been adopted across the world in recent decades. They have been employed in Europe, including Germany, France, Portugal, Turkey, Italy, the Czech Republic and Greece; in Latin America, including Brazil, Colombia, Argentina, El Salvador, Dominican Republic and Peru; in the Middle East, in Israel; in Asia, including India, Bangladesh, Nepal, Pakistan, Indonesia, Thailand, Cambodia, China, South Korea, Japan, and Taiwan; and in Africa, including South Africa, Zambia, Kenya, Zimbabwe, Tanzania, and Malawi.[25]

In Colombia, the constitutional replacement doctrine has been developed by the Constitutional Court to justify a power to review the content of constitutional amendments. The Colombian Constitution does not grant this power to the Court expressly. Articles 241 and 379 of the Constitution empower the Court to review constitutional amendments, but only on procedural grounds. The replacement doctrine is implied by means of a five-tiered argument developed in a line of authorities comprising Judgments C-551/2003, C-1200/2003, C-970/2004, C-153/2007, C-588/2009, C-141/2010, C-1056/2012 and C-10/2013.

The first premise of the doctrine is that the power to review compliance with amendment procedures entails a power to review the competence of the authority issuing the amendment. The second premise asserts that the power to amend the Constitution does not imply the power to replace it, but only to modify it. Thirdly, if this is so, then the Constitutional Court has the power to review whether the amending authority is in fact only modifying, rather than replacing the Constitution. Fourthly, only an analysis of content allows the Court to determine whether the Constitution has been modified or replaced. Finally, it follows from this that the power to review whether the Constitution has been replaced implies the competence to review the content of constitutional

[24] On this doctrine, see generally R Albert, 'Nonconstitutional Amendments' (2009) 22 *Can J L & Juris* 5.

[25] For a detailed recent study, see, Y Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers*, Doctoral thesis submitted to the Department of Law of the London School of Economics, 2014, <http://etheses.lse.ac.uk/915/1/Roznai_Unconstitutional-constitutional-amendments.pdf> [accessed 14 November 2014].

amendments.

In Judgment C-551/2003, the Court ruled that the power to amend the Constitution comprises the power to introduce changes to any article of the constitutional text. However, these changes can neither imply a derogation of the Constitution, nor its replacement by a different one. The Court distinguished between the original constituent power and the amending power, stating that, while the original constituent power knows no legal constraints, the exercise of the amending power is a derivative power, which is limited in form and substance.[26] In Judgment C-1200/2003, the Court clarified that there can be 'partial' constitutional replacements. An amendment is a partial constitutional replacement if it is of great 'transcendence and magnitude' for the system.[27] In Judgment C-970/2004, the Court explained that a constitutional amendment is a constitutional replacement if it replaces an essential element defining the identity of the Constitution.[28] The Court also explained the test to be used to apply the replacement doctrine, with the structure of a legal syllogism. The major premise is the rule that a constitutional amendment is a constitutional replacement if it replaces an essential element of the Constitution. The minor premise is that a constitutional amendment replaces an essential element. If this condition is met, then it follows that the amendment is a constitutional replacement.

In Judgment C-1040/2005, the Court spelled out what is meant by an 'essential element'. An element is essential if it underpins several constitutional provisions or, in other words, it is essential if its content cannot be reduced to only one constitutional provision. An element that undergirds several different provisions forms part of the structure of the Constitution, rather than being an incidental feature. If such an element is replaced by a new opposite element, the new element will be in tension with several constitutional provisions.[29] In

[26] In Judgment C-551/2003, the object of review was an Act calling for a referendum. The referendum was about several issues concerning the structure of the Congress and of the Public Administration, and the management of public funds. As such, the Act did not introduce any changes to the Constitution. It was the first part of a two-step amendment process, of which the referendum was the second step.

[27] The subject matter of Judgment C-1200/2003 was a Legislative Act that empowered the President to amend various laws with the purpose of adjusting them to a new adversarial criminal system that had been adopted at that time.

[28] In Judgment C-970/2004, the matter of review was again a Legislative Act empowering the President to amend various laws with the purpose of adjusting them to the new adversarial criminal system.

[29] In Judgment C-1040/2005, the Constitutional Court reviewed a Legislative Act derogating the prohibition of presidential re-election. The Act allowed the immediate re-election of the

Judgments C-153/2007 and C-588/2009, the Court added that the replacement of an essential element would lead to a 'constitutional change of great magnitude'.

The Constitutional Court has used these criteria to declare the unconstitutionality of several constitutional amendments in the past. Until 2013, the Court consistently applied the replacement test as a legal syllogism. In Judgment C-1040/2005, the Court held that an amendment stipulating only one presidential re-election and, at the same time, empowering the Congress to enact a law that guarantees all candidates equal rights in the electoral campaign, did not replace the principles of the separation of powers, alternative exercise of political powers, or electoral equality. However, the Court declared unconstitutional an amending clause stating that, if the Congress failed to enact the law of electoral guarantees within two months, the Council of State, that is, the highest administrative court, ought to enact a regulation granting equality of rights during the elections. The Court determined that this grant of power to the Council of State replaced the principle of the separation of powers, which is an essential element of the Constitution and, consequently, ought to be considered as a constitutional replacement.

In Judgment C-588/2009, the Constitutional Court declared unconstitutional an amendment that automatically inducted a certain category of temporary employees of the Public Administration into the administrative career. As a consequence of the amendment, they gained tenure without passing the usual merit-based exam. The Court held that this amendment replaced two essential elements of the Constitution, namely, the principle of equality and the principle of merit, a constitutional principle governing the administrative career of tenured civil servants.

In Judgment C-141/2010, the Court declared unconstitutional an amendment granting the possibility of a presidential re-election to a third term. This was an *ad hoc* constitutional amendment instigated by the then Colombian President Alvaro Uribe with the purpose of making him eligible to run for the presidency for the third time. Making reference to certain aspects of the constitutional design concerning the appointment of high court judges and members of other state agencies, such as the Central Bank, the Court held that allowing a second presidential re-election would be tantamount to replacing the principle of checks and balances. It would also replace the principles of alternated exercise of political power, the equality among presidential candidates, and the generality of laws.

President and commanded the Congress to enact a law for the purpose of setting in place some electoral guarantees for opponents to the President in the presidential campaign.

In Judgment C-1056/2012, the Court declared that an amendment excluding rules about conflict of interests of congressmen from the discussion and passing of constitutional amendments was a constitutional replacement, because it infringed basic constitutional principles concerning the respect of public morality in a democracy. In Judgment C-10/2013, on the other hand, the Constitutional Court declared that an amendment modifying certain rules concerning the distribution of income from mining taxes between administrative regions was not a replacement of the Constitution.

From the replacement jurisprudence, it appears that the 'essential elements' of the Constitution immune to replacement include the principle of separation of powers,[30] legislative bicameralism,[31] the elements of the rule of law including the principle of equality, the democratic principle, and the abstract and general nature of laws,[32] the pre-eminence of the common good,[33] the principles of popular sovereignty and deliberative democracy,[34] the social state principle,[35] and the principle of decentralisation of departments and cities.[36]

6 A Critical Analysis of the Judgments C-579/2013 and C-577/2014

In Judgment C-579/2013, the matter under review was the provision in Act 1/2012 empowering the Congress to determine selection criteria for use by the Attorney General to give priority to the prosecution of those 'most responsible' for 'systematically perpetrated' crimes against humanity, genocide, and war crimes. According to the same criteria, the Attorney General may refrain from prosecuting 'all the cases', and may also suspend sentences and commute criminal penalties into 'extrajudicial sanctions' or 'special arrangements'. The plaintiff sought a declaration that the expressions 'most responsible', 'systematically perpetrated', and 'all the cases' implied a constitutional replacement. The plaintiff claimed that these expressions implicitly replaced an essential constitutional element, namely, the state duty to guarantee human rights protection for victims and society generally by means of the strict enforcement of criminal laws against

[30] Judgments C-970/2004, C-971/2004, C-1040/2005, C-141/2010, and C-1056/2012.
[31] Judgment C-757/2008.
[32] Judgments C-588/2009, C-141/2010, C-249/2012, and C-1056/2012.
[33] Judgment C-1056/2012.
[34] Judgment C-303/2010.
[35] Judgment C-288/2012.
[36] Judgment C-10/2013.

all human rights violations and *all* infringements of international humanitarian law. According to the plaintiff, Act 1/2012 would unconstitutionally empower the Congress to replace this essential element of the Constitution by restricting the state duty to enforce criminal laws against only *some* human rights violations and only *some* infringements of international humanitarian law, namely, the violations and infringements 'systematically perpetrated' by the 'most responsible agents'.

The Constitutional Court held that the state duty to guarantee human rights and to enforce criminal laws against human rights violations has the structure of a legal principle. In doing so, the Court employed a distinction between rules and principles increasingly recognised in legal theory, developed in particular by Ronald Dworkin and Robert Alexy.[37] While rules stipulate a particular outcome whenever they apply, principles are optimisation requirements. Principles are norms that do not establish exactly what ought to be done, but require 'that something be realised to the greatest extent possible, given the legal and factual possibilities'.[38] The scope of what is legally possible is determined by weighing opposing principles, while factual statements about the case determine the scope of the factually possible. While rules apply by means of a legal syllogism, subsuming facts within a rule that dictates an outcome as a matter of 'if…then', principles are applied by means of balancing. In order to establish the 'greatest extent possible' to which a principle should be carried out, it is necessary to balance it against opposing principles accorded varying 'weight'. At this point, the Court introduced an innovation into its application of the replacement doctrine. The Court did not assess whether the provisions of the Legislative Act 01/2012 'denatured' the duty to guarantee human rights and enforce criminal laws as it had hitherto. Instead, the Court balanced this essential element of the Constitution against an opposing principle, namely, the goal of 'achieving a stable and lasting peace'.

On what grounds did the Court find that the goal of achieving a stable and lasting peace is a valid legal principle? The Court considered the large body of international legal principles concerning transitional justice as a valid legal framework for reviewing the constitutionality of Legislative Act 01/2012. On the basis of Article 93 of the Colombian Constitution,[39] the Court considered a

[37] See e.g. R Alexy, *A Theory of Constitutional Rights* (2002), 44ff; R Dworkin, *Taking Rights Seriously* (1977) 14ff.

[38] Alexy, above n 37, 47.

[39] 'International treaties and agreements ratified by the Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically. The rights and duties mentioned in this Charter will be interpreted in accordance with international treaties on

number of international and transnational legal instruments as binding. They belong to what Colombian jurisprudence terms the 'constitutional block', that is, the block of norms belonging to the international human rights treaties ratified by Colombia. As a monist jurisdiction, in Colombia norms belonging to the constitutional block are internally binding and ought to be applied by all judges and authorities, including the Constitutional Court.[40] The framework not only refers to achieving a stable and lasting peace, but also spells out a set of rules and principles related to reparation of victims, restoration of public trust in state institutions, reconciliation, strengthening of democracy and the rule of law, acknowledging truth, and land restitution. Instruments belonging to this framework include the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[41] the 1997 UN Human Rights Commission Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (also known as the Joinet Principles),[42] the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,[43] the 2006 UN Security Council Resolution 1674 (in which the importance of preventing conflict through development and democracy was stressed),[44] the 2011 Report of the Secretary-General of the UN Security Council titled *The rule of law and transitional justice in conflict and post-conflict societies*,[45] and other sources of international human rights law, international humanitarian law, and Inter-American human rights law.

The international and transnational framework also provides suitable balancing criteria to measure the proportionality of specific transitional justice mecha-

human rights ratified by Colombia'.

[40] There are similar provisions in other constitutions. See, e.g. Art. 5 LXXVIII §2º and §3º of the 1988 Constitution of Brazil: para 2: 'The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party'; para 3: 'International human rights treaties and conventions which are approved in each House of the National Congress, in two rounds of voting, by three fifths of the votes of the respective members shall be equivalent to constitutional amendments'.

[41] GA Res 40/34, 29 November 1985.

[42] L Joinet, *Question on the impunity of perpetrators of human rights violations (civil and political): Revised final report prepared by Mr. Joinet to Sub-Commission decision 1996/119*, UN Doc E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997.

[43] GA Res 60/147, 16 December 2005.

[44] SC Res 1674, 28 April 2006.

[45] B Ki-Moon, United Nations Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General*, UN Doc S/2011/634, 12 October 2011.

nisms. In this regard, the Court employed a version of the so-called 'rule of balancing' to reconcile the State duties to guarantee human rights and enforce criminal laws with the goal of achieving a stable and lasting peace. According to this rule, 'the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other'.[46] The Court came to the conclusion that the degree of detriment to the state duty to protect human rights and enforce criminal laws against human rights violations is less than the importance of satisfying the goal of a stable and lasting peace and revealing the truth. The Court reasoned in particular that prosecuting only the 'most responsible' agents is a suitable approach to assure the non-recurrence of crimes, dissolve criminal macro-organisations, and reveal patterns of human rights violations. At the same time, this policy of criminal prosecution represents only a mild interference with the state duty to protect human rights, because it does not amount to an absence of investigation of war crimes, genocide and human rights violations. It only empowers the state with the discretion to focus its attention on 'those agents who played an essential role in the perpetration' of those violations.

Further, the Court held that the powers vested in the legislature expressed a proportionate relation between the duty to guarantee human rights and enforce criminal laws and the goal of achieving a stable and lasting peace, provided their exercise meets certain conditions. First, the relevant statute must guarantee victims: a transparent selection process of the cases to be prosecuted; an impartial, timely, inclusive, and effective criminal investigation; judicial mechanisms to appeal decisions concerning the selection of cases; legal aid; the right to know the truth about the cases not selected by means of extra-judicial mechanisms; the right to compensation in full; and the right to find out where the remains of family members are. Secondly, the legislation must give priority to the prosecution of extra-judicial executions, torture, forced disappearances, sexual violence against women, forced displacement, and illegal recruitment of children, when these offences can be deemed as crimes against humanity, genocide, or war crimes systematically perpetrated. Thirdly, only illegal groups that 'effectively contributed to the clarification of truth, reparation of the victims, liberation of kidnapped people and child soldiers' may enjoy the benefits of transitional justice mechanisms. Finally, total suspension of penalties cannot operate for 'the most responsible agents for the perpetration of crimes against humanity, genocide, and war crimes systematically perpetrated'.

[46] Alexy stated the rule with this formulation in *A Theory of Constitutional Rights.* See Alexy, above n 37, 47.

On 6 August 2014, in Judgment C-577/2014, the Constitutional Court upheld the constitutionality of Article 3 of Act 1/2012. The plaintiff in this case argued that there was an unconstitutional omission in Article 3 of the Act. Article 3 empowers the Congress to deem certain offences 'political crimes' and to determine which offences should be so deemed. The effect of the provisions is that those who have committed 'political crimes' but who have demobilised and reintegrated into civil society in the course of the peace process remain eligible to participate in politics in the future. The Article sets a constraint to the exercise of this power, namely, that crimes against humanity and genocide cannot be deemed 'political crimes'. The plaintiff maintained that, by excluding including war crimes, transnational and drug trafficking offences, and acts of terrorism in the list of offences that cannot be deemed 'political crimes', this Article replaces the participatory democratic framework of the Constitution. This is an essential element of the Constitution and, in turn, one of its essential elements is the requirement of minimum moral standards for the candidates who intend to represent the people as political office-holders.

The Court did not agree with the plaintiff. The Court held that the amending power did not replace the participatory democratic framework of the Constitution. By contrast, not including the above mentioned offences in the list of crimes that cannot be deemed to be political crimes enhances the possibilities of future political participation for participants in the current and historical conflict. This is a suitable means to achieve two of the goals of transitional justice, namely, reconciliation and a stable and lasting peace.[47] In a dissenting opinion, two judges (Ortíz and Palacio) took this position to an extreme and argued that the Court should have declared that Article 3's prohibition of deeming crimes against humanity and genocide as political crimes was unconstitutional. Those judges reasoned that this prohibition replaced the constitutional principle of participatory democracy and rendered impossible the goal of achieving a stable and lasting peace. Political exclusion, they maintained, is incompatible with participatory democracy and is a cause of political conflict.

[47] At the time of submission of this article, the Constitutional Court has not made public the complete text of Judgment C-577 of 2014. Nevertheless, the way the press release is drafted provides grounds to anticipate that the justification of the judgment will use the balancing approach again. For instance, there is an explicit reference to the transitional justice goals of reconciliation and stable and lasting peace as reasons justifying the exclusion of other crimes that cannot be deemed to political offences.

7 Abusive Constitutionalism and Transitional Justice as Different Frameworks for Assessing a 'Constitutional Replacement'

Despite the fact that Colombian law has the structure and foundations of a civil law system, since Judgment C-836/2001, the Constitutional Court has followed a doctrine of precedent in constitutional matters.[48] Had the Court followed this doctrine strictly, it should have applied the traditional syllogistic methodology of the replacement test and it should have declared unconstitutional the provisions of Legislative Act 01/2012 under scrutiny in the cases C-579/2013 and C-577 of 2014. Recall that in Judgment C-588/2009, the Constitutional Court declared that an amendment automatically including a certain category of temporary public sector employees (appointed by the then incumbent government) in the administrative tenure-track without the customary exam violated the principle of equality and was unconstitutional under the replacement doctrine. The infringement upon the principle of equality generated by that amendment, however, was less severe than the one engendered by granting immunity from prosecution to perpetrators of human rights violations and other serious criminal offences under the concept of 'political crime'. Accordingly, under the precedent of Judgment C-588/2009, the Court in Judgment C-579/2013 should have declared unconstitutional the possibility of renouncing the duty of criminal prosecution in certain cases.

Again, in Judgment C-1056/2012, the Constitutional Court had declared the unconstitutionality of an amendment stipulating that rules about congresspersons' conflicts of interests would not be applicable in the discussion and passing of constitutional amendments. The Court held that this amendment infringed basic constitutional principles concerning an essential element of the Constitution, namely, the respect of public morality in a democracy. Again, this infringement upon public morality requirements concerning the character and behaviour of political representatives in a democracy is less severe than the one prompted by the possibility of allowing perpetrators of war crimes, transnational and drug trafficking offences, and acts of terrorism to participate in politics. Accordingly, under this precedent the Court should have declared the grant of power unconstitutional in Judgment C-577 of 2014.

However, the Court was correct in transforming the replacement test into a proportionality analysis in Judgment C-579/2013. The traditional syllogistic test

[48] See C Bernal, 'Precedent in Colombia', in E Hondius (ed), *Precedent and the Law* (2007) 311, 311–22.

is inappropriate for applying the replacement doctrine in a transitional justice framework. The traditional test might be appropriate for a non-transitional context. As David Landau put it recently, strategies such as the Colombian replacement test aim to defend democracy against 'abusive constitutionalism'.[49] Landau refers with this term to the 'the use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before'.[50] Incumbent governments use this strategy for making themselves difficult to dislodge from power or to render themselves judicially or politically less accountable. In Colombia, the traditional replacement test has proved to be an effective tool against constitutional amendment proposals, generally propelled by the executive, with the purpose of accumulating powers in the figure of the President, that is achieving a state of 'hyper-presidentialism' which renders the constitutional notion of checks and balances inoperative. Judgments C-588/2009 and C-1056/2012 are examples of this use of the constitutional replacement doctrine. So too is Judgment C-141/2010, in which the Constitutional Court declared the unconstitutionality of an amendment granting former President Alvaro Uribe the chance of re-election to a third term.

The 'abusive constitutionalism' scenario is entirely different from that of a transitional justice process. The aim of amendment in a process of constitutional transition is not to alter the constitution in order to undermine democracy, but to introduce changes in the constitutional framework to address deep political issues—issues which the polity has been unable to solve within the existing framework, but which do not require the framework to be abandoned entirely as it is in fundamental respects sound. For this reason, as Posner and Vermeule claim, '[e]very transition creates a divide between the old regime and the new regime'.[51] The syllogistic replacement test is therefore too strict: it does not allow transitional justice mechanisms to operate in an effective manner. Further, the use of the replacement test within this context lacks the justification of its employment against instances of abusive constitutionalism.

Three linked questions arise. First, is substantive constitutional review of amendments by a constitutional court still justified in the context of a process of transitional justice? Secondly, if so, what would be an appropriate legal framework and methodology for carrying out this type of review? Finally, on this basis, how should the transitional dilemma be solved?

[49] D Landau, 'Abusive Constitutionalism' (2013) *47 UC Davis LR* 189.
[50] Ibid, 195.
[51] EA Posner & A Vermeule, 'Transitional Justice as Ordinary Justice' (2004) 117 *Harv LR* 762, 765.

In answer to the first question, the aim of the various doctrines of unconstitutional constitutional amendments is to protect human rights, the rule of law, and democracy, from attempts to degrade their basic structure and entrenchment in the constitution. In a conflictual society, such attempts might well be dressed up as transitional justice mechanisms. The power to amend the constitution does not imply the power to denature its conceptual fabric by violating its fundamental principles, even for the sake of starting a process of transitional justice, and this justifies the substantive review by a constitutional court even of transitional justice mechanisms. The power to amend presupposes the existence of a constitution prior to and subsisting after its exercise. Thus, not even transitional justice mechanisms should be allowed to transform the constitution into a different kind of entity by depriving it of any of its essential conceptual elements: human rights, the rule of law, and democracy. That would involve not a process of constitutional amendment, but a radical break with the constitutional order and the establishment of a new one. The notion of amending a permanent constitution, as opposed to introducing an interim constitution and a new constitutional assembly, is to effect the transition within the general framework of the existing constitution and its institutions. This being the case, substantive review by a constitutional court is appropriate to secure that the amending power abide by this constraint.

Constitutional courts have indeed played an increasing role in constitution-making processes.[52] The paradigmatic example of this is s 71(3) of the 1993 South African Interim Constitution, granting power to the Constitutional Court to certify that the new Constitution complied with the 'constitutional principles' stated in the Interim Constitution. Reflecting on that example, Arato correctly suggests that constitutional courts are institutions suitable for guaranteeing at least procedural fairness in a constitution making process.[53]

In a transitional justice process under a permanent constitution, a constitutional court has two functions. On the one hand, it has the power (and duty) to guard the essential principles of the permanent constitution from degradation. On the other hand, it has a constitution-making power for guaranteeing the fairness of the transition. A transition aims to strengthen or create state institutions, mechanisms, and procedures for protecting human rights, democracy, and the rule of law, and those are exactly the substantial principles that a constitutional court is designed to protect. Furthermore, constitutional courts play a

[52] A Arato, 'Redeeming the Still Redeemable: Post Sovereign Constitution Making' (2009) 22 *IJ of Politics, Culture and Society* 427, 433.
[53] Ibid.

role providing 'argumentative representation' of the people.[54] They represent the people in making constitutional decisions on the ground of rational arguments, grounded in notions of human rights or the rule of law, for example, as opposed to decisions by the political representatives of the people, which are grounded in negotiation of interests. As the Constitutional Court acknowledged in Judgment C-579/13, a transitional justice process instantiates a conflict between justice and peace. In a deliberative democracy, this conflict should not only be solved on the basis of political negotiations (concerning the interests of the parties in conflict), but also through rational arguments concerning the interpretation of the legal framework that sets the boundaries for political negotiations. The Constitutional Court is a forum for this second, important form of debate.

Concerning the second question, the principle of proportionality provides a plausible methodology for resolving collisions between the essential principles of a permanent constitution and the basic goals of transitional justice. Alongside the international instruments relied upon by the Constitutional Court in Judgment C-579/2013, goals of transitional justice and criteria for balancing these goals and constitutional principles can also be found in the Report of the Secretary-General of the of the United Nations entitled *The rule of law and transitional justice in conflict and post-conflict societies* of 23 August 2004.[55] The report identifies the enforcement of criminal justice and the implementation of truth-telling, reparations, institutional reform, and vetting as main elements of transitional justice.[56] The pillars of the international legal system, that is, international human rights law, international humanitarian law, international criminal law, and international refugee law, also prescribe a set of standards useful to test the

[54] On the Constitutional Court as argumentative representative of the people, see generally, R Alexy, 'Balancing, Constitutional Review and Representation' (2005) 3(4) *Int J Const L* 572.

[55] K Annan, United Nations Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General*, UN Doc S/2004/616, 23 August 2004. Other international documents on topics related to transitional justice include: UN Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc E/CN.4/2005/102/Add.1, 8 February 2005 and the accompanying reports by D Orentlicher, *Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity*, UN Doc E/CN.4/2004/88, 27 February 2004 and *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, UN Doc E/CN.4/2005/102, 18 February 2005; GA Res 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 16 December 2005.

[56] K Annan, United Nations Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General*, UN Doc S/2004/616, 23 August 2004, 9.

proportionality of transitional justice mechanisms. Given that Colombia is a member of the Inter-American System of Human Rights,[57] the standards set by the Inter-American Court of Human Rights case law are directly binding. These include cases like *Barrios Altos* and *Almonacid*, in which the Court acknowledged the victim's right to reparation despite the existence of domestic amnesty laws,[58] and Reports 28 and 29 of 1992 of the Inter-American Commission on Human Rights, concerning the amnesty laws in Argentina and Uruguay.[59]

The transnational law concerning transitional justice fleshes out the minimum standards for a transitional justice process, of which a domestic constitutional court can properly take cognisance for the purposes of balancing.[60] Constitutional and international courts operate in a transnational legal environment in which they cannot disregard structures of international law and cross-national and comparative references.[61] Transnational law concerning transitional jus-

[57] On sources of the Inter-American System of Human Rights on transitional justice, see, AE Dulitzky, 'The Inter-American Commission on Human Rights', in Due Process of Law Foundation, *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America* (2007) 129-50; D Cassel, 'The Inter-American Court of Human Rights', ibid, 151-66. There are also sources concerning transitional justice in the framework of the European system of human rights. On the case law of the European Court of Human Rights on the matter, see generally, E Brems, 'Transitional Justice in the Case Law of the European Court of Human Rights' (2005) 11 *IJ Trans J* 282.

[58] *Barrios Altos v Peru* (2001) IACtHR Ser C No 75; *Almonacid Arellano et al v Chile* (2006) IACtHR Ser C No 154.

[59] 'Report 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, Argentina, October 2, 1992', in Inter-American Commission of Human Rights, *Annual Report 1992–93*; 'Report 29/92, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Uruguay, October 2, 1992', ibid.

[60] In *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (8) BCLR 1015, the South African Constitutional Court considered the international and transnational legal framework on transitional justice for reviewing the constitutionality of section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995. This section empowered the Committee on Amnesty established by the Act to grant amnesty to a perpetrator of an unlawful act associated with a political objective and committed prior to 6 December 1993. The section also determined the effects of the amnesty. The Court upheld the constitutionality of the section on the basis that it implied a limitation to the right to access to court justifiable by ss 22, 33(1) and (2), and the epilogue of the interim Constitution. Despite the fact that the Court ought to consider the constitutionality of that section only against the interim Constitution, speaking for the majority, in his opinion Mahomed DP cited the use of amnesty for criminal acts in the transitional justice processes in Chile, Argentina and El Salvador (paras 22–24). He also acknowledged that the interim constitution directed the Court 'to "have regard" to public international law if it is applicable to the protection of the' fundamental rights entrenched in chapter three of that constitution (para 27). However, Mahomed DP considered that none of the international instruments quoted by the applicants assisted their case.

[61] On this concept of transnational law, see VC Jackson, *Constitutional Engagement in a Transnational*

tice makes it clear that the mechanisms of prosecutions, truth-telling, reparation, institutional reform, and vetting should be approached holistically, as they constitute a system designed to achieve several goals that may be in tension. Those goals include providing recognition and compensation to victims, promoting civic trust and reconciliation, strengthening democracy,[62] achieving peace,[63] punishing wrongdoers, forcing individuals to 'disgorge property that was wrongfully acquired',[64] land restitution, collective and inclusive nation building,[65] and redressing socio-economic grievances.[66]

A constitutional review of the transitional justice mechanisms implemented by a constitutional amendment should likewise adopt a holistic approach.[67] The constitutional court should review whether the transitional justice framework has legitimate goals, whether the transitional justice mechanisms are suitable and necessary means to achieve those goals, and whether there is a proportional balance between them and the essential principles of the permanent constitution that are infringed in the process.

In order to undertake this analysis, a constitutional court can employ the principle of proportionality, including, its three sub-principles of suitability, necessity, and proportionality in the narrow sense.[68] Within this context, these sub-principles establish a requirement that each transitional justice mechanism ought to meet. The sub-principle of suitability requires that the relevant mechanism contribute to the achievement of one of the goals of transitional

Era (2009) 63. On transnational constitutional law, see also, M Tushnet, 'The Inevitable Globalization of Constitutional Law' (2009) 49 *Va JIL* 985.

[62] P de Greiff, 'Theorizing Transitional Justice', in M Williams, R Nagy & J Elster (eds), *Transitional Justice* (2012) 31.

[63] J Elster, 'Justice, Truth, Peace', in M Williams, R Nagy & J Elster (eds), *Transitional Justice* (2012) 78, 80. See also C Turner, 'Delivering Lasting Peace, Democracy and Human Rights in Times of Transition: The Role of International Law' (2008) 2 *IJ Trans Just* 126, 142.

[64] Posner & Vermeule, above n 51, 766.

[65] See, W Kymlicka, 'Transitional Justice, Federalism, and the Accommodation of Minority Nationalism', in P Arthur, *Identities in Transition: Challenges for Transitional Justice in Divided Societies* (2014) 303.

[66] D Sankey, 'Towards Recognition of Subsistence Harms: Reassessing Approaches to Socioeconomic Forms of Violence in Transitional Justice', (2014) 8 *IJ Trans J* 121; I Muvini, 'Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies' (2009) 3 *IJ Trans J* 163.

[67] On the advantage of a holistic approach to the mechanisms of transitional justice, see, P de Greiff, 'A Normative Conception of Transitional Justice' (2010) 50 *Politorbis* 17, 19.

[68] On these sub-principles, see, among many others: B Schlink, 'Proportionality (1)' in M Rosenfeld & A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) 718, 721; A Stone Sweet & J Mathews 'Proportionality, Balancing and Global Constitutionalism' (2008) 47 *Col JTL* 72, 75; A Barak, *Proportionality: Constitutional Rights and their Limitations* (2012) 3.

justice. The sub-principle of necessity requires that the mechanism be the least restrictive of all means (regarding the essential principle of the constitution that becomes limited) that are equally suitable to achieve the pursued end.

Finally, the goals of transitional justice might conflict with each other. For instance, punishment to wrongdoers can conflict with achieving peace,[69] and vetting individuals can conflict with inclusive democracy and empowering the state to use skilled administrative staff.[70] They can also collide with essential principles of the permanent constitution. The sub-principle of proportionality in the narrow sense is an appropriate standard for solving these collisions. It requires that each transitional justice mechanism achieve its pursued end to a degree that justifies the extent of its interference with other transitional justice goals and with the essential principles of the permanent constitution. In this respect, for example, it would not be disproportionate in the narrow sense to allow members of the guerrilla that admitted to minor drug offences to participate in politics, but it would be clearly disproportionate to allow perpetrators of human rights violations to become high ranked officials of the Army. International transitional justice principles, such as the Joinet principles, provide balancing criteria useful for the test of proportionality in the narrow sense. For example, Principle 28 (Restrictions on the Practice of Amnesty) states:

> When amnesty is intended to establish conditions conducive to a peace agreement or to foster national reconciliation, it shall be kept within the following bounds: (a) The perpetrators of serious crimes under international law and the perpetrators of gross and systematic violations may not be included in the amnesty unless the victims have been unable to avail themselves of an effective remedy and obtain a fair and effective decision; (b) Insofar as it may be interpreted as an admission of guilt, amnesty cannot be imposed on individuals prosecuted or sentenced for acts connected with the peaceful exercise of their right to freedom of opinion and expression. When they have done nothing but exercise this legitimate right, as guaranteed by articles 18 to 20 of the Universal Declaration of Human Rights and 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights, the law shall consider any judicial or other decision concerning them to be null and void; their detention shall be ended unconditionally and without delay; (c) Any individual convicted of

[69] Elster, above n 63, 96.
[70] Posner & Vermeule, above n 51, 766.

> offences other than those laid down in paragraph (b) of this principle who comes within the scope of the amnesty is free to refuse it and request a retrial if he has been tried without benefit of the right to a fair hearing guaranteed by articles 10 and 11 of the Universal Declaration of Human Rights and articles 9, 14 and 15 of the International Covenant on Civil and Political Rights or if he has been subjected to inhuman or degrading interrogation, especially under torture.[71]

This principle offers an example of criteria that can be used for achieving a balance between the essential constitutional principles of enforcement of criminal law, protection of the rights of the victims and fair trial rights, on the one hand, and the transitional justice goal of achieving a lasting peace, on the other. These criteria can also be employed by courts to assess the proportionality in the narrow sense of peace agreements containing amnesty clauses as transitional justice mechanisms.

8 Conclusion

Recall that according to the transitional dilemma, if the transition is successful the permanent constitution is replaced; if the permanent constitution remains in place, transition is rendered impossible. This defeats the notion of transitional justice within the framework of a permanent constitution, which is a major obstacle for both transitional justice and constitutionalism. The solution presented here recognises that a successful transition is likely to imply the replacement of the existing constitution with something substantially different, albeit within a *process* broadly circumscribed by the permanent constitution. That is, where there is no suspicion of 'abusive constitutionalism' the emphasis, at least, of the enquiry into the constitutionality of a constitutional amendment shifts from substance to process. Given that constitutional courts are appointed to provide argumentative representation of the people, it is still justified for them to assess whether the transitional justice mechanisms adopted are suitable, necessary, and proportionate to achieve the specific goals of a transition. In order to play this role, constitutional courts should balance the essential principles of the permanent constitution against the relevant goals of transitional justice, which may legitimately be drawn from international and transnational law, especially where

[71] L Joinet, *Question on the impunity of perpetrators of human rights violations (civil and political): Revised final report prepared by Mr. Joinet to Sub-Commission decision 1996/119*, UN Doc E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997. See also, Principles 19 and 20.

such norms are binding on the constitutional court (as in a monist system like Colombia). Courts may undertake this evaluation by means of the principle of proportionality. The use of this principle provides the following solution for the transitional dilemma: the adoption of transitional justice mechanisms under a permanent constitution is substantively constitutional if and only if those mechanisms limit essential principles of the constitution in a degree that is proportionate to the degree in which they achieve the goals they seek, which ought to be legitimate under the international and translational legal framework for transitional justice.

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FROM CONSTITUTIONAL WORDS TO STATEHOOD? THE PALESTINIAN CASE

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Abstract
A lot of dreams have been invested in the Palestinian constitution. Its ambitious provisions promise a socially progressive, inclusive and tolerant State. Yet, today, these drafts have lost the semantic ambiguity that typically characterises constitutions in the making. It is all too easy to decide that those constitutional words have lost any hint of their politically-induced performative force. It may be tempting to imagine what things may be like had the Oslo Agreements led to a successful constitutional draft; or what could have happened had Arafat not believed that he could somehow artificially turn back the legal clock to a pre-1967 legal patchwork. It is equally tempting to imagine what could – still – happen if, instead of being merely tolerated, perduring customary laws were encouraged to lend their full gravity to a burgeoning civic movement. The sovereignty deficit that plagues the Palestinian constitution-making effort may turn out to be an asset if, by standing in the way of establishing a constitutional democracy from the top down, it has allowed customary practices to flourish.

Keywords
Palestinian constitution, self-determination, sovereignty, customary law, urf, Gandhi, Swaraj, sovereignty, legal pluralism, Oslo Agreements

1 Introduction

Can words – rather than a state (or army) – constitute a country?[1] They would be words that have taken some knocking about. Seasoned through extensive parleys, stretched by multi-dimensional aspirations, challenged by occupational anger, the words of the Palestinian Constitution are meant to carry the weight of their country. Can they (and should they) carry it all the way towards statehood?

[*] University College London, Faculty of Laws. This is an updated version of "Drafting a Constitution for a Country of Words: The Palestinian Case," which appeared in (2012) 4 *Mid East L Gov* 72. Many thanks to Koninklijke Brill for permission to reproduce the sections that overlap here.

[1] 'We have a country of words. Speak speak so I can put my road on the stone of a stone. We have a country of words. Speak speak so we may know the end of this travel'. See M Darwish, 'We Travel Like Other People' in M Darwish, S al-Qasim & Adonis (eds), *Victims of a Map: A Bilingual Translation of Arabic Poetry*, (1984: tr. A al-Udhari) 31.

An increasing number of Palestinian voices stress the fact that statehood cannot be, and never was, an end in itself. As a means to promote the rights of all segments of the Palestinian population, statehood is only viable if a certain number of conditions are met. Prominent among them is the state's accountability to the whole of the Palestinian population.

In March 2011, the Palestinian Legislative Council's (PLC) constitution-drafting committee was asked to 'finalise' its work 'in accordance with the merit of finalising the independent Palestinian State's establishment'. Yet raising concern about the merit of such 'finalising' has not so far dampened the ambition of this constitutional draft.[2] Its endeavour to set the basic legal framework for limiting and organising the powers of the executive, legislature and judiciary (with significantly greater staunchness than other Arab constitutions)[3] is not only an attempt to shape a way of life; its performative language defiantly blazons the very elements that have until now stood in the way of this aspiration. Constitutions do not usually define borders or the rights of its 'refugees'; nor do they usually come *before* statehood.

What can, and what do, constitutions usually constitute? Chalmers suggests a threefold answer to this question, distinguishing between the 'epistemological' setting out of 'the conditions which enable individuals to have a conception of the political or legal'; the formal identification of the 'subjects of the rights and entitlements bestowed by the Constitution'; and the forging of some kind of aspirational identity or so-called 'politics of the soul.'[4] As this framework proves helpful as a bid to structure my discussion of the Palestinian constitution-making endeavour, this paper is structured along these three themes, starting with 'the sphere of the legal.'

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[2] Two main processes of writing constitutional drafts have been conducted in parallel. Under the auspices of the PLO, drafts have been written since 1988; the latest draft, ('Third Draft') was written during the build-up towards the establishment of the Palestinian State in Provisional Borders within the framework of the Second Phase of the Roadmap. Under the auspices of the Palestinian Authority, the PLC presented the Basic Law in 1997 as an interim constitution. This document was not approved by Arafat until 2002. See The Palestinian Basic Law, 2003 Permanent Constitution draft (tr N Brown), <http://www.palestinianbasiclaw.org/basic-law/2003-permanent-constitution-draft> [accessed 8 December 2014].

[3] As it stands, the current draft may still be deemed one of the most liberal constitutions in Arab history, not only because of the strength of its rights provisions but also because of the genuine attempt to close many of the loopholes that exist in other Arab constitutions (especially when it comes to emergency powers and the independence of the judiciary).

[4] See: D Chalmers, 'Constituent Power and the Pluralist Ethic', in M Loughlin & N Walker (eds), *The Paradox of Constitutionalism* (2007) 291.

2 The sphere of the legal

Even when considered in a strictly epistemological sense, the claim that constitutions somehow 'set out the conditions which enable individuals to have a conception of the political or legal' is problematic. It suggests a transition from some sort of pre-legal, hazy merging of the legal and political to a formally *constituted* legal sphere that lends itself to a specifically legal framework of analysis (as opposed to its political counterpart). This claim is remarkably akin to that first formulated by Jellinek at the turn of the 20th century and lends itself to the same objections: any attempt to sort the legal away from the political fabric that conditions and enables it leads to an inability to explain the normative status of law.[5] This inability is in turn paid for by an exposure to either some reductive 'legal realism' or convenient reference to an absolute (whether it be God, natural law or otherwise) to ground law's normative claim.

As a particularly daring instance of 'building the ship at sea', the Palestinian construction of the legal sphere could hardly be more foreign in its eclectic pragmatism to the romantic claim that constitutions somehow constitute the sphere of the legal (even if only epistemologically). When, in September 1993, the signing of the first of the Oslo Agreements entrusted the Palestinian leadership with some control over a small territory, the Palestine Liberation Organization's Legal Committee quickly drafted a provisional constitutional document, which was fiercely criticised both externally[6] and internally.[7] As a result, the Palestinian Authority was established before any basic law was issued, hence prompting an enduring difficulty, given the Palestinian Authority's limited representativeness (I develop this issue at length in section 2).[8] It also meant, more importantly, that the emerging Palestinian institutions were left devoid of any clear 'non-Oslo' legal

[5] In a bid to free legal science from the 'vice of methodological syncretism', Jellinek denounced as illegitimate any amalgam of different methods of cognition, observing: '[i]f one has comprehended the general difference between the jurist's conceptual sphere and the objective sphere of natural processes and events, one will appreciate the inadmissibility of transferring the cognitive method of the latter over to the former.' See G Jellinek, *System der subjektiven öffentlichen Rechte* (tr S Paulson, in S Paulson, B Litschewski Paulson & M Sherberg, *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (1998) 28.

[6] The draft proclaimed Jerusalem the capital and clearly aimed at the production of a permanent constitution for a sovereign state (this is still very much the case in the current 2003 draft).

[7] The hasty drafting lacked any publicity and was unlikely to stand in the way of Presidential authoritarianism.

[8] While the PLO purports to represent Palestinians everywhere (this includes 4.7 million United Nations registered refugees), the Palestinian Authority represents the Palestinian population of the West Bank and Gaza.

ground. Arafat's answer to this predicament was bewildering: upon assuming leadership of the Palestinian Authority, he issued a decree purporting to restore the legal status that existed prior to the 1967 Israeli occupation.[9] This meant the restoration of an impossibly eclectic patchwork of British, Jordanian, Egyptian and Israeli pre-1967 laws. It also implied that all post-1967 Israeli orders were to be deemed no longer valid; a logical conclusion which was not, however, followed in practice (some post-1967 Israeli military orders are still implemented by Palestinian courts on the basis that they have not been specifically repealed). The resulting legal framework has been described as a 'salad',[10] with layer upon layer of concomitant legal regimes whose applicability depends –within Palestine itself – on location, subject matter and nationality.

An individual (let's call her Nuzha)[11] standing in a street in Jericho[12] may go to a Palestinian court to solve a civil matter according to Jordanian law; may face criminal charges on the basis of the Jordanian Penal Code or the revolutionary Penal Code of the PLO (or tried for 'security offences' by either the Israeli

[9] For a study of the Palestinian legal system under the British Mandate, see N Bentwich, 'The legal system of Palestine under the mandate' (1948) 2 *Middle East J* 33.

[10] 'The Palestinian legal system can be compared to a tossed salad, with layers of different laws and systems all mixed up into a confused mess. This situation in the Palestinian Territories is perhaps unprecedented in modern history'. See W Muhaisen, 'The Palestinian Legal System' (essay, 2003), The Palestinian Legal System, <http://www.theyap.org/showcase/politicsandlaw/palestinianlegalsystem.htm> [accessed 17 November 2011].

[11] Nuzha may be a national of any country except Israel: as an Israeli citizen 'settled' in Jericho, she would be subjected to Israeli law. Note that even if she were born and lives in Jericho, Nuzha's ability to participate in Palestinian elections is subject to Israel's control: While the Interim Agreement was to have given the Palestinian Authority power to keep and administer registers and records of the population, power was limited to printing changes in the Palestinian Population Registry, common to the West Bank and Gaza, provided that Israel had already approved the changes. See S Bashi & K Mann (Gisha: Legal Centre for Freedom and Movement), *Disengaged Occupiers: The Legal Status of Gaza* (2007) 50-4, <http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf> [accessed 11 November 2014].

[12] As a major population centre within the West Bank, Jericho is part of 'Area A', where the Palestinian Authority in theory exercises jurisdiction over all aspects of life including internal security (Israel however retains its ability to intervene if it deems it necessary). In 'Area B' (generally the lesser populated towns etc.) Israel has control over security (the Palestinian Authority cannot operate its own security forces in this area). 'Area C' (which consists of major parts of the West Bank territory), for its part, is still under total Israeli control. The Palestinian Authority has no jurisdiction over there. Settlers now outnumber Palestinians in Area C by two to one.

military courts[13] or the Palestinian Authority's own state security courts);[14] would need to refer to Ottoman law to resolve any land dispute or set up a charitable organisation[15] and may, independently of the above, rely on customary law as a route towards dispute resolution.[16] Nuzha's cousin, standing in an East Jerusalem street (a mere 30-minute drive from Nuzha), will be subjected to a very different set of laws. Israel's unilateral annexation of East Jerusalem effectively means that the 260,000 Palestinians who live there are exclusively subject to Israeli law.

If issued tomorrow, the Palestinian constitution would not necessarily change any of this.[17] As a strategic element in the construction of a state-like apparatus, a Palestinian constitution may have an important role to play in the gradual transition from a *de facto* to a *de jure* state. Yet it is far from clear whether, as things currently stand,[18] the establishment of a Palestinian state is the best way (or even *a* way) of achieving equality of rights for all Palestinians.[19]

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[13] Security offenses are defined broadly and may include charges as varied as stone-throwing or membership in outlawed organisations.

[14] The Palestinian Authority's state security courts have come to attract attention (public awareness of these state security courts seems otherwise worryingly low) following the debate triggered by the Palestinian Authority's recourse to the death penalty: a total of 92 different sentences of capital punishment have already been delivered since the inception of the Palestinian Authority, of which 16 have already been executed. In June 2005, the President of the Palestinian Authority issued an order for a retrial by a civilian court of all those sentenced to death under the Revolutionary Penal Code in military courts. No new sentences were delivered in 2006 or 2007, but sentences were again delivered by military courts in 2008 (13), and 2009 (17). See S Nusseibeh, *Capital Punishment under the Palestinian Authority* (Paper presented at the World Congress Against the Death Penalty, Geneva, 24 February 2010), <sari.alquds.edu/doc/capital_punishment%2023-2R.doc> [accessed 22 November 2014].

[15] Until four years ago, the same Ottoman law governed the setting up of charitable organisations in Israel.

[16] Otherwise known as *Urf'*, Arabic for 'that which is known', this system of customary law extends to a wide number of Arabic countries. Mainly aimed at preventing further damage within the communities of either of the individuals involved in a dispute, it consists in a set of conflict resolution procedures promoting active community involvement.

[17] One way of negotiating the various pitfalls of drafting a constitution while under occupation would be for the Palestinian drafters to envisage a transitional constitution whose sunset clause would clearly signal its bridging role towards a process that is more comprehensive and hence does not suffer from the same legitimacy deficit.

[18] Geographically, the continuing expansion of Israeli settlements leads some experts (both Palestinian and Israeli) to deem the establishment of a Palestinian state impossible. Politically, the moribund state of the Palestinian National Council leads some to highlight the hazards inherent in the political disenfranchisement of more than half of the Palestinian population.

[19] '[A]s the prospect of a genuine – a sovereign and independent – Palestinian state has receded, another discourse has returned, one with much deeper roots in the Palestinian political

The current layers of concomitant legal regimes may not sit well with the positivist idea that all law must originate in a single power source. In fact, it may be considered a healthy reminder of the possibility of taking a broader (and less Westphalian) view of law, built around a diffuse network of legal norms. From this perspective, the Palestinian legal maze could be deemed an incentive to research ways in which the existing system of customary law may provide for and support the grass-roots advocacy of Palestinian rights in a way of which a formal (written) Palestinian constitution may not be capable.

3 Identifying the subjects of Palestinian rights

Article 2 of the current Basic Law states: '[t]he Palestinian people are the source of all power'. This sounds odd. Are 'the people' not, by definition, the source of all power? Without the political might engendered by a group of individuals pondering ways of living together, there could not be any constitution, let alone any law. Political power, understood as the power to (re)shape social interactions in the light of moral or prudential concerns cannot but emanate from the people.

Article 2 goes on to state that the Palestinian people are the source of all power 'which shall be exercised through the legislative, executive, and judicial authorities, based on the principle of separation of powers, and in the manner set forth in this Basic Law.' The distinction between the 'power' referred to in the first part and the 'powers' (legislative, executive and judicial) that ought to remain 'separated' contributes to the oddity of this English translation. As it turns out, an 's' after the initial reference to 'power' seems to have been lost in translation,[20] which suggests that the drafters probably had in mind something like Article 33 of the Belgian Constitution: '[a]ll powers emanate from the Nation'.

The peculiar formulation of Article 2 may well find its roots in what it was trying to avoid saying, for there is one word – 'sovereignty' – whose absence is noteworthy. Most constitutions use the term at one point or another, including

imagination than talk of statehood, and much closer to the ideas that inspired the Arab uprisings. It's often forgotten that until the mid-1970's, Palestinians were looking not to establish a state but to achieve "national liberation", to restore their rights in the land from which they had been driven – beginning with the right of return. Palestinians rarely talk about statehood, but they often talk about their rights; statehood is viewed, at best, as a means to achieve them'. See A Shatz, 'Is Palestine next?' (2011) 33 *London Review of Books* 9.

[20] See Basic Law 2009 (Palestinian Legislative Council) Art 2.

the South African,[21] Egyptian[22] and French constitutions,[23] which are all known to have had some influence on the Palestinian drafting process. The relatively recent Iraqi and Afghan constitutions give pride of place to the concept: '[t]he law is sovereign. The people are the source of authority and legitimacy […]'[24] and '[n]ational sovereignty in Afghanistan belongs to the nation that exercises it directly or through its representatives.'[25]

Beyond its silent influence on the constitutional draft, the distorting effect of this 'sovereignty issue' can also be seen at work at a more insidious level. When it comes to defining what and *who* constitutes the Palestinian people, its struggle for sovereignty may be seen as a catalyst: religious and cultural differences are meant to retreat (not necessarily successfully) in front of the national liberation campaign.

Who decides who belongs to the Palestinian people and what interests are shared by it?[26] An answer formulated predominantly in terms of ending the occupation is bound to be precarious.[27] An optimistic reading of the ongoing drafting effort would deem the constitution's extensive human rights provisions, as well as its conspicuous concern for safeguarding the rule of law, to point to a genuine move towards a positive and idealist construction of Palestinian

[21] Constitution of the Republic of South Africa 1996 (South Africa) Art 1: '[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values'.

[22] Constitution of the Arab Republic of Egypt 1971 (Egypt) Art 3 as it stood in 2003: '[s]overeignty is for the people alone who will practise and protect this sovereignty and safeguard national unity in the manner specified by the Constitution.' This has since been replaced, in the 2011 Interim Constitution, by '[s][overeignty is for the people alone and they are the source of authority. The people shall exercise and protect this sovereignty, and safeguard the national unity.'

[23] Constitution of France 1958 (France) Art 3: '[l]a souveraineté nationale appartient au peuple qui l'exerce par ses représentants et par la voie du référendum. Aucune section du peuple ni aucun individu ne peut s'en attribuer l'exercice.'

[24] Iraqi Constitution 2005 (Iraq) Art 5.

[25] Constitution of Afghanistan 2003 (Afghanistan) Art 4.

[26] When raised in the context of a conference organised by Al-Quds University on the Palestinian Constitution-making endeavor (this conference, held on 7 and 8 May 2011, was attended by a mix of academics, diplomats and Palestinian officials), the question of what or who 'constitutes' the Palestinian people was notably met with a slightly impatient: 'it's widely agreed that the Palestinian people includes each and every refugee around the globe.' See 'Conference on Palestinian Constitution: Perspectives and Challenges', Al-Quds University, 7-8 May 2011.

[27] An answer *à la Schmitt*, inviting a substantivisation of politics and citizenship, which would hence be defined by the sharing of certain physical or moral qualities, is even more dangerous: see generally, for example, C Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1985). It is of course more than doubtful whether members of a polity can identify any set of qualities, moral or otherwise, which uncontroversially defines them as a political unity.

aspirations.[28] Far from being settled or reducible to the refugee question, the ongoing delineating of a Palestinian 'social spirit' may be the most important byproduct of this constitution-making endeavour.

> For a newly formed people to understand wise principles of politics and to follow the basic rules of statecraft the effect would have to become the cause; the social spirit which must be the product of social institutions would have to preside over the setting up of those institutions; men would have to have already become the advent of law that which they become as a result of law.[29]

Now it might seem that acknowledging this circularity – what is presupposed as coming before (the Palestinian people) invariably comes after (if at all) – 'must be costly to a democracy, or demoralizing: If the [Palestinian] people do not exist as a prior – or even as a post hoc – unifying force, then what will authorize or legitimate their exercises of power?'[30] But denial of this issue is costly too.

The cost of shrugging off the inevitably circular (and hence open-ended) process that underlies the collective self-definition at the heart of any constitutional practices probably finds its most powerful theoretical illustration in the works of Carl Schmitt. His endeavour to determine what binds together the members of a community in substantive terms – as a set of qualities shared by 'the people' – undeniably topples any hint of circularity.[31] It also leads to considering any ap-

[28] While the Palestinian constitution-making process has already managed to arouse a good deal of public, 'civic' debate, it does remain vulnerable to the charge of elitism (a large proportion of the constitution-drafting committee was educated abroad etc.). See N Brown, 'Constituting Palestine: The Effort To Write A Basic Law For The Palestinian Authority' (2000) 54 *Middle East J* 25, 25.

[29] J Jacques-Rousseau, *The Social Contract* (tr M Cranston, 1968) Book II, Ch 7, 86-7.

[30] B Honig, *Paradox, Law, Democracy: Emergency Politic*s (2009) 15.

[31] 'The people' unambiguously precedes and conditions the emergence of any legal order. Referring to Sieyès' theory of the nation's *pouvoir constituant*, Schmitt emphasises that the word 'nation' 'designates the people as a unity capable of political action, with the consciousness of its political specificity and the will to exist politically [...] The theory of the people's *pouvoir constituant* presupposes the conscious will to exist politically, thus a nation [...] The conscious choice of a certain type and form of this existence, the act through which "the people gives itself a constitution" thus presupposes the state whose type and form is determined. But for the act itself, for the exercising of this will, there cannot be any procedural rule, no more than for the content of a political decision. Nation willing it will suffice'. See C Schmitt, *Verfassungslehre* (1928) Ch 8, 79 (my translation).

peal to ethics the inevitable and insignificant product of power struggles that are, as such, reducible to 'normative nothingness and concrete disorder.'[32]

The task of determining what interests and aspirations are shared by, and constitutive of, a community is always going to be an open-ended endeavour. In a certain (typically Western) understanding of constitutionalism, it is the job of the constitution to preserve this open-endedness through the imposition of limits on divided state powers (these limits are 'a way of acknowledging that a people is never directly present to itself as a unity: whoever claims to speak on its behalf may only do so if the claim can be *questioned* by another power').[33] Yet in some contexts, the strategic (and formalist) drafting of a constitution (whether it be for the purpose of gaining international recognition or otherwise) may well have the opposite effect, stiffening rather than promoting the articulation of socio-ethical aspirations.

Many claim to speak on behalf the Palestinian people. Yet in their present state, Palestinian institutions can hardly be said to foster the connection between political power and its 'source' – the Palestinian people (Article 2). The Palestinian National Council (PNC) is the one body[34] that is supposed to represent all segments of the Palestinian population (whether in the Occupied Territories or the diaspora).[35] The PLC (which has not been able to convene in recent years), in contrast, only represents Palestinians living in the Occupied Territories. As the Palestinian Authority's legislative arm, its authority (and raison d'être) stems from the Oslo Agreements.

The move to secure recognition of statehood at the United Nations (UN) Security Council may be seen as the culmination of a process condoning the gradual transfer of power away from the PNC. Established as a short-term administrative entity charged with the limited governance of a restricted territory,[36] the Pales-

[32] 'Legally, the sovereign decision is (from a decisionist perspective) neither explained by reference to a norm or to a concrete order, neither inserted in a concrete order; […] The sovereign decision is absolute beginning, and the beginning (also in the sense of *arche*) is nothing other than a sovereign decision. It springs from a normative nothingness and a concrete disorder'. See J Kervégan, *Hegel, Carl Schmitt: Le politique entre spéculation et positivité* (1992) 44 (translation by author).

[33] H Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood,' in M Loughlin & N Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2007) 9, 22 (emphasis added).

[34] There is no definitive list showing who the current members are. Many have died of old age.

[35] Because of the high number of Palestinian refugees who are not as yet registered to vote at the PNC elections (these elections have also been criticised for their lack of transparency), representation of those scattered throughout the diaspora is still very patchy.

[36] Its five-year mandate was extended in 1998.

tinian Authority has sought to establish all the infrastructure of statehood while still under occupation. Its latest bid to replace the PLO and substitute it with the State of Palestine has been widely criticised as overstepping the mark (aside from being at odds with resolution 43/177).[37] As a subsidiary body, competent only to exercise those powers conferred on it by the Palestinian National Council [...] it does not have the capacity to assume greater powers, to "dissolve" its parent body.'[38]

The greatest peril of this Palestinian Authority-initiated move (even if it has the PLO executive committee's approval), however, lies in its implications for those Palestinians scattered across the globe:

> If they are 'disenfranchised' and lose their representation in the UN [as a consequence of the PLO's substitution with that of Palestine], it will not only prejudice their entitlement to equal representation, contrary to the will of the General Assembly, but also their ability to vocalise their views, to participate in matters of national governance, including the formation and political identity of the State, and to exercise the right of return.[39]

Sharing the concern 'that any potential move to alter the status of the PLO as the sole legitimate representative of the Palestinian people at the UN may have negative implications on the legal position of the Palestinian people, in particular on the representation of their indivisible and collective rights,'[40] senior Palestinian lawyers and scholars a few years ago signed a joint statement

[37] In its Resolution 43/177 the UN General Assembly acknowledged 'the proclamation of the State of Palestine by the Palestine National Council on 15 November 1988' and it decided that 'effective as of 15 December 1988, the designation should be used in place of the designation Liberation Organization in the United Nations system, without prejudice to the observer status and functions of the Palestine Liberation Organization within the United Nations system.' See GA Res, 'Question of Palestine', 43/177, 15 December 1988.

[38] G Goodwin-Gill, 'Opinion Re The Palestine Liberation Organization, the Future State of Palestine, and the Question of Popular Representation' (10 August 2011) 2, para 7, <http://www.alzaytouna.net/english/selections/2011/Plo_Statehood_Opinion-8-11.pdf> [accessed 22 November 2014].

[39] Ibid.

[40] A al-Qasem et al, 'Palestinian lawyers affirm essential role of PLO at UN', *Ma'an News Agency*, 1 October 2011, <http://www.maannews.net/eng/ViewDetails.aspx?ID=425080> [accessed 17 November 2011]), para 5.

demanding immediate and direct elections to the PNC.[41] Given the huge number of Palestinian refugees who are not currently registered to vote (or registered *tout court*), the amplitude of the challenge underlying such elections prompts some to highlight that this call for elections cannot be more than a symbolic move aimed at denouncing the legitimacy of the UN bid.[42]

One may wish to dispute such skepticism. In her seminal report[43] (instigated by the UN High Commission for Refugees) on refugee participation in 'country of origin's political processes', Katy Long draws on recent instances of 'out of country voting' (OCV), including the 2005 and 2010 Iraqi elections,[44] to highlight both their challenges and potential limitations. From a logistical perspective, one of the difficulties is to facilitate affordable[45] travel to and from polling stations in relative safety[46] (postal/online voting may alleviate that difficulty in countries with an adequate infrastructure) and to safeguard the privacy of voters' information.

Aside from these technical hurdles, the most difficult task consists of setting up the criteria determining one's right to vote. Defining these criteria widely, so as to include the wider diaspora (whether they are registered as refugees or not, and encompassing second generation migrants) has clear development benefits (remittances, skills-transfer etc.) and is likely to lead to a more sustainable[47]

[41] Since 1996, 40% of the PNC (those on the PLC) have been directly elected. According to the (so far tentative, as it has not been signed) Palestinian National Reconciliation Agreement, 'the Legislative, Presidential, and the Palestinian National Council elections will be conducted at the same time exactly one year after the signing of the Palestinian National Reconciliation Agreement.'

[42] Less often raised, are the grounds on the basis of which one may argue that the definitive power to decide upon statehood in any form (and the likely compromises that have to go with it) ought to belong to those Palestinians suffering the daily consequences of the Israeli occupation in Gaza and the West Bank.

[43] K Long, 'Voting with Their Feet – A Review Of Refugee Participation and the Role Of UNHCR In Country of Origin Elections and Other Political Processes,' *United Nations High Commissioner for Refugees Policy Development and Evaluation Services*, September 2010, <http://www.unhcr.org/4ca08d249.pdf> [accessed 22 November 2014].

[44] For the 2005 Iraqi elections, OCV was (belatedly) provided in 14 different countries.

[45] The Danish government was the only one to fund the cost of such traveling. See Long, above n 43, 32.

[46] 'In the Iraqi elections held in March 2010, for example, Sunni insurgents killed 39 people in attacks designed to disrupt polling activities.' See Long, above n 43, 22.

[47] 'By facilitating refugee and IDP engagement in political negotiations following conflict, these groups are more likely to understand themselves as stakeholders in the peacebuilding and reconstruction processes. This in turn is likely to lead to more sustainable repatriation and return, as refugees and Internally Displaced Persons are both recognized and recognize

and secure peace-building and reconstruction process.[48] Yet the financial costs associated with such a wide enfranchisement of the diaspora can be significant, as illustrated by the Iraqi experience.[49] The electoral law which belatedly enfranchised the Iraqi diaspora in 2005 stipulated eligibility criteria that were very broad 'so that estimates of numbers of eligible expatriates included almost anyone who had left the country at any time for any reason' (voter registration totaled only 22 percent of the estimated expatriate population in the 14 countries offering OCV).[50]

Even if one were to adopt much more restrictive eligibility criteria, for instance by conditioning eligibility to vote to an 'intention to return' (a move which would be very problematic given the continuing expansion of Israeli settlements),[51] the sheer number of Palestinian refugees would create unprecedented difficulties. While the international community should nevertheless be able to rise to the challenge, one may ponder the extent to which, in the present circumstances, PNC elections would empower Palestinians not only to articulate, but also to carry through their yearning for equal rights.

The power to bring about those aspirations would require a reversal of the current dynamic, hence a transfer of power away from the Palestinian Authority towards the PLO, a move that would go against vested Israeli interests. As unlikely as it may be, such an institutional revolution is only conceivable if it stems from grass-roots activism; that is, from the bottom up, rather than from some ambitious 'constitutionalist politics' driven by calls for democratic legitimation.

The peril of a constitutionalist strategy that is mainly outward-looking (animated by a desire to build 'all the trimmings of a state' in hope of gaining

themselves to be equal citizens in their country of origin.' See Long, above n 43, 6.

[48] Long, above n 43, 6, quoting J Milner, 'Refugees and the Regional Dynamics of Peacebuilding' (2009) 28 *Refugee Survey Quarterly* 13-30: 'The overall security of the peace-building process is also likely to increase, as ensuring refugee and IDP access to civil political space will help to prevent the emergence of so-called "spoiler" refugee groups whose failure to engage in reconstruction can undermine a post-conflict settlement.'

[49] '[V]oting in the 2005 Iraqi elections cost USD $72 million (with an initial budget of USD$92 million), or USD $270 per external voter, a questionable use of international financial resources.' See Long, above n 43, 14.

[50] J Thomson, 'Iraq: A Large Diaspora and Security Concerns,' in International Institute for Democracy and Electoral Assistance' in A Ellis, C Navaro, I Morales, M Gratschew & N Braun (eds), *Voting from Abroad: The International IDEA Handbook* (2007) 168, 169.

[51] 'Given that the reason for insisting on refugees' right to vote regardless of their non-residency is the fact of their forced displacement, there would appear to be a connection between refugees' enfranchisement during a period post-conflict reconstruction and at the very least their intention to return at a future date.' See Long, above n 43, 26.

international recognition) lies in its alienating from the law-making process the very people it was supposed to empower. If a state is not only triggered by, but remains primarily an answer to, a liberation campaign (rather than a response to the necessity to articulate and coordinate common goals) it is in danger of being reduced to an economic and/or administrative state; a state where the political has been neutralised by legal norms combined with economic welfare and reduced to the mere 'technology of administration.'[52]

4 Aspirational identities: building 'true home rule' (or 'Swaraj')

> [The end of the Raj] may bring mere home rule (the rule of the modern coercive state) but not true home rule (the rule of the just, limited state); in any case it will not bring about self-rule.[53]

Gandhi's words are increasingly frequently quoted by Palestinian intellectuals[54] and activists,[55] and not only because of the:

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[52] C Schmitt, *Legality and Legitimacy* (1932: tr Jeffrey Seitzer, 2004) 5.

[53] A Parel, 'Editor's Introduction' in A Parel (ed), *Gandhi: 'Hind Swaraj' and Other Writings* (2009) lxvi.

[54] 'CI: People call you the "Gandhi of Palestine". What has it meant for you to be held in such high esteem? MA: I have very much difficulty with that, I am not Gandhi. He is in a class by himself. My idea was to promote non-violence and Gandhi's teachings with the hope that someone else would come and pick it up, because I think this is going to take ten to fifteen years before the Palestinians will be able to accept the struggle in a non-violent way'. See C Ingram, 'Interview with Mubarak Awad', in C Ingram (ed), *In the Footsteps of Gandhi: Conversations with Spiritual Social Activists* (1991) 37.

[55] 'When we joined UNESCO we were practically creating the power of culture against the culture of power. That's how countries in the world liberated themselves. That's how a person like Gandhi who had no military power managed to unify India and get independence. […] It's the power of the idea, the power of culture, and the power of dignity.' See M Barghouti, 'The UN should accept Palestine as a full member state', *The Palestine Monitor*, 5 January 2012, <http://www.palestinemonitor.org/details.php?id=26z1esa527yj3cx58fmg> [accessed 19 November 14]; 'a principled Palestinian leadership would follow the example of Mandela and Gandhi, leading the masses in popular resistance and inspiring effective and sustained international solidarity in order to tip the balance of powers – a necessary condition for exercising our UN-sanctioned rights'. See O Barghouti, 'Virtual Statehood or the Right of Return,' *Occupied Palestine*, 14 September 2011, <http://occupiedpalestine.wordpress.com/2011/09/14/virtual-statehood-or-the-right-of-return-by-omar-bagrhouti/> [accessed 22 November 2014].

> striking resemblance between the two cases [the creation of Israel and Pakistan] in establishing political boundaries on ethnic or religious grounds in regions with mixed populations. Both Pakistan and Israel, as products of partition, are self-conscious political models based on such grounds, with Pakistan having sought to become an Islamic State and Israel a Jewish State.[56]

Gandhi's words are increasingly quoted primarily because they denounce any attempt to establish 'home rule' from the top-down as delusive: if liberation is assimilated to the mere toppling of external rule and hasty building of a Western-style nation state, then it may not be worth it. 'Independence must begin at the bottom. Thus, every village will be a republic or *panchayat* having full powers.'[57]

If there ever was something approaching this ideal of bottom-up, locally grown independence in post-World War I 'Palestine', it was during the early stages of the first intifada. While it may never have managed to be completely non-violent (it took a definite, violent turn during the Kuwait Crisis),[58] the seeds of what may properly be termed 'embryonic self-rule' were there nevertheless. In a detailed survey of the legal decision-making structures during the first intifada, Adrien K. Wing outlines the importance of local popular committees:

> In the beginning of the *intifada*, each locality formed various popular committees (*lijan sha'biya*) which became involved in day-to-day underground governance. By May 1988, there were 45,000 functioning local committees of various types. The local popular committees elected representatives to larger coordinating committees, which in turn established regional ties, and then linked up with the UNLU [Unified National Leadership of the Uprising].[59]

As the primary legal institution of the intifada, the UNLU sought to control the use of force and coordinated civil society activities: withholding of taxes, boycott of Israeli products, work stoppages and mass resignations of the police

[56] S Nusseibeh, *What Is a Palestinian State Worth?* (2011) 32.

[57] M Gandhi, 'Gandhi's Political Vision: The Pyramid vs The Oceanic Circle (1946)' in A Parel (ed), *Gandhi: 'Hind Swaraj' and Other Writings* (2007) 181, 181.

[58] Growing dissatisfaction with the earlier intifada power structure enabled the rise of Hamas and increasingly bloody internal clashes.

[59] A Wing, 'Legal Decision-Making During the Palestinian Intifada: Embryonic Self-Rule' (1993) 18 *YJIL* 95, 119 (citations omitted).

force and tax collectors.[60] Consisting of a highly decentralised network of committees,[61] it issued leaflets (*bayanat*) containing policies and laws. These laws drew from a variety of legal traditions. Ottoman law (to some extent),[62] mandate law, and Israeli military and civil law were largely rejected,[63] 'either as a symbolic estrangement from the Israeli administered legal order, or because the laws promulgated under those systems have been used to compromise Palestinian rights.'[64] Along with parts of Egyptian and Jordanian civil law (and some Islamic religious law), customary law (*urf*) had a large influence on the UNLU.

Known as the ancient legal tradition *urf'* ('that which is known'), customary law is still used to resolve conflicts outside the official civil and religious courts (which remain to this day considered by many Palestinians as not only unsympathetic, but illegitimate). Cases that may be handled under *urf* 'include contract disputes, land matters, interfamilial feuds and personal injuries'.[65] 'Judges in the civil court generally appear to tolerate the competing system, sometimes even consciously accommodating it [customary law] by delaying actions in a case while awaiting a *sulh* [binding settlement].'[66]

While respected elders (always men) have traditionally adjudicated and

[60] Referring to the above-mentioned 'civil society activities,' Salim Tamari writes: 'are all essential features of the process of the withdrawal of Palestinian society from two decades of dependence on the Israeli colonial state apparatus. The UNLU has exhibited great skill *and flexibility* in coordinating these acts of civil disobedience among the rural, urban, and refugee segments of the population, and in translating them into a collective national act of rebellion. But they all remain acts of *disengagement*. To transform them from a process of disobedience to a process of affirmation necessitates the forging of alternative economic, social, and administrative structures.' See S Tamari, 'The Palestinian Movement in Transition: Historical Reversals and the Uprising' (1991) 20 *J of Palestinian Studies* 57, 68.

[61] '[L]ocal committees decide when people in their district can sustain demonstrations and/or strikes, raise money and material aid for the neighboring villages and refugee camps which may be under curfew, and pay attention to their constituency's morale'. See G Pressberg, 'The Uprising: Causes and Consequences' (1988) 17 *J Palestinian Studies* 38, 45.

[62] 'Although Palestinians relied on the Ottoman land code long after the Ottomans left the region, the Israelis' use of Ottoman land law in a manner that disadvantaged Palestinian property holders has delegitimized Ottoman law in the eyes of Palestinians'. See Wing, above n 59, 106-7.

[63] As indicated in §1, land law still is (and remained during the intifada) Ottoman and today some post-1967 Israeli military orders are still implemented by Palestinian Courts on the basis of the fact that they have not been specifically repealed.

[64] Wing, above n 59, 102.

[65] A Wing, 'Custom, Religion, and Rights: the Future Legal Status of Palestinian Women' (1994) 35 *HILJ* 149, 153 citing G Bisharat, *Palestinian Lawyers and Israeli Rule: Law and Disorder in the West Bank* (1989) 41.

[66] Bisharat, above n 65, 42.

administered *urf*, public figures came to the fore during the first intifada.[67] Today, customary law continues to play a major role in Palestinian legal culture, even if it has come under pressure to reform. Women's groups denounce how it perpetuates women's social and legal subordination.[68] It has been further alleged that 'some customary law judges are illiterate; there are different local versions of customary law and no unified one, and some arbitrators demand emoluments verging on bribery.'[69] Given the strengthening of Islamic movements since the 1970's, it has become overlaid 'by a facade of Islamic symbols.'[70]

Yet having sustained its authority through four occupations, customary law is still hailed as an example of Palestinian control over Palestinian affairs according to Palestinian custom. Unlike the current Basic Law (and the whole legislative infrastructure that accompanies it), customary law can truly be said to 'reign over the hearts of [Palestinian] citizens':

> [t]here will never be a good and solid constitution unless the law reigns over the hearts of the citizens; […] How then is it possible to move the hearts of men, and to make them love the fatherland and its laws? Dare I say it? Through children's games; through institutions which seem idle and frivolous to superficial men, but which form cherished habits and invincible attachments.[71]

The current constitution-drafting effort is anything but frivolous. Some of its more formal dimension may be captured by Nathan Brown when he writes (without irony): '[t]hroughout the world, constitutions have become one of the most important attributes of sovereignty: new states are almost as likely to issue constitutions as they are to print postage stamps and adopt flags.'[72] Now if the goal is to seek 'a past from which we may spring rather than that from which we seem to have derived',[73] it may be worth delaying the issuance of

[67] Such as Feisal Husseini.

[68] Wing, above n 65, 157.

[69] I Zilberman, 'Palestinian Customary Law in the Jerusalem Area' (1996) 45 *Catholic ULR* 795, 804.

[70] 'For example, the style of debate in the course of arbitration became closer to that prescribed by Islam, and Islamic traditions (Hadith) and Quranic verses were cited more frequently in the written verdicts.' See Zilberman, above n 69, 803.

[71] J Jacques-Rousseau, 'Considerations on the Government of Poland and on its Proposed Reformation', April 1772, (Completed but not published) <http://www.constitution.org/jjr/poland.htm> [accessed 22 November 2014].

[72] Brown, above n 28, 25.

[73] F Nietzsche, *The Use and Abuse of History,* (tr A Collins, 1949).

stamps (and a constitution) and ponder the extent to which the burgeoning civic movements[74] on both sides of the security fence are truly best served by a two-state solution. Some form of federalism,[75] enabling different communities to live alongside each other and sharing at least one geographical region (Jerusalem – not unlike Brussels today) would arguably have more in common with the regional structure[76] that existed prior to the dismantlement of the Ottoman Empire (and enabled the peaceful coexistence of various religious denominations) than a two-state solution.[77]

5 Conclusion

> Sumud means steadfastness, and it has turned into a strategy: when the imbalance of power is so pronounced, the most important thing to do is to stay put.[78]

Years ago, while visiting Jerusalem East, I was invited to a Palestinian house that had been 'occupied' a few days before: a group of young Israeli settlers

[74] 'If Israel ends its occupation of the West Bank, and allows it to join with Gaza, the result could be two states – a Palestinian one alongside an Israeli one. But if you accompany that with a civil rights movement inside Israel, the goal could be very different – a secular, democratic state "for all its citizens", where Jew, Christian and Muslim are equal.' See D Hearst, 'Could Arab staying power ultimately defeat Zionism?', *The Guardian*, 5 August 2011, <http://www.theguardian.com/commentisfree/2011/aug/05/48-arabs-palestine-abbas-zionism> [accessed 22 November 2014].

[75] This is an old idea: '[s]ome important voices within Palestine, especially Jewish organisations such as Brit Shalom (Covenant of Peace, founded in 1925) and later Ihud (Union, founded in the 1940s and represented by such prominent intellectuals as Martin Buber and Judah Magnes), argued in favor of some form of federalism or binationalism on both practical and moral grounds. Such voices did not, unfortunately, find resonance in the largely Zionist-driven Jewish population, nor yet in the nationalist-driven Palestinian leadership'. See Nusseibeh, above n 56, 34-5.

[76] 'The Ottoman administrative structure consisted of geographic districts called *sanjaks*, each with a central governorship responsible for running local affairs. These governorships were connected to a regional capital, and these in turn to the so-called High Portal in Istanbul. The area that later became Mandatory Palestine comprised three *sanjaks.*' See Nusseibeh, above n 56, 227, note 6.

[77] '[T]he indigenous Jewish presence in the Arab world made itself felt in politics […], business […], and literature. While the Jewish minority did not enjoy a perfect political existence, yet relations never deteriorated to the inhumane and life-destroying levels reached in Europe'. See Nusseibeh, above n 56, 226, note 3).

[78] Hearst, above n 74.

stormed the house at night, a fight ensued, the (Israeli) police were called. As the settlers had managed to occupy roughly half of the house, it was decided that the house should be split in two. I was shown the dividing line separating the part of the house in which its Palestinian owners could still live, while the other part was vigilantly guarded by the Israeli settlers. The Palestinian family could not at any time leave their part of the house empty for fear of losing it altogether. The settlers, I was told, were invoking ownership rights according to Ottoman law. I did not get the chance to talk to the settlers or to check any of those underlying legal claims. I was so struck by the folly of the Israeli police's 'solution' and the extent to which it resembled, in its absurdity, Solomon's compromise, for surely splitting the house according to the assault's random result (forcing its inhabitants to live in perpetual fear) undermined the very meaning of a property right?

Yet what surprised me most was the relative impassivity with which the matter was presented (among Palestinians). The dispassionate tone that ruled over the discussions that I witnessed left me with the sense that an inconspicuous peril may well be lurking behind the all too visible, quotidian injustices and humiliation. What if they (Palestinians and Israelis alike) get used to it? Is it the case that events that would otherwise arouse powerful emotions can be sunk into the humdrum by the combined weight of decades of occupation?

A lot of dreams have been invested in the Palestinian constitution. Its ambitious provisions promise a socially progressive, inclusive and tolerant state. Yet today these drafts have lost the semantic ambiguity that typically characterises constitutions in the making. It may be tempting to imagine what things may be like had the Oslo Agreements led to a successful constitutional draft (established prior to the Palestinian Authority's coming into existence); or what could have happened had Arafat not believed that he could somehow artificially turn back the legal clock to a pre-1967 legal patchwork. It is equally tempting to imagine what could – still – happen if, instead of being merely tolerated, perduring customary laws were encouraged to lend their full gravity to the moral sentiments that, against the odds, manage to sustain a burgeoning civic movement; one that is capable of establishing 'true home rule' or 'Swaraj.'

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RETHINKING RECOGNITION: THE CASE OF IRAQI KURDISTAN

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Abstract

The relationship of Iraqi Kurdistan to the Iraqi federal polity and the outside world challenges some of the standard assumptions in international law and international relations theory about statehood and *de jure* recognition. The Iraqi Kurdish model–building a *de facto* state first, and seeking international recognition later–provides an interesting counterpoint to the standard model and, for example, the Palestinian approach, which has focussed on international recognition before practical statecraft. The importance of international recognition in the current crisis involving the so-called Islamic State in Iraq and Syria, however, demonstrates that de jure recognition in the international community of states is still essential, and that 'sovereign' status likely remains the goal state desired by sub-national communities such as the Iraqi Kurds.

Keywords

Iraq, Federalism, Statehood, Sub-National Politics

As we approach the centenary of WWI, its legacies continue to impact world events. In the Middle East, post-war diplomatic efforts codified in the Sykes-Picot Agreement of 1916, Treaty of Sevres (1920) and Treaty of Lausanne (1923), carved out the borders of what would become the recognised states of today's Middle East (apart from Israel). These states were to be maintained by heavily centralised and militaristic governments. A recent wave of decentralisation has put these states and borders into question. The timeliest examples of this are Iraq and Syria. Both states were forcibly kept together by strong central governments in Baghdad and Damascus, despite a heterogeneous population housing a host of ethno-religious actors. The 2003 Iraq War and the 2011 Syrian Revolution fundamentally altered the almost 100-year old centralised structures in both states. In Iraq, the new buzzword became 'federalism', meaning decentralisation and the emergence of peripheral actors in their own right. The Kurds of northern Iraq are the most prominent case of *de facto* or empirical statehood to emerge from this period. In Syria, following 2011, several anti-regime actors have also emerged and gained attributes of traditional 'sovereignty', taking legitimacy away

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from the regime of Bashar al-Assad. These actors include the so-called Islamic State (IS, or *al-dawlat al-Islamiyya*), the Kurds of Syria, the *Al-Qaeda* affiliate *Jabhat al-Nusra*, among several other opposition movements. IS, specifically, has declared itself as a new state extending across, and thus eliminating, the border between eastern Syria and western Iraq.

The current debates over the 'breakup' of Middle Eastern states are not only misguided but divert attention from the actual, more complex, reality: whilst the Great War's legacy of the nation-state in the Middle East lives on, it is no longer the be all and end all of sovereignty in Iraq, Syria or Lebanon. Since 1991, Kurdish Peshmerga have controlled the Kurdistan Regional Government (KRG)'s three provinces in northern Iraq, free from any interference from the central government. From roughly the same time, Hezbollah has enjoyed quasi-sovereignty over a large part of southern Lebanon, again free from any serious interference from the central government. Along with Syria after 2011, these three states have endured the proliferation of what might be called 'para-statal actors', all making claims of legitimacy in their use of violence against the monopoly that is regarded in the Weberian tradition as constitutive of statehood itself.[1]

This does not necessarily require the breakup of these states, but rather the realignment of power within each state. Contrary to much of the commentary in both international relations and international law,[2] which still uses the concept of the 'state' as the ultimate tool for analysis, the argument put forward here is that *de jure* recognition is not the ultimate criterion of either legitimacy or effective 'sovereignty' in the region. Decentralisation in Iraq and Syria has facilitated a plethora of sub-states that effectively compete with established states for legitimacy and, in so doing, take sovereignty away from their central governments. In international diplomacy—the crucible in which internationally-recognised, *de jure* statehood is forged—this is explicitly linked to the question of 'who to talk to'. Understanding what is happening in the region, let alone forecasting what comes next, must rest on an understanding of the actors that legitimately claim to represent people and territory. The power to legitimise or de-legitimise representation has begun to erode, so that it is no longer solely the prerogative of central governments, or even national peoples. Who has the right to legitimise or delegitimise involvement or indeed representation is deeply contested.

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[1] See: M Weber, *The Vocation Lectures: 'Science as a vocation'; 'Politics as a Vocation'* (tr R Livingstone, 2004) 33–4.

[2] See generally H Lauterpacht, *Recognition in International Law* (reissue 2013; 1947).

This note examines the case of the Kurds in Iraq as an illustration of the current crisis of statehood. A pragmatic Kurdish leadership has moved beyond the stringent 20th century notions of statehood to make its project the most successful of the cases that redefine sovereignty along sub-statal lines in the region.

1 State-building without a state

Immediately following WWI, the Kurds were promised a national state by the Treaty of Sevres. This promise, however, was later revoked by the Treaty of Lausanne, which split the Kurds among four states: Turkey, Iraq, Syria, and Iran. For much of the 20th century, separate nationalist movements agitated for autonomy, self-determination, and independence on each side of the newly drawn states.

During this time, the Kurds of Iraq were the victims of various Arab nationalist regimes in Baghdad. This ultimately led to genocide in the 1980s. Out of tragedy came promise, however, as the UN, sponsored initially by the US, France, and UK, decided to establish a protectorate and no-fly zone in the Kurdish areas of Iraq following 1991. For the next decade, the KRG developed as a government separate from Baghdad. In effect, the international community had taken sovereignty away from Saddam Hussein's central government and established a *de facto* state in the country's north.

This placed the Kurds in a dilemma in 2003, when a US-led coalition toppled Saddam's regime: to continue on their path of independence and disassociation with Iraq, or to 're-marry' and become an autonomous province within a federal Iraq. The former was complicated due to three constraints. Geopolitically, all prospective neighbours and international supporters objected to an independent Kurdish state formed out of Iraqi territory. Economically, the Kurdistan Region was a landlocked territory in a hostile neighbourhood without the capacity to export its resources, particularly oil, or to sustain itself. Territorially, prior to independence, negotiations with Baghdad were necessary over the Kirkuk and Mosul territories, areas required for both economic and nationalist reasons. Against this backdrop, the Kurdish leadership decided in favour of the second option, to remarry Iraq, and became champions for a democratic and federal Iraq. The issue of independence became a bargaining tool, but in reality Erbil had a stake in the post-conflict governance in Iraq.

Since 2003, rather than pushing for formal *de jure* recognition, other than at a

rhetorical level, Erbil has pursued a non-statist approach. To put it paradoxically, becoming a *de jure* state has not necessarily been part of the state-building process. This approach has focused on gaining empirical statehood before any serious motion for official recognition. This runs contrary to the 'Palestinian model', which emphasises official recognition as a necessary condition for state-building, despite complications with being granted that recognition. The KRG elite strategically decided to not antagonise larger players by declaring independence. Unlike their Palestinian counterparts, the Iraqi Kurd movement had not used 'independence' to evoke anxieties. Rather, the movement has sought autonomy within a democratic and federal Iraq. In fact, the Kurds were champions of federalism leading up to the 2003 regime change in Baghdad. The leadership has not taken the numerous opportunities presented, following the weakening of Baghdad, to break away from Iraq. Rather, it has demonstrated awareness of nationalism's limitations in addressing self-sustainability and the neighbourhood's opposition to independence. Moreover, it has also demonstrated tact in not evoking regional fears of pan-Kurdish nationalism.

2 Drafting the Iraqi Constitution with Kurdish ink

Empirical or *de facto* statehood is defined by the Montevideo Convention on the Rights and Duties of States 1933, which stipulates that a state must have (1) a permanent population, (2) a defined territory, (3) a government, and (4) the capacity to enter into relations with other states.[3] The Kurdish leadership used the post-2003 constitution-making process as the key to their state-building project through attempting to establish the conditions stipulated by the Montevideo Convention. Iraq's supreme law, for the first time, recognised the distinct nation of the Kurds, and mandated Kurdish as one of two official languages, along with Arabic. If independence was not yet possible, then the new Iraq, as defined by the new constitution, would give the Kurds a *de facto* state. The constitution, therefore, was the top priority. The leadership astutely chose to invite international negotiation experts from North America and Europe to advance their position. Throughout the entire process, independence was used as a bargaining chip, or trump card, if demands were not met. The resulting Iraqi Constitution of 2005 met every Kurdish demand, and resulted in the

[3] Convention on the Rights and Duties of States (Montevideo Convention), 26 December 1933, 165 LNTS 19, Art 1.

KRG satisfying each condition in the Montevideo Convention. First, to ensure sovereignty over territory, Article 121 was significant:

> First: the regional powers shall have the right to exercise executive, legislative, and judicial powers in accordance with this Constitution, except for those authorities stipulated in the exclusive authorities of the federal government. Second: In case of a contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region. Third: Regions and governorates shall be allocated an equitable share of the national revenues sufficient to discharge their responsibilities and duties, but having regard to their resources, needs, and the percentage of their population. Fourth: Offices for the regions and governorates shall be established in embassies and diplomatic missions, in order to follow cultural, social, and developmental affairs. Fifth: The regional government shall be responsible for all the administrative requirements of the region, particularly the establishment and organization of the internal security forces for the region such as police, security forces, and guards of the region.[4]

Iraqi Kurdistan is the only part of the country legally considered to be a 'region' as defined by the Constitution. Article 121, in short, empowered the KRG to exercise several of the incidents of sovereignty over its territory. These included the power to maintain its own national guard rather than invite the Iraqi Security Force back in the Kurdistan Region.

To tackle the territorial impediment to independence, the Kurdish leadership lobbied for Article 140, which decrees the right to a referendum over the status of the oil city of Kirkuk, among other 'disputed territories' following a process of 'de-Arabisation' and resettling displaced Kurds in the territories. In other words, once the Arabs were removed, and the Kurds were brought back, Kirkuk would participate in a referendum and choose whether to join the KRG or to remain under the jurisdiction of Baghdad. To minimise the potential influence of Baghdad, and to address the fear of re-centralisation in the future, the KRG

[4] Iraqi Cabinet, 'Destour jumhuriyya al-Iraq', <http://www.cabinet.iq/PageViewer.aspx?id=2> [accessed 23 September 2014]. Constitution of the Republic of Iraq, Art 121, <http://www.iraqi-nationality.gov.iq/attach/iraqi_constitution.pdf> [accessed 10 December 2014].

leadership also agitated for Article 121, which granted the power of regional law to 'amend the application of the national legislation within that region' in case of contradiction in matters outside the exclusive authority of the central government.[5]

The final move was to ensure that the Kurdish bloc had veto power over constitutional amendments at the time. Article 142(4), which in essence ruled that any amendments to the articles of the Constitution would be rejected if two-thirds of the population in three or more governorates voted against the amendment provided the KRG, made up of three governorates, with this veto power over the set of proposed amendments.[6] Article 126(4), moreover, ensured that 'articles of the Constitution may not be amended if such amendment takes away from the powers of the regions that are not within the exclusive power of the federal authorities'.[7]

The point of 'exclusive powers' is noteworthy. Article 110 sets out several competencies reserved for only the central government in Baghdad. The first exclusive power concerns foreign policy and diplomacy. Any offices for the regions abroad, according to Article 121(4), have to be part of the federal embassies in foreign capitals. Although it is an exclusive power, the KRG independently practices foreign affairs and diplomacy. Moreover, KRG now has *de facto* embassies, which are not within the Iraqi embassies but in separate buildings free from Iraqi interference and are concerned with explicitly political affairs. This exemplifies the KRG leadership's ability to work outside the confines of the Constitution, without repercussions from a weak central government.

Since 2003, legally or extra-legally, the KRG has sought to meet the Montevideo criteria and achieve empirical statehood. It has defined its permanent population as *Kurdistani*, rather than Kurdish, in order to include other ethnicities, such as Chaldeans, Assyrians, Yazidis, Turkmen, and Shabaks, living in Iraqi Kurdistan. The territory is indeed defined, thus far as the three provinces of Erbil, Duhok, adn Sulaimania – although it is expected to expand in wake of the ISIL crisis in Kirkuk and other 'contested' territories. It has established a government, the KRG, which is operating increasingly separate from Baghdad. Finally, Erbil

[5] Ibid.

[6] The analytical concept of 'veto players' is well recognised in political science and international relations, but less appreciated among lawyers. The concept is put to work with great effect in reference to the Parliament Acts in Iain McLean's chapter titled 'A Fresh Start: Veto Players, Win Sets, and Constitutional Moments' in I McLean, *What's Wrong With the British Constitution?* (2010) 29.

[7] Constitution of the Republic of Iraq (above n 4), Art 126(4).

has demonstrated the capacity to enter into foreign relations with other states, through a robust foreign policy, that will be explained in the following section. The leadership has set Iraqi Kurdistan on a state-building trajectory to continue moving toward and solidifying its satisfaction of the Montevideo criteria.

3 Diplomacy as the lifeline

If Erbil has already achieved empirical statehood, what is the useful function of independence? According to Scott Pegg, there are five core reasons why unrecognised movements seek recognition. First, without independence, an entity cannot turn to the UN for either verbal or material aid during a crisis. Second, the sub-state entity is unlikely to benefit from bilateral or multilateral treaties or alliances. Third, the international aid regime becomes quite limited. Fourth, the uncertain legal status works to deter investments and exports. Fifth, private firms will be reluctant to agitate the larger, central government of the host-state.[8]

Although the Constitution served to alleviate Erbil's anxieties at remaining part of Iraq, it was not enough to alleviate the Kurdish leadership's existential fears around being an unrecognised state. The document has proved to be more political than legal, and was hampered from the start by ineffective mechanisms for enforcement. Article 140, which called for a referendum in Kirkuk by December 2007, for example, has not been implemented to date. For the KRG, it became apparent that Baghdad would not necessarily abide by its own supreme law. Erbil did not trust the Iraqi central government to abide by the Constitution. It was perceived that more had to be done to ensure that Iraqi Kurdistan's statehood would continue unabated.[9]

The leadership turned to diplomacy as the avenue to bypass obstacles to independence in an environment of mistrust towards the central government and its equivocal respect for the constitution. Erbil had already mitigated the antagonism towards Kurdish independence by sticking to Iraq. Now, it searched for friends that could act as possible protectors. As the KRG's *de facto* Foreign Affairs Minister Falah Mustafa commented, 'you can't chose your neighbours, but you can chose your friends'.[10] For the KRG leadership, choosing friends was the way to address its existential crisis. The outcome of its diplomatic efforts has

[8] S Pegg, *International Society and the De Facto State* (1998) 50.
[9] Interview with Fuad Hussein (Erbil, December 2013).
[10] Interview with Falah Mustafa (Cambridge, October 2013).

now become evident: Islamic State in Iraq and the Levant (ISIL) did not attract Western intervention when it terrorised Syrians, nor when it invaded Fallujah in December 2013, nor even when it took over Mosul in June 2014. When it moved towards Erbil, the US mandated airstrikes overnight.[11] The experience of Iraqi Kurdistan would seem to qualify some of Pegg's assertions. The following sections describe the process in which the KRG leadership can be seen to have used diplomacy to overcome Pegg's 'recognition problematic', ensuring that the international community has in fact addressed certain existential threats in Iraqi Kurdistan's favour despite its status as a sub-state entity.

3.1 An unrecognised state cannot turn to the UN for verbal or material aid

On the contrary, the UN saved Iraqi Kurdistan from an oppressive Saddam Hussein in 1991, after France, the UK, and the US established a safe haven (with material assistance) and condemned Saddam Hussein. The spillover from the Syrian civil war, beginning in 2011, put the Kurdistan Region on the humanitarian map. The KRG sought out the UN, which now works closely with Erbil. In fact, the Department of Foreign Relations (DFR) has allocated Dinar Zebari as the Head for International Organisations. His role, as he perceives it, is to maintain relations with non-government orgnanisations, including the UN. Since 2003, the UN presence has increased. There are some 400 UN officials from 14 UN agencies based in the region. [12] In January 2014, moreover, the UN Secretary General flew to Erbil to meet with the senior leadership. Through the use of diplomacy, and the office of Zebari, the KRG has ensured that the UN is a strategic partner.

3.2 An unrecognised state is unlikely to benefit from bilateral or multilateral treaties

In November 2013, KRG PM Nechirvan Barzani and Turkish PM Recep Tayyip Erdogan signed a bilateral agreement concerning oil exports through pipelines, gas export, and export payment means.[13] The process that led to this monumental

[11] H Cooper, M Landler & A Rubin, 'Obama Allows Airstrikes against Iraq Rebels', *NY Times*, 8 August 2014, A1.

[12] Interview with Dindar Zebari (Erbil, January 2013).

[13] W Khoudouri, 'Erbil-Ankara Oil Agreement Threatens Iraq's Unity', *al-Monitor* (online), 15 December 2013, <http://www.al-monitor.com/pulse/business/2013/12/oil-kurdistan-turkey-

agreement is telling. Erbil's neighbours, particularly Turkey and Iran, historically feared Kurdish autonomy and political mobilisation due to the possible implications for their own Kurdish minorities. As a way of maintaining its *de facto* statehood and addressing the existential threat of non-recognition, the KRG leadership knew that building trust with Turkey was essential. This came in a strategy of non-antagonisms. The leadership made it clear that they did not seek to incite any unrest among the Turkish or Iranian Kurds. Politically, relations improved as trust increased, based primarily on economic and security interests; Erbil acting as a buffer from Iraq's constant instability and presenting itself as the 'Mosul *wilayet*', which was an Ottoman province that hosted a majority of the Kurds. The KRG leadership's idea was to play into Erdogan's neo-Ottomanist dreams.

For Erbil, diplomacy was trust-building. For Ankara and Erbil, then, the mutual interest was in stability. The Kurdish Region has proven both able to provide a stable environment for Turkish companies to expand in oil and gas and other sectors, and able to exert influence over potential hotspots with competing Kurdish parties that hold anti-Turkish views. For example, Syrian President Bashar al-Assad granted the Kurds in Syria autonomy in a move to destabilise Turkey for its meddling in the Syrian civil war. The leading Kurdish party, the Democratic Union Party (PYD), is closely linked with the PKK and this remains problematic for Turkey. Nonetheless, Ankara continues to work with Erbil in ensuring that the influence of the PYD does not grow or alter the regional equation. Here, again, the Kurdish Region is proving to be a strong Turkish partner. The overarching interest is in regional stability, rather than any threatening notion of pan-Kurdish nationalism. This stability, for both sides, is required for building mutual trust and to lead to much-needed economic development.[14] Erbil proved to Turkey that it was committed to its newfound partnership and that it could work with Ankara in the region.

Whereas five years ago, Ankara–Erbil negotiations were always conducted vis-à-vis Baghdad or another state actor, as trust between the two developed, Ankara began engaging in direct talks with the KRG. Greater economic activity facilitated this rapprochement. The KRG has become Turkey's second largest trading partner and is on a trajectory to overtake Germany for that position.[15]

threat-baghdad.html#> [accessed 23 September 2014].

[14] R Mansour, 'Iraqi Kurdistan and the Syrian–Kurd Pursuit of Autonomy' (Al-Jazeera Centre for Studies Report, 24 September 2012).

[15] D Jones, 'Turkish Trade Ties with Iraqi Kurds Anger Baghdad', *Voice of America* (online), 20 December 2012, <http://www.voanews.com/content/turkey-trade-iraq-kurd/1569286.html> [accessed 23 September 2014].

The policy of trust-building and creating economic interdependencies, therefore, concluded with the signing of the bilateral treaty between the two. While Erdogan has not become the President of Turkey, his neo-Ottoman regional policies have questioned the assumption that unrecognised states cannot benefit from bilateral or multilateral treaties.

3.3 An unrecognised state faces a limited international aid regime

The presence of aid organisations, including UN agencies and USAID in the Kurdistan Region, after 1991 but more significantly after 2003, counteracts this assumption. ISIL had been terrorising large parts of Syria for several years. In December 2013, ISIL moved in and took over parts of Fallujah in Iraq. In June 2014, moreover, ISIL took over Mosul, Iraq's second largest city. During this process, the international aid regime was quite slow to provide support to both Iraq and Syria—two recognised states. It was only when ISIL decided to attack the Kurdish Peshmerga in Sinjar and other areas of northern Iraq that the international community, namely the US, decided to act swiftly.

How could a sub-state merit a response from the international community, where two states had previously been ignored? The answer to this is based on the KRG's diplomatic efforts in the past decade. To the US and the Western community, the leadership began positioning the KRG as 'the Other Iraq', a Western-friendly ally committed to the ideas of democracy and human rights.[16] When the Obama administration was in negotiations to withdraw from Iraq in 2010, the Kurdish leadership made their anxieties well known, even offering the US permanent air bases in Kurdistan, as a token of their commitment.[17] With the KRG a strategic ally for Washington, its existence as such became fundamental to US foreign policy in the region. The international aid community, therefore, acted to provide aid to the minorities in the Kurdistan Region, as well to fend ISIL away from the KRG's territories with airstrikes—which were not used to support either Iraq or Syria.

[16] Interview with Hemin Hawrami (Erbil, January 2014).

[17] M Rubin, 'Will America Leave Kurdistan?' *American Enterprise Institute*, 26 September 2011, <http://www.aei.org/article/foreign-and-defense-policy/regional/middle-east-and-north-africa/will-america-leave-kurdistan/> [accessed 23 September 2014].

3.4 An unrecognised state's uncertain legal status deters investment and exports

Erbil–Ankara relations are primarily based on economic considerations. Since being landlocked was a key impediment to independence for the KRG, diplomacy was again necessary for survival, especially for an economy dependent on the export of oil. The aforementioned trust-building between the KRG and Ankara was also based on mutual economic interests.

The leadership, therefore, fosters strong trade ties with Turkey and Iran, among others, to export its oil and establish interdependencies. The stability has attracted thousands of Turkish nationals, hundreds of Turkish companies, and several Turkish banks and schools to the Kurdish Region. With trade valued at nine billion dollars in 2013, some 30,000 Turks now live and work in Kurdistan.[18]

To further link Erbil and Ankara, a historic pipeline was completed in December 2013, connecting the Taq Taq oil fields in the Kurdistan Region to Fishkabur, Turkey. Most importantly, this pipeline does not go through Iraqi territory. Initial export level estimates include: 150,000 bpd for the Taq Taq to Khurmala pipeline, 300,000 for the Khumala to Duhok pipeline, and 300,000 for the Duhok to Fishkabur (Turkey) pipeline. The expectation is for these levels to increase, and with such increases, the KRG elite hope to move away from economic dependence on Baghdad.

3.5 An unrecognised state has difficulties attracting private firms, which fear agitating the central government

Again, events on the ground in the Kurdistan Region question this assumption. Foreign investment has thrived in Erbil, making the region one of the fastest growing economically, even among states. To date, there is an estimated 46 billion US dollars worth of projects underway in the energy, construction, tourism, and basic infrastructure sectors.

Fearful of Kurdish economic independence, Baghdad is agitated by Erbil's move toward economic development, particularly in the oil and gas sector. To combat this, former Iraqi Oil Minister Shahrastani famously threatened to blacklist any company that deals with the KRG without Baghdad's approval.[19]

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[18] S Kerr, 'Turkey: Economics and Energy Interests Ease Old Cross-Border Tensions', *Financial Times,* 9 December 2012.

[19] Al Arabiya, 'Iraq Nullifies Kurdish Oil Contracts', *al Arabiya*, 24 November 2007, <http://www.alarabiya.net/articles/2007/11/24/42056.html> [accessed 04 December 2014].

This deterrent did not last very long. Most famously, in 2011, Exxon Mobil, one of the largest oil and gas corporations, sacrificed its stake in Basra, southern Iraq, and moved to the KRG's jurisdiction, signing a Production Sharing Contract (PSC) with Erbil.[20] Following this, several other private firms followed suit, including Total, Gazprom, and Chevron.[21]

Again, the above is the outcome of a concerted diplomatic effort to attract businesses into the Kurdistan Region. The KRG's Representative to the UK, a *de facto* Ambassador, Bayan Sami Abdul Rahman, claims that one of the top priorities of her representation is to present business opportunities to the UK.[22] Declaring that 'Kurdistan [Iraq] is open for business,' the KRG passed an investment law in 2006 that offers foreign investors 100 percent ownership of their operations in Iraqi Kurdistan. The KRG actively seeks to invite trade delegations from Western capitals, and uses increased business ties and relations with influential world actors as another check against the existential threats associated with not being recognised and thus susceptible to being forgotten. Washington, in saving Erbil from ISIL, considered the great number of Americans working in the region, in oil and gas companies. This strategy seems to have put Erbil on the map.

4 Conclusion: constantly negotiating

Fakhri Karim, a senior Kurdish official, told the author that 'the Kurds have a state under the table'.[23] The KRG has its own armed force, the Peshmerga, which exercises effective control over its territory—even now against the onslaught of the ISIL. Iraq's security forces are prohibited from entering without Erbil's approval. The KRG administers its own foreign policy and sends its own separate representations abroad, independent from the Iraqi embassy in foreign capitals. The KRG also issues its own oil contracts and has recently built a pipeline and begun exporting its own oil, independent of Baghdad. These actions, which have traditionally been reserved for the state, pose the question: is official recognition necessary for autonomy, or has the KRG's leadership bypassed the 'territorial

[20] S Pfeifer, 'Big Oil: Exxon Move Shocks the Sector', *Financial Times*, 7 December 2014, <http://www.ft.com/cms/s/0/1a0e76ce-1a6d-11e1-ae14-00144feabdc0.html#axzz3EEnX5oSv> [accessed 24 September 2014].

[21] B Swint, 'Kurdistan's Oil Ambitions', *Bloomberg Business Week*, 14 November 2013, <http://www.businessweek.com/articles/2013-11-14/2014-outlook-kurdistans-oil-ambitions> [accessed 26 September 2014].

[22] Interview with Bayan Sami Abdul Rahman (London, April 2013).

[23] Interview with Fakhri Karim (Erbil, January 2014).

trap' and achieved national self-determination without the need for a separate nation-state, at least as long as the likelihood of such an entity is doubtful?

The case of Iraqi Kurdistan shows those interested in transitional constitutionalism a successful instance of an alternative approach, one that places *de facto* state-building above *de jure* international recognition. Rather than moving for formal recognition as a state, the KRG's leadership has developed and worked with alternative, sub-national modes of sovereignty and governance. Although a strong sense of nationalism has motivated strong demand for independence by the Kurdish population, a pragmatically minded leadership has adroitly shifted away from the Palestinian 'recognition-before-state-building' model and toward a new model: state-building notwithstanding non-recognition. Erbil proactively ensured that the 2005 Iraqi Constitution was friendly to their decentralised ambitions. When it looked like the Constitution was not enough, the KRG used diplomacy to overcome the existential threats associated with lack of recognition. Whilst the KRG's leadership wants independence, it is aware of the structural realities of its environment, and plays within the bounds, pushing the envelope at times. Independence is used as a bargaining tool, and ultimately a veto play, to negotiate a list of demands that make the KRG a *de facto* independent entity. The case also demonstrates, however, that whatever route is taken, diplomacy and international recognition is ultimately still essential to survival in an international community populated by states; even a strong *de facto* state looks for international recognition for support in crises, and in some cases is able to obtain it. And it shows that full-fledged, *de jure* statehood will probably remain the end-goal in most cases.

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THE PROVISIONAL CONSTITUTION OF THE FEDERAL REPUBLIC OF SOMALIA: PROCESS, ARCHITECTURE, AND PERSPECTIVES

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Abstract
Much ink has been spilled over the Republic of Somalia. Somaliland became synonymous for pariah state and was in the spotlight and in the immediate interest of international organisations and intergovernmental bodies due to the continuous deadlock and unsolvable political turmoil. Quite recently, the country attracted the interest of the international community as a new Constitution was adopted, and thus the Republic of Somalia joined the club of numerous African countries, such as Tunisia, Egypt, South Sudan, and Libya with a new constitutional order. The Constitution was adopted with the aim of terminating a long period of tensions, warfare, political turmoil, and often chaos, by establishing efficient political institutions and introducing governance that is more responsive and accountable to its people. In this Note, I review and evaluate the Somali Constitution, while the aim is to provide an overview of the role of the constitutional drafting process and the new constitution in the political era of the post conflict Somalia. The analysis begins by considering the recent political environment of Somaliland, and the whole process that led to the new Constitution. This will be followed by a detailed discussion about the major components of the Constitution, elaborating on the architecture of the polity. Finally, the last part will be devoted to an attempt to highlight the benefits and the deficits of the new constitution.

Keywords
Transitional Constitutionalism, Somalia, Failed States

1 Introduction

Much ink has been spilled over the Republic of Somalia. Somaliland became synonymous for pariah state and was in the spotlight of international organisations and intergovernmental bodies due to the continuous deadlock and unsolvable political turmoil. Quite recently, the country attracted the interest of the international community because a new constitution was adopted. The Republic of

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Somalia thus joined the club of numerous African countries with a new constitutional order, such as Tunisia, Egypt, South Sudan and Libya.[1] This new constitution was adopted with the aim of terminating a long period of tension, warfare, political turmoil, and often chaos by establishing efficient political institutions and introducing governance that is more responsive and accountable to its people.

In this note, I review and evaluate the Provisional Constitution of the Republic of Somalia (*Provisional Constitution, Constitution*). The aim is to provide an overview of the role of the constitutional drafting process and of the new Constitution in post-conflict Somalia. The analysis begins by considering the recent political environment of Somaliland, the role of various actors and the process that led to the new Constitution. This will be followed by a discussion of the major components of the Constitution. Finally, the last part will highlight the benefits and deficits of the Provisional Constitution.

2 Political Turmoil in Somalia: Developments leading to the New Constitution

It is essential to be aware of the process by which the Provisional Constitution of the Federal Republic of Somalia was drafted and ratified. The examination of past constitutional processes and the stance of various actors will illuminate how the constitutional framers decided to solve the foreseen constitutional dilemmas, to combine various interests and to resolve long-standing problems.

The Republic of Somalia, which was a former British and Italian colony, gained its independence in 1960. A new constitution was adopted by national referendum. In 1979, another national referendum lead to the replacement of the constitution. However, the constitutional order of Somalia was overthrown in the 1990s, and since then, the country and its population have suffered from civil war, lack of efficient governmental structures, hunger, drought, conflicts and isolation.[2] A series of reconciliation initiatives and peace conferences to restore normality and the constitutional order were held under the auspices of various parties such us the UN, the so-called 'frontline states' of Kenya, Ethiopia,

[1] All these new constitutions in Africa permit us to describe this phenomenon as a new wave of constitution making. For a more detailed analysis on the wave of constitution making see J Elster, 'Forces and Mechanisms in the Constitution-making Process' (1995) 45 *Duke LJ* 364, 369.

[2] J A Mubarak, *From Bad Policy to Chaos in Somalia* (1996) 26; J Bahadur, *The Pirates of Somalia; Inside their Hidden World* (2011) 55; J Fergusson, *The World's Most Dangerous Place* (2013) 20.

and Djibouti, and the Islamic states of Egypt, Libya and Yemen, but they were unsuccessful.[3]

Nonetheless, in 2000, the Somali National Peace Conference, the so called Arta Process, reached an agreement and a temporary constitution with a three years life span, the Transitional National Chapter, was adopted.[4] The process was held under the auspices of the Djibouti government and was endorsed by the UN and Egypt. This new constitution was successful in the sense that power sharing between the four major clans of Somalia was proportionate. Although the Transitional National Government that was formed was the first significant attempt to achieve normality and to represent the people of Somalia internationally, the expectations were not met.[5] The Transitional National Government failed to produce national unity and opposition was formed, backed by Ethiopia and decentralised Somali authorities under the umbrella of the Somali Reconciliation and Rehabilitation Council (*SRRC*), led by Puntland President Abdulahi Yusuf.[6]

Even before the Transitional National Chapter expired, the new deadlock led to another initiative, the Mbagathi Talks in 2002. In essence, the aim of this initiative was to bring the Transitional National Government and the rival coalition to a political settlement. After a series of discussions and negotiations led by the Inter-Governmental Authority for Development,[7] a new constitutional document was drafted, the Transitional Federal Charter of 2004.[8] Accordingly, the new government was based on the federal paradigm[9] and was transitional in nature.[10] The transitional character of the constitution was not signalled with a sunset clause, but the text of the Transitional Federal Charter explicitly prescribed the process for the drafting of a new constitution.[11]

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[3] A Le Sage, 'Somalia: Sovereign Disguise for a Mogadishu Mafia' (2002) 29 *Rev of African Political Economy* 132.

[4] See K Menkhaus, 'Somalia: A Situation Analysis and Trend Assessment', Writenet Paper Commissioned by United Nations High Commissioner for Refugees, Protection Information Section, August 2003, <http://www.refworld.org/docid/3f7c235f4.html> [accessed 16 July 2014] 10. For more details on the Arta Process, see A P Kasaija, 'The UN-led Djibouti Peace Process for Somalia 2008–2009: Results and Problems' (2010) 28 *J of Contemporary African Studies* 261, 264.

[5] For a detailed analysis of the reasons of the Transitional National Government's failure, see Le Sage, above n 3, 133ff.

[6] K Menkhaus, 'The Crisis in Somalia: Tragedy in Five Acts' (2007) 106 *African Affairs* 357, 359

[7] K Menkhaus, 'Somalia: What went Wrong?' (2009) 154 *The RUSI Journal* 6, 7.

[8] Menkhaus, above n 4, 15.

[9] Transitional Federal Charter for the Somali Republic, Art 11(1).

[10] Ibid, Art 11(3a).

[11] Ibid, Art 11(3b).

Along the path to democracy and stability, political tension and armed confrontation were not absent. The Transitional Federal Government and its President Abdulahi Yusuf failed to gain popular support as they were seen as orchestrated by Ethiopia.[12] In addition, the members of the previous regime, now forming the Mogadishu Opposition, were marginalised.[13] At the same time, another front emerged, the Islamic Court Union with strong political and militia force.[14] Eventually, the Transitional Federal Government was left without legitimacy and control over the country.

In June 2008 a UN led peace conference in Djibouti took place to bridge the gap between Somalia's Transitional Federal Government and the Alliance for the Re-liberation of Somalia which was a coalition between the Mogadishu opposition and the moderates of the Islamic Court Union.[15] The so called Djibouti Accord was an 11 point agreement and among its consequences was a power-sharing deal between Somalia's Transitional Federal Government and the Alliance for the Re-liberation of Somalia that doubled the size of the parliament in order to bring opposition figures into power.[16]

The landmark event for the termination of the transitional period and the acceleration of the constitutional drafting process was the Kampala Accord of 2011.[17] However, this development was not welcomed by civil society in Somalia. As was testified before the House of Commons Foreign Affairs Committee, 'there is a perception amongst many Somalis that decisions that affect their lives are often internationally driven, with little local consultation. This was evidenced in the reaction to the recent Kampala Accord on political transition in Somalia'.

Nonetheless, the Kampala Accord paved the way for the Garowe Process,

[12] Menkhaus, above n 7, 7.

[13] Menkhaus, above n 6, 362.

[14] Ibid, 370.

[15] For more details on the armed conflict that broke out in February 2006 between the Transitional Federal Government and a board umbrella Group of Islamists see Menkhaus, above n 7, 7; Kasaija, above n 4, 269.

[16] Decisions of the High Level Committee Djibouti Agreement, 25 November 2008, <http://www.ucdp.uu.se/gpdatabase/peace/SOM%2020081126.pdf> [accessed 16 July 2014] para 5; see Kasaija, above n 4, 272.

[17] Broadly speaking, it declared the termination of the transitional period by extending it for one year without further extension. See 'Agreement Between the President of the Transitional Federal Government of Somalia and the Speaker of the Transitional Federal Parliament of Somalia, Made in Kampala on 9th June 2011' (The Kampala Accord) <http://unpos.un-missions.org/Portals/UNPOS/Repository%20UNPOS/110609%20-%20Kampala%20Accord%20%28signed%29.pdf> [accessed 16 July 2014]; see also K Menkhaus, 'Somalia at the Tipping Point?' (2012) *Current History* 169, 170.

during which the constitution-making process was defined in detail.[18] It is remarkable that according to this process an effort was undertaken to widen the political process and making it even more representative. However, the Garowe Process was also criticised as an internationally driven initiative.[19]

Eventually, the National Constituent Assembly, consisting of 825 delegates, debated the draft constitution and this drafting process concluded in 2012 with the adoption of the Provisional Constitution of Somalia.[20] The Constitution was not approved by a referendum, as it was initially supposed to be,[21] but on 1 August 2012, the National Constitutional Assembly approved it by an overwhelming majority.[22]

We have seen that the developments leading to the current constitutional regime was full of complexities, international interventions and risks. The landmark events during this constitutional drafting process were internationally driven and lacked social consensus. As a result, every new constitutional government was susceptible to strong opposition.[23] However, since the breakdown of Somalia in the 1990's, every peace effort succeeded in fostering the institutional prerequisites of a legitimate government winding down the centrifugal forces. In particular, the transition from the Transitional National Government to the Transitional Federal Government introduced the federal character of the constitution so as to ameliorate the power sharing between different actors, while, as will be seen below, references of the Provisional Constitution to the Shari'ah, which did not exist in the Transitional Federal Chapter, reflect an influence of the Alliance for the Re-liberation of Somalia, and represented an innovation heralding the religious sentiment of Somali civil society.

Remarkably, the most modern mechanisms, such as temporary and interim constitutions and constitutional experimentation, were used to tackle the prob-

[18] Menkhaus, above n 17, 170; Foreign Affairs Committee, *Piracy off the Coast of Somalia, Tenth Report of Session 2010-2* (HC 1318) 115.

[19] L Hammond, 'Somalia Rising: Things Are Starting to Change for the World's Longest Failed State' (2013) 7 *J of Eastern African Studies* 183, 184.

[20] A O Shuriye, 'The Inveterate Failures of the International Community on Somali Impasse' (2012) 12 *Middle-East Journal of Scientific Research* 927, 934.

[21] Transitional Federal Charter for the Somali Republic, Article 11(3b).

[22] Of the 645 members of the constituent assembly present, 621 backed the document and 13 voted against, while 11 abstained. See 'Somali Leaders Back New Constitution', *BBC News Africa*, 1 August 2012 <http://www.bbc.com/news/world-africa-19075685> [accessed 16 July 2014].

[23] For more discussion on how the external attempts at mediation pre-empt the emergence of a stable social consensus, see E Afsah, 'Constitution-Making in Islamic Countries – A Theoretical Framework' in R Grote & T Röde (ed), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (2011) 475, 477.

lems typical for constitution-making. Elster rightly remarks that the constitutional drafting process is surrounded by a paradox. On the one hand there is an urgent need for a new constitutional document, on the other hand, there is not enough time for sufficient and productive consultation.[24] However, interim and temporary constitutions permit constitution drafters to defer to the future such decisions and to reconsider in order to develop better constitutions.[25]

The constitutional history of Somalia shows that one of the most pressing problems was the failure of each newly formed government to follow through with the reconciliation efforts to produce a government of national unity. The following part of this note examines selected aspects of the Provisional Constitution in more detail. The aim is not only to present its most important components, but also to test whether the new Constitution enshrines the principles and the culture of the Somali civil society.

3 The Fundamentals of the Provisional Constitution

The Provisional Constitution of the Federal Republic of Somalia is the supreme law of Federal Republic of Somalia.[26] The Constitution is comprised of 15 chapters and 143 articles. Chapters 5 and 12 flesh out the principle of federalism, Chapters 6 to 9 embody the separation of powers and Chapter 10 introduces the Independent Commissions. Chapter 2 encompasses the Bill of Rights, while the procedure for amending the Constitution is prescribed in Chapter 15 under the Title 1.

The Provisional Constitution followed the previous pattern of the Transitional Federal Chapter and declared Somalia as a federal state.[27] Federalism seems to correspond to the diversity of the Somali society as, before the decolonisation, Somalia was divided into several regions and a decentralised system of governance aims to be closer to the people.[28] The term 'Provisional' Constitution is fraught with ambiguity. On the one hand, it may have been used in contrast to

[24] Elster, above n 1, 394.

[25] See V C Jackson, 'What's in a Name? Reflections on Timing, Naming, and Constitution-making' (2008) 49 *William and Mary LR* 1249, 1282.

[26] Provisional Constitution, Art 4.

[27] Provisional Constitution, Arts 3(3) and 48

[28] However, the opinion has been expressed that Somalia is a homogenous country and therefore such provision was unnecessary, see Shuriye, above n 20, 934.

state constitutions and to imply a hierarchy between federal and states' constitutions.[29] On the other hand, it may have been used in contrast to the transitional constitutions.

The Constitution creates a two-level government and distinguishes two types of competences. Article 54 contains an exhaustive list of competences to be exclusively exercised by the Federal Government: Foreign Affairs, National Defence, Citizenship and Immigration, and Monetary Policy.[30] In addition, Article 50, which is open textured, recognises shared competences between the Federal Government and member states based on the principle of subsidiarity.[31] There are four main organs: the President, the bicameral Federal Parliament, the Federal Government, and the Constitutional Court. The system of governance is determined by the division of powers between these organs, exercised within the framework of the federal, republican and parliamentary political system.

The President is the Head of the State.[32] Presidential powers are enumerated in Article 90. The President exercises a variety of competences. These include legislative oversight, as presidential assent on bills makes them to laws;[33] administration, as the President is the head of the armed forces;[34] regulatory competences, as the President appoints the Prime Minister[35] or declares a state of emergency;[36] and judicial authority, as the President pardons offenders and commutes sentences on the recommendation of the Judicial Service Commission.[37]

The President is elected by the two Houses of the Federal Parliament.[38] The required supermajority of two thirds during the first and the second voting rounds aims to enhance the legitimacy of the Presidency. The Constitution makes detailed provision for the election procedure of the President; however, it does not cover every eventuality. Importantly, there is no provision regarding the event of a tie, for example between three candidates in the final vote of the second round. In addition, in the event of the replacement of the President by the Speaker

[29] The hierarchy between the Federal Constitution and the State Constitutions is explicitly mentioned in Article 51(4) of the Provisional Constitution.
[30] Ibid, Art 54.
[31] Ibid, Arts 50(b) and 50(f).
[32] Ibid, Art 87(1a).
[33] Ibid, Art 90(f) and Art 85.
[34] Ibid Art 90(b).
[35] Ibid Art 90(d).
[36] Ibid Art 90(a).
[37] Ibid Art 90(p).
[38] Ibid, Art 89.

of the House of the People,[39] the question arises whether the acting President, who is a member of the Federal Parliament, would have the right to vote in the presidential election.

The term of office of the President is four years[40] and there is no provision relating to term limits. In addition, ambiguity exists in Article 90, which gives the President wide discretion to appoint the Prime Minister. The Federal Government *latu sensu* is comprised of the Council of Ministers[41] while the head of the Federal Government is the Prime Minister.[42] According to Article 99, the Council of Ministers has wide powers and general competence. Nonetheless, the competences of the Prime Minister reflect his special status in the context of the Federal Government, namely his power to appoint the members of the Council of the Ministers[43] or his power to dissolve it with his resignation.[44]

The Constitution concentrates law-making powers in the Houses of the Federal Parliament, giving the Prime Minister and the Council of Ministers effective control over the legislative agenda. For instance, the Council of Ministers may initiate draft legislation[45] and it has exclusive competence on the annual budget. Remarkably, this is mentioned three times in the Constitution.[46] Although this does not create any interpretative problems, it does not advance the constitutional drafting economy either.

As a counterweight, the Prime Minister and the Council of Ministers require a vote of confidence by the House of People with a simple majority of the total members.[47] Thus, the executive remains dependent on and accountable to the legislature. The Federal Parliament is bicameral, comprising the Upper House and the House of the People.[48] Their competences are listed in Articles 71 and 69, respectively. The Upper House represents the interests of the member states and safeguards the federal system,[49] while the House of the People represents the citizens.[50]

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[39] Ibid, Art 95.
[40] Ibid, Art 91.
[41] Ibid, Art 97(1).
[42] Ibid, Art 100a.
[43] Ibid, Art 97(3).
[44] Ibid, Art 97(4).
[45] Ibid, Art 80(1).
[46] Ibid, Arts 69(1)(b), 79(1)(b) and 79(1)(c), and 80(1)(b).
[47] Ibid, Art 69(1)(d).
[48] Ibid, Art 55.
[49] Ibid, Art 61(3).
[50] Ibid, Art 61(2).

The legislative process is described in Articles 82 to 85. Institutional dialogue in case of disagreement between the Upper House and the House of the People is based on a supermajoritarian voting system, which enhances consensus in the law enactment process.[51] The absence of a legislative veto by the Upper House prevents deadlocks in the law enactment process,[52] which is concluded in the House of the People.[53]

Despite its significant competence, the Upper House does not have equal constitutional status with the House of the People.[54] The relationship between the House of the People and the Government is defined by parliamentary scrutiny of the Government and the accountability of the Government to Parliament. However, the President has to dissolve the House of the People if it fails to approve the Council of Ministers of the program of the Government.[55]

The Constitution adopts the concentrated model of constitutional review,[56] granting the Constitutional Court a monopoly over constitutional review. The formation of the Constitutional Court is regulated in Article 109B. The Judicial Service Commission nominates the judges and the House of the People approves them. There is no supermajority rule limiting the power of the governing party in the lower house when making appointments to the Constitutional Court. This could raise questions regarding the strict separation of powers and judicial independence. The Constitutional Court has the supreme power to review acts of the Federal Parliament in case they fail to conform to the Constitution.[57] Its competences are described in Article 109C.

Finally, Chapter 10 incorporates in the constitutional system the Independent Committees and the Office of Ombudsman. The Constitution prescribes a series of Committees of different kinds and subject matters.[58] The whole constitutional system (President, Council of Ministers and Houses of Parliament) is involved in the appointment of the members of the Committees.[59]

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[51] The supermajority requirement enhances bargaining and compromise. For more discussion on negotiation democracy, see K Armingeon, 'The Effects of Negotiation Democracy: A Comparative Analysis' (2002) 41 *European J of Political Research* 81.

[52] The Provisional Constitution, Art 81(2).

[53] Ibid, Art 81(4).

[54] Ibid, Arts 47, 69(1)(d), 109B and 113.

[55] Ibid, Art 67 in combination with Art 69(o).

[56] For a detailed discussion on the models of constitutional review, see S Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *AJCL* 707.

[57] Provisional Constitution, Arts 4(2) and 86(1).

[58] Ibid, Art 111.

[59] Ibid, Art 112.

4 Problems and Prospects: A Preliminary Assessment

Constitution-making was always a great concern of scholars. Undoubtedly, lawyers have a leading role in every constitution drafting process. Nonetheless, such documents are not just legal conventions. The political, cultural and societal realities of every country should be enshrined in such documents. Otherwise the constitution-making process will not be fruitful.[60]

From a constitutional engineering point of view, and to the credit of its drafters, the most modern ideas of constitutionalism are reflected in the text of the Constitution. Constrained parliamentarianism, supermajority requirements during the legislative process (signalling the great need for consensus in Somali political life), as well as the recognition of independent bodies with supervisory authority to enhance accountability of the political institutions are some of the innovative features of the Constitution. Without overestimating the impact of sound institutions and creative constitutional engineering in the face of a complex and often divisive political, diplomatic, economic, ethnic, cultural and social reality, the Constitution, despite its shortcomings, could be the organisational basis of a peaceful and prosperous Somalia.

At the same time, criticism has been raised on a variety of grounds. First, it seems that the Constitution was drafted fast and without proper consideration as it was completed within several months.[61] However, the most interesting concern is based on the impression that the new Constitution lacks a sufficient link to the Somali civil society as the whole process was UN led.[62]

In fact, the UN and the international community pulled the levers of the constitutional drafting process and therefore it was felt that the role of Somali civil society was more passive and less engaged.[63] That said, it was originally planned to have the new Constitution ratified with a referendum but the realities in Somalia did not permit the realisation of this plan.[64] Instead, it was ratified by a representative body with an overwhelming majority. Undoubtedly,

[60] Samuels adopts two criteria for the positive assessment of any constitution. The first is whether a constitution brings democracy and the second is whether it contributes to sustainable peace. See K Samuels, 'Post-Conflict Peace-Building and Constitution-Making' (2006) 6 *CJIL* 663, 665.

[61] Menkhaus, above n 17, 170; Hammond, above n 19, 184.

[62] M Harper, 'Somalia: Whose Country is it, Anyway?' (2013) 37 *Fletcher Forum of World Affairs* 161, 166.

[63] For more details on the importance of public participation during constitutional drafting processes, see Afsah, above n 23, 506.

[64] BBC reported that the referendum did not take place for security reasons as parts of the territory

the referendum process would have engaged Somali civil society to a greater degree and it remains to be seen whether the prescribed process to review the Constitution and its ratification by a referendum[65] will fill this gap and foster a nexus with Somali civil society.

Pertaining to specific provisions, the analysis below will highlight some technical ambiguities caused by specific constitutional regulations. First, the ambiguous and imperfect formulation of key principles of Somali federalism and the lack of constitutional conventions may contain the seed of future tensions, conflicts and instability, which have plagued the country for years, if not decades. In particular, the boundaries between federal and states' competences are not clear. This could lead to conflicts regarding the ambit of federal power. History shows that in any new federal state, the delineation of federal and states' powers is a politically sensitive issue, which could threaten the stability and even the unity of the state. This is further exacerbated by the political, societal and historical characteristics of Somalia (for example, the *de facto* cession of Somaliland). In that context, clarifying and delineating federal and state powers should be a priority.

In addition, two essential characteristics for a stable government—the nature of a country's party system, and the majority-building capacity of a country's electoral system—are both subject to special legislation adopted by the House of the People.[66] Nonetheless, this provision is under further revision.[67] However, the deferral to future lawmakers decision-making on certain constitutional issues is not always a negative development. On the contrary, it is a useful mechanism to limit decision cost and error cost during the constitution-making process.[68]

Concerning the competences of the Head of the State, it is unclear whether the President is under a legal obligation to appoint as Prime Minister the leader of the political party enjoying the overall majority of seats in Parliament. This could be less problematic in countries with strong and long parliamentary traditions, where constitutional customs and conventions have been developed. As Somali democracy is in *statu nascendi*, such an ambiguity could trigger political crises and instability.

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of Somalia are under the control of al-Shabab, a militia linked to al-Qaeda; see 'Somali Leaders Back New Constitution', *BBC News*, 1 August 2012, < http://www.bbc.com/news/world-africa-19075685> [accessed 6 July 2014].

[65] Provisional Constitution, Art 137.

[66] Ibid, Art 47.

[67] Ibid, Schedule 1 (C6).

[68] For further discussion on the mechanisms to postpone and delegate to future lawmakers constitutional issues, see R Dixon & T Ginsburg, 'Deciding Not to Decide: Deferral in Constitutional Design' (2011) 9 *IJ Con L* 636.

Likewise, while the text of the Constitution endorses the system of a concentrated model of constitutional review, there is no explicit provision concerning the power of the Constitutional Court to review legislative procedure (*interna corporis*) and the hierarchical role of the Shari'ah might create problems of interpretation.[69] Finally, and as a matter of both structure and substance, there is no preamble to set out the values of the civil society and to epitomise the nexus between the text of the Constitution and the people of Somalia. However, by comparing the new Constitution and the Transitional Federal Chapter, the references of the former to the Shari'ah is a clear effort to encapsulate the religious sentiment of Somali civil society.

5 Conclusion

Interpreting constitutional drafting results, especially when the outcomes are really fresh, is always a risky business. In the case of Somalia, the new Constitution is in its early application since the ratification. The rush of the international community to proceed as soon as possible with a new Constitution points to a deep concern and sound interest in bringing peace and prosperity to Somalia. The political wheel must keep on turning and the new Constitution signals a new start. The recent Constitution does not merely encapsulate the historical circumstances of the present *status quo* in Somalia, but like a palimpsest, embodies the constitutional *acquis* and the lessons learned from past constitutional experiences. Now, the new Government, enriched with a new constitutional cloak must think carefully about how it can better realise its ideals for democracy, reconciliation and peace in this new regime. Nonetheless, it has to be acknowledged that constitutional documents are not panacea solving all problems. It remains, at the time of writing, to be seen whether the new Constitution will manage to bring lasting peace and stability in the region paving the way for a prosperous future.

[69] Provisional Constitution, Art 2(3).

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ICELAND: THE BIRTH OF THE WORLD'S FIRST CROWD-SOURCED CONSTITUTION?

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Abstract
Following the country's devastating economic crash in 2008 and the liberal 'Pots and Pans Revolution' it precipitated, Iceland embarked on a novel, massively participatory constitutional drafting process in a bid to establish a new Constitution for the Nordic island nation. This involved a world-first use of 'crowd-sourcing' and social media to gather 'citizen generated content' in the final Draft Constitution. The Draft's current status is uncertain, however, as it has not yet been ratified by the Althingi, the Icelandic Parliament. This note, written from the perspective of a Rejkjavik public lawyer and one of the 25 Members of the Constitutional Council, tells the saga of the world's first crowd-sourced constitution, the social and economic environment in which it was conceived, and speculates as to the circumstances which might lead to its revival.

Keywords
Iceland, Constitutional Assembly, Ratification, Economic Crisis

1 Introduction

This note tells the story of the drafting of a new constitution for Iceland in the aftermath of the financial crisis of 2008. It is told from the perspective of the author, one of 25 elected members of Iceland's Constitutional Council, which operated in 2011. It presents a first-person account of the constitution-drafting process and its unique circumstances, which has attracted some comparative interest. Attempting a constitutional transition in the aftermath of an economic disaster of unprecedented scale, the Constitutional Council drafted a new constitution in an effort to design rules for the tiny Nordic nation which would, among other things, minimize the chances of such an economic disaster recurring. The approach taken by the Constitutional Council to creating the draft was unprecedented and innovative, especially as an attempt, perhaps for the first time in the history of a nation-state, for a foundational text to be written with the more or less direct participation of its people.[1] Historically, processes of

[1] H Landemore, 'Inclusive Constitution Making: The Icelandic Experiment' (2014) *J of Political Philosophy* (early online view), 2.

constitution-writing have generally tended to be elitist and secretive. The draft Icelandic constitution was generated in a massively transparent process, making active use of such tools as social media. The public was invited to join actively in the drafting process itself, simulating 'crowd-sourcing' techniques, familiar mostly in computer programming to that date.

Despite the draft being approved by 2/3 of votes in a (non-binding) national referendum, it has not been implemented; the bill requires parliamentary approval to take effect, but has been 'shelved' by the Icelandic Parliament, the *Althingi*. Many remain doubtful whether it ever will pass into law. Nevertheless, this democratic process of constitutional design, utilising tools in communications and social media, could signal a new approach to the making of constitutions, and perhaps other legislation. The working methods of the Constitutional Council that captured the world's attention are of continuing interest to comparative constitutional studies despite the draft constitution's current uncertain status.

2 Background

Iceland is a peculiar place in many respects. Located in the middle of the Atlantic Ocean, midway between Europe and America, the tiny population of 330,000 is highly homogeneous, and prides itself on a high level of literacy and general education. Internet connectivity is among the highest in the world.

Iceland's democratic republic was founded in 1944 when Icelanders unilaterally declared independence from then Nazi-occupied Denmark. In the effort to achieve a smooth transition, emphasis was put at the time on forging a united stance among the citizens of Iceland on the issue of independence, and potentially contentious matters such as drafting a constitution were left to wait for a more suitable time.[2] The Danish Constitution of 1849 was taken as the model for Iceland's first constitution as an independent state. Despite it being firmly stated that a domestic constitution should be written for Iceland following independence, the Icelandic republic still rests on a modified translation of the 1849 Constitution of the Danish constitutional monarchy.[3]

Two important changes were made to this Constitution at the outset. First, the President of the new republic was to be elected by the public and not by

[2] Compare this to the incomplete Israeli Basic Law, and the failure by the Federal Republic of Germany to update its interim *Grundgesetz* following reunification.

[3] See Constitution (Republic of Iceland), Act No. 33/1944.

Parliament,[4] which gave Iceland the first popularly elected President in Europe. Secondly, the President was given the power to veto legislation from Parliament by refusing to sign it. Rather than preventing a bill passing into law, exercises of the presidential veto trigger a national referendum on the issue to ratify the law against the presidential veto.[5] (This provision was triggered in the political crisis that followed the 'Icesave' controversy, discussed below). Besides these two important changes, the Constitution has been updated to a minor extent a few times since its establishment, mostly in order to change voting constituencies and matters relating to general elections. The most extensive change was made in 1995, when a new human rights chapter was written into the Constitution. The extensive changes promised at the birth of the republic, however, never came to fruition.

3 'The Crash'

In 2008, Iceland experienced an economic downfall so extensive that it has become known in the country simply as 'the Crash'. All major national banks collapsed, and the country entered into a deep financial and economic crisis. This received global attention, as it reflected the economic difficulties experienced across the world at the time. Overnight Iceland became the canary in the coal-mine, and its survival would indicate if other small European economies would leave the mineshaft alive. Emergency measures were passed to protect domestic depositors from the systemic failure. Despite these measures, the national economy suffered massively. The country became involved in diplomatic tensions with foreign governments—particularly the United Kingdom and the Netherlands—over the loss of foreign deposits with Icelandic banks. A series of bills precipitated a political crisis, as the presidential veto was exercised and referenda were called on the question to what extent (and for how long) the nation should assume the newly nationalized banks' debt.[6]

The downfall in Iceland was not only economic—it was also political and moral. The rather wealthy society had believed that relatively little corruption existed within the Icelandic administration and political landscape. The immense

[4] Ibid, Art 3.

[5] See ibid, Art 26. See also T Gylfason, 'Constitution on Ice', Working Paper No 5056, Centre for Economic Studies and Ifo Institute, November 2014, <https://notendur.hi.is//gylfason/cesifol_wp5056.pdf> [accessed 9 December 2014].

[6] For a history and analysis of the Icelandic crisis, see generally E Bergmann, *Iceland and the International Financial Crisis: Boom, Bust, and Recovery* (2014).

growth of the country's banking system—which had grown in the years of the economic boom to around ten times the nation's annual GDP—had been perceived as something to be proud of, traced to the brilliance of young Icelandic bankers. This made the downturn all the more traumatic for the Icelandic society. And the scale of the disaster was unprecedented—the sums of wealth destroyed in the crash were equivalent at the time to seven times the country's annual GDP.[7] It was the first, spectacular collapse of the global financial crisis—the first of many, with Ireland, Greece, Cyprus, and others soon to follow, and the Eurozone debt crisis still threatening to undermine the stability of the European Union as a result.

The anger experienced by a broad cross-section of the Icelandic public was largely based on a sense of betrayal by political and economic elites. It was widely perceived that elected politicians had participated in creating a 'smokescreen', which made the growth of unsafe banking practices possible. The people took to the streets in mass protests. This sort of mass protest remains unique in the history of this relatively young democracy, both in the number of participants and in the manner in which the protests took place, followed only by the 1949 protests against Iceland entering NATO. People young and old, from all walks of life, armed themselves with pots and pans used to create a rhythmic beat to the loud, repeated chant demanding the government to resign. The series of protests have been named the 'Pots & Pans Revolution' as a result. January 2009 saw the *Althingi* surrounded by thousands of people, and unprecedented mass arrests.

Eventually, the protests became too loud to ignore, and the Government acknowledged that reform was necessary. The April 2009 parliamentary election produced a majority government excluding both the Independence Party and the Progressive Party which had, separately or in coalition, governed Iceland virtually without interruption throughout the history of the Republic.[8] The new Government faced the momentous task of dealing with the consequences of the Crash.

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[7] Gylfason, above n 5. By way of comparison, the Darien Disaster, which triggered a series of economic problems in Scotland in the late 17th century, and arguably led to the demise of the Kingdom of Scotland and the creation of the United Kingdom, destroyed about 25% of the country's capital. See P W J Riley, *The Union of England and Scotland: A Study in Anglo-Scottish Politics of the Eighteenth Century* (1978), 35, 199; I McLean, *What's Wrong with the British Constitution?* (2010) 65.

[8] Gylfason, above n 5.

4 Reactions

The Crash provoked a number of political and institutional responses aimed at preventing a similar failure in the future, of which five are discussed here. First was the establishment of a Special Prosecutor's Office, which grew from 3 to 100 employees almost overnight. This was to some extent due to the advice of Eva Joly, a Norwegian-born French investigative judge specializing in corruption and economic crimes, who was appointed as a consultant to the newly elected government. The Office prosecuted senior bankers, public servants, and others on charges such as insider trading and market manipulation. Some of the charges lead to sentences, and others to acquittal. Many decisions still await a final verdict in the Supreme Court. Nevertheless, a certain importance is linked to the investigation of the acts that lead to the crisis and their referral to the judicial system, as similar acts have gone widely unpunished in other countries. Also noteworthy is the fact that the court system seems to have handled the caseload being brought before it, unprecedented both in scale and matter, quite well.

Secondly, a Special Investigation Commission appointed by the Parliament published its 2,400-page report in 2010 outlining flaws in the system as a whole and describing the legal violations and acts of recklessness by private and public actors, as well as academics and media, which contributed to the disaster.[9] In a society as small as Iceland, the detail of this report and its level of scrutiny should not be underestimated.

Thirdly, the Prime Minister at the time of the Crash, Geir Haarde, was tried and sentenced for negligence in his official capacity in the *Landsdómur* in 2011, in the first time the special tribunal was convened in the nation's history.[10] He has referred that verdict to the European Court of Human Rights, and the case has not yet been heard, but this approach to negligence in the conduct of high office is certainly unique.

Fourthly, the double national referendum on the *Icesave* bills established limits to the population's liability for debts to guarantee foreign deposits with Icelandic banks. In both referenda, the Icelandic public refused to shoulder such responsibility, and the legal soundness of this refusal has been confirmed by the EFTA Court, which on 28 January 2013 cleared Iceland of all charges in this

[9] See Rannsóknarnefndar Alþingis, Report of the Special Investigation Committee, Reykjavik, 12 April 2010, <http://www.rna.is/eldri-nefndir/addragandi-og-orsakir-falls-islensku-bankanna-2008/skyrsla-nefndarinnar/english/> [accessed 7 November 2014].

[10] See Landsdómsmálið Nr. 3/2011, Alþingi gegn Geir Hilmari Haarde, <http://www.landsdómur.is/um-landsdom/frettir-og-tilkynningar/nr/71> [accessed 3 December 2014].

regard.[11] The Court rejected the claim that Iceland had breached the Deposit Guarantee Directive or had discriminated against depositors contrary to EEA law.

Fifthly, and most relevantly for the purposes of this note, was the appointment of Iceland's Constitutional Council in 2011. Along with many others, the author had participated actively in the protests in 2008 and 2009. A law student at the time, I delivered a speech at one of the organized protests,[12] which gained significant attention among the public and in the media. Following that speech, I was elected as one of the 25 members of the Constitutional Council in a general election in 2010.

My position in taking a place on the Constitutional Council—the position which had found so much resonance in the Icelandic constituency—was that the process of amending the Constitution was reflective of an underlying power struggle within the Icelandic nation since the establishment of our republic. This struggle relates to the abundance of natural resource wealth and relatively insular political leadership: political elites manage resource ownership and wealth, and though they are meant to do so for the benefit of the people who hold indirect ownership over those resources, the lack of democratic control means that political elites can become divorced from their constituents.[13] This underlying struggle, in turn, may explain the situation of the draft new constitution: according Art. 79 of Iceland's current Constitution, the Constitution can only be changed if Parliament accepts the changes before announcing a new general election, and the *new* Parliament thereafter confirms the changes. This makes constitutional amendment difficult, as it gives political elites the opportunity for filibustering and horse trading, making the amendment process highly vulnerable to politicking in the last days of each parliamentary session.

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[11] Case E-16/11, *EFTA Surveillance Authority v Iceland* (EFTA Court, 28 January 2013) <http://www.mfa.is/media/icesave-2011-12/16_11_Judgment-Icesave-Case.pdf> [accessed 10 November 2014]. For the background to the *Icesave* dispute, see e.g. M E Méndez-Pinedo, 'The Icesave Dispute in the Aftermath of the Icelandic Financial Crisis: Revisiting the Principles of State Liability, Prohibition of State Aid, and Non-Discrimination in Europe' (2011) 3 *European J of Risk Regulation* 356.

[12] <https://www.youtube.com/watch?v=aE-t_hSZojE> [accessed 20 January 2015].

[13] The Venice Commission took notice of the 'crisis of trust' in the Icelandic 'population vis-a-vis the political class and, by extension, the institutions' following the Crash. See Opinion No 702/2013, Venice Commission Opinion on the Draft New Constitution of Iceland (11 March 2013), para 12.

5 The preparation for the writing of a new Constitution

A unique atmosphere was palpable after the Crash in Iceland. There was a widespread desire to change the society in order to prevent similar things from recurring. Bruce Ackerman's notion of a 'constitutional moment' is apt to describe it—it was a period in which matters of constitutional politics captured the attention of the public,[14] and the aspiration behind the new constitution was that Iceland's liberal 'pots and pans revolution' would crystallise into a new social, political, and economic order.[15]

I remember the very special atmosphere of excitement and unity, despite underlying tension, in late 2008 and 2009. People debated in the media and amongst themselves about big and important issues more than ever before. Suddenly, the average person found herself diagnosing complex economic situations over coffee with friends, and cracking faults in legislation at family dinners. One of the recurring themes at such occasions was the Constitution. The perception was widely held that Iceland needed its own social contract, as had been promised from the foundation of the republic, to replace the Danish legacy document.

The way forward chosen by the Government at the time was to appoint a seven-member Constitutional Committee, comprised in the first instance of a broad range of academic experts. The role of the Committee was threefold—first, to organize a National Assembly of 1000 randomly selected members of the public, who would outline the sort of values on which the nation wanted to build its new social contract. Secondly, to prepare a nationwide election of 25 representatives to a Constitutional Assembly, whose task would be to draft a new constitution building on the views of the National Assembly. Thirdly, to prepare the ground for the Constitutional Assembly by offering analysis of the 1944 Constitution and gathering available academic material about local and international constitutional matters.

Consisting of 950 randomly selected individuals of all ages and from all segments of society, the National Assembly met for a day in early November 2010. It issued a set of conclusions stating that a new Constitution was called for, and that it needed to contain provisions on national ownership of natural resources, foster accountability, facilitate the decentralization of power, ensure

[14] See B Ackerman, *We The People: Foundations* (1991) 31.
[15] See B Ackerman, *The Future of Liberal Revolution* (1994) 46.

environmental protection, and so forth. All the output of the National Assembly was made accessible to the public online.[16] The Assembly was also live streamed online on the day of event. The results were summarized and rendered into a 'mind map' made publicly available. A generous budget was allotted to bring together randomly selected individuals for a one-day exercise in brainstorming and discussion of main ideas to be included in the constitution. Despite being quite general, and at times even paradoxical, most of the Forum's conclusions arguably reflected the views of the population of Iceland. Among them were the importance of human rights, democracy, transparency, equal access to healthcare and education, as well as a desire for a more strongly regulated financial sector and for putting Iceland's natural resources under public control.[17]

The next step was taken in late November 2010, when elections were held to select the 25 representatives on the Constitutional Council. As laid down by Act No. 90/2010 on the Constitutional Council, the role of the Council would be to draft a new Constitution for Iceland. Every Icelandic person 18 years of age and older was eligible to run for the elections, apart from the President of Iceland, Ministers, members of the Constitutional Committee and Supreme Court judges. Despite the fact that 'reform fatigue' had started to set in at that time, 522 candidates came forward, each supported by between 30 – 50 signatures. Considering Iceland's small population of only 330,000 people, and an eligible population of about 250,000, this is remarkable: about one in 500 eligible citizens put themselves forward for election, and about one in 15 people endorsed a candidate with their signature.

The 25 members of the Council were elected in vote with a 37% turnout—which is relatively low on Icelandic standards, which tend to be more than 80%.[18] However, the elections were considered complex because of the numerous candidates and the uniqueness of the topic, which might explain the low turnout. On the up side, it was clear that there was no need to use legal provisions for adding members to even out the participation of men and women: the Constitutional Council consisted of 15 men and 10 women, almost all of whom had little to no prior political experience in conventional terms. The members were quite diverse, although five of them were professors and three junior academics, making the academy more represented than the general public.

[16] For the National Assembly's website: <http://www.thjodfundur2010.is.heim/> [accessed 2 December 2014].

[17] Landemore, above n 1, 7-8.

[18] See 'Voter turnout data for Iceland', *International Institute for Democracy and Electoral Assistance*, <http://www.idea.int/vt/countryview.cfm?CountryCode=IS> [accessed 7 November 2014].

Shortly afterwards, the Supreme Court of Iceland deemed the elections void due to technical errors, although there was no evidence that the alleged errors had led to any substantive problems with the result of the ballot.[19] As no question existed as to the substantive outcome, the Parliament appointed the members-elect so that the work would not be delayed further.

6 Methodology

As Landemore has observed, the unique inclusiveness which symbolized the methodology used to draft a new Icelandic constitution involved three different and complementary methods: (i) direct popular participation at various stages of the process, (ii) elements of descriptive representativeness where direct participation wasn't possible, and (iii) transparency. All three aspects arguably combined to ensure not just procedural legitimacy, but also some degree of epistemic reliability.[20]

The Constitutional Council of Iceland had only four months to write a new constitution. The recently published 700-page report from the Constitutional Committee proved to be very helpful to speed the work of the Constitutional Council, but more was needed if the task was to be completed on time. It was decided that, for the sake of both speed and credibility, the Constitutional Council would work in as transparent a manner as possible. Relying heavily on online social media and technology such as Facebook, Youtube, and Twitter, we aimed to represent the sort of change which we requested from other public servants in our proposed draft. All general meetings of the Constitutional Council were broadcast live on its website. Every week a new draft of the constitution was put online, allowing the general public to comment on the most recent changes using their own Facebook-accounts. All in all, the draft was posted online twelve times at various stages of completion. The draft was therefore created in an incremental way, and while there was not a stated conscious intention on the part of the Council members to establish a systematic back and forth between the Council and the crowd, something close to a feedback loop emerged from the very first draft onwards. The first draft contained only the main 'headings' or 'chapters'.

[19] See 'The judgment of the Supreme Court of Iceland', 25 January 2011, <http://www.haestirettur.is/control/index?pid=1109> [accessed 7 November 2014]. For an English language media summary of the decision, see 'News Review: The Supreme Court's Verdict', *Iceland Review Online*, 26 January 2011, <http://icelandreview.com/news/2011/01/26/news-review-supreme-courts-verdict> [accessed 7 November 2014].

[20] Landemore, above n 1, 3

Once the structure was exposed to comments, the Council proceeded to integrate some of the remarks and write up the actual text corresponding to each 'heading'. The text was fleshed out progressively, and responsively, over several iterations of the same process. Feedback from the public was received and assessed by Council members. Useful feedback would shape and inform the next draft which would then be published online, and so on.[21]

The Council also invited the public, including experts and stakeholders, to send briefs with their ideas and suggestions during the drafting process. All of those suggestions were discussed by the relevant sub-committee of the Council, and some became part of the final document. Internet penetration is very high in Iceland and therefore a lot of ideas and suggestions were delivered through the Council's website and by email. However, the Council also received handwritten proposals, and these were processed the same way as other material. Some of the ideas and suggestions came from other countries, but, as the language of the process was Icelandic, most of the material received was in that language. This methodology of producing content resembles an idea mostly used in computer science known as 'crowd sourcing'. The essence of such philosophy is the accumulation of knowledge through completely open processes.[22]

The results were quite amazing, as the comments and proposals received were almost without exception both useful and respectful. At the beginning, we had feared that the uncivilized tone to which online debate often descends would taint the work. However, such concerns proved totally unnecessary. The people repaid the trust they were shown by allowing open dialogue in a profound way, lifting the work and the outcome to a higher level than would ever have been possible for the 25 Council members with our limited time, resources, and staff. It is my conclusion, after participating in this project, that the wisdom of the crowd is profound, and should not be underestimated. Further, this methodology also provided legitimacy and 'ownership' of the project by those who participated. And as a consequence, by giving every person an equal opportunity to have a say, this process meant that when certain persons, for example experts, criticised the finished document, it was hard for them to explain why they did not rather

[21] On the substance of the draft, see Z Elkins, T Ginsburg, and J Melton, 'A review of Iceland's draft constitution' (2012) Constitutional Review: Iceland 2012, <http://comparativeconstitutionsproject.org/wp-content/uploads/CCP-Iceland-Report.pdf > [accessed 5 November 2014]. For information in English and a translation of the bill, see 'The Constitutional Council hands over the bill for a new constitution', *Stjórnlagaráð*, 29 July 2011, <www.stjornlagarad.is/english> [accessed 7 November 2014].

[22] See D Brabham, 'Crowdsourcing as a Model for Problem Solving' (2008) 14 *Convergence* 75.

participate in the process than criticize its result *post hoc*. It has to be stated, however, that a lot of local experts participated in writing the new draft with the Council, either as volunteers or by request of the Council.

Insufficient research exists on the methodology of this drafting process, including insufficient critique. Professor Ragnhildur Helgadottir is one of the scholars who has written extensively about this project. In a recent article, she points out that only 13% of the online submissions on the Constitution came from women, while 77% were from men and 10% from organizations.[23] Helgadottir's preliminary work on this issue shows that we should still take pause to reflect critically on the process: first, most of the commentators were aged between 40 and 65. While it is positive that older people were not excluded by the online medium, this is not an underrepresented constituency in normal public participation mechanisms, either. Furthermore, very few foreign citizens made suggestions via the website. Based on these findings, Helgadottir finds the crowd-sourcing process to have empowered Icelandic born middle-age males first and foremost—by no means an underrepresented group in traditional Icelandic politics. She says this finding may suggest 'that expectations towards informal mechanisms for public participation should be kept in check; they are not a clear solution for groups that are underrepresented in traditional politics, they can hardly replace more traditional mechanisms completely and a multiplicity of consulting mechanisms may be best'.[24] Adding my anecdotal experience to this line of criticism, it also seemed that the people who participated in the online dialogue were a self-selecting cohort, that is generally more interested in topics such as the freedom of speech and the Internet, than the members of the general Icelandic public. This is a matter to be addressed by constitutional process designers wishing to emulate the Icelandic crowd-sourcing model in the future.

Despite such limitations to 'Web 2.0 constitutional drafting', it remains clear that the Icelandic methodology is ground-breaking in a number of ways, which make it interesting for the comparative study of constitutional transition. Landemore observes that, throughout history, the *actual writing* of constitutional texts has been the most secretive moment in the history of constitutions—as

[23] R Helgadottir, 'Which Citizens?—Participation on the Drafting of the Icelandic Constitutional Draft of 2011' *IJ Con L Blog*, 7 October 2014, <http://www.iconnectblog.com/2014/10/which-citizens-participation-in-the-drafting-of-the-icelandic-constitutional-draft-of-2011/> [accessed 5 November 2014].

[24] Ibid.

was the case, for example, of the 'Founding Fathers' in the United States.[25] She argues that the Council's use of crowd-sourcing was particularly striking in that it is both a recent technique and a deeply unconventional way of writing a constitution. While crowd-sourcing has become a popular tool to engage people in a wide variety of processes—ranging from urban planning to solving complex scientific problems—it had never been applied to a task as seemingly complex and momentous as the process of writing a new constitution.[26] She also points out that the transparency of the methodology means that the public was able to witness, observe, and thus make up their minds about the activities of the actors engaged in the constitution-writing process. 'It would be hard to overstate the novelty of this transparency, especially in comparison with recent constitution-writing processes, such as the European or the Egyptian one', Landemore argues.[27]

Another characteristic element of the Constitutional Council's methodology was its emphasis on striving to reach consensus rather than using binding majority decision-making procedures. Many of the core issues addressed by the Council could have been resolved with a vote in the first few days of the work. However, it was decided that, instead of using such methods, consensus would be sought in as many cases as possible. This proved to be very successful, in my opinion; a number of matters which seemed to have only two possible solutions at first were examined from different and new perspectives, often providing a third way which was better than the first two in the opinion of both sides to a disagreement. After witnessing the power of consensus-building, it became evident that the standard democratic process which entails a majority overriding the minority on strength of numbers possibly still rests on a zero-sum paradigm of binary victory and defeat. By using this method, the Council managed what was thought by many to be inconceivable; that is to reach a unanimous decision on the final draft to a new Icelandic Constitution in a short space of time and with broad-scale public input. Bearing in mind how different the members of the Council were, that was an achievement which could never have been obtained without using consensus as a basis for collective decision-making—aiming for a solution to suit everybody, even those one disagreed with wholeheartedly. The draft was handed to the *Althingi* by the members of the Constitutional Council on 29 July 2011.

[25] Landemore, above n 1, 2.
[26] Ibid, 10.
[27] Ibid, 15–6.

7 The aftermath

It became clear quite shortly after the Parliament received the draft that certain parliamentarians and stake holders in Iceland would resist the draft becoming Iceland's Constitution. The draft was essentially shelved by the *Althingi*, where it remains to this date. Many reasons have been named for this failure: Was the draft too radical? Did it lack quality and professionalism? Did the public lose interest in this complex issue, with the imminent problem of making ends meet overtaking politically sublime topics such as constitution-writing? Did the powerful opposition, heavily linked to the 'owners' of Iceland's rich natural resources, simply manage to choke it? Was it a mistake of the Council to rewrite the constitution in its entirety, as opposed to merely amending some articles? Or is the old myth true which suggests that power corrupts and that democratically elected power-holders are unable, despite all promises, to give the power back to its rightful owner, the people?

It is not necessary to stipulate which, if any, of those suggestions are true for the purposes of this note. However, an important fact remains unhidden: the Icelandic voters have clearly articulated their desire for this draft to become the new constitution of Iceland: this was done in a non-binding national referendum on the constitutional proposal held on 20 October 2012. The referendum garnered substantial participation—half of the 235,000-strong electorate of Iceland participated—and secured a 2/3 approval of the draft as the basis of a new constitution. It remains to be seen whether Iceland's 'constitutional moment' has been missed, or whether the nation still finds itself in a process of constitutional transition.

8 Conclusions

Four years after the world's most inclusive constitution-writing process, Iceland still has its old Danish-based constitution. Media all over the world rushed to Iceland during the Constitutional Council's drafting process, admiring the process and the methods it employed. Communities in many different countries were inspired by this, and have consequently relied to some extent on a public participation model in their own transitions. The members of the Council, including myself, have travelled the world to explain how this could be done. The venues vary from small NGOs in basements in Amsterdam to the OECD annual conference in Paris. The story of Iceland's attempt to 'crowd-source' its

constitution, at least to a degree, in the wake of huge financial crisis regularly fills the audience with a sense of inspiration and hope.

It is evident that new methods of constitutional transition are called for, as common problems like global warming, population growth, and resource depletion are likely to cause social, political, and economic upheavals in the years to come. If politicians choose to ignore democratic and civilized calls for change through legislation, the danger of more violent and rebellious outbursts are imminent. Iceland's constitutional transition was catalyzed by an economic crisis, rather than an environmental or a political one, but the economic cycles set in motion by the events of 2008 have not played themselves out yet. It is too early to say whether Iceland's transition is over. When the next financial disaster hits, Iceland will be affected like other places. The difference, however, of Iceland's situation will be that we have an alternative—a more sustainable, transparent, and fairer society mapped out in the draft of a new Constitution. Perhaps then we will find the courage to implement it and thereby see the world's first crowd-sourced constitution enter into force.

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CONSTITUENT POWER AND THE LIMITS OF ADJUDICATION: KOSOVO AND QUEBEC

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Abstract
Law, and therefore courts, can only make sense of collective agency in terms of constituted power that is power exercised in conformity with law. However, constituent power, insofar as it purports to create a new legal order, cannot act in conformity with the existing legal order. Constituent power can only be understood as lawful, therefore, if it is understood retroactively, from the perspective of the new legal order. This article considers the ICJ's treatment of the constituent power of 'the People' in the Kosovan declaration of independence, and the Supreme Court of Canada's consideration of the Quebecois legal right to secede. Considering the literature on constituent power and the ontology of 'the People', this article suggests that democracy and the rule of law offer a partial solution to the paradox of constituent power. It introduces John Searle's ontology of 'institutional facts', arguing that the nature of the constituent entity can be understood as a 'status function' created by a 'Declaration'. It concludes by considering the limits to the justiciability of constituent power and the corollary necessity for recognition, or what Derrida calls a 'last instance'.

Keywords
Constituent Power, Political Community, Speech Act Theory, Law and Politics

1 Introduction: the paradox of constituent power

In both the *Accordance with International Law of Unilateral Declaration in respect of Kosovo,* Advisory Opinion ('the *Kosovo Opinion*')[1] and the *Reference re Secession of Quebec* ('the *Quebec Secession Case*')[2] the 'will of the people' was recognised as a source of constituent power. However, in both cases the relevant court acknowledged that 'the people' could only express its will in a legally cognizable way through representatives; that is, through constituted power. This presents something of a paradox: constituent power was only judicially intelligible as constituted power. In the *Kosovo Opinion* the International Court of Justice ('ICJ')

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[1] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion,* Advisory Proceedings, ICJ Reports 2010, 403.

[2] *Reference re Secession of Quebec* [1998] 2 SCR 217.

acknowledged that the authors of the declaration of independence were 'persons who acted together in their capacity as representatives of the people of Kosovo', that is as constituted power, yet also held that they acted 'outside the framework of the interim administration',[3] that is as constituent power constituting a new legal order. In the *Quebec Secession Case,* the Supreme Court of Canada accepted that a clear expression by a clear majority of the Quebecois in favour of secession would legitimate attempts by their representatives to negotiate an exit from the Canadian federation. The Court however, rejected the simple majoritarian understanding of popular sovereignty which was advanced by the *amicus curiae.* The will of the Quebecois people must, the Court held, be mediated through the Canadian Constitution; the constituent power of the Quebecois could only be effective as such by operating within the existing legal order, that is, as constituted power.

This article explores the paradox of constituent power. Law, and therefore courts, can only make sense of collective agency in terms of constituted power; that is, power exercised in conformity with law. However, constituent power, insofar as it purports to create a new legal order, *cannot* act in conformity with the existing legal order. Constituent power can only be understood as lawful, therefore, if it is understood retroactively, from the perspective of the new legal order. I will first consider the ICJ's identification of the authors of the Kosovan declaration of independence, and the criticisms which have been made of its findings. I will argue that these criticisms lack an adequate ontology of 'the people', and therefore fail to understand the declarators' claims to representative standing. I will then turn to the relationship between constituent power and existing legal orders. I will consider the status of the legal regime established under SC Res 1244 (10 June 1999) and UNMIK Reg 1999/1 (25 July 1999), and its bearing on the authors of the Kosovan declaration of independence. Lastly, I will consider the problem of 'retroactive' authorisation. I will consider the Supreme Court of Canada's argument in the *Quebec Secession Case* that *de facto* succession and international recognition cannot retroactively create a legal right to secede. I will also consider the way in which democracy and the rule of law offer a partial solution to the paradox of constituent power. I will conclude by considering the limits to the justiciability of constituent power and the corollary necessity for recognition, or what Derrida calls a 'last instance'.

[3] *Kosovo Opinion*, para 109.

2 'Who is the signer of such acts?'

Jure Vidmar has argued that the ICJ's 'pronouncement on the identity of the authors of the declaration may well be problematic from the aspect of the support of the will of the people for the alteration of the legal status of the territory'.[4] He argues that 'a unilateral declaration of independence […] cannot be issued by just anyone' but only those 'entitled to speak on behalf of the people' and who have 'the capacity to speak and act on behalf of the people'.[5] This capacity is 'linked to' and derives not only 'from the will of the people' but also from 'effectiveness presumed under the Montevideo criteria for statehood'.[6] 'The *Kosovo* Opinion', argues Vidmar, 'seems to confirm that.'[7] However, Vidmar finds a tension between the Court's finding that the authors of Kosovo's declaration of independence 'acted together in their capacity as representatives of the people of Kosovo' and its finding that they acted 'outside the framework of the interim administration.' The Court, Vidmar argues, 'ignored the crucial question, namely from where this capacity to act as representatives of the people of Kosovo' derives.'[8] For Vidmar this capacity

> […] derives from the institutions of self-government. The authors of the declaration occupy posts within these institutions and were elected to their posts according to the prescribed procedures. The institutions they represent, and not their personal integrity, give them the capacity to act […] The Court's finding that the authors of the declaration had the capacity to act on behalf of the people of Kosovo is thus *inherently* linked to the institutions of self-government and it is not possible to separate the capacity to act from the institutions that give the individuals this capacity. But this is exactly what the Court did. It established that the individuals had the capacity to act and, in doing so, it silently derived this capacity from the institutions of self-government. But, in the next

[4] J Vidmar, 'The *Kosovo* Advisory Opinion Scrutinized' (2011) 24 *Leiden J of Int L* 355, 357.

[5] Ibid, 360.

[6] Ibid, 360-361; Ioannidis, below n 47, 3, rightfully points out that '[w]hat the Court examined was the existence of rules regulating *the act of communicating the intention to become an independent state*' (emphasis original). If this is the case, the 'effectiveness' of the author may not be relevant to the legality of the declaration.

[7] Vidmar, above n 4, 361.

[8] Ibid.

> step the Court separated the representatives from their institutions and treated them as individuals.[9]

This reasoning, Vidmar argues, 'makes the declaration of independence formally questionable from the perspective of the will of the people.'[10] It is not altogether clear why this is the case. Vidmar himself admits that 'there is little doubt that independence is the wish of the majority of Kosovo's population'[11] and that, as the ICJ held in the *Western Sahara Advisory Opinion,*[12] 'there might exist circumstances in which the will of the people is obvious and public consultation is not necessary.'[13] In any event, Kosovo was not such a case. Indeed, as early as 1991, an underground referendum in Kosovo, in which 87 per cent of the electorate participated, returned a result of 99.87 per cent in favour of independence.[14] Vidmar's argument that the declaration is questionable from the perspective of the will of the people seeks to rely on that which he elsewhere denies: that the authors could act other than in their capacity as members of the Assembly. It is, of course, open to Vidmar to criticise the ICJ's finding that the authors did not act in that capacity, but if he is understood as suggesting that they were, in fact, acting in that capacity, it would not seem open to him to suggest that the declaration of independence was not representative of the will of the people. Vidmar's argument may be that *if* the ICJ is correct then the declaration of independence is questionable from the perspective of the will of the people. I will show that this is not correct.

Vidmar is not, however, alone in this analysis of the ICJ's Opinion. Marcelo Kohen and Katherine Del Mar argue that:

> [...] the very evidence that demonstrated the *ultra vires* nature of the UDI — that it was intended to operate outside the legal framework established by the UNSC — led the Court to reach the reverse conclusion that one would have expected. Instead of declaring the act to have been exercised *ultra vires*, the Court considered that the act was so far outside the realm of the competences of the PISG that

[9] Ibid (emphasis added).
[10] Ibid, 362.
[11] Ibid.
[12] *Western Sahara Advisory Opinion,* Advisory Proceedings, ICJ Reports 1975, 12.
[13] J Vidmar, 'International Legal Responses to Kosovo Independence' (2009) 24 *Vanderbilt J of Trans L* 779, 826.
[14] Ibid, 789.

> it was not governed by the legal framework established by UNSCR 1244 to apply to the PISG.[15]

According to Kohen and Del Mar:

> [a]ll the individuals who issued the UDI were acting in that capacity [as constituted organs of the PISG], since they considered themselves to be the 'democratically elected representatives'. As a matter of course, they were elected within the framework of UNSCR 1244 and as organs constituting the PISG.[16]

Kohen and Del Mar do, appreciate the nature of constituent power. '[I]t is to be expected', they say:

> [...]in those cases in which the relevant domestic legal system does not recognize a right to separate from the state in question that persons issuing a UDI would claim that the act is not governed by the applicable legal regime because they are performing a revolutionary act of a *pouvoir constituant*.[17]

They go on to say that '[s]uch a claim is nothing more than the unilateral perception of those issuing a UDI'.[18] This fails, however, to grasp the structure which such speech acts take.

Acts such as this belong to what John Searle calls Declarations, a 'fascinating class of speech acts', which combine the 'word-to-world and the world-to-word direction of fit'. That is to say, Declarations simultaneously represent how things are in the world and attempt to change the world to match the content of the speech act. Searle continues:

> [They] have both directions of fit simultaneously in a single speech act. These are cases where we change reality to match the propositional content of the speech act and thus achieve world-to-word direction of fit. But, and this is the amazing part, we succeed in doing so because we represent the reality as being so changed.[19]

[15] M Kohen & K Del Mar, 'The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of "Independence from International Law"?' (2011) 24 *Leiden J of Int L* 109, 118.
[16] Ibid, 120–1.
[17] Ibid, 118.
[18] Ibid, 119.
[19] J Searle, *Making the Social World: The Structure of Human Civilisation* (2010) 12.

To say that the claim to act as *pouvoir constituant* is 'nothing more than the unilateral perception of those issuing a UDI' neglects the fact that the 'truth' of such a claim can only be achieved by representing it as already being true. That is to say, in order to act as *povoiur constituant*, as representatives of the people, the authors of the UDI must represent reality and themselves as *already being* so changed. Far from representing the 'unilateral perception' of the authors, the success of such declarations is determined by the recognition of the claim by other members of the community, something which will be discussed further below.

Both Vidmar and Kohen and Del Mar assume that the authors of the declaration either had status which derived from the interim legal order established by the United Nations or they had no status whatsoever. Vidmar, for example, repeatedly argues that the ICJ found the authors of the declaration to be acting 'in their personal capacity', that it treated them as 'individuals', 'a group of individuals' or as 'individuals' with 'capacity to act'. Unfortunately, Vidmar's argument is not supported by the text of the ICJ's opinion. The Court referred to the authors as 'persons who acted together in their capacity as representatives'.[20] It is clear from this that the Court considered the authors' actions to be the actions of a collective entity, not simply the actions of manifold individuals. This collective entity was constituted, in the Court's opinion, by the authors' status as representatives of the people of Kosovo. There is similarly little textual support for Vidmar's contention that the Court 'silently derived this capacity from the institutions of self-government'. This rests on a tacit assumption, shared by both Vidmar and Kohen and Del Mar, that the authors of the declaration could *only* derive their capacity as representatives of the people of Kosovo from a pre-existing legal norm, in this instance from SC Res 1244 and UNMIK Reg 1999/1.

This assumption, that the capacity to represent must rest on a prior legal norm, is misguided. Such a position inevitably leads to an infinite regress of attribution and authorisation.[21] Moreover, both Vidmar and Kohen and Del Mar collapse 'constituent into constituted power and politics into law, thereby hypostatizing the legal order into a self-grounding, self-serving and

[20] *Kosovo Opinion*, para 109.

[21] Kelsen recognised this: 'attribution has a regressive structure […] [C]rucially, this regression is not infinite: relations of empowerment lead back to a "first constitution", enacted by an assembly or an individual. But whoever enacts the first constitution cannot be empowered to do so by a norm of positive law' (H Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood', in M Loughlin & N Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2007) 9, 11).

self-sustaining system of rules.'[22] This is, however, inevitable: the law 'can only make sense of collective agency in terms of constituted power, power exercised in conformity with the law.'[23] That is to say, constituent power (the will of the people) must be understood as being represented power exercised by agents or representatives. However, Vidmar and Kohen and Del Mar are wrong to assume that the authors' 'capacity to act on behalf of the people of Kosovo is thus inherently linked to the institutions of self-government'[24] established under the international legal order.

Hans Lindahl argues that 'constituent power only appears from the first-person plural perspective. Collective self-government entails that the creation of norms involves a "We" as a *unity* in action.'[25] However, 'whether or not a collective subject [i.e. a "We"] exists politically can only be established retrospectively, from within the unity of a legal order: political unity does not admit of pre-legal existential judgment.'[26] Jacques Derrida expresses a similar point in his assertion that '[t]he "we" of the declaration speaks "in the name of the people." But this people does not exist. They do *not* exist as an entity, it does *not* exist, *before* this declaration, not *as such*.'[27] There is, therefore, 'a remarkable equivocity that goes to the heart of collective self-constitution':

> On the one hand, there is no first-person plural perspective in the absence of an act that effects a closure by seizing the political initiative to say *what* goal or interest joins together the multitude into a people, and *who* belongs to the people […] [The] invocation [of 'We'] fails not merely because there is no subject to whom the speech-act can be attributed, but because the author to whom the act would be attributed is authored by his attribution: 'there can be no "people" prior to the imputation of a will to them'.[28]

That is to say:

[22] Ibid, 9.
[23] Ibid, 11.
[24] Vidmar, above n 4, 361.
[25] Lindahl, above n 21, 10 (emphasis original).
[26] Ibid, 20. Likewise, 'no sense can be made of the unity of a legal order without the political unity implied in the first-person plural perspective of a "We" as a subject in constituent action': Ibid, 16.
[27] J Derrida, 'Declarations of Independence', (1986) 7 *New Political Science* 7, 10 (emphasis original).
[28] Lindahl, above n 21, 18 (emphasis original).

> [W]hoever exercises constituent power must claim to act in the name of the collective, that is, must claim to act as a *constituted* power: he not only speaks about but also on behalf of 'our movement …'. […] An act can only *originate* a community by *representing* its origin. This paradox governs the attribution of legislation to a collective, for assigning the acts of individuals to a collective involves following a regressive strategy that takes us from the present to the past. But the 'end point' of attribution is not the initiating act of a collective subject existing in an original present; instead. Attribution leads back to 'a past which has never been a present'.[29]

The critics of the ICJ fail to recognise that attribution leads back to a past which has never been a present and that, therefore, the 'representativity' of those who claim to act on behalf of the constituent power, those who claim to act as constituted power, is 'fully legitimated only by the signature, thus after the fact of the coup', in what Derrida terms a 'sort of fabulous retroactivity.'[30] This retroactive legitimation is generated, according to Lindahl, by 'the people' 'exercising their constitutional rights'. In doing so, 'they retroactively take up the first-person plural perspective of a "We" that has (already) enacted a constitution in its own interest.'[31] Moreover, although:

> […] no collective self exists independently of the individuals that compose it because […] acts of self-attribution are in each case individual acts […] the self to which they attribute these acts is a political unity, a 'We', the existence of which is not simply the summation of the manifold of individual acts of attribution.[32]

In the same way, the initial act of 'representivity' cannot, I argue, be reduced to the 'summation of the manifold of individual acts' insofar as the act purports to be an act by and of the incorporated political community, the 'We'. The acts 'of the people' are indissolubly linked to acts 'in the name of the people' 'because a people can never be directly present to itself as a subject in constituent action, an act can only be identified as its act by raising a representational or attributive

[29] Ibid, 18-9 (emphasis original).
[30] Derrida, above n 27, 10.
[31] Lindahl, above n 21, 19-20.
[32] Ibid, 20.

claim'.[33] The 'capacity' of the authors to act as the representatives of the people of Kosovo could only therefore be retroactively authorised by the people exercising the constitutional rights conferred on them by the new constitution of Kosovo, not by SC Res 1244 or UNMIK Reg 1999/1.

I have argued that there is little textual support in the ICJ's opinion for the position taken by Vidmar and Kohen and Del Mar. However, there is support for their argument that the capacity of the authors of the declaration was derived from the international legal regime in the text of the declaration itself. In the text, the authors refer to themselves as 'the democratically-elected leaders of our people'.[34] Elections to the Assembly of Kosovo had been held on 17 November 2007[35] and the declaration was signed by 109 of the 120 members of the Assembly returned in that election, in addition to the President of Kosovo (who was not a member of the Assembly).[36] It is clearly this election to which the authors refer in the text of the declaration. I would argue, however, that this was a rhetorical strategy on the part of the authors who were conscious that 'whoever exercises constituent power must claim to act in the name of the collective, that is, must claim to act as a *constituted* power'.[37] It is clear from the text that they claimed to act in the name of a collective ('our people') whose 'will' the declaration 'reflects'. It is also clear that they purported to exercise constituent power in declaring 'Kosovo to be an independent and sovereign state' and 'a democratic, secular, multi-ethnic republic'.[38] The authors claimed to act as a constituted power whose authority lay in the elections of the year before because the real '"end point" of attribution is not the initiating act of a collective subject existing in an original present; instead attribution leads back to "a past which has never been a present"'.[39] The authors could only be empowered to act in *this* representative capacity at a point yet to come. Yet, as Derrida tells us, 'this future perfect, the proper tense for this coup of right […] should not be declared, mentioned, taken into account. It's as though it didn't exist.'[40] The authors of the declaration could not appeal to the future in which their claim to exercise constituent power 'in the

[33] Ibid, 24. Derrida expresses this idea when he says '[i]t is still "in the name of" that the "good people" of America call *themselves* and declare *themselves* independent, at the instant in which they invent (for) themselves a signing identity': Derrida, above n 27, 11 (emphasis original).
[34] Text of the declaration of independence of 17 February 2008, cited in *Kosovo Opinion*, para 75.
[35] *Kosovo Opinion*, para 73.
[36] Ibid, para 76.
[37] Lindahl, above n 21, 19.
[38] Text of the declaration of independence of 17 February 2008, cited in *Kosovo Opinion*, para 75.
[39] Ibid.
[40] Derrida, above n 27, 10.

name of' the people of Kosovo had been retroactively legitimated and therefore had to appeal to a constative past event.[41]

In response to the question '[w]ho is the actual signer of such acts', Derrida argues that 'the "representatives" themselves, they don't sign […] In principle at least, because the right is divided here. In fact, they sign; by right, they sign for themselves but also "for" others.' He continues, '[t]hey speak, "declare", declare themselves and sign "in the name of...": "[…] in the name and by the authority of the good people […]"'. 'It is, rather, 'the "good people" who declare themselves free and independent.'[42]

Vidmar and Kohen and Del Mar neglect to develop an account of the ontology of 'the people' and, therefore, fail to define the status of the authors of the declaration as representatives of the people. Once the ontological nature of 'the people' and its relationship to the declaration's authors in constituting this people are properly understood, it becomes clear that it is not simply a question of whether or not the authors acted as one of the 'Institutions of Self-Government'. As Derrida says, the 'undecidability' between a performative structure (i.e. the authors as constituent power) and a constative structure (i.e. the authors as constituted power) 'is *required* in order to produce the sought-after effect';[43] that is, independence. The ICJ's reasoning ceases to be problematic from the perspective of the will of the people (formally or otherwise) once we acknowledge that the will of the people consists not in pre-authorisation but in individual acts of retroactive *self*-attribution.

According to Searle, all of institutional reality is created by speech acts that have the same logical form as Declarations.[44] 'The People' is an institutional fact created by declarations of the same logical form and, like any other institutional fact, a 'people' only exists to the extent that a number of individuals are represented as existing as a group and to the extent that this representation is recognised or accepted by them. It is my argument that this ontology, grounded in a theory of speech acts, is best able to capture the paradox of constituent power.

[41] On the distinction between constative and performative in declarations of independence, see B Honig, 'Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic' (1991) 85 *Am Pol Sci Rev* 97. Honig argues (at 107) that Arendt similarly finds refuge in the fable of the past event of the American Declaration of Independence in order to anchor her conception of authority in modern politics. See above for discussion of the of the constative and performative elements of the Kosovan declaration of independence and below for discussion of what Derrida terms the 'last instance'. See also Honig's analysis at 105.

[42] Derrida, above n 27, 9.

[43] Ibid (emphasis original).

[44] J Searle, above n 19, chapter 5.

It does this because declarations and the paradox share the same logical structure. Just as declarations succeed in achieving world-to-word fit by representing reality as being so changed, so too constituent power succeeds by representing itself as constituted power, i.e. by representing the reality it constitutes as having already been constituted.

3 'A measure the significance and effect of which would lie outside the order'

The ICJ, in the *Kosovo* opinion, held that 'the declaration of independence, therefore, was not intended by those who adopted it to take effect within the legal order created for the interim phase' and, more importantly, 'nor was it capable of doing so.' It was 'a measure the significance and effects of which would lie outside that order.'[45] Indeed, Marc Weller has argued that a 'declaration of independence steps outside the previously existing domestic legal context and cannot be evaluated according to that domestic law.'[46] Or, as Michael Ioannidis puts the point, '[a]ny attempt to reconstruct a legal order in a way that is not provided by a rule of this order […] violates it.'[47]

Ioannidis' argument is predicated on his contention that SC Res 1244 has a 'dual legal nature' functioning both as international law and as 'the basis of Kosovo's constitutional order.'[48] He acknowledges that the 'constitutional nature' of the interim legal order 'is only implied by the Court's argument',[49] which acknowledged that the purpose of SC Res 1244 'is to regulate, during the interim phase […] matters which would ordinarily be the subject of internal, rather than international, law.'[50] Ioannidis argues that SC Res 1244 and UNMIK Reg 1999/1 'are the bases of Kosovo's interim constitutional order' because they

[45] *Kosovo Opinion*, para 105.

[46] M Weller, 'Modesty Can Be Virtue: Judicial Economy in ICJ *Kosovo* Opinion?' (2011) 24 *Leiden J of Int L* 127, 146; 'Meeting Summary: Kosovo: The ICJ Opinion – What Next?', *Chatham House, the Royal Institute of International Affairs*, 9–10, <http://www.chathamhouse.org/publications/papers/view/109474> [accessed 17 November 2014].

[47] Ioannidis, 'Kosovo's Declaration of Independence and the Creation of a New Legal Order: Can a Revolution Against International Law Be Legal?' (2011) *European University Institution Working Paper,* LAW 2011/07, 2.

[48] Ibid, 1.

[49] Ibid, 2.

[50] *Kosovo Opinion*, para 89. The Court goes on to refer to 'the specific legal order, created pursuant to resolution 1244 (1999)' and 'the body of law adopted for the administration of Kosovo' (para 89).

function 'as containing the ultimate norms determining the law-making organs and procedures within that territory.'[51] Section 1 of UNMIK Reg 1999/1 provides that '[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK'. Moreover, the Special Representative of the Secretary-General had extensive powers including the veto of legislation passed by the Provisional Institutions of Self-Government.

The specific legal order created by SC Res 1244 and UNMIK Reg 1999/1, therefore, 'had the effect of superseding the legal order in force at the time in the territory of Kosovo'[52] reducing 'the FRY's sovereignty over Kosovo to a nominal title or *nudum ius*'.[53] Ioannidis argues, citing Hans Kelsen, that 'a constitution is effective if the norms produced in conformity with it are *"by and large" effective*' and that 'the actual *ineffectiveness* of FRY's laws in the territory of Kosovo mean[t] that this territory was not any more constituted by the FRY's legal order.'[54] Any FRY laws which remained in force 'did so because the new highest legislative authority decided upon their remaining in force'.[55]

However, Alexandros Yannis, in his discussion of East Timor, argues that:

> [...] suspension of sovereignty does not imply that the UN has assumed the sovereignty of East Timor. Suspension of sovereignty signifies rather that sovereignty is not an applicable concept any more and what matters is what are the rights and obligations of the UN transitional authority regarding the administration of the territory.[56]

The same applies, I would argue, *mutatis mutandis* to the legal order established by SC Res 1244 and UNMIK Reg 1999/1. Moreover, 'in neither [...] Kosovo or East Timor can it seriously be argued that the transfer of authority essentially constitutes delegation of sovereign rights', and references to the agreement of the FRY are 'rather feeble attempts to produce a fig-leaf of local consent.'[57] Thus, whilst Ioannidis' analysis is correct insofar as effectiveness is concerned, he fails to acknowledge that the legitimacy of *this* legal order (and not, *pace* Vidmar, that

[51] Ioannidis, above n 47, 5.
[52] *Kosovo Opinion*, 97.
[53] Ioannidis, above n 47, 7.
[54] Ibid (emphasis added in the former case; emphasis original in the latter).
[55] Ibid, 7–8.
[56] A Yannis, 'The Concept of Suspended Sovereignty in International Law and Its Implications in Politics' (2002) 13 *EJIL* 1037, 1048.
[57] Ibid, 1049.

of the legal order constituted by the declaration of independence) is 'questionable from the perspective of the will of the people.'[58] Presumably it was cognisance of this which led the ICJ to imply rather than define the status of the transitional legal regime. Yannis argues that 'when there is a final settlement, sovereignty will revive and rest again with the local peoples in whatever form is envisaged for the final status of these territories.'[59] This understanding of suspended sovereignty, in conjunction with the ICJ's finding that the 'final settlement' of Kosovo's status was not determined by SC Res 1244, means that it is arguable that there was no breach of the transitional legal order by the authors of the declaration because, as the Court held, they operated 'on a different level'.[60]

The Court's reasoning on this point is, however, problematic. In concluding its findings, the Court held that:

> [...] The declaration of independence of 17 February 2008 was not issued by the Provisional Institutions of Self-Government, nor was it an act intended to take effect, or actually taking effect, within the legal order in which those Provisional Institutions operated. It follows that the authors of the declaration of independence were not bound by the framework of powers and responsibilities established to govern the conduct of the Provisional Institutions of Self-Government [...][61]

This suggests that because the authors did not *intend* for the declaration to take effect within the existing legal order that *it follows* from this that they were not bound by that legal order. However, as Judge Bennouna, dissenting, argued, 'if such reasoning is followed to its end, it would be enough to become an outlaw, as it were, in order to escape having to comply with the law.'[62] Or, as Kohen and Del Mar put it, an agent:

> [...]that wishes to act in a way that would either fall outside its material competence or violate applicable procedural rules may claim simply not to be acting in the capacity of the organization in

[58] Vidmar, above n 4, 362.
[59] Yannis, above n 56, 1050.
[60] *Kosovo Opinion*, para 114.
[61] Ibid, para 121.
[62] Ibid, dissenting judgment of Judge Bennouna, para 46.

> question and call itself by a different name, in order to argue that its actions should not to be considered *ultra vires*.[63]

As Kohen and Del Mar themselves note, 'it is immaterial whether or not the authors were the PISG, as all the actors taking part in the political process in Kosovo were, and remain, bound by UNSCR 1244.'[64] It is immaterial not because the authors were bound regardless of their identity, but because, as Weller argues, '[w]hether or not the freely elected representatives of the people of Kosovo acted through the medium of the Assembly, their action could no longer be evaluated according to the constitutional framework.'[65] A declaration of independence necessarily breaches the existing legal order and cannot, therefore, be evaluated in terms derived from norms of that order.

Here the paradox of constituent power becomes clear once again. As Ioannidis argues, the only perspective available to the ICJ, from which the actions of the authors of the declaration can be evaluated, is the constitutional framework because:

> […] Even if the new regime did succeed in establishing itself in Kosovo, it did not replace or substitute the legal order on which Resolution 1244 based its validity, namely international law.
>
> From this perspective, the ICJ is *not* in a position similar to that of domestic courts ultimately accepting the legality of new regimes after successful revolutions. These courts became part of a new legal order, which, after having established itself, offered the only source from which courts could derive their authority […] To the extent that the ICJ traces its authority to the same order with Resolution 1244, it could not accept the Declaration as the source of authority contesting the old, international law-based regime […][66]

[63] Kohen & Del Mar, above n 15, 121.

[64] Kohen & Del Mar, above n 15, 115. Ioannidis, above n 47, 13, citing Kohen & Del Mar: '[t]he Constitutional Framework, however, sets the procedural and substantive conditions for the creation of all norms applicable in the territory of Kosovo. These norms are binding on all natural and juridical persons within the Kosovo jurisdiction.'

[65] Weller, above n 46, 144.

[66] Ioannidis, above n 47, 14. Ionnidis also says (at 14): '[i]f the Court continues to understand itself as an organ of the same legal order that produced Kosovo's international law-based regime, it could only adopt the constitutional view of that regime.'

From the perspective of the 'old regime' a declaration of independence, unless made pursuant to a norm contained within the old regime, is *necessarily* illegal.[67] The Court was correct, therefore, to say that the declaration of independence was not 'capable' of taking effect within the existing legal order. However, if the old legal order and the new legal order did not operate on 'different levels' the ICJ was incorrect to find that there had been no violation of law.[68] '[T]he problem is not,' argues Lindahl, 'that the act of the revolutionaries cannot be *interpreted* within the legal order they attempt to overthrow; it is that this material fact can only be interpreted as treason, not as the exercise of constituent power.'[69]

This is the paradox of constituent power: law 'can only make sense of collective agency in terms of constituted power, power exercised in conformity with law' yet constituent power, insofar as it purports to create a new legal order, cannot act in conformity with the existing legal order. Constituent power can only, therefore, be understood as 'legal power' if it is '*retroactively* interpreted as an empowered act.'[70] It is this issue of retroactivity which forms the crux of the Canadian Supreme Court's opinion on the legality of secession by Quebec.

4 The will of the people and the rule of law

Democracy is one, partial solution to the paradox of constituent power. Democracy recognises that the claim to act as constituted power 'must always be legitimated' and the 'division of powers […] is a way of acknowledging that a people is never directly present to itself as a unity: whoever claims to speak on its behalf may only do so if the claim can be questioned by another power.' In this way, 'the rule of law gives institutional form to the ontology of collective selfhood underpinning democratic politics.'[71]

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[67] Ionnidis, above n 47, 12.

[68] I think Ionnidis may be conflating the dual status of the legal orders established by SC Res 1244, 10 June 1999 and UNMIK Reg 1999/1, 25 Jul 1999. The declaration of independence operates on the same level as the legal regime created by these instruments as they functioned domestically, that is as the temporary constitutional order of Kosovo. If that is the case the declaration of independence would breach 'domestic' law not international law. International law is not concerned with breaches of domestic law as both the ICJ and Vidmar recognize. If this is the case this may have ramifications for Ioannidis's argument regarding the ICJ's 'perspective' on the declaration.

[69] Lindahl, above n 21, 24 (emphasis added).

[70] Ibid, 11 (emphasis original).

[71] Ibid, 22.

In the *Quebec Secession Case*, the Supreme Court of Canada acknowledged that '[i]t is, of course, true that democracy expresses the sovereign will of the people'[72] but also recognised that 'democracy in any real sense of the word cannot exist without the rule of law.'[73] 'It is the law,' the Court held, 'that creates the framework within which the "sovereign will" is to be ascertained and implemented.'[74] In contrast to Vidmar and Kohen and Del Mar, however, the Court avoided hypostatizing the legal order as 'self-grounding, self-serving and self-sustaining'.[75] It acknowledged that 'a system of government cannot survive through adherence to law alone. A political system must also possess legitimacy […] [and] that requires an interaction between the rule of law and the democratic principle.'[76]

Moreover, in contradistinction to the Kosovo declaration of independence, the Canadian Court understood any prospective secession by Quebec to be an act taking place *within* the existing legal order: '[t]he secession of a province from Canada *must* be considered, in legal terms, to require an *amendment* to the Constitution'[77] and '[a]ny attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order.'[78] 'The Constitution,' the Court held:

> [...]is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, *acting through their various governments duly elected and recognized under the Constitution*, to effect whatever constitutional arrangements are desired […][79]

Thus, not only was the Court only able to interpret secession as an act taking place within the existing legal order, it was only able to understand its quality as an act of constituent power as being first of all an act of constituted power; an act of the 'various governments duly elected and recognised under the Constitution'.[80]

[72] *Quebec Secession Case*, para 66.
[73] Ibid, para 67.
[74] Ibid.
[75] Lindahl, above n 21, 9.
[76] Ibid.
[77] Ibid, para 84 (emphasis added).
[78] Ibid, para 104. 'The amendment of the Constitution begins with a political process undertaken pursuant to the Constitution itself' (para 88). This argument obviously relates to the argument put forward by Ioannidis, above n 47. I intend to expand on this and consider Kelsen's work in more detail.
[79] Ibid, para 85 (emphasis added).
[80] Ibid.

The Court acknowledged, however, that '[a]lthough under the Constitution there is no right to pursue secession unilaterally […] this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession.'[81] The Court held, correctly, that the 'alleged principle of effectivity […] does not provide an *ex ante* explanation or justification for an act.'[82] Moreover, like Kohen and Del Mar, Judge Bennouna, and arguably the ICJ, the Court recognised that to accept the principle of effectivity would amount to 'accepting that […] Quebec may act without regard to the law,' that it may act *outside* of the Canadian legal order, 'simply because it asserts the power to do so.'[83] 'Such a notion', the Court held, 'is contrary to the rule of law',[84] or, in Lindahl's terms, 'can only be interpreted as treason, not as the exercise of constituent power.' The Court held that *de facto* secession does not provide justification *ex ante,* but also that recognition by other states 'does not relate back to the date of secession to serve retroactively as a source of "legal" right to secede.'[85]

From the perspective of the old regime (the only perspective which the Supreme Court of Canada could possibly take) this is undoubtedly true. From the perspective of the new regime, however, this 'fabulous retroactivity' is precisely the way in which the legality and legitimacy of the constituent act is established. As Derrida says, 'the coup of force makes right, founds right or the law, gives right.'[86]

5 Conclusion: the necessity of the last instance

As both the Supreme Court of Canada and Lindahl recognise, there is a limit to democracy and the rule of law's ability to 'institutionalise' the paradox of constituent power. The ability of the collective self, the 'We' which is both

[81] Ibid, para 106.

[82] Ibid, para 107.

[83] Ibid. The Court recognises that '*ex hypothesi* [a] successful revolution took place outside the constitutional framework of the predecessor state, otherwise it would not be characterized as a "revolution"' (para 144).

[84] Ibid, para 108.

[85] *Quebec Secession Case*, para 142. Two paragraphs later, the Court re-iterates: '[i]t may be that a unilateral secession by Quebec would eventually be accorded legal status by Canada and other states, and thus give rise to legal consequences; but this does not support the more radical contention that subsequent recognition of a state of affairs brought about by a unilateral declaration of independence could be taken to mean that secession was achieved under colour of a legal right.'

[86] Derrida, above n 27, 10.

constituent and constituted power, to accommodate contests of representational claims is finite: 'there is a form of constituent power […] that proceeds from a radical outside no political community succeeds in domesticating.'[87] Moreover, these decisions illustrate the limited ability of courts to adjudicate acts of constituent power. Both the ICJ and the Supreme Court of Canada trace their authority, their capacity to judge, back to the legal order which was, or would be contested, by the acts of this 'radical' constituent power and in both instances constituent power was only justiciable to the extent that it claimed to be constituted power. To the extent that exercises of constituent power cannot be accommodated by norms of an existing legal order, they must be translated into constituted power by another means. The success of any declaration is, therefore, dependent on someone other than the author(s) of the statement[88]. It is not enough simply to represent reality as being changed. The authors' representative capacity is, in Searle's terminology, a status function, that is a 'a function […] where the objects and the people cannot perform the function solely in virtue of their physical structure' and the 'performance of the function requires that there be a collectively recognised status that the person or object has, and it is only in virtue of that status that the person or object can perform the function in question.'[89] Necessarily, this recognition can only be given after the fact and in this way the change in reality which is represented as already existing at the time of the utterance takes effect retroactively. Moreover, institutional facts (such as 'the People') require 'continued recognition or acceptance because they exist only as long as they are recognized or accepted.'[90] Searle says that '[o]ne mark of recognition or acceptance is continued usage of the institution and institutional facts',[91] echoing Lindahl's suggestion that it is the uptake of constitutional rights by the collective which legitimates the authors' claim to representivity. The requirement of recognition is not, necessarily, limited to

[87] Lindahl, above n 21, 22.

[88] Derrida puts the this way: '[a]nother "subjectivity" is still coming to sign, in order to guarantee it, this production of signature. In short, there are only countersignatures in this process.' In the case of the American Declaration of Independence the people 'sign in the name of the laws of nature and in the name of God ... He comes, in effect, to guarantee the rectitude of popular intentions, the unity and goodness of the people. He founds natural laws and thus the whole game which tends to present performative utterances as constative utterances.' For a Declaration of Independence to have 'meaning and effect there must be this last instance.' Derrida, above n 27, 11, 12.

[89] Searle, above n 19, 8.

[90] Ibid, 103.

[91] Searle, above n 19, 103.

the members of one community to which the authors belong. For example, the authors of the declaration require not only the recognition of the members of the community on whose behalf they claim to act but also, arguably, the recognition of the international community of states.[92] Crucially, however, this recognition can only ever be granted *ex post facto* and the representative status of the authors achieved only retroactively. In order to understand the ontology of 'the People' (and institutional facts generally) one must remember that '[y]ou make something the case by representing it as being the case.'[93] This insight provides a partial solution to the paradox of constituent power. Constituent power can only be rendered intelligible when it is understood to act as constituted power. This is not because constituent power is necessarily unique, but rather because this is the logical structure which underpins all institutional reality.

[92] I believe that Searle's account of the ontology of institutional facts has ramifications for the doctrine of recognition in international law, an idea which I will develop in a future article.

[93] Searle, above n 19, 120.

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WILL SURVIVING CONSTITUTIONALISM IN MOROCCO AND JORDAN WORK IN THE LONG RUN? A COMPARISON WITH THREE PAST AUTHORITARIAN REGIMES

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Abstract

In the past three years, Morocco and Jordan have introduced political and constitutional reforms. Indeed, despite the fact that King Mohammed VI in Morocco and King Abdullah II in Jordan continue to hold near absolute powers, both the 2011 Moroccan Constitution and the constitutional amendments to the 1952 Jordan Constitution introduced some important democratic novelties. The impression is that Mohammed VI and Abdullah II gave rise to what can be defined as 'surviving constitutionalism': a constitutionalism whose main purpose is not to democratize the country, but to guarantee the regimes' own survival. We are therefore dealing with the paradox according to which constitutionalism – which should be aimed at limiting arbitrary power – is used as a means to maintain and strengthen authoritarian/semi-authoritarian regimes. This paper shows that the constitutional and political reforms carried out in these two countries were indeed primarily directed to appease people's discontent to ensure the regimes' stability and continuity. However, this paper also argues that it is far from certain that this strategy will work in the long run. A comparative analysis with other past authoritarian regimes (in particular Chile, Mexico and Egypt), shows that the constitutional institutions introduced in Morocco (e.g. the duty of the King to appoint the Head of Government from the party which wins the most seats in the elections to the House of Representatives, the introduction of concrete constitutional review, and the strengthening of judicial independence) and Jordan (e.g. the establishment of a Constitutional Court, judicial oversight of elections, and the abolition of the King's power to indefinitely postpone elections) should not be underestimated: they may become effective constraints on authoritarian power in the future. Thus, the 'surviving constitutionalism' that has served to appease the public's dissatisfaction in the short term may boomerang in the medium and long term.

Keywords

Constitutionalism, Transition to Democracy, Authoritarian Regimes

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1 Introduction

In the past few years, Middle Eastern and North African (MENA) countries have experienced profound transformations, especially on social, constitutional and political fronts. Indeed, the phenomenon known as the 'Arab Spring' began on 17 December 2010, when a young street vendor named Mohamed Bouazizi lit himself on fire in the town of Sidi Bouzid, in Tunisia, as a sign of protest against the regime of Ben Ali for the nation's high unemployment rate, rampant corruption, and more generally for the lack of fundamental freedoms and rights. This episode, and especially Bouazizi's eventual death on 4 January 2011, gave rise to mass protest demonstrations in the country, and after a few days President Ben Ali, who had ruled over the people for 23 years, was forced to flee Tunisia. What happened in this country acted as a catalyst for the rest of the Arab world: protests, demonstrations and in some cases even revolutions took place in a number of MENA countries.

The consequences of these events are impressive. First and foremost, it is important to stress that four long-lasting dictators were overthrown: Ben Ali in Tunisia, Qaddafi in Libya, Mubarak in Egypt and Saleh in Yemen. Another relevant characteristic common to many of the countries involved in the Arab uprisings was the rise to power of Islamist movements. For example, the Justice and Development Party won the November 2011 parliamentary elections in Morocco, Ennhadha came out as the party with a relative majority in Tunisia and the Muslim Brotherhood (through its Freedom and Justice Party) won the parliamentary and presidential elections in Egypt.

Furthermore, many of these countries decided to mark a discontinuity with the past by adopting a new constitution or making constitutional amendments. Morocco was the first country involved in the Arab upheavals to adopt a new constitution, in July 2011, followed by Egypt, which adopted two constitutions in the span of one year. The first came into force in December 2012; however, on 8 July 2013, following President Mohamed Morsi's removal from office, Egypt's interim president, Adly Mansour, issued a new constitutional declaration that suspended the 2012 Constitution and laid out a process for amending it. The revised Constitution came into force in January 2014. In the same month, after more than two years of debates in the Constituent Assembly, the new Tunisian Constitution was adopted. In Jordan, King Abdullah II decided to introduce a number of changes to the 1952 Constitution and to partially amend the electoral law. This 'wave of constitutionalism' in the Arab world does not seem to be over yet. In Yemen, for example, a constitution-drafting committee was formed some

months ago. Moreover, notwithstanding the huge difficulties that Libya is facing, even that country has started a constitution-making process.

In this paper, I will limit the scope of my analysis to Morocco and Jordan, and I will show that the constitutional and political reforms carried out in these two countries mainly responded to the need to appease people's discontent so as to ensure the regimes' stability and continuity. I will point out that King Mohammed VI in Morocco and King Abdullah II in Jordan gave rise to what can be described as 'surviving constitutionalism':[1] their main purpose was not to democratise their country, but to guarantee their own survival. I will then argue that it is not certain that this strategy will work in the long run. In fact, a comparative analysis with other past authoritarian regimes (i.e., Chile, Egypt and Mexico) shows that the strengthening of democratic procedures and institutions introduced in the constitutions of Morocco and Jordan are not necessarily only 'cosmetic', but they may become effective constraints of authoritarian power in the future.

Accordingly, this paper proceeds in four sections. First, I point out the reasons the Arab monarchies have so far survived the Arab uprisings. Second, I illustrate the main novelties introduced in the 2011 Constitution of Morocco and in the amendments to the 1952 Constitution of Jordan, and I show that Mohammed VI and Abdullah II used these reforms as instruments of survival. In the third section, I discuss the cases of Chile under Pinochet, Egypt under Mubarak and Mexico during the era of a single hegemonic party in order to stress that an autocratic regime can be bound by a constitution of its own making. Finally, I draw some concluding remarks.

2 The Resistance of Arab Monarchies to the Uprisings

Sean L. Yom and F. Gregory Gause III have rightly stressed that the 'Arab Spring' might just as well be called the 'Arab *Republics'* Spring'.[2] As a matter of fact, while several long-lasting authoritarian presidents in the MENA region have been overthrown, Arab monarchs have so far survived the Arab uprisings.

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[1] See also J O Frosini & F Biagi, 'Transitions from Authoritarian Rule following the Arab Uprisings: A Matter of Variables', in J O Frosini & F Biagi (eds), *Political and Constitutional Transitions in North Africa: Actors and Factors* (2014).

[2] S L Yom & F G Gause III, 'Resilient Royals: How Arab Monarchies Hang On' (2012) 23 *Journal of Democracy* 74, 74.

Besides mere repression, the literature[3] has identified many other factors that explain how the eight Arab monarchies (Morocco, Jordan, Kuwait, Saudi Arabia, Oman, Qatar, the United Arab Emirates [UAE] and Bahrain) have managed to resist the wind of change that has been blowing in the Arab world since December 2010.

First of all, one should not forget the high degree of religious or tribal legitimacy enjoyed by Arab monarchs. The Alaouite crown of Morocco and the Hashemite House of Jordan claim direct descent from the Prophet Mohammed. King Abdullah of Saudi Arabia is often referred to as 'Custodian of the Two Holy Mosques', Mecca and Medina.[4] The royal families in Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE command authority and respect among the tribal confederations in their societies.

Second, Arab kings and emirs are often considered the effective guarantors of social and political stability. In Morocco, one of the main reasons Mohammed VI was not called into question is because the people think that without the king and his 'unifying role', the country would be ungovernable. In Jordan, the monarchy serves as a 'security blanket for all Jordanians regardless of their origins, providing protection for the country's various ethnic groups'.[5] Furthermore, 'in times of unrest, crowds are more likely to protest for legislative change than for the abandonment of the monarchy'.[6]

Third, Arab monarchs do not 'dirty their hands' in everyday politics. This gives them a twofold advantage: first, when things go wrong, they tend to lay all the blame on the politicians; second, when they are put under significant pressure by the population, they can initiate political, economic and constitutional changes and appear as the country's real reformers. As we will see, this is precisely the strategy followed by Mohammed VI in Morocco and Abdullah II in Jordan.

Fourth, access to oil rents continues to be a strategic means for 'petro-

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[3] Ibid; R Brynen, P W Moore, B F Salloukh & M-J Zahar, *Beyond the Arab Spring: Authoritarianism & Democratization in the Arab World* (2012) 173 ff.; M Ottaway & M Muasher, 'Arab Monarchies: Change for Reform, Yet Unmet' (December 2011) *The Carnegie Papers* <http://carnegieendowment.org/files/arab_monarchies1.pdf> [accessed 11 April 2014]; L Noueihed & A Warren, *The Battle for the Arab Spring: Revolution, Counter-revolution and the Making of a New Era* (2012) 245 ff.; A Keyman, 'The Resilience of Arab Spring Monarchies' (April 2012) *e-International Relations* <http://www.e-ir.info/2012/04/02/the-resilience-of-arab-monarchies-in-the-arab-spring/#_ftn1> [accessed 11 April 2014].

[4] Keyman, above n 3.

[5] Ottaway & Muasher, above n 3, 9.

[6] J A Goldstone, 'Understanding the Revolutions of 2011' (May/June 2011) 90 *Foreign Affairs* 8, 13.

monarchies' to prevent dissent and to calm protests.[7] In fact, in order to appease public dissatisfaction, oil-rich monarchies have used the revenues deriving from oil reserves to give state employees pay raises and welfare payouts, and to create jobs, loan benefits and costly price subsidies. It should be noted that 'oil rents easily recirculate across borders in the form of aid',[8] and therefore even non-oil countries (such as Jordan and Morocco) have benefitted through the economic assistance of wealthier monarchies, such as those in Saudi Arabia, Kuwait, Qatar and the UAE.

Fifth, Arab monarchs can count on 'foreign patrons':[9] the Unites States in Jordan and in the Gulf monarchies, and France in Morocco are probably the most evident examples. These close relations were of fundamental importance even during the Arab upheavals, in order to constrain 'Western calls for change'.[10] In Bahrain, given the presence of the US Fifth Fleet, the United States' criticism of the gross violations of human rights by the police during the 2011 February protests was very limited. In much the same way, former French President Nicolas Sarkozy did not call for regime change in Morocco; on the contrary, he defined the reform process carried out by Mohammed VI as 'exemplary'.[11]

As far as external involvement is concerned, the monarchies' survival was also guaranteed through the military intervention of the Gulf Cooperation Council (GCC). This happened in Bahrain, which is the only Arab monarchy to have experienced large-scale protest demonstrations similar to those that took place in the republics. The GCC's action was crucial to calm the situation.

3 Surviving Constitutionalism

Despite the fact that *all* the Arab monarchies have managed to resist to the wind of change, one cannot deny the fact that the Arab upheavals have produced some significant political and constitutional changes. Of course, a distinction should be drawn between the Gulf monarchies, on one hand, and Jordan and Morocco,

[7] See S A Yetiv, 'Oil, Saudi Arabia, and the Spring that Has not Come', in M L Haas & D W Lesch (eds), *The Arab Spring: Change and Resistance in the Middle East* (2013) 97, 97 ff. It should be noted, however, that oil rents play a key role not only in the monarchies, but also in the republics, such as in Algeria.

[8] Yom & Gause III, above n 2, 83.

[9] Ibid, 84.

[10] Brynen, Moore, Salloukh & Zahar, above n 3, 187.

[11] See <http://www.lemonde.fr/afrique/article/2011/06/18/la-france-salue-les-reformes-annoncees-par-le-roi-du-maroc_1538011_3212.html> [accessed 11 April 2014].

on the other. Indeed, if the former managed to preserve the *status quo* and were forced to introduce only extremely limited changes,[12] the latter tried to compensate for a lack of oil reserves with political and constitutional reforms. In the following paragraphs I discuss the major novelties introduced in the 2011 Constitution of Morocco and in the amendments to the 1952 Constitution of Jordan; I show that both Mohammed VI and Abdullah II opted for these reforms so as to calm down the protest demonstrations and guarantee the stability and the continuity of their regimes. In other words, constitutionalism represented for both kings an instrument of survival, and for this very reason, one can refer to it as 'surviving constitutionalism'.

3.1 The 2011 Constitution of Morocco

The first protest demonstrations broke out in Morocco after 20 February 2011 – the date from which the eponymous *'Mouvement du 20 Février'* took its name. This movement, largely composed of young people, specifically denounced the systematic and endemic corruption, and the high cost of basic products alongside low wages and increasing poverty. It also called for greater social justice, free access to health care, greater employment opportunities and the right to housing. Young Moroccans also hoped for the achievement of profound and radical constitutional and political reforms, the construction of a state based on the rule of law, and a free and independent legal system in order to enable the country to become a parliamentary monarchy.[13]

The regime has been able to keep protest movements under control mainly due to the fact that it responded quickly to the requests being made. Indeed, on 9 March 2011 – less than three weeks after the first demonstrations – the king announced a far-reaching reform of the Constitution, which included some of the protestors' demands. Thus, Mohammed VI managed to turn the element of time to his advantage, catching the demonstrators off balance.

The new 2011 Constitution – which was adopted in less than four months – was 'granted' by the king, and did not result from a democratically elected Constituent Assembly. Indeed, the entire constituent process was driven

[12] In Saudi Arabia, for example, the king announced that women will be allowed to vote and run for office in the next municipal elections (2015); in Oman, the powers of the Shura Council were strengthened; in the UAE, the electorate for the Federal National Council was expanded (see Brynen, Moore, Salloukh & Zahar, above n 3, 173 ff; Ottaway & Muasher, above n 3, 14 ff).

[13] I Fernández Molina, 'The Monarchy vs. the 20 February Movement: Who Holds the Reins of Political Change in Morocco?' (2011) 16 *Mediterranean Politics* 435, 436-7.

by Mohammed VI:[14] it was he who decided to replace the previous (1996) Constitution, to identify in his speech on 9 March 2011 the 'key elements' on which that reform was to be based, to appoint the members of the Commission on Constitutional Reform (which had the task of drafting the new Constitution), and finally to grant his approval to the draft presented to him by the president of the Commission. In other words, he had the first and the last word. Moreover, considering that the consultation – held on 1 July 2011, through which the population ratified the new Constitution – was much more like an authoritarian plebiscite than a democratic referendum, it is evident that the 2011 Constitution represents another '*octroyée*' Constitution in Moroccan history.[15]

The new Constitution both breaks from and maintains continuity with the previous one. In fact, although it introduced some relevant democratic novelties in relation, *inter alia*, to the protection of fundamental rights and freedoms, the horizontal separation of powers, and territorial organisation, it continues to grant the king near absolute powers.

As far as discontinuity is concerned, one must first underline that the new Constitution guarantees greater independence and autonomy to the judiciary. The latter has been elevated from a mere 'authority' (as defined under the 1996 Constitution) to the status of a full-blown branch of the state.

Its independence is guaranteed principally through the Higher Council of the Judicial Power, which replaced the High Council of Magistracy and acquired expanded functions. This body is still chaired by the king; however, under the new Constitution, the executive president is not the minister of justice (as provided under the 1996 Constitution) but is the first president of the Court of Cassation, thus making this body more independent.

The 2011 Constitution also introduced significant novelties in the field of constitutional adjudication. Indeed, in addition to *ex ante* review (already provided under the previous Constitution), the new Constitution allows for concrete constitutional review. In fact, Article 133 states, 'the Constitutional Court shall have competence to look into an exception of unconstitutionality raised in the course of a trial, when one of the parties argues that the law

[14] For a more detailed description of the Moroccan constituent process, see F Biagi, 'The 2011 Constitutional Reform in Morocco: More Flaws than Merits' (2014) 7 *Jean Monnet Occasional Papers* 6 ff., <http://www.um.edu.mt/europeanstudies/jmceu-med/papers> [accessed 11 April 2014]; see also F Biagi, 'The Pilot of Limited Change. Mohammed VI and the Transition in Morocco', in Frosini & Biagi, above n 1.

[15] Before the 2011 Constitution, Morocco had adopted five constitutions (in 1962, 1970, 1972, 1992 and 1996), and all of them can be considered '*octroyée*' constitutions.

on which depends the outcome of a trial undermines the rights and freedoms guaranteed by the Constitution'. The introduction of such *ex post* review thus appears extremely important in enabling the Court to reinforce its position as a counter-majoritarian body and may thus contribute to the process of democratisation more effectively than in the past.

Furthermore, while under the previous Constitution the prime minister was appointed at the discretion of the king, the 2011 Constitution states that the king appoints the head of government from the party that wins the most seats in the elections to the House of Representatives, and with a view to their results. This practice had already been followed on two occasions (following the 1997 and 2007 elections), although since it had no constitutional status, it could be disregarded at any time, as occurred following the 2002 elections. This will evidently place a significant limit on the king's powers, who will now be unable to appoint a head of government without reference to election results: it will therefore *de facto* be the people who choose the head of the executive.

It is also important to mention that the new Constitution declared the supremacy of international convention over domestic laws, and that national legislation must consequently be brought into line with the former.[16]

On the other hand, though, continuity with the past is still evident. First and foremost, despite what is stated in Article 1 of the Constitution,[17] Morocco did not turn into a parliamentary monarchy based on the British or the Spanish model, where 'the King reigns but does not govern'. Indeed, the sovereign continues to be the key figure in determining political direction and adopting decisions of strategic importance for the country. First of all, the king continues to chair the Council of Ministers, the body that resolves matters of decisive interest for the state. Moreover, after consultation with the head of government, the king can dismiss ministers (Article 47) and has the power to dissolve the houses of parliament (after consultation with the president of the Constitutional Court and after informing the presidents of the two houses of parliament and the head of government) (Article 96). The sovereign also continues in his role as president

[16] It should be pointed out that the Constitution enshrines the supremacy of international conventions, but 'within the framework of the provisions of the Constitution, the laws of the Kingdom, and *respect for its immutable national identity*' (emphasis added). It is evident that the reference made by the Constitution pertains to the Islamic religion. It remains to be seen how judges will interpret this provision (on this point, see N Bernoussi, 'La Constitution de 2011 et le juge constitutionnel', in Centre d'Études Internationales (eds.), *La Constitution marocaine de 2011: Analyses et commentaries* (2012) 207, 225-6.

[17] Article 1 defines the monarchy not only as 'constitutional', 'democratic' and 'social', but also as 'parliamentary'.

of the Higher Council of the Judicial Power (Article 56), supreme commander of the Royal Armed Forces (Article 53), and is also required to chair a new national security body, namely the Supreme Security Council.

Although Article 19 of the previous constitutions (which granted the king temporal and spiritual powers) has been 'split' into Articles 41 and 42, the sovereign continues to be both the head of state, the supreme representative of the nation, and the '*Amir Al Mouminine*' – that is, the 'Commander of the Faithful'. From a symbolic point of view, the reform of the old Article 19 is a true revolution. For the first time in 50 years, the most important provision of the Moroccan Constitution has been changed, thus losing its 'sacredness'. However, it is far from certain that this 'split' will bring about significant novelties from a practical point of view.[18]

The Constitution specifies that the sovereign shall exercise his powers through royal decrees (*dahirs*), which must be countersigned by the head of government. It should be stressed that whilst the *dahirs* that do not require countersignature by the head of government are now the exception, they do relate to matters of particular importance: in addition to the appointment of the head of government (Article 47), they cover the religious prerogatives inherent in the institution of the Commandership of the Faithful (Article 41), the appointment of the ten members of the Regency Council (Article 44), the dissolution of parliament (Article 51), the approval of appointments of magistrates by the Higher Council of the Judicial Power (Article 57), the proclamation of a state of emergency (Article 59), the appointment of half of the members of the Constitutional Court (Article 130), and the presentation of proposed constitutional amendments for referendum (Article 174).[19]

The strategy followed by Mohammed VI is clear. On one hand, the Moroccan monarch decided to adopt a new Constitution containing some important democratic novelties in order to appease public dissatisfaction and thus calm protests. On the other hand, he did not renounce most of his key powers and thus remained 'the master of the political game'.[20]

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[18] See D Melloni, 'Le nouvel ordre constitutionnel marocain: de la 'monarchie gouvernante' à la 'monarchie parlementaire'?', in Centre d'Études Internationales (eds), above n 16, 40.

[19] For a more detailed commentary on the new Constitution, see Centre d'Études Internationales (eds), above n 16; International IDEA, *The 2011 Moroccan Constitution: A Critical Analysis* (2012); A Bouachik, M Degoffe & C Saint-Prot (eds), 'La Constitution marocaine de 2011: Lectures croisées' *77 Publications de la Revue marocaine d'administration locale et de développement, Série 'Thèmes actuels'* (2012).

[20] A Tourabi, 'Constitutional Reform in Morocco: Reform in Times of Revolution' (2011)

3.2 The Amendments to the 1952 Constitution of Jordan

Although the first demonstrations that can be linked to the Arab upheavals occurred in January 2011, it should be stressed that people in Jordan 'began taking to the street long before the first protests in Tunisia heralded the beginning of the Arab Spring'.[21] The uprisings that took place in the neighbouring countries simply made the lack of trust toward the regime even stronger. The demonstrations continued in February and reached their peak on March 24 and 25. The protesters – composed mainly of representatives of the Muslim Brotherhood, trade unions, non-Islamist opposition parties, and liberal youth activists – called for economic and political changes. They protested against rising food and fuel prices, inflation, unemployment and rampant corruption, and they sought a strengthening of the representative institutions (e.g., selection of the prime minister by the Chamber of Deputies, popular election of the upper house, reform of the electoral law), and ultimately transition to a parliamentary monarchy. Protesters' demands focused on 'changes *within* the regime rather than on regime change'.[22]

Similar to Mohammed VI in Morocco, Abdullah II played a crucial role in the reform process. Indeed, besides appointing four different prime ministers in the space of three years,[23] in spring 2011 the monarch appointed two committees: the National Dialogue Committee to propose changes to the voting system, and the Royal Committee on Constitutional Amendments to propose reforms to the 1952 Constitution. The packet of constitutional reforms was adopted in September 2011, while, after months of bitter debate, in June 2012 the Parliament passed the new electoral law, which partially amended the 'single non-transferable vote' system in place since 1993.

Electoral legislation is an extremely sensitive issue in Jordan. First, one must consider that most of the members of the House of the Representatives are not affiliated with a party. This is due not only to historical reasons (between 1957 and 1992, political parties were illegal), but also to the electoral law. Indeed, the latter introduced an electoral system that allowed citizens 'to choose only one candidate

<http://www.arab-reform.net/sites/default/files/Morocco_EN.pdf> [accessed 11 April 2014].

[21] H A Barari & C A Satkowski, 'The Arab Spring: The Case of Jordan' (2012) 3 *Ortadoğu Etütleri* 41, 48-9.

[22] Ottaway & Muasher, above n 3, 9 (emphasis added).

[23] Marouf al-Bakhit in February 2011, Awn Shawkat Al-Khasawneh in October 2011, Fayez al-Tarawneh in May 2012, and Abdullah Ensour in October 2012; the latter was reappointed prime minister following the January 2013 parliamentary elections.

even though several are elected from each district'.[24] This system favoured tribal elites while disadvantaging the formation and development of political parties. In those parts of the country where tribal culture dominates, people tend to vote for those candidates affiliated with their tribe or family.[25]

The reform of the electoral law has met the demands of the opposition only in a very limited manner. The number of seats in the House of the Representatives was increased from 120 to 150, and the quota reserved to women was increased from 12 to 15 seats. Of those 150 seats, only 27 (that is, 18%) are now assigned through the new proportional national-list system; the rest are still allocated in accordance with the previous 'single non-transferable vote' system. Thus, it comes as no surprise that the results of the January 2013 parliamentary elections showed that the great majority of the elected are still the king's 'loyalists'.[26] A real reform of the electoral law therefore represents a *condicio sine qua non* for a transition to a democratic form of government.

The constitutional reforms were much more limited compared to Morocco's. Significantly, Chapter 4, Section I of the Constitution – devoted to 'The King and His Prerogatives' – has been left intact. This means that the monarch continues to hold executive power, able to appoint the prime minister and the senate, and dissolve both houses of the parliament. Moreover, he ratifies and promulgates the laws, and orders the enactment of the regulations necessary for their implementation. His veto power can only be overridden by a two-thirds vote of both houses. He is the 'Supreme Commander' of the armed forces, declares war, approves amendments to the Constitution and appoints and dismisses judges.

Having said that, the 2011 reform of the Constitution should not be underestimated. Indeed, the constitutional amendments include the prohibition of any form of torture and a partial enhancement of fundamental rights. Furthermore, judicial independence was slightly strengthened, and the government's power to issue temporary laws when parliament is not in session was partially limited.

Two other significant novelties refer to the organisation and oversight of elections, and to constitutional adjudication. As far as elections are concerned, it should be noted that the king has lost the power to indefinitely postpone elections, and that an independent electoral commission has replaced the Ministry of Interior in organising elections. The new commission has the task of supervising and administering the parliamentary electoral process (and any other elections

[24] Ottaway & Muasher, above n 3, 10.

[25] See <http://www.europeanforum.net/country/jordan> [accessed 11 April 2014].

[26] On the results of these elections, see S L Yom, 'Jordan: The Ruse of Reform' (2013) 24 *Journal of Democracy* 127, 135.

decided by the Council of Ministers) at all stages. Moreover, the House of the Representatives has lost the power to determine the validity of the election of its members. Now this task has been assigned to the Court of Appeal, whose decisions are final and not subject to any challenge. The set-up of an electoral commission combined with judicial oversight of the elections has undoubtedly established the conditions to make the elections more free and fair.

With regard to constitutional adjudication, it is important to stress that despite recurrent calls for the creation of a similar body,[27] Jordan did not have a constitutional court. This demand was finally addressed in 2011. Despite some concerns regarding its independence (for example, all the justices are appointed by the king), the establishment of the Constitutional Court must be welcomed. This new body has the power to check the constitutionality of laws and regulations, as well as to interpret the provisions of the Constitution. Claims before the Court can be lodged by the senate, the Chamber of Deputies and the Council of Ministries. Interestingly enough, the reform of the Constitution has also introduced concrete constitutional review.[28]

Unlike Morocco, where the process of constitutional implementation is proceeding at a rather slow pace, in Jordan both the Electoral Commission and the Constitutional Court have already been established. The former supervised the electoral process for the first time during the January 2013 elections.

King Abdullah II's strategy very much resembled the one followed by Mohammed VI. Indeed, the Jordanian monarch decided to introduce constitutional and electoral reforms in order to meet – at least partially – protesters' demands. At the same time, however, almost all his powers remained in his hands.

4 Constitutionalism in Non-Democratic Regimes

In the previous paragraphs, I showed that Mohammed VI and Abdullah II gave rise to surviving constitutionalism: indeed, both the 2011 Moroccan Constitution and the amendments to the Jordanian Constitution mainly responded to the

[27] See M L Burgis, 'Judicial Reform and the Possibility of Democratic Rule in Jordan: A Policy Perspective on Judicial Independence' (2007) 21 *Arab L Quarterly* 135, 162-3; M Abu-Karaki, 'Democracy & Judicial Controlling in Jordan: A Constitutional Study' (2011) 4 *J of Politics and L* 180, 180 ff.

[28] 'In pending cases, any party to the lawsuit may argue that a law is not in conformity with the Constitution. In case the relevant court finds that the plea has merit, it must refer the matter to the court specified by the law for the purposes of examining the referral of such to the Constitutional Court' (Art 60).

need to appease people's discontent so as to ensure the regimes' stability and continuity. The two kings allowed constitutional reforms to take place as long as their key powers and prerogatives were not questioned: their main purpose was not to democratise the country, but to guarantee their own survival. We are therefore dealing with the paradox according to which constitutionalism – which should be aimed at limiting arbitrary power – is used as an instrument to maintain and strengthen authoritarian/semi-authoritarian rules.

It is accepted that Mohammed VI and Abdullah II have so far achieved their aim: both monarchies continue to be *executive* monarchies, and the countries have remained authoritarian/semi-authoritarian regimes.[29] Initially, one may be tempted to think that the two kings can sleep easy. The novelties introduced in the Moroccan and Jordanian constitutions do not seem to represent (at least up to the present time) a threat to the monarchies. Indeed, constitutions in authoritarian/semi-authoritarian contexts are often considered 'paper tigers'. This assumption is true in most cases, *but not always*. Indeed, in the following paragraphs, on the basis of a comparative analysis with other past non-democratic regimes, I show that the strategy followed by Mohammed VI and Abdullah II *may* not work in the long run, since the strengthening of democratic procedures and institutions are not necessarily only 'cosmetic', but may become effective constraints of autocratic power in the future. The non-democratic regimes I will examine are Chile under Pinochet, Egypt under Mubarak, and Mexico during the era of a single hegemonic party (the PRI).

4.1 The Case of Chile: The Role of the *Tribunal Constitucional*

It is well known that from 11 September 1973 to 11 March 1990, Chile was governed by the authoritarian regime of General Augusto Pinochet. The case of Chile is extremely interesting because it shows that even an authoritarian regime can be bound by a constitution of its own making. Robert Barros pointed out that in 1980, Pinochet's regime 'introduced and sustained a constitution which set into operation institutions that limited the dictatorship's power and prevented it from unilaterally determining the outcome of the October 5, 1988 plebiscite which triggered the transition to democracy in 1990'.[30] It is important to stress that

[29] It is important to stress that according to the 2014 Freedom House Report on 'Freedom in the World', Morocco is considered a 'partially free' country, and Jordan a 'not free' country. See <http://freedomhouse.org/sites/default/files/FIW2014%20Booklet.pdf> [accessed 11 April 2014].

[30] R Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta and the 1980 Constitution* (2002) 1. The plebiscite was on whether President Augusto Pinochet should remain in office for a further

the 1980 Constitution was not aimed at perpetuating the regime, but at providing an 'orderly transition'[31] once the military left power. Indeed, the institutional limits established by this Constitution were mainly designed to '*bind others*, to hold future civilian actors to the terms of the military's constitution'.[32] In practice, however, what happened was that these institutions strongly limited the military dictatorship itself.

One of the institutions that most constrained Pinochet's regime was the Constitutional Court (*Tribunal Constitucional*). This body carried out, *inter alia*, mandatory, preventive constitutional review of organic constitutional law and laws interpreting the constitution, and it settled any constitutional disputes that arose in the course of processing bills, constitutional reform proposals or treaties requiring congressional approval. The Court was composed of seven members: three of them were elected by the Supreme Court, one by the president of the republic, one by the junta and two by the National Security Council. Thus, the majority of the membership had been selected by the military government.

Unlike the judiciary – which 'never sought to challenge the undemocratic, illiberal and antilegal policies of the military government'[33] – the Constitutional Court, since its very first judgment,[34] proved to be anything but the regime's ally. In particular, the *Tribunal* played a fundamental role in determining the legal and institutional framework of the 1988 presidential plebiscite. On 24 September 1985,[35] the Constitutional Court issued a landmark decision that required the Electoral Court (*Tribunal Calificador de Elecciones*) to be established for the plebiscite. In a narrow 4 to 3 vote, the majority of the Constitutional Court, by opting for a systematic interpretation of the constitution rather than a literal interpretation, stated that the Electoral Court needed to be operative for the plebiscite so as to oversee the regularity of the vote. According to the *Tribunal Constitucional*:

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eight years.

[31] Z Elkins, T Ginsburg & J Melton, 'The Content of Authoritarian Constitutions', in T Ginsburg & A Simpser (eds), *Constitutions in Authoritarian Regimes* (2014) 141, 144.

[32] Barros, above n 30, 317 (emphasis added).

[33] L Hilbink, 'Agents of Anti-Politics: Courts in Pinochet's Regime', in T Ginsburg & T Moustafa (eds). *Rule by Law: The Politics of Courts in Authoritarian Regimes* (2008) 102, 102.

[34] In its first ruling the Constitutional Court declared Article 30, para. 3 of the project on organic constitutional law of the *Tribunal Constitucional* to be unconstitutional. Indeed, according to the Court, permitting the *Tribunal* to use secret documentation to convict individuals while prohibiting the defendant any knowledge of this evidence represented an evident violation of the due process of law (see Barros, above n 30, 270 ff.).

[35] *Sentencia Rol*. No. 33, D.O., 3 October 1985.

[...] a contrary interpretation not only would injure the spirit of the constitution but, also, common sense which is the base of all logical interpretation, since it might amount to exposing the plebiscite itself to a judgment of legitimacy of grave prejudice for the normal development of the future institutional order.[36]

Besides this case, the *Tribunal Constitucional* also declared the constitutional illegitimacy of laws that restricted free political competition or that gave the opportunity for arbitrary intervention in the political process. Indeed, several important legislative acts were considered by the Constitutional Court to be in contrast with the rights and freedoms provided for in the 1980 Constitution, such as equality before the law, equal protection of the law, due process, freedom of association and political rights.

Thus, the Court was crucial in assuring that the plebiscite 'would be a fair contest and a valid expression of the popular will'.[37] Pinochet was defeated in the plebiscite, as 55% of voters did not grant him another term in office.

4.2 The Case of Egypt: The Role of the Supreme Constitutional Court

In order to understand the role played by the Supreme Constitutional Court (SCC) during Hosni Mubarak's authoritarian regime (which lasted from 1981 to 2011), one has to begin by considering that when Gamal Abd al-Nasser died in 1970, Egypt was experiencing serious economic difficulties. This situation had largely developed through the nationalisation of much of the private sector and the elimination of any significant check on executive power, which produced a mass exodus of private capital from the country. Therefore, the priority of Nasser's successor, Anwar Sadat, was to attract foreign investments. However, as pointed out by Tamir Moustafa, 'given the regime's history of nationalising the vast majority of the private sector, it was difficult to convince investors that their assets would be safe from state seizure or adverse legislation on entering the Egyptian market'.[38] For this reason, Sadat decided to create a Supreme

[36] I follow the translation by Barros, above n 30, 299.
[37] Barros, above n 30, 305.
[38] T Moustafa, *The Struggle for Constitutional Power: Law, Politics and Economic Development in Egypt* (2007) 4.

Constitutional Court,[39] which was set up in 1980.[40] This Court was designed to effectively protect property rights so as to placate investors' concerns.[41]

Mubarak, who succeeded Sadat in 1981 following the latter's assassination, was in favour of this protective policy. At the beginning, the Supreme Constitutional Court focused its activity on safeguarding economic rights, thus fulfilling the expectations of Sadat and Mubarak. However, by 1985 the Court began to grant people not only economic rights, but also civil and political rights. In this way, the Court directly confronted the executive, which was opposed to political liberalisation. As Clark Lombardi put it:

[...] by the mid-1980s the SCC was demonstrating a willingness to check the executive when it seemed unambiguously to violate explicit constitutional limitations on executive power – even if their decision touched upon sensitive issues. The SCC confronted the executive as early as 1985, when it issued a starting ruling setting limits on the executive's emergency powers.[42]

Moreover, starting from the early 1990s, the Court, on the basis of an expansive reading of the 1971 Constitution, began to rely on international human rights conventions so as to guarantee an even more effective protection of fundamental rights and freedoms (freedom of the press, freedom of association, and so on) to Egyptian citizens.[43]

Thus, in the period from 1985 to the end of the 1990s, the Supreme Constitutional Court, which had been conceived as an ally of the executive, turned into a body that often constrained the authoritarian regime. In the early 2000s, however, Mubarak put an end to the Court's boldness by packing it with regime-friendly judges.

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[39] The Court was assigned three main functions: first, it could issue binding interpretations of legislative acts if different judicial bodies disagree about their interpretation; second, it could resolve conflicts of jurisdiction between different judicial bodies; third, it could carry out constitutional reviews of legislative acts.

[40] The Court was already provided for in the 1971 Constitution, but it started its activity ten years later because the enabling legislation was issued only in 1979.

[41] Moustafa, above n 38, 57 ff.

[42] C Lombardi, 'Egypt's Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian, Aspirationally "Islamic" State' (2008) 3 *J of Comp L* 234, 243.

[43] Lombardi, above n 42, 244-5; Moustafa, above n 38, 167-9.

4.3 The Case of Mexico: The Role of the IFE and the Electoral Court

Mexico was characterised for a very long time by a non-democratic regime. Indeed, the era of a single hegemonic party, the PRI (Institutional Revolutionary Party), lasted for 71 years – i.e., from 1929, when the precursor to the party was established,[44] to 2000, when Mexico experienced its first alternation regarding the presidency of the republic. During its power, the PRI occupied almost all government offices, both at federal and local levels, thus relegating the opposition to 'window dressing'.

The transition to democracy in Mexico was extremely gradual and took place mainly through electoral reforms.[45] Indeed, since 1977 several important changes have been made in the field of electoral legislation and electoral institutions, which eventually brought about the '*cambio político*' (political change).[46] As far as the electoral institutions are concerned, it should be noted that for many years both the organisation and the adjudication of the elections were in the hands of the federal government. It goes without saying that this situation allowed the PRI to commit all kinds of electoral misdeeds. The electoral reforms – most of which were introduced through amendments to the 1917 Mexican Constitution – gradually remedied these problems by guaranteeing a more autonomous and independent electoral process, as well as judicial oversight of the elections. Indeed, the electoral processes were organised and monitored by the IFE (Federal Electoral Institute), whose independence had been significantly increased. Moreover, an Electoral Court (*Tribunal Electoral del Poder Judicial de la Federación*) was in charge of adjudicating the elections, thus putting an end to the 'self-certification of elections'.

What it is important to point out is that, especially in a first phase,[47] the

[44] The National Revolutionary Party was established in 1929, was renamed Party of the Mexican Revolution in 1938 and finally was renamed PRI in 1946.

[45] Even though some important reforms were also implemented in other branches of government, such as the judiciary. For example, it is important to mention the 1994 constitutional reform, which significantly expanded the powers of the Supreme Court by transforming it into a 'true constitutional tribunal' (B Magaloni, 'Enforcing the Autocratic Political Order and the Role of Courts: The Case of Mexico', in Ginsburg & Moustafa (eds), above n 33, 180, 199).

[46] R Becerra, P Salazar & J Woldenberg, *La mecánica del cambio político en México: Elecciones, partidos y reformas* (2000).

[47] See the 1977 reform, which has been defined as '*desencadenadora*' (that is, a 'chain-breaking reform'): J Woldenberg, *El cambio político en México* (2007) 18 <http://www.trielectoralhidalgo.org.mx/pdf/cuaderno.pdf> [accessed 11 April 2014], which partially changed the electoral system and the system of electoral oversight.

electoral reforms carried out by the PRI were aimed at *increasing the legitimacy of the regime without decreasing its power over the country*.[48] The PRI's purpose, then, was to perpetuate its hegemonic rule. With the passing of time, however, these reforms ended up producing the opposite effect. From a closed and static party system, Mexico turned into a more open and inclusive one, thus reflecting the growing political diversity that was gradually characterising the country.[49] This transition culminated in the year 2000, which represents a watershed in the history of Mexico. Indeed, the PRI lost the presidential elections, and Vicente Fox, candidate of the National Action Party (PAN), became president of the republic.

5 Concluding Remarks

First, it is important to stress that this paper was *not* aimed by any means at predicting the weakening or the fall of the Moroccan and Jordanian monarchies following the constitutional reforms introduced in these countries. Rather, its purpose was to show, on the basis of a comparative analysis with other past authoritarian regimes, that constitutionalism *may* one day lead to significant constraints on the non-democratic regimes of Mohammed VI and Abdullah II. Indeed, the cases of Chile, Egypt and Mexico have highlighted the paradox according to which the seeds of the limits to authoritarian power (and in some cases, even of the transition to democracy) can be found in the very constitution adopted during the authoritarian regime. Thus, surviving constitutionalism in Morocco and Jordan, which has served to appease public dissatisfaction in the short-term so as to ensure the regimes' stability and continuity, may boomerang in the medium- and long-term.

Two main objections can be raised against this assumption, but both can be overcome. First, one can argue that even in the past, the two monarchs strengthened democratic institutions and procedures, but their power was not threatened by these constitutional changes. In Morocco, for example, King Hassan II (Mohammed VI's father) adopted two constitutions during the 1990s (one in 1992 and one in 1996) in which some relevant democratic novelties were introduced (such as the Constitutional Council, the Economic and Social Council and stronger protection of fundamental rights), but he managed to

[48] See D Gómez Álvarez, 'Pròlogo', in C Astudillo & L Córdova Vianello, *Los árbitros de las elecciones estatales: Una radiografía de su arquitectura institucional* (2010) XIX, XXIV-XXV.

[49] See L Córdova Vianello, 'La reforma electoral y el cambio político en México', in *Reforma política y electoral en América latina 1978-2007* (2008) 653, 658.

maintain power in his hands. This time, however, the novelties introduced in the 2011 Moroccan Constitution and in the amendments to the 1952 Jordanian Constitution are *much greater* compared to the past, and therefore the possibility that they will produce 'democratic effects' on the two countries is undoubtedly higher. Indeed, the new Moroccan Constitution established the duty of the king to appoint the head of government from the party that wins the most seats in the elections to the House of Representatives, declared the supremacy of international conventions over domestic legislation, introduced concrete constitutional review, strengthened judicial independence, and guaranteed a greater protection of fundamental rights. Similarly, Jordan set up a Constitutional Court, abolished the king's power indefinitely to postpone elections, established an independent electoral commission to supervise the electoral process, and introduced judicial oversight of the elections.

In both countries, interestingly enough, among the most relevant novelties introduced by the constitutional reforms, one finds those regarding *constitutional review*, as well as *independent organisation and judicial oversight of the elections*, which are precisely the 'constitutional tools' that led to the constraint of the authoritarian regimes in Chile, Egypt and Mexico.

A second objection that can be raised refers to the fact that a comparative analysis with Chile, Egypt and Mexico can be misleading since the latter are presidential or semi-presidential regimes, while Morocco and Jordan are monarchies. It is true that, as mentioned above,[50] Arab monarchs enjoy a high degree of religious or tribal legitimacy, are often considered the effective guarantors of social and political stability, and tend not to 'dirty their hands' in everyday politics. This special 'status' is undoubtedly an extremely important guarantee in times of unrest, and tends to make kings less vulnerable compared to presidents. Having said that, however, the characteristics and the dynamics of authoritarian monarchies are often very similar to authoritarian presidential regimes. Indeed, in both forms of government, power is concentrated in the hands of a single person (or single party, as in the case of Mexico), political pluralism is non-existent or strongly limited, territorial decentralisation is extremely weak, and the protection of fundamental rights and freedoms is not sufficiently guaranteed. Given these similarities, one cannot exclude that what happened in Chile, Egypt and Mexico might one day happen also in Morocco and Jordan. Thus, constitutionalism can become a weapon against authoritarian regimes *notwithstanding the form of government*.

[50] See above at §2.

In the post-colonial era, several monarchies have been overthrown in the Arab world and in Muslim (albeit non-Arab) countries following *coups d'état* and revolutions.[51] If the Moroccan and Jordanian monarchies collapse one day, it will likely be due to these kinds of dramatic events. However, the constitutional reforms carried out by Mohammed VI and Abdullah II should not be underestimated: so far surviving constitutionalism has contributed to the kingdoms' stability and continuity, but one day it may turn into an effective constraint of authoritarian power, thus contributing to the establishment of a more democratic form of government.

[51] Egypt (1952), Tunisia (1957), Iraq (1958), North Yemen (1962), Federation of South Arabia (1967), Libya (1969), Afghanistan (1973) and Iran (1979).

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MAPPING THE CONSTITUTIONAL PROCESS

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Abstract

It is generally accepted that process bears on constitutional outcomes, and drafters increasingly desire to divine predictive guidelines from comparison—a 'roadmap to success'—drawn from the experience of others. Developing a methodology for such a comparison is difficult, and the appearance of a pre-written 'recipe for success' conceals obvious pitfalls. In particular, there is an inherent tension between comprehensiveness and granularity, in that the more jurisdictions studied the less country-specific details can be included. This paper sketches the findings of a chart prepared for the Libyan Constitutional Drafting Assembly ('CDA') in June 2014, which compares eighteen contemporary and historical constitutional drafting processes to aide the CDA in setting its own procedure under the terms of the Libyan Constitutional Declaration (2011). The methodology presented here breaks the constitution-making process into four 'phases', which together encompass 35 distinctive elements of process design, ranging from the mundane (e.g. appointment of a secretariat) to the complex (e.g. public participation programmes). These are analysed temporally to draw some preliminary conclusions about process design with the aim of identifying guidelines that lead to successful constitutional outcomes. As more countries enter one or the other phase of constitutional transition, developing a more rigorous methodology for comparative study would seem imperative.

Keywords

Constitutional Drafting, Comparative Constitutionalism, Constitutional History, Libya Constitution, Constitutional Process

1 Introduction

On 4 June 2014, the United Nations Support Mission in Libya (UNSMIL) provided the Constitution Drafting Assembly (CDA) with USB drives for each of its members containing a handful of documents for use in making decisions about Libya's new constitution and writing process. One of the documents

[*] Libertas Constitutional Consulting. The author wishes to acknowledge the invaluable assistance of Rebecca Healey in preparing the comparison chart and performing the underlying research, as well as that of Danielle Thompson and Carl Cecere, and Travis Zirker for his help creating the charts included herein.

was a comparison chart of eighteen different post-conflict constitution-writing processes from historical and contemporary comparative practice.[1]

At the time the CDA received these documents, they were expected to request an extension of the four-month timeline stipulated in the Libyan Constitutional Declaration.[2] The comparison chart was designed to inform this and other decisions regarding the CDA's own procedure—including elements such as how and when to include public input, the use of international and local experts, and committee versus plenary work. As of this writing, although the CDA has determined that, as an autonomously-elected body, such a request was unnecessary, they have decided to extend their own timeline to March 2015, allowing a year from convening to public referendum. The decision to extend this timeline (although not necessarily the means) may be an outcome informed by the research presented in the comparison chart.

Commissioned by Tripoli-based Rashad Consulting and funded by the United Nations Development Programme's Libya Mission, the chart distills over 180 pages of eighteen cross-referenced country studies down to their procedural components. The result is that facts, timelines, and dates from a large body of material are presented in a format that any person with a secondary education (such as that required of CDA members[3]) might read and understand.

The chart is the first of its kind. As such, its presentation to the Libyan Constitution Drafting Assembly is likely the first time a constitution drafting body has been provided the means to easily compare practical aspects of constitutional process from a range of examples to inform their own. Until now, case studies have been the main source of guidance for constitutional assemblies in their analogical reasoning. A comprehensive comparative analysis is superior to country-by-country case studies as it compares 'parameters' of the drafting process in a systematic manner. The downside is that the appearance of a pre-written 'recipe for success' conceals obvious pitfalls. This paper attempts to be as comprehensive as possible while avoiding the risks by sketching the findings of the chart, suggesting an approach to using them in practice, and fleshing them out with some observations for their application. Rather than being an exhaustive pronouncement, it is hoped that this paper will stimulate discussion and debate about how best to compare and present cross-jurisdictional experiences within

[1] The full chart, only portions of which are presented here, is accessible at: <http://media.wix.com/ugd/fa311e_cc038eafa08d459abbd6b57e462e8337.xls?dn=%22UNDP-LCC%20Comparison%20Chart%201APR2014.xls%22> [accessed 12.11.2014].

[2] Constitutional Declaration (2011), Amend 1 (9 April 2013) § 3.3.

[3] GNC Law 17, Art 9.2 (16 July 2013).

constitutional transitions. Developing such a methodology is especially crucial at this time as a large number of jurisdictions, particularly in the Middle East and North Africa region, find themselves at various stages of transition.

None of the findings discussed here will be entirely unfamiliar to practitioners or academics. A swath of research and information was taken from the country studies compiled in the United States Institute for Peace's (USIP) *Framing the State in Times of Transition* (2010) and Interpeace's *Constitution-making and Reform: Options for the Process* (2011). The comparison chart and its underlying research, however, go beyond these seminal studies, encompassing information contained in all available English-language general and country-specific constitution-writing research and reports. Its findings support, but also qualify, some prevailing opinions, and suggest new connections in constitutional process that might result in constitutional success.

'Constitutional process' is defined here as the manner in which a constitution is written (thereby excluding the unwritten variety), from the instigation of a plan through to enactment and implementation. It excludes substantive aspects of constitutional design, or what is contained in a constitution's texts. Until recently, constitutional process has been a 'blank spot' within comparative constitutional study.[4] This has been filled in part by the works of USIP and Interpeace. The recent focus on the topic, and the impetus for this study, is the notion that *process matters* in its ability to legitimise or delegitimise a constitution. Indeed, one of the most important findings of this study is that abiding by the constitution-making plan itself correlates strongly with a successful constitutional outcome. If drafters can abide by their own rules—what in a sense becomes a 'proto-constitution'—then the political community more broadly tends to view the drafting process as legitimate, and is more likely to accept the meta-rules established in the fully-formed constitution.

While the study permits some unique and revealing observations of constitutional processes, its ambitions are limited. First, language barriers and resource constraints necessarily reduced its scope. Secondly, many recorded factors implicitly require qualitative assessment. Efforts were made to base any such qualitative assessments on objective factors, but some subjectivity could not be avoided. Thirdly, while eighteen processes represent a reasonable cross-section of comparative and historical constitution-writing experience, several notable 20th century processes are missing. Fourthly, the limited sample size and methodological constraints mean that this study should not be considered as

[4] J Elster, 'Ways of Constitution Making' in A Hadenius (ed), *Democracy's Victory & Crisis* (1994) 137.

a 'statistical' or 'quantitative' analysis. It is presented as a rather large and carefully nuanced comparative case study. The more systematic and comprehensive a case study becomes, the more it tends to the 'quantitative' side, with a resultant loss of nuance and granularity. This warns against treating the chart as a 'quantitative' study, in the sense of attempting to apply the procedural 'parameters' it presents in a prescriptive fashion without proper comparison and, above all, familiarity with the jurisdiction under study.

The purpose of this article is to first, discuss those aspects of constitutional process that seem to have the most practical bearing on constitutional outcomes; second, to describe the parameters of constitutional process, how they interact with one another, their usefulness as predictive factors of ultimate success, and how they might interoperate with country-specific factors not recorded in the chart when applying the study's findings.

2 Developing a Methodology for Mapping Constitutional Process

Eighteen different constitutional processes were studied from sixteen different countries.[5] The constitutional processes under study included, in country alphabetical order, Afghanistan (2004), Bosnia (1995), Cambodia (1993), Egypt (2012), Egypt (2014), Eritrea (1997), Hungary (1991), Iceland (pending), Iraq (2005), Kenya (2005), Kenya (2010), Morocco (2011), Nepal (pending), Norway (1814), Poland (1997), South Africa (1996), Tunisia (2014), and the United States (1789).[6]

These processes were chosen in part for their relevance to Libya, in part for their recency, and in part for their importance to the meta-study of *process*. Because of its legacy of authoritarian government, the post-Soviet constitutional experiences of Poland and Hungary are of comparative interest to the Libyan case, as well as its Arab Spring North African neighbours Egypt, Tunisia, and Morocco. Recent or on-going processes are also included, mostly from neighbouring regions. All of these are post-conflict processes—with the exception of Iceland, which followed an economic crisis—and thus most operated in a constitutional vacuum or created a constitution anew. South Africa's inclusion is justified from a process perspective because it marked a radical transition from the old regime,

[5] Kenya 2005 and 2010 and Egypt 2012 and 2014 are each treated separately.

[6] For those familiar with comparative substantive constitutional study, the selection of countries and their processes may seem inadequate, especially in the omission of the German Basic Law (1949) and Japanese Constitution (1947).

and is widely considered to have been 'successful'. Two historical processes, the United States and Norway, were included in the initial study because their processes bear striking resemblances to South Africa's, and because they are generally regarded as 'successful' given their longevity, stability, and ability to adapt over time.

For these eighteen processes, the study identified thirty-five aspects of constitution-making, divided into four phases. Phase I comprises 'Preliminary decision-making regarding Constitutional Procedure' to 'Election or Appointment of a Constitution-writing Body'. Phase II comprises 'Convening the Constitution-writing Body' to 'Preliminary Draft'. Phase III comprises 'Completed Preliminary Draft' to 'Final Draft'. Phase IV comprises 'Final Constitution' to 'Implementation and Beyond'. The chart noted the presence, timing, and, where appropriate, the quality of thirty-five features within these four Phases, ranging from the routine (such as the establishment of a secretariat and the adoption of rules of parliamentary procedure) to complex factors (such as public participation within the various phases, transparency, and ultimately, '*post-hoc* success').

Phase I covers the preliminary process, from the creation of a plan to write a constitution through to elections or the appointment of a constitution-drafting body. The first element recorded within Phase I included the time frame and process for deciding on a constitution-writing plan and guiding principles. This 'prelude' is not included in the time measurement of 'Phase I' or the country's overall 'constitutional process' for two reasons. First, the study took a legalistic definition, setting the clock running from the formal agreement by those in power to a process for writing the constitution. Secondly, for some countries—such as South Africa, Kenya, and the United States—this prelude required much longer than the formal process recorded here, and would have made the study impossible by multiplying the number of elements to be recorded. That the three countries listed all had successful constitutional processes suggests one hypothesis for further investigation, that a longer *pre*-process possibly results in a healthier formal process—both resulting in a more 'successful' constitution when measured by indicators such as longevity and stability. Such a conclusion would merit its own comparative study. The elements studied within Phase I included drafting an electoral law, pre-election civic education (as it related to the special instance of electing a constitution-drafting body), pre-election public consultation (on the constitution itself), elections, and appointment of a constitution-writing body. The last two items were generally mutually exclusive.

Phase II covers the convening of the constitution-drafting body through to

the production of a first draft. Unlike the other Phases, the end of Phase I was not necessarily the start of Phase II. Recorded elements in Phase II include establishing a secretariat; promulgating rules of parliamentary procedure for the drafting body; formulating committees; adopting a program or agenda for substantive issues; drafter education and capacity-building; the role of local experts; the role of international experts, powers, and influences; pre-draft civic education; pre-draft public consultation; incorporating public input; transparency; plenary discussions; technical drafting; and production of preliminary drafts.

Phase III covers the process from first to final draft. Elements include establishing a program for public consultation, post-draft publication, post-draft civic education, post-draft public consultation, incorporating post-draft public input, plenary and committee debate, and production of a final constitution.

Phase IV covers formal constitutional procedures from promulgation of a constitutional text to its implementation. Specific aspects include promulgation, or when the constitution becomes law; approval by the legislature; certification by the relevant superior judicial body; civic education on the final constitution; staging a referendum; rejection, including re-drafting and a second referendum; and when the constitution comes into effect. Finally, the last recorded element was '*post-hoc* success,' discussed below.

Some loss of resolution was required to fit sometimes vastly different processes into one scheme for the purposes of comparison. The last phase, in particular, followed a less sequential timeframe than other phases, especially as jurisdictions differed widely in what was required to implement the constitution. All elements represent choices that must be made either by those establishing a constitution-writing plan at the time the plan is made or, if that plan is left incomplete, (as under Libya's Constitutional Declaration, for example), throughout the process by the various parties involved in the constitutional transition. In Libya, this has involved the Transitional National Council, two legislatures, the Supreme Court, and the Constitution Drafting Assembly itself. The inclusion of each element in the comparison chart identifies the range of choices available to these decision-makers, and provides comparative information about how other countries in transition have decided to handle these choices.

Each element under study was measured by its presence and duration. If a time quality is identified, its presence may be assumed. If that element was not present in the process, its absence is marked by N/A, or not applicable. In rare cases—especially where it relates to how often the constitution-writing body engaged in plenary discussions and when it developed its rules of parliamentary

procedure and formed a secretariat and committees—precise information on that element is either difficult to find or beyond the limits of the study. In the former instance, dates and times are approximated as well as possible (indicated by a carrot sign), or descriptives such as "immediately" or "throughout" are used. In the latter case, which occurred only four times in measuring the frequency of plenary discussions, 'unavailable' is recorded. Where possible, N/A or 'unavailable' is accompanied within the chart by relevant contextual information.

Many elements within the chart are also measured by their quality. These elements included civic education, public participation, incorporation of public participation, constitution-maker education/capacity building, transparency, the role and influence of experts, foreign influence, and post-hoc success. Civic education and public participation are quantified and valued at each stage of the process. This is done to measure and cross-correlate these elements from several different angles. In this way, we can analyse at which stage countries engaged in each (or both) activities, and which stage each (or both) of the activities was most effective. 'Civic education' is defined as information shared with the public about the constitutional process or constitutionalism generally. The one exception to this definition is in the 'prelude' stage, when civic education relates to information given to the public regarding the special implications of electing a constitutional assembly, if applicable. 'Public participation' is defined as the public's ability to express its views in a format people believe could influence the constitution's substantive content. The qualitative assessment of both elements involves some judgment in measuring the presence and effect of several objective factors. For civic education, these factors include whether educational materials were provided by official (e.g. governmental or constitutional bodies) or unofficial sources (including international non-governmental organisations and civil society organisations), the circulation of these materials and actual reach and awareness of them, and the specificity of the materials in educating the public about discrete aspects of constitutional content or events. For public participation, factors include whether means of public communiqués relating to the constitution and its writing process were conducted by official or unofficial sources, how deeply means of public feedback penetrated urban and rural areas and the country as a whole, and whether the feedback mechanisms allowed meaningful participation (e.g., whether it was preceded by quality civic education and related to specific elements of constitutional content and process in a manner well-timed for incorporation into the constitution or its process). Whether public participation was incorporated was also measured qualitatively for Phases

I through III. To judge this element, the timing of public participation, formal mechanisms for evaluating it, and how public feedback manifested itself in the constitution are all considered.

Constitution-maker education or capacity building is also evaluated qualitatively, based on whether and to what extent drafters were already educated in constitutional matters, whether any training programs were conducted, and (if so) their length. The quality of transparency is measured by the availability of official minutes, meetings, and general information to the press and the public. For local and international expert influence, the number of domestic and outside experts, their relationship with the drafting body (whether internal or external and the degree of influence wielded by them), and their role in actual drafting if any is evaluated. The role of international powers is evaluated on the basis of the role and influence of foreign nations or multi-national organisations such as the United Nations or the European Union. The role of international influence was determined by the constitution-drafting body's consideration and impact of comparative practices and constitutional philosophies; for the two historical processes under review, international influence served the role that international experts usually play today, but some contemporary processes such as Kenya, while involving international experts, also amassed a library of comparative practices for drafters to reference.

Elements measured qualitatively were rated on a scale of 'poor, moderate, or strong' or, for the role of local and international experts, powers, and influences, on a scale of 'weak, moderate, or strong'. It should be noted that these simplified scales do not include a nullity measure. Thus, when transparency is measured as 'poor,' it usually means meetings were completely closed. Assessing the quality of each of these elements merits its own study under a more sophisticated methodology.

'Constitutional success' is inherently difficult to define in an objective manner, and presents the major methodological challenge. The factors ultimately considered in the study's definition of 'constitutional success' as an outcome include the following: 1) whether the constitution was accepted contemporaneously to its enactment, measured by referendum voter turn out and success rates; 2) whether it was accepted over time, measured by a) violence levels, b) corruption levels, and c) adherence by governmental bodies to constitutional strictures; 3) the frequency and extent of formal amendments that would amount to wholesale rejection of the fundamental constitution; and 4) the constitution's longevity. The last element is considered important and relevant to success because, despite jurisdictions that permit judicial review and constitutional amendment, longevity

of the original document allows laws developed under the constitution to remain in force and enhances the legal and economic stability of the country overall.

'Success' does *not* measure the prosaic beauty of the constitution's text, its coherence, or other substantive values such as realisation of the drafters' objectives. Although constitutional success is also measured on our scale of 'poor, moderate, strong', processes that have been completed too recently (such as Egypt's 2014 and Tunisia's 2013 constitutions) or which remain incomplete (Eritrea, Iceland, Kenya 2005, and Nepal) are marked 'TBD' (to be determined) or 'unsuccessful constitutional process,' respectively.

A subset of the recorded elements—those that appear to correlate most strongly to the success or failure of a process—will be discussed in Section III, below. These elements include most of those measured qualitatively: civic education, public participation, transparency, and the role of experts. In addition, elements also bearing on success *not* recorded in the chart but observed by the author throughout the process of preparing the country studies and chart are discussed. These form the basis of some suggested guidelines for process-designers in making choices about constitution-making procedure.

3 Findings from the Comparison

3.1 Realistic Timeframes

Within the cases studied, successful processes generally fell within a timeframe of two-five years from finalisation of a writing plan to implementation of the constitution. Processes that were either two long or too short ran into problems at either end. As described above, the timeframe recorded here focused on the formal process—that which was agreed upon by official organs and institutions, from the date of agreement to date of constitutional implementation. As such, the often long prelude, that in which a new constitution is called for and the writing process negotiated and finalised, was recorded as an element of Phase I, but was excluded from the formalised timeframe. As emphasised previously, this important period merits further study, but is beyond the scope of this article.[7]

[7] The end of the study at the date of implementation of the constitution also excludes important constitutional events, such as the first instance of judicial review, or the first challenge to government corruption in violation of the constitution by civil society or the media, and a more complete study might record these elements as well. The primary recipient of the study, the Libyan CDA, had to make a very practical decision about extending its own referendum and implementation deadline so that expectations could be set as to when elections should be held

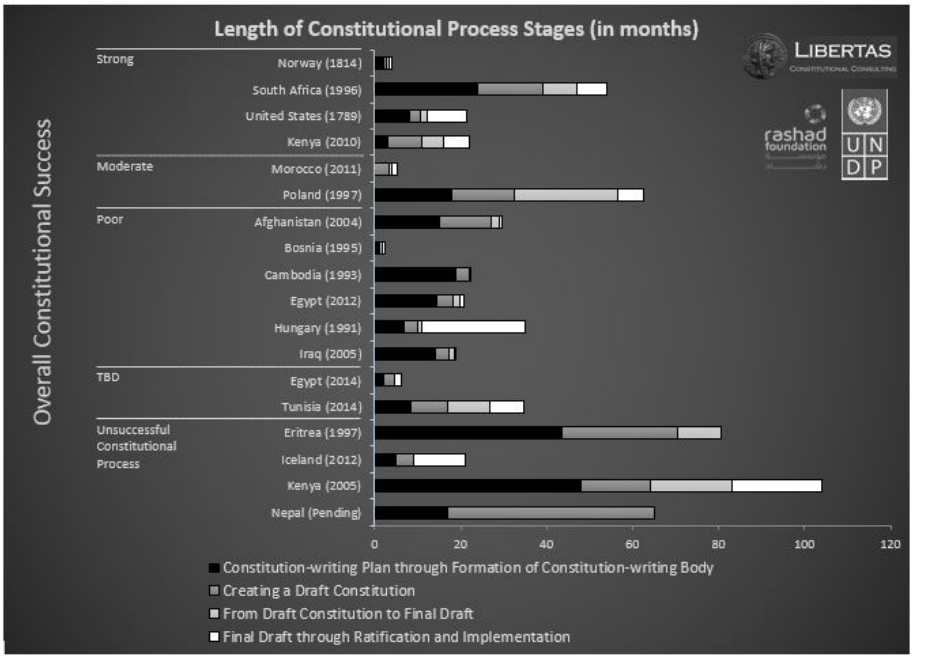

Figure 1: Length of Constitutional Process Stages

For those processes under study, successful processes had a pre-draft phase (excluding the preliminary phase) that was roughly equal to the post-draft phase. This meant that a draft constitution was considered, discussed, and edited for just as long a period as was required to write a draft, presumably allowing for greater refinement, perfection, and acceptance by the populace before successful finalization and implementation.

The median duration of the implementation phase in successful processes was around six months, and in many cases problems could be observed when this phase was much longer or much shorter. This may be because transition to the new constitution and the constitutional rule of law required institutional changes that could not be executed successfully in haste. On the other hand, a long implementation process may indicate things such as a failed referendum, lack of

again and the second interim congress terminated. With these decisions imminent, it was helpful to the CDA to know how other processes were timed and what their outcomes were. It was also helpful for the CDA to know not only overall comparative timelines, but how each phase compared in length.

public support, or official 'feet-dragging' that boded ill for official compliance with the new constitution once implemented.

The length of the preliminary phase—between deciding on a plan and the election or nomination of a constitution-writing body—had no observable effect on constitutional success in any of the cases studied. Many processes with long preliminary phases were successful, including Poland and South Africa, but unsuccessful and incomplete processes also had long preliminary phases. The same held true for the long 'prelude' phase. The prelude period could meander or proceed in fits and bursts as consensus for a new constitution built, waned, then built again, finally leading to a formal agreement to write a constitution—all without any observable impact on the legitimacy of the process or the success of the resulting constitution. So too could the preliminary period take several years (although not stop and start) without impacting the process or constitutional success.

Apart from this preliminary phase, however, it appears that processes shorter than six months generally resulted in less successful outcomes. Of the cases studied, this is borne out by Bosnia, Cambodia, Egypt (2012), and Iraq—processes lasting less than six months. If only the pre- and post-draft stages are considered, Hungary's 1989 constitutional process was also extremely short, at four months. The constitution that resulted is also considered to have fared poorly, being replaced in 2011 in a highly controversial process.[8] For each of these countries, key elements of constitutional process design were missing—for all but Egypt (2012), for which the issue was the exclusion of important societal elements—the too-short processes lacked either meaningful pre- or post-draft public consultation, or both. Exclusion of these time-consuming elements was one reason the process was so short, and might well be a reason why the constitutions that resulted were less successful.

Although most countries with shorter process timeframes failed, two historical cases included prove exceptional cases that highlight some of the difficulties in comparing historical processes with contemporary ones. The United States Constitution's timeframe is frequently pointed to within contemporary Libya as having a short constitutional timeframe, with the Constitutional Convention lasting only four months. The Constitutional Convention, however, only accounts for the pre- and post-draft stages. Other elements normally included in these stages were instead incorporated in the preliminary and implementation stages,

[8] P Krugman, 'Hungary, Misunderstood?', *NY Times Online*, 21 Jan 2012, <http://krugman.blogs.nytimes.com/2012/01/21/hungary-misunderstood/> [accessed 25 March 2014].

which were far longer—one and two years, respectively. The implementation phase involved extensive public participation in the lead up to ratification. Elections for state ratifying conventions extended the franchise radically,[9] and public debate within the conventions and concurrent to it (e.g., in pro-Federalist and anti-Federalist editorials) ultimately resulted in meaningful change to the constitution in ten amendments.[10] Secondly, the preliminary phase included extensive informal public education through active and mass-scale pamphleteering, for example the widely read *Common Sense* by Thomas Paine and *Thoughts on Government* by John Adams.[11] Thirdly, many of the drafters of the U.S. Constitution had expertise and experience in constitutional design from drafting their own state constitutions, or from their lived experience under those constitutions (or later iterations) for roughly the previous decade.[12] This last explanation may also apply to the historical example of Norway, a three-month process, where many drafters had studied constitutional design and Enlightenment theories of government.[13] That meaningful constitutional development in the U.S. occurred during unlikely points in the constitution's development underscores the need for flexibility in interpreting timeframes. The implementation and preliminary phases should be considered in determining the U.S. constitution's true timeframe. Moreover, these aspects demonstrate problems with comparing historical to contemporary processes.

A lengthy process often means continual changes to the process and loss of momentum, such as has occurred in Nepal (which has yet to produce a draft) or in Hungary, whose 1989 constitutional moment was missed altogether. Poland's eight-year constitutional process is exceptional, though it lost momentum at least once. Its moderately successful culmination despite process length may be explained in part by: 1) the drafters' obsession with process legitimacy; 2) its inclusiveness; 3) the constitutional experience of experts and other leaders participating in the process; and 4) Poland's long fixation on constitutionalism.

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[9] A Amar, *America's Constitution: A Biography* (Random House, 2005) 14-18.

[10] See generally K Bowling, 'A Tub to the Whale": The Founding Fathers and Adoption of the Federal Bill of Rights' (Fall 1998) 8 *J of the Early Republic* 224.

[11] See generally B Bailyn, *The Ideological Origins of the American Revolution* (2nd ed, 1992).

[12] G Wood, *The Creation of the American Republic, 1776-1787* (1969) 430-8.

[13] Norway celebrates the 200th anniversary of its constitution this year, the third oldest in continuous operation. The Norwegian drafters were highly esteemed, many of them experts within their given fields, and several had constitutional and even comparative experience. Under the threat of a retributive Swedish take-over for Norway's support of Napoleon, perhaps the prestige of the drafters, the so-called 'Men of Eidsvoll' and the process-designer, Danish Crown Prince Christian Frederik, contributed to Norway's constitutional success.

From the cases studied, it would appear that successful processes are those that identify realistic deadlines for the procedural elements they wish to include, with reference to the level of expertise of their drafters. Processes under six months seem to have precluded adequate time for important elements of constitutional design, such as public participation or organising an inclusive drafting body. The provision of nominated experts as drafters may decrease the time needed for drafting. Processes over five years were slowed due to indecision, continual changes to the process, or lack of political consensus; all elements that serve to undermine the legitimacy of the process, cause public apathy, and cause a loss in momentum that is extremely difficult to reverse. The involvement of experts internal to the process may again serve to right some of the problems associated with an otherwise too-long process.

3.2 Public Participation: Including the Voice of the People Both Substantially and Meaningfully

Most successful constitutions from this comparative study involved mechanisms for substantial and meaningful public participation. Meaningful public participation must be preceded by unbiased civic education, helping the public to know how to participate and what their constitutional options are. Pre-draft public consultation is more difficult to incorporate than post-draft public consultation, but the issues that arise in this regard may be effectively addressed by the use of modern information and communications technology and well-considered feedback mechanisms.

It is apparent that public participation was not dispositive for constitutional success in the processes under study. Unsuccessful and incomplete constitutional processes included public consultation just as much as successful ones—if not with more consistency. The public participation chart depicted below is informative, but displays only public participation and success rates. If taken alone, it would seem to suggest that public participation had little bearing on success or resulted in either great success or extreme failure in the process. Either way, commonly-held beliefs about the importance of public participation to process and constitutional success are challenged by this comparative case study. It would appear that, as a rule, public participation is a necessary but not sufficient procedural element of constitutional success.

It seems that public participation must be both meaningful and substantial to engender the kind of process legitimacy that produces a successful constitution. 'Meaningfulness' here is judged as a quantum of the public's impact on the con-

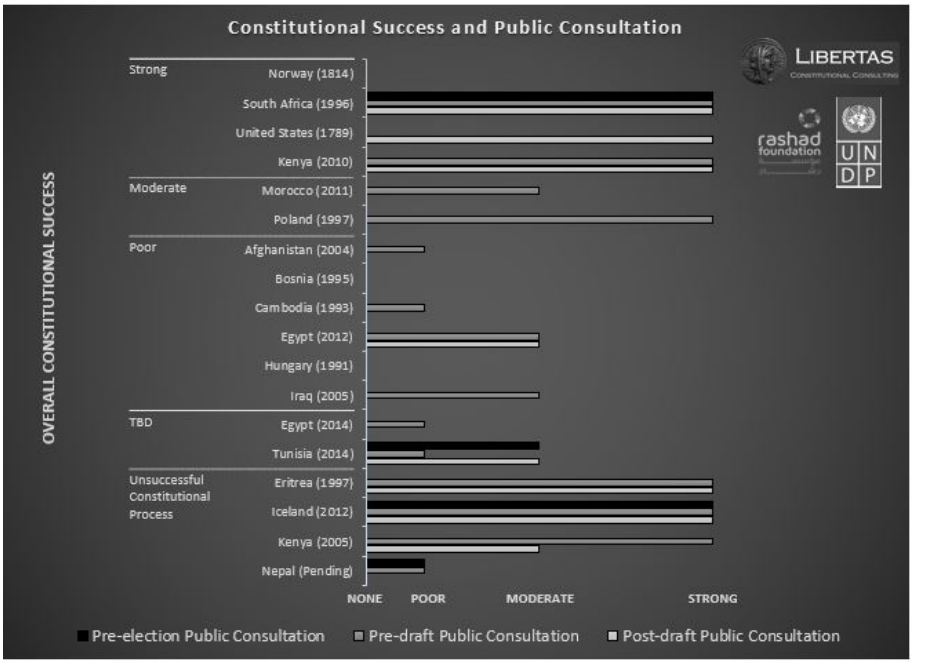

Figure 2: Constitutional Success and Public Consultations

stitution's content. Submissions and public commentary cannot be meaningful if they are not produced in formats that can be readily incorporated by drafters, either due to volume or nature of the submission. The size of the political community will make a difference here; for example both South Africa and Iceland's constitutional process solicited open-ended contributions, but proved to be more useful in the smaller and more homogeneous Iceland. Public hearings, giving the public the chance to interact face-to-face with the drafters, can also be a meaningful form of public participation. Sessions of this type can prompt ideas and questions in the minds of the drafters and may impact their positions and attitudes towards the constitution. Where well received, forms of public influence such as demonstrations, petitions, and editorials can also be meaningful. However, as the actual meaningfulness of these methods can only be judged subjectively, a more reliable way to ensure meaningfulness may be to allow the public to determine the issues upon which the constitution turns, for example through conducting preliminary surveys or pre-referendums on key issues, or by allowing commentary (followed up by revisions) to provisional articles, as occurred in

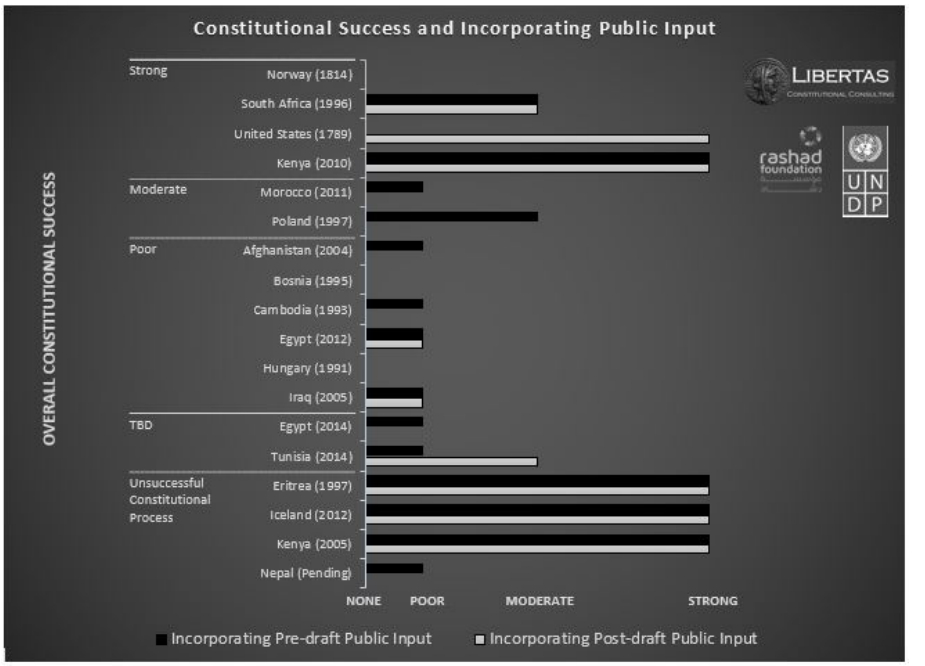

Figure 3: Constitutional Success and Incorporating Public Input

Iceland.

'Substantiveness' may be judged by the amount of constitutional text or issues that are impacted by public participation. Up and down referendums after completion of a final text, may not, alone, meet this requirement. Referendums or surveys on key issues prior to the creation of a draft will meet this requirement, as will allowing the public to comment on and suggest edits to provisional texts, so long as these influence the final text. Successful participation presents the public with real choices. In Morocco, the public received propaganda from the king rather than information presenting constitutional choices. In Iraq, information was less biased, but failed to focus on significant constitutional issues, effectively precluding the public from affecting the outcome on these matters.

Several factors will prevent public participation from being meaningful or substantial. Lack of precision in the design of a public participation campaign can prevent substantial participation. One reason, in addition to its overlap with civic education, that Afghanistan's public consultation failed to be effective was that conversations with the public were kept vague, and so difficult to incorporate

into the text. Timing issues can also prevent incorporation of public feedback, as was the case in both Afghanistan and Iraq. In Afghanistan, the time allotted for public participation and civic education—both late in the process and too short for permitting incorporation of the feedback—pre-empted the public's role in the drafting process. In Iraq, the volume of feedback elicited from the public was impressive, yet the feedback excluded significant populations—Sunni and Kurdish—and the lack of time and clear procedures prevented meaningful incorporation. Because of these issues, feedback did not reach the drafting body till their role was usurped by the more exclusive Leadership Council.

It would appear that public participation's impact reflects the agency of political elites. Although comprehensive public participation campaigns were run in Eritrea, Iceland, and Kenya (2005), political processes prevented the finalisation or the implementation of the constitution. In Kenya (2005), the legislature re-wrote the constitution, nullifying much of the public's input in previous drafts. In Iceland, after a process widely praised for its ingenuity in 'crowd-sourcing' a constitution, the Icelandic legislature (*Althingi*) failed to bring the constitution to a final vote to carry it into force. Eritrea's completed process, widely hailed for its incorporation of public feedback at various stages, was stymied when President Afwerki and the ruling party refused to implement the constitution and hold new elections. In short, political manoeuvring prevented successful implementation of constitutions that benefited from very good public participation campaigns. Had elites not intervened, it is likely that these constitutions and their processes would have been successful, with public participation certainly contributing to that success.

Effective public participation depends on a public able to engage in important constitutional issues and options. In order to have a meaningful constitutional voice, members of the public need to know how to articulate their constitutional preferences, usually requiring prior civic education. Civic education is most useful if it precedes public participation, allowing the public to make informed decisions about constitutional options and outcomes before communicating these to constitutional decision-makers. Appropriate timing of both is particularly relevant in developing countries or for populations where education levels are generally low. In Afghanistan, public participation overlapped with civic education, diminishing the effectiveness of both. Civic education can also help to ensure a smooth transition as the constitution is implemented. *Post-hoc* civic education, however, cannot compensate for failing to provide it at an earlier stage or failing to incorporate public feedback. Processes that suffered from these ills include Afghanistan, Iraq, Egypt (2012), and Kenya (2005).

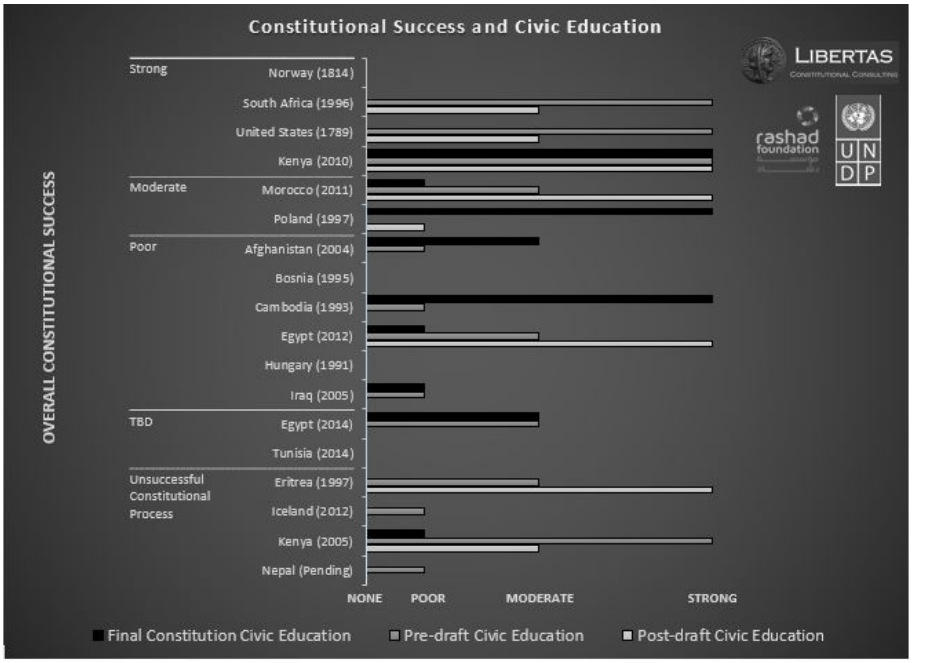

Figure 4: Constitutional Success and Civic Education

One of the best means of public education is a transparent process and good record-keeping that can be shared with the public. Iceland's method of webcasting plenary sessions and posting successive drafts online was a means to invite participation, but also served to educate the public. This supports the conclusion that effective civic education should precede public participation; not only was education incorporated into the electoral process for the special constitutional body, but the public were educated about the constitution's substance by watching the proceedings and reading draft texts *before* they engaged in feedback mechanisms by suggesting textual edits.

Such substantial public participation requires sophisticated methods for processing feedback, particularly when elicited pre-draft. One of the problems with South Africa's otherwise excellent public participation was that there was little way to incorporate all two million pre-draft submissions. However, both Kenyan processes addressed this issue by maintaining a database and a research crew that coded submissions topically and placed them into discrete binary formats that could be used by drafters. Where funding or sophistication is lacking

for such a system, feedback formats could be carefully structured in binary formats to ease processing.

Post-draft feedback is, by definition, more constructive, as it is based on an existing text. Iceland successfully incorporated the 5,000 submissions made to the various draft articles posted online. Yet post-draft feedback poses other challenges, as constitutions nearing the finish line are almost always the by-product of multi-party, elite negotiations. The United States navigated this issue successfully by encouraging feedback in binary form after negotiations were completed (ratify the constitution or not) and then incorporating more complex public feedback (suggestions for Bills of Rights) via amendments.

3.3 Transparency: Poor Transparency Contributes to Poor Constitutional Outcomes

The transparency of a constitution-drafting body, or its openness to public scrutiny, has been stressed by groups like USIP as essential to constitutional success. This comparison also suggests that transparency is a useful ideal: all but one process (Egypt (2012)) ranking 'poor' on the success scale also ranked poorly on the transparency scale. However, transparency may not be *essential* to constitutional success, as only 50% of successful constitutions within the study have a higher than 'poor' rating for the quality of transparency. While this may qualify strong claims about the role of transparency in crafting a successful constitution, it seems safe to consider transparency to have a presumptive positive influence on constitutional processes.

This positive influence seems to have been counteracted in unsuccessful and incomplete constitutional processes such as Eritrea, Iceland, and Kenya (2005) by political forces preventing the successful completion or implementation of the constitution, in a similar manner to public participation. In Eritrea, early constitutional proposals were released to the public. Mass public meetings, all of which were recorded, were held in 157 different locations across the country as well as sixteen held abroad, involving over 121,000 Eritreans.[14] Furthermore, there is evidence that public input was incorporated in the final draft.[15] Minority party views, however, were suppressed, and some scholars argue that the true process was closed, as the dominant, armed party, the People's Front for Democracy and Justice, never intended to implement the final

[14] B H Selassie, 'Constitution Making in Eritrea: A Process-Driven Approach' in *Framing the State in Times of Transition: Case Studies in Constitution Making* (2010) 69.

[15] Ibid.

Figure 5: Overall Constitutional Success

draft.[16] In Iceland the open, participatory process, including web-streaming proceedings of the Constitutional Assembly, was dominated by the liberal party throughout, and conservative participation was low. Conservatives within the *Althingi* then blocked the constitution being brought to an open vote and,[17] since the return of a conservative government to power in 2013, the process has stalled.[18] In the Kenya (2005) process, although meetings of the Constitutional Commission were not open, it produced lengthy public reports on deliberations

[16] T Medhanie, 'Constitution-making, Legitimacy and Regional Integration: An Approach to Eritrea's Predicament and Relations with Ethiopia' *Diiper Research Series*, Working Paper No 9 (2008) 2, 14, 21, and 22.

[17] *B Kaufmann, 'Not a Fairy Tale. The Icelandic Direct Democracy Saga (Part 1)' (Democracy International, 2 Apr 2013) Accessible at: <https://www.democracy-international.org/not-fairy-tale-icelandic-direct-democracy-saga-part-1>* [accessed 9 April 2014].

[18] L Mirani, 'Iceland's experiment with crowd-sourcing its constitution just died', *Quartz,* 29 March 2013, <http://qz.com/68910/icelands-experiment-with-crowd-sourcing-its-constitution-just-died/> [accessed 7 April 2014].

and incorporated the results of an extensive public participation campaign.[19] Yet the moderately transparent process was undermined by its unexpected hijacking by the legislature, whose approval, meant to only be a formality, resulted in a complete—closed—re-write of the text.[20]

3.4 Use of Experts: Local Expertise Preferred over Foreign Experts and Influences

All successful constitutions from the comparative study included experts, most of them local. Such was the case in Kenya (2010), Norway, Poland, South Africa, and the United States. In fact, constitutional bodies and decision-makers from these countries seemed to have been 'stacked' with the best constitutional minds the nation had to offer. Including local experts is not impossible when drafters are elected; in Poland and South Africa, elected drafters drew in local experts via special commissions or working groups. However, process-makers should consider whether they want to have local experts serve as constitution drafters when deciding whether to elect or nominate drafters, as expert 'stacking' is more easily accomplished where drafters are nominated by elites rather than elected by the people. Such was the case in Kenya (2010) and the United States. Nominations allow for pooling and vetting the most qualified drafting candidates from specific regions or the entire country. Elections will tend to select candidates with popular legitimacy, but not necessarily expertise.

International intellectual influences or experts featured a small but prominent role in successful constitutions. In historical constitutions, including Norway and the United States, international sway took the form of intellectual influence. In a modern context, international influence is also significant but tends to be more direct. In South Africa, international experts were consulted after a first draft was produced, but otherwise played bit parts throughout. Kenya (2010) reserved one seat on their Committee of Experts tasked to draft the Constitution for an international expert, which was awarded to a scholar from South Africa. They also developed an extensive library so that comparative constitutions could be studied.

Too much international influence or presence can be detrimental to a constitutional process, because the result may be maladjusted to local needs and

[19] Constitution of Kenya Review Commission, 1 *Main Report: The Commission's Method of Work* (2003) 86.

[20] AL Bannon, 'Designing a Constitution-Drafting Process: Lessons from Kenya' 116 *Yale LJ* (2007) 1838-9.

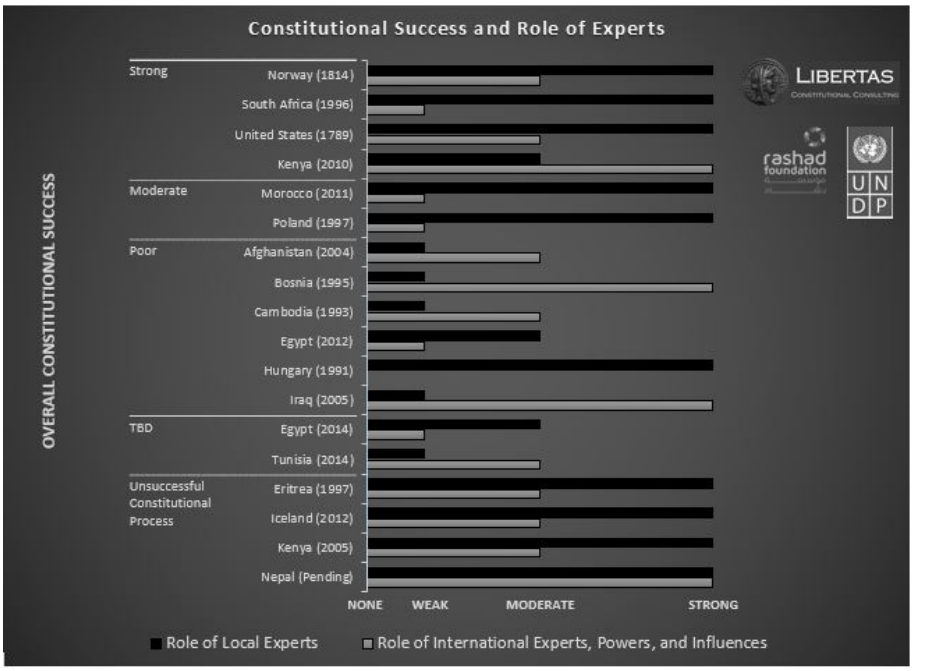

Figure 6: Constitutional Success and Role of Experts

circumstances, or may suffer from the negative perception of foreign fabrication. For a constitution to become respected as the basic law of a new legal order, it needs to be 'owned' by the people it governs such that it engenders voluntary compliance with the law. This stands in contrast to the post-World War II (or even post-Cold War) days when foreign powers, and their experts armed with the *Federalist Papers,* were accepted as legitimate drafters for a country's founding document. Bosnia and Iraq are examples of this trend. Bosnia's mostly foreign-written constitution has yet to establish peace and the rule of law in that country, and pressure from the United States in Iraq forced through a constitution in a short timeframe that did not mediate ethnic and sectarian tensions, the repercussions of which are being felt as of this writing. Afghanistan's constitution was effectively re-written by international interests, producing a document garnering little respect by the country's warring factions. In short, constitution-writers should be wary of too much international presence, but there is little downside—and much upside—in ensuring the active participation

of local constitutional experts. Such will improve the prose and practicality of the written text, as well as ensuring the appearance and reality of local origin for a document that must become the people's own.

3.5 Inclusiveness: Critical to Constitutional Success

Inclusiveness has been identified by USIP, Interpeace, and others as important to constitution-drafting. The study undertaken here demonstrates just how critical it is to include elites from all political parties, factions, and minorities in the drafting process. Although it was not recorded as part of the comparison chart, the in-depth country studies undertaken for its preparation revealed that *all* successful, and one moderately successful constitution under study—Kenya (2010), Norway, Poland, South Africa, and the United States—included representatives from all major factions and regions in the drafting process and in key decisions and negotiations.

There are three suggested benefits to inclusiveness. First, because they were included in key decisions, all parties invested in the process and became interested, despite their interim wins or losses, in the constitution's ultimate success. As a result, these processes were able to achieve consensus or near-consensus within the constitution-drafting body regarding the final constitution, which facilitated public consensus, as in the United States and South Africa. Secondly, including representatives from various elements of society—tribes, classes, interests, regions, etc.—helped those represented by them to feel included vicariously. It was a means for the greater populace to participate indirectly in the proceedings, despite any other means of public participation. If their views were represented and considered, even if the outcome was not ideal from their point of view, they could trust that the deliberations had been fair and endorse the outcome. Finally, including all groups prevented one or the other from sabotaging the process or constitutional structure, such as is currently happening in Libya and Iraq, and which brought about the overthrow of Morsi and rejection of the 2012 constitution in Egypt.

A significant means of fostering inclusiveness and a distinctive organisational culture leading to consensus was early plenary policy discussions within the constitution-drafting body. Drafters of successful constitutions (Kenya (2010), Norway, South Africa, and the United States), engaged in healthy plenary policy discussions to work through and reach consensus on large issues early on in the process. Early, successfully completed negotiations and compromises contributed to later cohesion, momentum, and the confidence to work through

smaller compromises quickly. Tunisia's process, too early to be called successful, witnessed almost immediate organisation into six themed committees in which all substantive discussions and writing took place for much of the process. Plenary policy discussions came much later. Tunisia's difficulties during the process may have been prevented had plenary discussions come earlier in the process.

Efforts at inclusiveness, even if ultimately unsuccessful, helped to engender process legitimacy and eventual acceptance of the final product by an overwhelming majority of the people. Such was the case in South Africa, where drafters made repeated efforts to reach out to extreme and militant parties on the left (especially to the Pan Africanist Congress and Inkatha Freedom Party). Efforts at accommodation and compromise in the United States fostered general acceptance of the process and constitution as the fundamental law of the land even by those who opposed its contents.[21]

Conversely, failure to include certain elements of society, especially political elites, can sabotage an otherwise good process. Such was the case in Kenya (2005), Iceland, and Eritrea, all exemplary participatory processes. Egypt's 2012 constitution did not satisfy the moderates who claimed responsibility for the revolution that toppled Mubarak, triggering a counter-revolution and, unfortunately, another process which failed to include significant elements of society. Although it is too early to tell, Egypt's 2014 constitution, opposed by Islamists, may find a similar fate to its 2012 predecessor.

In sum, inclusion of all elites and factions appears key to constitutional success. Successful constitutions were inclusive enough to reach at least near-unanimity, while unsuccessful constitutions could in part be characterised by their exclusion of important social elements and power-bases. In fact, in several cases, non-inclusiveness trumped all other positive elements of a process—public participation, transparency, and local expert involvement.

[21] For example, Daniel Shay, who lead Shay's rebellion in Massachusetts (an armed opposition to state and federal forces which provided the impetus for the convening of the Federal Convention in 1787), was an Anti-Federalist delegate to the Massachusetts Constitutional Convention. Even though he opposed the Constitution's ratification, Shay led no more rebellions after its passage into fundamental law. He had become vested in the process through participation; as a result, despite Shay's disagreement with the outcome, he abided by it.

3.6 Promise-Keeping: The Process as a Proto-Constitution

Another observation from the in-depth country reports that is not apparent from the comparison chart itself is that the drafters' ability to adhere to their own constitution-writing plan played a very important role in those processes that were successful. If drafters were able to comply with the rules governing them in establishing the constitution, the constitution that resulted tended to receive better acceptance by the population and achieve a better rule of law state. The process thus became a 'proto-constitution'. Adhering to the plan and meeting deadlines in these processes served to maintain momentum, but perhaps also signalled to the public the importance of the document on which the drafters were working. Respect for the 'proto-constitution', often contained in an interim constitution, earned the respect of the people, which translated into enhanced legitimacy for the ultimate constitution.

Complying with their own rules often came at great cost to drafters. The prime example of this comes from the Kenya (2010) process, where the Constitution's Committee of Experts adhered to the prescribed timeline despite great obstacles: when politicians withheld funding for the Committee's mandate, rather than delaying the process, the experts chose to self-fund until public monies were forthcoming. South African drafters made similar Herculean efforts in adhering to the initial plan laid out in their transitional constitution by working long hours and then through the night in the final hours before their deadline.

Interestingly, keeping to the plan was not possible unless the process was also inclusive. Including relevant elites from most if not all elements of society and engaging in early plenary discussions allowed the body to build an internal culture of trust through early compromises, which then lead to more and more easily-attained compromises, permitting the kind of progress and speed necessary to comply with external and internal deadlines. Such was the case in South Africa, Kenya (2010), Norway, and the United States.

On the other hand, it appears that processes that are constantly subject to change, such as Nepal and Poland, tend to lose momentum and legitimacy. Although this was corrected with great effort in Poland, processes can flounder—such as the case in Nepal as of this writing. It is important to note, however, that this applies only after a process has been finally decided. The machinations that occur during the 'prelude' to a constitutional process, where the plan itself is formed, has no bearing on ultimate success. South Africa's multi-year 'prelude', initiated by a transitional constitution, is a case in point. Once a plan is decided upon, however, the process crystallises, and sticking to it seems to make a differ-

ence to the outcome. The one exception to this hallmark of constitutional success within our study is that the overall process should not be too short. If, as in Iraq, a process is adhered to which is too short in the first place, compliance will make no difference.

4 Conclusion

Comparative case-studies can aid decision-makers setting the framework for a constitutional process to make informed decisions, as well as drafters writing a new constitution themselves. This is particularly crucial in post-conflict situations, in which time and resources are often constrained, and the effort to create a basic law requires the cooperation of competing social forces and visions for the society. From this study, the following observations would appear to be justifiable, even in light of the difficulties discussed in Section II, above. In particular, four procedural parameters appear to have affected the outcome in a number of cases:

1. *Inclusiveness.* Excluding groups, especially elites, seems to reliably result in poor outcomes. If a constitution-making process is not inclusive, it will not much matter what other choices are made regarding the process, as the exclusion of relevant groups and social segments can unravel an otherwise model process.

2. *Compliance with Reasonable Timelines.* The second guideline is to take whatever time is necessary in the 'prelude' and preliminary stages to plan a realistic process, but then hold to that timeframe despite all obstacles. This may be most difficult, but especially crucial, in conflict and post-conflict situations. Process designers and drafters alike should be careful to treat the process plan as they would want the public to treat the ultimate constitution. The reasonableness of the timeframe elected will in part depend on the elements process designers include, noting that civic education and public participation campaigns can take quite a long time, and that drafting time need not take as long if drafters are nominated experts rather than elected representatives. Thus processes under six months are likely too short, especially where they involve public participation and elected drafters. Processes longer than five years may see a loss of momentum and legitimacy and public apathy.

3. *Public Campaigns and Transparency.* If the process is otherwise inclusive, public participation campaigns seem to improve the chances of constitutional success. Where process designers elect to run public campaigns, our study emphasises that public participation becomes more meaningful if preceded by civic education and provision for it is either made after a draft constitution is published, or accompanied by adequate mechanisms to code and process submissions. The public's acceptance and 'buy-in' to the process is greater if they feel their participation actually bore on significant constitutional decisions. Extensive public participation campaigns wherein public feedback is actually incorporated into constitutional texts may lessen or eliminate the need for a transparent, open-door drafting process. That said, the lack of transparency is often a hallmark of poor constitutional outcomes, and thus should be avoided if possible.

4. *Experts.* The inclusion of local over foreign experts, whether drafters themselves or nominated by drafters to assist the process, will help to improve the perception that the constitution is homegrown, and enhance the likelihood that a constitution will be accepted as fundamental law. Drafters with constitutional expertise will decrease the length of time needed for technical drafting. Compiling a drafting body that is also an expert body is easier to accomplish when the body is nominated rather than elected.

This paper is designed to illustrate the sort of comparison in which a constitutional assembly such as the Libyan CDA could engage, and to sketch a methodology for this exercise. It is generally accepted that process bears on constitutional outcomes, and drafters increasingly desire to divine predictive guidelines from comparison—a 'roadmap to success'— drawn from the experience of others. Although this paper falls short of proffering such a roadmap—and, indeed, none can exist—the guidelines offered here must be taken into consideration with specific, in-country conditions, such as existing political institutions and constitutions and, especially, historical traditions of constitutionalism within the country. Indeed, the wide range of processes compared owe their ultimate success or failure not only to the procedural elements studied, but also to the contingencies of each constitution's unique history and circumstances. (Although the one element that seems capable of destroying *any* process, no matter how well-planned or executed, is the lack of inclusiveness).

Each political community must find its own path to constitutionalism. The kind of systematic comparison provided above, organised temporally and thematically around individual procedural elements, can be very helpful in that task. This sort of comparison should act as a basis on which to apply country-specific knowledge to the task of designing a constitutional process in light of its cultural, legal, political, and institutional background. As more countries in transition approach constitution-making in the next decade and undertake comparisons in preparing their constitutional process and substance, it is hoped that the methodology presented will invite comment and debate, leading ultimately towards a more rigorous approach to comparisons of this nature.

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A UNIVERSAL APPROACH TO INTERNATIONAL LAW IN CONTEMPORARY CONSTITUTIONS: DOES IT EXIST?

Giulio Bartolini[*]

Abstract
The effectiveness of the international legal system and its capacity to be 'universal' is largely dependent on the attitude of domestic authorities towards international rules, which can be influenced by solutions provided in constitutions. Specific attention should be paid to the role and rank of sources of international law in domestic legal orders and their relationship with the constitution and other national sources. In the past, scholars identified three different approaches to this issue (Western constitutions, Socialist States and Third World countries). However, it is relevant to examine the current state of the art in contemporary constitutions, due to novelties concerning the attitude of States towards international sources. A survey of these texts reveals a spectrum of solutions, including: constitutions that ignore the topic; the express subordination of international law to the constitution and/or acts of Parliaments; and the predominance of general custom and/or international treaties over national legislation. This assessment clearly identifies some potential difficulties for international law to apply equally and indiscriminately across domestic legal systems even if a general survey indicates the increasing openness of contemporary constitutions towards international law. Consequently, a series of mechanisms have also been included in contemporary constitutions to solve conflicts between domestic and international rules. Nonetheless, in some instances, difficulties to reconcile international law with national constitutions can be recognised which contribute to undermining the 'universal' character of the international legal order.

Keywords
Constitution-making, Universality, Treaties, International Law, Domestic Law, Human Rights Treaties, Customary International Law

1 Introduction: The Increased Relevance of International Law for Contemporary Constitution-Making Processes

The international law dimension of a constitution is highly important, as the effectiveness of the international legal system and its capacity to be 'universal' is

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largely dependent on the attitude of domestic authorities towards international rules.[1] As Triepel asserted in 1923, international law is like a field marshal who can achieve his goals only if his generals (in this case, States) issue orders to their subordinates.[2] Even if this metaphor was strongly influenced by Triepel's dualist perception of the relationship between the international and national legal orders, it still deserves attention as it emphasises the positive (or problematic) role that national rules can play in permitting the application of international law provisions within domestic legal systems.

In this regard, an analysis of specific provisions included in national constitutions concerning the role and rank of sources of international law in domestic legal orders, and their relationship with the constitution and other sources, is therefore essential. In fact, when a domestic constitution is 'friendly' to international law,[3] the probability of the latter legal order being implemented increases, although an effective evaluation of a specific State's attitude towards international law is highly dependent on the concrete practice of its national organs. Therefore it is critical to examine the specific constitutional provisions of a State before making conclusions about that State's relationship with international law. Constitutions represent the main point of reference and source of legitimacy for the mandate of national legal actors potentially involved in addressing issues relevant for international law.[4] Consequently, when constitutions misjudge the potential role of international law in domestic legal systems, international law finds it difficult to play its 'universal role'. Accordingly, avoiding potential conflicts between legal orders with contrasting exigencies becomes largely dependent upon creative interpretative solutions, which can be quite precarious.

From an international law perspective, even if this legal system provides neither guidance on how States should accommodate international law in their constitutions, nor indications concerning which mechanisms should be used to

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[1] English translations of contemporary constitutions have been obtained through three main databases: World Constitutions Illustrated (HeinOnline); Oxford Constitutions of the World and 'Constitute' <www.constituteproject.org>.

[2] H Triepel, 'Les rapports entre le droit interne et le droit international' (1923) 1 *RCADI* 106. For a similar position see A Cassese, 'Modern Constitutions and International Law' (1985) 3 *RCADI* 342.

[3] D Lovric, 'A Constitution Friendly to International Law: Germany and Its Völkerrechtsfreundlichkeit' (2006) 25 *Aus YIL* 75, 75.

[4] A Denza, 'The Relationship between International Law and National Law,' in M Evans (ed), *International Law* (2010) 411, 417: 'For each national legislature and court, the starting point for any examination of the relationship is its own constitution'.

implement international sources at the domestic level,[5] constitutions ought to not only be open to international law but also to be ready to accommodate international provisions in their legal systems. Arguably, the rationale for constitutions to pay tribute to international law does not principally derive from theoretical evaluations regarding the monist or dualist approaches of national legal systems with regard to international law. Indeed, several scholars have deemed these abstract approaches as incapable of concretely affecting the development or revision of domestic constitutions in this area,[6] or of providing a clear picture of the practice in this regard.[7] Instead, the rationale for international law's influence on domestic laws comes from one basic principle maintained by international law since its foundation – that is, the supremacy of international law over domestic laws and the impossibility for municipal legal systems to affect the application of international law.

International practice is constant in affirming this approach, mainly maintaining that a State cannot refer to its own legal order to justify its failure to comply with its international obligations. This basic principle has been persistently reiterated by arbitral and international tribunals, ready to recognise this solution notwithstanding the domestic relevance of the norms at issue. For instance, as early as 1875 the arbitral tribunal in the *Montijo* case maintained that 'a treaty is superior to the Constitution…The legislation of the Republic must adapt to the treaty, not the treaty to the law',[8] according to a solution endorsed by the Permanent Court of International Justice.[9] This principle has also been clearly ex-

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[5] See in general K J Partsch, 'International Law and Municipal Law,' in R. Bernhardt (ed) *Encyclopedia of Public International Law,* vol 2 (1995) 238; P M Dupuy, 'International Law and Domestic (Municipal) Law,' (2011) *Max Planck Encyclopedia of Public International Law* (on-line edition).

[6] Denza, above no. 4, 417.

[7] J Crawford, 'Change, Order, Change. The Course of International Law' (2013) 365 *RCADI* 164, 164-5: 'Classifying a State's constitutional design as either monist or dualist is not so much an exercise in absolutes as a matter of degree…Neither theory provides a satisfactory explanation for the practice of international and national courts in articulating the content and design of legal systems'. See also E De Wet, 'The Constitutionalization of Public International Law,' in M Rosenfeld, A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012), 1209.

[8] 'Montijo' Arbitration (*United States v Colombia*, 1875) per Mr Robert Bunch quoted in John Bassett Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party*, vol 2 (1898), 1440.

[9] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (1932) PCIJ Ser A/B no. 44, 32: 'a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.'

pressed in relevant treaties, such as article 27 of the Vienna Convention on the Law of Treaties.[10] Codifications proposed by the International Law Commission (ILC) further reflect this principle, such as articles 3 and 32 of the *Draft Articles on the Responsibility of States for Intentionally Wrongful Acts (Draft Articles on the Responsibility of States)*,[11] which both reaffirm longstanding rules of customary international law in this area.[12]

This principle, which has been qualified by scholars as the result of 'une supériorité logique'[13] of international law over municipal laws, is clearly linked to its intrinsic necessity for the international legal order. Indeed, Gaja has argued that, without it, 'the binding character of international law would be put in jeopardy'.[14] As maintained by Virally, for instance, 'Le droit international est inconcevable autrement que supérieur aux Etats, ses sujets. Nier sa supériorité revient à nier son existence'.[15] Moreover, this supremacy could also provide international law with the fundamental benefit of receiving the support of domestic actors and mechanisms in achieving its application. In this way, it is argued that international law may guarantee the realisation of the 'ideal model … [in which] both the national legal order and the international legal order would be in charge of the application of the international norm'.[16] The effectiveness of international law could therefore be increased by a proper accommodation of international law principles and sources in domestic constitutions.

Consequently we could expect States involved in constitution-making processes to be ready to properly evaluate the relationship between international law and domestic sources, especially taking into account the current dynamics of the international legal order. While basic references to international law have been included in the evaluations of constitution-makers since the earliest constitutional instruments, it would seem that the relationship and interaction between

[10] 23 May 1969, 1155 UNTS 331.

[11] Report of the ILC on the Work of its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, p. 43, UN Doc A/56/10 (2001).

[12] M Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), 374-5.

[13] D Carreau, *Droit international* (9th ed, 2007), 59.

[14] G Gaja, 'Dualism – A Review', in J Nijman, A Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (2007), 61.

[15] M Virally, 'Sur un pont aux âjes: les rapports entre droit international et droits internes,' in H Rolin, *Mélanges offerts à Henri Rolin: problèmes de droit des gens* (1964) 488, 497. See, in similar terms, G Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 *RCADI* 1.

[16] P Dupuy, 'The Unity of Application of International Law at the Global Level and the Responsibility of Judges' (2007) 1(2) *EJLS* 2.

the international and national legal orders is probably at its zenith today. Indeed, Franck and Thiruvengadam's view that '[n]o constitution, today, is an island unto itself,'[17] would seem to be irrefutable.

In this context, a series of partly interrelated factors have facilitated the further interaction between international and national legal orders. These factors include: (1) the development of universal and regional integration within the framework of international organisations endowed with law-making or other relevant powers, which are able to influence not only the conduct of State organs but also the activities of private and legal persons; (2) the ever-growing interdependence of States and the increasing relevance of international obligations in several areas pertaining to the public activities of States, with an obvious reduction of their *domaine reservé*; (3) the development of international human rights standards capable of complementing provisions at the national level, thus creating fruitful interaction in this area in terms of both the substantive provisions and the control mechanisms available at multiple levels of protection; and (4) parliaments' increased exigencies in terms of democratic control over the executive's external activities in areas pertaining to international law.

Moreover it should be emphasised that external actors have actively contributed to constitution-making processes in several recent cases, thus embracing an area traditionally qualified as the hallmark of States' sovereignty and self-determination. The degree of internationalised *pouvoir constituant* has, however, varied widely.[18] On one end of the spectrum it includes constitutions internationally *octroyées*, such as that of Bosnia-Herzegovina, where the content of the supreme law of the land was included in an international instrument, i.e. Annex IV to the Dayton Agreement.[19] The other extreme involves advisory functions and supervision exercised in a more or less stringent manner by international organisations, such as the United Nations (UN) or the Council of Europe's Venice Commission, or by relevant third States. Various experiences may be relevant in this regard, such as those of Namibia, South Africa, East Timor, Afghanistan, Iraq,

[17] T M Franck and A K Thiruvengadam, 'International Law and Constitution-Making' (2003) 2 *Chinese JIL* 467, 468.

[18] See N Maziau, 'L'internationalisation du pouvoir constituant. Essai de typologie: le point de vue heterodoxe du constitutionnaliste' (2002) 106 *RGDIP* 549; P Dann & Z Al-Ali, 'The Internationalized pouvoir constituant – Constitution-Making Under External Influence in Iraq, Sudan and East Timor' (2006) 10 *Max Planck Yearbook of United Nations Law*, 423; V Sripati, 'The United Nation's Role in Post-Conflict Constitution-Making Process; *TWAIL Insight*' (2008) 10 *Int Comm L Rev* 411; E Hay, 'International(ized) Constitutions and Peacebuilding' (2014) 27 *Leiden JIL* 141.

[19] S Yee, 'The New Constitution of Bosnia and Herzegovina,' (1996) 7 *EJIL* 176.

Kosovo, South Sudan, Angola and Kenya, to name but a few.

Reference to these recent constitution-making processes tends to introduce a key limitation to the focus of my research. In particular, this article will primarily address written constitutions (or relevant modifications to existing texts) adopted since the 1990s. This temporal delimitation is far from arbitrary. As emphasised by Cassese,[20] prior to the last decade of the twentieth century, three main attitudes of domestic constitutions towards international law were identifiable. These were mainly influenced by political and historical factors, which had a fundamental influence on States' legal approaches towards international law. In particular, a comparative review of existing constitutional provisions in that period reveals three main alignments (Western, Socialist and Third World States) with specific features in relation to these issues. While all States, whatever their ideology and legal tradition, were cautious in proclaiming their formal adherence to international law, distinct groups of States can be assigned to a spectrum of different attitudes vis-à-vis international law.

Broadly speaking, several Western countries tended to recognise a significant role for sources of international law (both customs and treaties), in some cases formally admitting their superiority with regard to municipal laws, with the exception of safeguard caveats aiming to maintain the constitution as the supreme law of the land. On the contrary, the constitutions of Socialist countries and Third World States, especially 'newcomers' to the international arena such as States involved in the decolonisation process, did not even pay lip service to international law.

For instance, the absence of any formal reference to the role of international customs in the latter's domestic legal orders was very common. This omission was motivated by different factors, such as: (1) the long-standing sceptical attitude of Socialist States towards general international law, whose value was only admitted as the result of Socialist States' express or tacit endorsement; (2) 'colonial' influences in constitution-making processes, such as the absence of formal reference to international customs in the 1958 French Constitution or, similarly, the idea in former British colonies that an unwritten rule - to the effect that customary law was part of the law of the land - could be sufficient; and (3) the international law agenda of several Third World States, accompanied by fierce criticisms of the existing legal order and the role of existing customs, which were largely qualified as the product of and an infliction from developed States.[21] In

[20] A Cassese, 'Modern Constitutions,' above n 2, 331.

[21] See T Maluwa, *International Law in Post-Colonial Africa* (1999), 42; F Okoye, *International Law and*

a similar way, several constitutions of Socialist and Third World States neither mentioned nor attributed a specific role and rank to treaties in their domestic legal systems.

This potential three-group qualification of States' approaches to constitutions with regard to international law could not have survived the historical and legal events that followed 1989. These events resulted in the development of an impressive number of constitution-making processes in the last two decades, which clearly emphasised the need to reassess national constitutions' attitudes towards international law.

A first point of departure was the abandonment of Socialist approaches to international law in domestic constitutions. The Socialist legal legacy no longer represented a suitable normative approach for national constitutions and consequently all former Communist States, especially in Europe and Central Asia, were involved in drafting new constitutions. As analysed later on, these States showed a clear tendency to pay formal tribute to international law.[22] In this way, they recalled the 'fièvre internationaliste de l'immédiat après-guerre'[23] of several Western States that had experienced authoritarian regimes and were more open to pledging fidelity to international legal values. Several other States, particularly Latin American and African ones, were also abandoning authoritarian regimes at the time, a phenomenon that had a significant impact on their constitutions.

From the early 1990s, the majority of African constitutions were abrogated to be replaced by new texts aimed at promoting (at least from a formal point of view) the rule of law, democracy and division of powers.[24] This opportunity also led to a reconsideration of the role of international law in such domestic systems to varying extents, partly influenced by the less competitive and challenging positions of these States with regard to the international legal system.[25] By way

the New African States (1972), 193-4.

[22] As maintained by Vereshchetin 'one of the common features of all new constitutions in that region is their openness to international law' (V S Vereshchetin, 'New Constitutions and the Old Problem of the Relationship between International Law and National Law' (1996) 7(1) *EJIL* 29, 32). For a similar position see E Stein, 'International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?' (1994) 88 *AJIL* 427; S Marochkin, 'Place and Role of Norms and Sources of International Law in the Legal System of the Russian Federation: The Doctrinal Exploration and the Legislative Development of the Constitutional Principles' (2012) 3 *BLR* 31.

[23] De Visscher, 'Les tendances internationales des constitutions modernes' (1952) *RCADI* 573. See also in this regard Cassese, 'Modern Constitutions,' above n 2, 351.

[24] On this phenomenon see for instance: H. Roussillon (ed.), *Les nouvelles constitutions africaines* (2nd ed, 1995); P F Gonidec, 'Constitutionnalismes africaines,' (1996) *African J Int L* 12.

[25] We can mention, for instance, African States' re-emerging interest in the arbitral function of the

of example, Namibia was the first post-colonial African country to expressly recognise the role of international customs as a source of domestic law in its 1990 Constitution, an approach subsequently adopted by other African States.[26] In this regard it could be argued that Namibia's willingness to accept the role of international law in its constitution may have been due to its emergence as an independent State through the active involvement of the international community and receipt of international support in its constitution-making process. Similarly, in some constitution-making processes, such as the drafting of the South African Constitution, issues related to international law were subjected to specific scrutiny, resulting in the adoption of provisions that emphasised the openness of the domestic legal system to international values.[27] This innovative solution clearly had an impact on other African States.

In a similar way, Latin American States were also involved in transitional political processes which had an important impact on their domestic constitutions. Some of these States had common approaches to international law, especially in their original 'constitutionalisation' of international standards pertaining to human rights law by granting constitutional status to treaties and soft-law documents developed at both universal and regional levels.[28]

During this period other States, while less affected by substantial constitution-making processes, still had to deal with the increasing intrusion of international law into municipal legal systems, as highlighted, for example, by the constitutional provisions adopted in Europe to address regional integration. Finally, political events continue to imply significant modifications to constitutions as a potential outcome, as recently emphasised by the 'Arab Spring,' which has led to the abrogation of several constitutions in the area, thus ensuring that the role of international law in domestic legal systems is a constant subject of potential debate.[29]

International Court of Justice after the crisis prompted by the decision of the ICJ in the *Southwest Africa Case (Liberia v South Africa)* ICJ Reports 1966.

[26] On the relevance of section 144 of the 1990 Namibian Constitution see T Maluwa, *International Law*, above no. 21, 48; Frank and Thiruvengadam, 'International Law', above n 17, 508.

[27] See J Dugard, 'International Law and the South African Constitution' (1997) 1 *EJIL* 77; D J Devine, 'The Relationship between International Law and Municipal Law in the Light of the Interim South African Constitution 1993' (1995) 44 *ICLQ* 1.

[28] T Buerghenthal, 'Modern Constitutions and Human Rights Treaties' (1998) 36 *Colum. J Trans L* 211.

[29] Mention could be made of the Venice Commission's critical remarks on the draft Tunisian Constitution, with regard to its provisions dealing with international law. See: European Commission for Democracy through Law, *Opinion on the Final Draft Constitution of the Republic*

In light of this survey of interrelated factors, an examination of constitutional provisions adopted in this area since the 1990s allows us to assess whether it is finally possible to identify clear and common patterns regarding the relationship between international and domestic sources of law as provided by national constitutions. In particular, as it will be impossible to focus on all relevant aspects of the so-called 'internationalisation' of contemporary constitutions,[30] our attention will instead be focused on an analysis of the formal rank attributed to international sources of law in relation to municipal ones, as this is one of the main indicators of the potentially fruitful or problematic nature of the relationship between these sources.

However, an empirical analysis of these primary sources reveals the difficulties of identifying unique solutions, as States continue to maintain an 'anarchic' approach in this area.[31] This first partial conclusion must, however, be qualified. In particular, taking into account the state of the art with regard to constitutional provisions in this area prior to the 1990s, it seems clear that contemporary constitution-making processes tend to follow similar key trends with regard to some aspects. In our opinion an overall assessment allows us to conclude that the current tendency is to attribute a significant formal role to sources of international law in domestic constitutions, subject to certain caveats and in particular to the problematic relationship with the constitution itself. However, while these potential limits may still appear unsatisfactory from an international law perspective, it seems certain that contemporary constitution-making processes are increasingly open to international law and conscious of the far-reaching relevance of international obligations and standards for national authorities, thus potentially permitting international law to play its 'universal and cosmopolitan' role.

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of Tunisia (2013), para 38-40.

[30] From a constitutional law perspective on these issues, see W Chang and J Yeh, 'Internationalization of Constitutional Law,' in M Rosenfeld & A Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (2013) 1165; A Levade & B Mathieu, 'L'internationalisation du droit constitutionnel. Acteurs – domaines – techniques' (2006) 18 *ERPL* 161.

[31] A Cassese, *International Law* (2nd edition, 2004), 220.

2 Treaties and Their Rank in Contemporary Constitutions

In considering contemporary constitutions' approaches to international sources, the legal standing of treaties within domestic legal orders can be identified as a first point of reference. As international law is increasingly intrusive in domestic affairs due to the networks of treaties binding States, it is evident that such international sources can have a significant impact on domestic legal orders and raise potential conflicts with national sources. In this regard, provisions included in contemporary constitutions help to identify some of the main issues, such as the relationship between treaties, the constitutions themselves, and acts of Parliament, which is sometimes influenced by the subject of the international treaty as in the case of human rights conventions. Furthermore constitutions also include provisions that aim to clarify the possibility and requirements for international treaties to produce legal effects on the domestic legal order, thus providing some indications of implementation techniques adopted by the relevant State.

2.1 The Relationship between Constitutions and International Treaties

As emphasised above concerning the relationship between constitutions and treaties, international adjudication bodies have constantly reaffirmed the impossibility for States to invoke their constitutional provisions as a defence for the non-fulfilment of international obligations. However, this position has encountered clear difficulties in acceptance at the domestic level as '[t]raditionally, a constitution is perceived as essentially a state-centered notion which is linked to the concept of statehood and the idea of a state exercising its sovereign power.'[32] Consequently, early examples of constitutions and relevant case-law took the opposite position, considering the supreme law of the land to have priority over treaties,[33] while only the Dutch Constitution recognised a different potential position.[34]

[32] C M Fombad, 'Internationalization of Constitutional Law and Constitutionalism in Africa' (2012) 60(2) *Am J Comp L* 439, 441.

[33] See Cassese, 'Modern Constitutions,' above n 2, 368-93.

[34] Among the early examples of constitutions, only that of the Netherlands is considered to provide treaties with supremacy over the constitution. In the case of the Netherlands constitution, a treaty that conflicts with the constitution has to be approved by Parliament with at least a

A similar trend can be identified with regard to contemporary constitutions. Consequently, authors such as Peters have affirmed that 'not unsurprisingly, the issue seems to be tackled almost exclusively in young, mostly post-transition State constitutions, which have been created in an area already marked by globalisation'.[35] Even if Peters' evaluation was based on a Euro-centric analysis, comprehensive examination allows us to confirm that numerous contemporary constitutions proclaim the impossibility for international law sources to contradict the constitution. At a glance these provisions could still be interpreted as indicating a 'nationalistic' constitutional approach that is sceptical of international law, as they tend to confirm that international values and obligations cannot be introduced into the domestic legal order when in contrast with the constitution.

Nonetheless, from our perspective these clauses take a less competitive approach vis-à-vis international law than would appear *prima facie* and than may be expected. In fact in the majority of cases the supremacy of constitutions over international law is inferred or complemented by provisions defining the role of constitutional or superior courts, which are required to evaluate the compatibility of treaties with constitutional values, usually prior to their ratification,[36] as for instance maintained by article 72 of the 1995 Constitution of Kazakhstan, according to which 'the Constitutional Council shall…consider the international treaties of the Republic with respect to their compliance with the constitution, before they are ratified.' This approach is familiar to numerous contemporary constitutions, such as those of: Afghanistan (2004, article 121); Albania (1998, article 131); Andorra (1993, article 46.1); Angola (article 6, 228); Armenia (1995, article 6, 100); Azerbaijan (1995, article 130); Benin (1990, article 146); Bolivia (2009, article 256); Brazil (1988, article 102); Bulgaria (article 85.4, 149.1); Burkina Faso (1991, article 150); Burundi (2005, article 296); Cape Verde (2010, article 12.4, 278); Central African Republic (2004, article 71); Chad (1996, article 220); Colombia (1991, article 241); Comoros (2001, article 10); Congo (2001, article 146, 183); Côte d'Ivoire (2000, article 86); Croatia (1991, article 140); Czech Republic

two-thirds majority of the vote: a majority substantially similar to that required to formally revise the constitution itself. See E A Alkema, 'Netherlands,' in D. Shelton (ed.), *International and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (2011), 421-2.

[35] A Peters, 'The Globalization of State Constitutions,' in J Nijman & A Nollkaemper (eds), *New Perspectives*, above n 14, 260.

[36] In some rare cases the vague terms of relevant constitutional provisions also seem to imply the possibility of ex-post constitutionally test, a solution that can obviously create legal problems if the instrument is already legally binding for the State and a previous examination of the constitutional legitimacy of the treaty has not been carried out according to the possibility grant by the constitution.

(1993, article 87); Democratic Republic of Congo (2005, article 216); Dominican Republic (2010, article 185); Ecuador (2008, article 425); Equatorial Guinea (1991, article 94); Gabon (1001, article 87); Georgia (1995, article 6, 89); Guinea (2010, article 93); Kazakhstan (1995, article 72); Kyrgyzstan (2010, article 97.6); Lithuania (1992, article 105); Madagascar (2010, article 116, 137); Mali (1992, article 90); Mauritania (1991, article 79); Mongolia (1992, article 10.4, 66); Morocco (2011, article 55); Niger (2010, article 120, 170); Poland (1997, article 133, 188); Romania (1991, article 11, 146); Russia (1993, article 125); Rwanda (2003, article 145, 192); Senegal (2001, article 97); Slovakia (1992, article 125); Slovenia (1991, article 160); Togo (1992, article 138); Tunisia (2014, article 20, 120); Ukraine (1996, article 9, 151); Uzbekistan (1992, article 109); and Venezuela (1999, article 336). In other cases the constitutions simply make it impossible to ratify and/or apply treaties contrary to the constitution without providing for the involvement of superior courts in this area, as in the case of: Belarus (1994, article 8); Bhutan (2008, article 25); and Estonia (1992, article 123). Only in some rare cases the constitutional provisions maintain the priority of the constitution over ratified treaties or imply the possibility of an ex-post constitutionally test after the ratification process, according to solutions that can obviously create legal problems of State responsibility.[37] Similarly in a few constitutions, such as article 10 of the 1994 Tajikistan constitution, the constitution's supremacy is simply upheld in relevant provisions that generally define the rank of domestic and international sources, thus implying the inferiority of the latter with regard to the supreme law of the land.

Consequently, rather than merely proclaiming the supremacy of their provisions, the majority of these constitutions tend to define a prearranged mechanism to both favour legal certainty and avoid potential conflicts between international law and the constitution. In doing so, they attribute to national superior courts the ability to review the constitutionality of treaties during the treaty-making process. Constitution-makers are thus perfectly aware of the potential difficulties raised by such constitutional safeguard provisions with regard to international law. Accordingly, they aim to prevent conflicts between domestic and international law by relying on certain mechanisms aimed at avoiding potential frictions between international and domestic legal orders. It is therefore the duty of national authorities to evaluate whether to afford precedence to international interests, thus modifying the constitution, or to maintain the supremacy of the

[37] See e.g. Serbian Constitution (2006), Arts 16, 167 and 194. See also S Djanjić, 'Serbia', in D Shelton, above 34, 544-6.

constitution but avoid creating situations of international responsibility for the State simply by not ratifying the proposed treaty.

Therefore, several constitutions also provide that '[t]he conclusion of international treaties, which require any amendments to the Constitution, shall be preceded by the passage of the said amendment.'[38] This solution clearly echoes article 54 of the 1958 French Constitution, the principle underlying which is now common to several domestic systems unrelated to the French constitutional experience[39]. While this process can obviously be time-consuming for the State participating in the relevant treaty, it permits the achievement of an appropriate balance between international and domestic interests, avoiding subsequent situations of potential conflict that could risk raising issues of State responsibility. As it is known, in several cases States have opted to modify their constitutions before ratifying an international treaty whose provisions had the potential to conflict with constitutional rules or, similarly, they have introduced references to these treaties in their constitutions in order to grant them a constitutional guarantee and facilitate their application at the domestic level. This was recently emphasised by the saga of the ratification process of the Statute of the International Criminal Court, which required several States to introduce constitutional modifications.[40]

Conversely, in some rare cases, the Constitutional Court is required to review the 'compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution'.[41] In this latter case the role of international law as a fundamental parameter of reference in the law-making process of domestic legislative authorities has been reaffirmed. Constitution-makers have adopted a cooperative approach towards international law in order to evaluate in a preventive manner whether the proposed constitutional changes could imply the international responsibility of the State in cases of future non-fulfilment of treaty obligations that are no longer in line with the constitution.

Domestic mechanisms aimed at avoiding situations of incompatibility between the constitution and international obligations can also be reinforced by

[38] Bulgarian Constitution, Art 85.4.

[39] See e.g. Madagascar (2010, Art 137); Mali (1992, Art 90); Morocco (2011, Art 55); Niger (2010, Arts 120 and 170); Peru (1993, Art 57); Romania (1991, Art 11); Rwanda (2003, Art 192); Senegal (2001, Art 97); and Ukraine (1996, Art 9).

[40] See H Duffy, 'National Constitutional Compatibility and the International Criminal Court' (2001) 11 *Duke JCIL* 5. See e.g. references to the Statute of the International Criminal Court in the Constitutions of: Colombia (Art 93); France (Art 53.2); Ireland (Art 29); Kenya (Art 134).

[41] Kosovo Constitution (2008), Art 113.3.

international mechanisms, as in the case of reservations to multilateral treaties. Such reservations can represent an additional opportunity to achieve an equilibrium between competing interests, with the aim of impeding the violation of a State's core constitutional principles. As it is known, in several cases States have included reservations, claiming that the entry into force of the international instrument cannot restrict constitutional provisions or should be interpreted according to its terms, thus maintaining the supremacy of constitutional values in relevant areas.[42] In some States this possibility is also envisaged by the constitution itself: article 145 of the El Salvador Constitution provides for the ratification of treaties contrary to the constitution as long as State organs include pertinent reservations at the time of ratification.[43]

It follows that systems adopted in several constitutions are intended to seek an appropriate balance between the international and domestic legal orders, rather than picture this relationship in terms of insoluble tensions. Furthermore, these constitutional clauses present an additional advantage as they expand democratic control over a State's external activities. In fact, they usually permit several State organs (members of Parliament or supreme representatives of Parliament, government, Presidents of the Republic, judicial authorities, etc.) to demand an evaluation of the constitutional compatibility of the proposed treaty. In this manner the sphere of stakeholders is enlarged, who can perform checks and balances in this area in order to prevent predominant domestic actors in foreign affairs (such as the executive or the President of the Republic) from potentially undermining basic domestic values through their external activities, or from concluding international treaties that infringe on the competency of other constitutional bodies, such as Parliament.[44]

2.2 Treaties and Acts of Parliament

The rank of treaties with regard to acts of Parliament is an additional element that sheds light on the attitude of contemporary constitutions and their treatment of

[42] See e.g. the dozens of reservations introduced by States to the 1966 Covenant on civil and political rights in order to maintain their compatibility with their national constitutions. See for example the Gambia's reservation regarding art. 14 CCPR 'For financial reasons free legal assistance for accused persons is limited in our constitution to persons charged with capital offences only. The Government of the Gambia therefore wishes to enter a reservation in respect of article 14 (3) (d) of the Covenant in question'.

[43] See for instance article 145 of the El Salvador Constitution.

[44] T Ondo, 'Le contrôle de constitutionnalité des engagements internationaux par la Cour constitutionnelle du Gabon' (2013) 90 *RDIC* 213, 218.

international sources. The latter can have a significant impact on domestic legal orders and raise potential conflicts with subsequent domestic sources. This is the case particularly in the situation discussed above – where international law increasingly intrudes into domestic affairs due to networks of treaties binding States.

In this area a significant shift is appreciable between texts adopted prior to the 1990s and subsequently. In the first period constitutions that formally granted treaties a higher position than acts of Parliament were rare. In some cases, indeed, constitutional reforms actually 'downgraded' the rank of treaties, even when previously vested with a superior authority.[45] On the contrary a current trend in contemporary constitutions is to favour the recognition of a special status to international treaties within the domestic legal order, thus increasing the formal openness of contemporary constitutions with respect to international law. In particular, various texts contain provisions similar to article 122.2 of the 1998 Albanian Constitution, according to which '[a]n international agreement ratified by law has priority over the laws of the country that are incompatible with it'. Similar provisions (or identical solutions inferred from the rank attributed to different legal sources[46]) can be identified in the constitutions of: Andorra (1993, article 3); Argentina (1994, article 75); Armenia (1995, article 6); Azerbaijan (1995, article 151); Benin (1990, article 147); Bolivia (2009, article 410); Bulgaria (1991, article 5); Burkina Faso (1991, article 151); Cape Verde (2010, article 12.4); Central African Republic (2004, article 72); Chad (1996, article221); Comoros (2001, article 10); Congo (2001, article 184); Côte d'Ivoire (2000, article 87); Croatia (1991, article 140); Czech Republic (1993, article 10); Democratic Republic of Congo (2005, article 215); Djibouti (1992, title VI); East Timor (2002, article 9.3); Ecuador (2008, article 425); Estonia (1992, article 123); Georgia (1995, article 6); Guinea (2010, article 151); Italy (amendment 2001, article 117); Kazakhstan (1995, article 4); Kosovo (2008, article 19); Macedonia (1991, article 118); Madagascar (2010, article 137); Mali (1992, article 116); Mauritania (1991, article 80); Montenegro (2007, article 9); Mozambique (2004, article 18); Niger (2010, article 171); Paraguay (1992, article 137); Poland (1997, article 91); Russia (1993, article 15); Rwanda (2003, article 190); Senegal (2001, article 98); Slovenia (1991, article 8, 153); Tajikistan (1994, article 10); Togo (1992, article 140); Turkmenistan (2008, article 6); and Tunisia

[45] Cassese, 'Modern Constitutions,' above n 2, 405, citing the examples of constitutional reforms involving Benin, Congo, Madagascar, Suriname, Turkey, Syria.

[46] See e.g. Bolivian Constitution, Art 410: '…The application of the legal norms shall be governed by the following hierarchy…: 1. Constitution of the State; 2. International Treaties; 3. National Laws…'.

(2014, article 20).

The clear aim of these constitutional provisions is mainly to avoid the infringement of international obligations by the State in question. Constitution-makers have sought to avoid such infringements by formalising a preference for international treaties in the text of the constitution itself. It follows from such a constitution-making trend that the need to increase the role of Parliaments in the treaty-making process is even greater and can be justified not only by the maintenance of democratic control over foreign policy, but also by the need to ensure supervision over States when entering into treaties. As emphasised above, these international sources can definitively impact Parliament's capacity to act as law-maker at the domestic level. Thus constitutions commonly include provisions defining the extent of parliamentary involvement in the treaty-making process.[47]

Nonetheless, the current relevance of constitutional provisions proclaiming the formal superiority of international treaties could certainly be increased by the inclusion of a series of additional positive tools. For instance, some constitutions require superior courts to review the compatibility of subsequent acts of Parliament with respect to ratified international treaties. In this sense, article 149 of the 1991 Bulgarian Constitution provides the Constitutional Court with the power to rule 'on the compatibility of domestic laws with the universally recognized norms of international law and the international treaties to which Bulgaria is a party'. Similar provisions can be found in other constitutions.[48] Furthermore, while few constitutions explicitly refer to superior courts' ability to undertake the judicial review of legislation to establish whether it infringes international norms, it should be emphasised that the abovementioned constitutional provisions (claiming that duly ratified treaties can override national legislation) could also benefit from mechanisms of 'common' constitutional review to enforce their superiority. In these cases, the authority vested in such tribunals and their capacity to guarantee a uniform solution at the domestic level clearly help to reaffirm the priority of international treaties and ensure that provisions proclaiming their superiority have more than a merely declaratory nature.

[47] Some constitutions even require that all treaties be submitted to Parliament for ratification. See e.g. Bhutan Constitution (2008), Art 10 ('…all international conventions, covenants, treaties, protocols and agreements duly accepted by the Government hereafter, shall be deemed to be the law of the Kingdom only upon ratification by Parliament'); Colombian Constitution (1991), Art 224 ('In order to be valid, treaties must be approved by Congress'). For extensive lists of categories of treaties to be approved by the Parliament before being ratified by the State see e.g.: Bulgaria (1991, Art 85); Central African Republic (2004, Art 69); and Thailand (2007, Art 190).

[48] See e.g.: Ecuador (2008, Art 425); and Montenegro (2007, Art 149).

As mentioned, the formal recognition by constitutional provisions of the superiority granted to international treaties can certainly favour the implementation of such treaties. Nonetheless it should be pointed out that, even in its absence, domestic legal orders have already managed to develop a series of legal techniques aimed at attributing precedence to international treaties in relation to subsequent acts of Parliament that conflict with treaty provisions. Indeed, various solutions have aimed at favouring judicial interpretations of subsequent statutes in line with the provisions of treaties, thus avoiding - as far as possible - solutions implying the international responsibility of the States involved. In particular we could refer to the doctrine of consistent interpretation which is used in order to apply domestic law in harmony with international provisions.[49] In some cases, contemporary constitutions have included provisions formally requiring domestic actors to adopt this interpretative approach to prevent conflicts between international and municipal law as maintained by article 91 of the 1997 Poland Constitution according to which 'An international agreement…shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes'. Such provisions thus crystallise a solution that clearly favours the openness of the domestic legal system towards international law. This openness is made particularly explicit in the South African constitution, section 233 of which provides that '[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'. Through these provisions the possibility to refer to the doctrine of consistent interpretation is clearly maintained in the municipal legal system thus facilitating the possibility for domestic judges to pay judicial deference with respect to international law.

2.3 Human Rights Treaties and Contemporary Constitutions

Our discussion of the rank of treaties with regard to domestic legislation would not be complete without a separate section devoted to a specific category *ratione materiae* of international treaties: human rights conventions. A survey of contemporary constitutions clearly emphasises that, in several cases, human

[49] See e.g. G Betlem & A Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation' (2003) 3 *EJIL* 569. For the approach used by States adopting common law traditions, see M Kirby, 'International Law: The Impact of National Constitutions' (2006) 21 *Am ULR* 327; S Fatima, *Using International Law in Domestic Courts* (2005) 296-315.

rights treaties have acquired an even more important status than 'ordinary' treaties. Various solutions have been adopted in this regard, all tending to emphasise the relevance attributed by constitution-makers to similar treaties that are qualified as a fundamental part of the domestic legal system. This trend has also been facilitated by the functional need to pay formal attention to human rights standards. In the framework of key supranational regional organisations, such as the Council of Europe or the EU, these standards represent a fundamental prerequisite for admission. Consequently States involved in constitution-making processes which intend to join these international organisations have a strong incentive to accommodate international human rights law into their domestic legal orders in a proper manner.

A first hypothesis is the so-called 'constitutionalisation' of international human rights treaties, by attributing a constitutional rank to a series of international human rights instruments. For instance article 19 of the 2004 Constitution of Burundi maintains that 'The rights and duties proclaimed and guaranteed, among others, by the Universal Declaration of Human Rights of December 10, 1948, the International Human Rights Pacts of December 16, 1966, the African Charter on Human and Peoples' Rights, the Convention on the Elimination of all Forms of Discrimination against Women and the Convention on the Rights of the Child are an integral part of the Constitution of the Republic of Burundi.' Similarly this is the case, for example, with the constitutions of: Argentina (1994, article 75); Benin (1990, article 7); Bosnia-Herzegovina (1995, article 2 and annexes); Brazil (amendment 2004, article 5.3); Congo (2001, preamble); Dominican Republic (2010, article 74); Djibouti (1992, preamble); Mexico (2011, article 1); Togo (1992, article 50); and Venezuela (1999, article 23). In this regard the constitutions usually list a series of pertinent universal and regional treaties, while in some cases reference is also made to documents originally adopted as non-binding instruments, such as the *Universal* and *American Declarations of Human Rights*,[50] reflecting the increasingly frequent assumption that these texts have a normative character. Through the attribution of a constitutional rank to such international human rights instruments, they tend to acquire a special status in the domestic legal order, thus implying that their content cannot be repealed by acts of Parliament. Similarly, without expressly attributing a constitutional status to human rights treaties, other constitutions formally guarantee such conventions a higher rank than acts of Parliament, as affirmed, for instance, by article 93 of the Colombian Constitution according to which 'International treaties and agreements ratified by Congress that

[50] GA Res 217A (III), UN GAOR, 3rd sess., 183rd pen mtg, UN Doc A/810 (10 December 1948).

recognize human rights and that prohibit their limitation in states of emergency have priority domestically.' A similar solution is maintained by several constitutions as the constitutions of: Bolivia (2009, article 13); Ecuador (2008, article 424); Kosovo (2008, article 22); Kyrgyzstan (2010, article 6); Romania (1991, article 20); and Slovakia (1992, article 7, 154).

In these cases, the relevance of such solutions can vary according to the constitution's general attitude with regard to treaties. In the case of constitutions that already formally recognise a higher status to 'common' international treaties, the added value of special provisions concerning human rights conventions may be quite modest, as in the case of the Constitution of Benin. On the contrary, in the case of constitutions that only attribute a special rank in the domestic legal system to human rights treaties, such as the Argentinian Constitution, the impact of such special clauses is more pervasive. In such cases the rhetoric of human rights law has evidently played a particular role in the constitution-making process, inducing constitution-makers to attribute a special *force de resistance* to a specific category of international treaties capable of guaranteeing fundamental values at the domestic level.

Another common solution adopted by some constitutions is the requirement for constitutional provisions dealing with human rights to be interpreted in accordance with international instruments, according to an approach originally included in article 10.2 of the 1978 Spanish Constitution. This solution has been highly influential and has been employed in several constitutions, such as article 18.3 of the 2006 Serbian Constitution according to which '[p]rovisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation'. In this regard we could also mention constitutions of Angola (2010, article 26); Bolivia (2009, article 13); Cape Verde (1992, article 16); Colombia (1991, article 93); Ethiopia (1994, article 13); Moldova (1994, article 4); Mozambique (2004, article 43); Peru (1993, final provision); Romania (1991, article 20.1); and South Africa (1996, section 39). In these cases, human rights treaties and the case-law developed by international human rights monitoring bodies can play a significant complementary role in integrating constitutional provisions regarding fundamental rights and ensuring that their interpretation is in line with international legal standards.

In other cases constitutions simply proclaim the binding character of international human rights instruments at the domestic level. They may do so without necessarily providing human rights instruments with any special rank or, alter-

natively, by stating that international instruments will complement the human rights provisions included in the constitution. This approach has, for instance, been used in the following constitutions: Angola (2010, article 26); Cambodia (1993, article 31); Cameroon (2008, preamble); Central African Republic (2004, preamble); Chile (1989, article 5); Côte d'Ivoire (2000, preamble); Guinea (2010, preamble); Niger (2010, preamble); and Rwanda (2003, preamble). The added value of such provisions could appear modest, as they mainly aim to pledge the fidelity of the domestic system to universal values. It might be contended that the international obligations provided by human rights treaties ought to be respected by domestic authorities once ratified and implemented even in the absence of specific constitutional clauses. Nonetheless the inherent scope of these constitutional provisions is to emphasise the richness of the catalogue of human rights provisions pertinent to the domestic legal order, thus highlighting the relevance of the human rights agenda for constitution-makers and the potential impact of international standards for the subsequent practice developed by domestic actors in this area. In yet other cases such provisions explicitly incorporate international soft-law documents at the domestic level, as in the case of article 5 of the 1993 Constitution of Andorra, which provides that '[t]he Universal Declaration of Human Rights is binding in Andorra', or article 7 of the 2004 Constitution of Afghanistan, claiming that '[t]he state shall observe … the Universal Declaration of Human Rights'. Additionally, human rights treaties are sometimes qualified as the ultimate yardstick of permissible limitations to constitutional rights, as potential derogations from constitutional human rights norms may not exceed the limitations provided by international treaties: this approach is seen, for instance, in article 17 of the 1998 Albanian Constitution or article 164 of the 2008 Ecuadorian Constitution. Finally, a constitutionally protected right to submit individual petitions to international organisations after the exhaustion of domestic remedies is provided for in article 46.3 of the 1993 Russian Constitution.

A survey of these provisions therefore emphasises the current importance attributed by contemporary constitutions to international human rights instruments. Such constitutions use international standards as an additional tool to protect basic values, also in order to provide the fundamental rights recognized by national texts with a 'safety net' supplied by external sources and actors. It is clear that processes of transition from former authoritarian regimes have facilitated the attribution of formal relevance to international human rights instruments by several contemporary constitutions. This is emphasised by the significant number of States involved in such political processes that have ultimately adopted one of the abovementioned approaches. In several cases it is clear that

the insertion of such clauses represents a substantial concession to the pressing demands of the international community, especially with regard to constitution-making processes supported by external actors.

Furthermore, in numerous constitutions the concrete formal impact of human rights treaties on constitution-making processes and their potential relationship with constitutional texts is more indirect. In several cases international treaties have acted only as a source of inspiration during the process of drafting pertinent constitutional provisions, with no formal reference to them being included in the final text, such as in the 1996 South African Constitution.[51] These solutions are nonetheless relevant as such rules, largely crafted on the basis of international instruments, ultimately obtain a constitutional rank, thus placing human rights standards at the highest level in the domestic legal order.

At the same time it is quite clear that such formal recognition may only represent a cosmetic solution for several States whose records of human rights violations are significant. Also in this case it is evident that constitutional provisions may only be one of several potential elements favouring the rule of law at the domestic level.

2.4 Constitutional Provisions Clarifying Conditions for Ratified Treaties to Produce Legal Effects in the Domestic Legal Order

The provisions analysed so far constitute only some of the potential constitutional clauses of relevance to the proper application of international treaties at the domestic level. In particular, the extent to which ratified international treaties might be considered part of the domestic legal system can depend upon conditions provided by the constitution which reflect the State's attitude towards international law.

Such provisions can also provide indications of the possible monist or dualist approach of the domestic legal system with regard to international law, even if it is well known that such an academic distinction mainly represents a legal archetype and is hardly capable of capturing the diverse nuances present in legal

[51] Dugard, International Law, above n 27, 84-6; T Maluwa, 'International Human Rights Norms and the South African Interim Constitution' (1994) 19 *South African YIL* 29; P Andrews, 'Incorporating International Human Rights Law in National Constitutions: the South African Experience' in R Miller & R Bratspies (eds), *Progress in International Law* (2008) 35.

orders.[52] Consequently these constitutional provisions reflect legal traditions concerning the role of treaties in domestic legal orders, such as clauses included in several Common law countries' constitutions requiring Parliaments to explicitly implement treaties into domestic law in order for them to have legal effect in the domestic legal system: a solution usually qualified as the quintessential example of a dualist approach to international law. Similarly, other constitutional provisions seek to clarify that treaties must be qualified as part of the domestic legal system and may be applicable once ratified and/or published in the official journal of the State in question, or once they have entered into force at the international level. Several contemporary texts make reference to at least some of the formulas discussed above, such as the Constitutions of: Albania (1998, article 122.1); Andorra (1993, article 3); Angola (2010, article 13.2); Armenia (1995, article 6); Bhutan (2008, article 10); Dominican Republic (2010, article 26); East Timor (2002, article 9); Ethiopia (1994, article 9); Kenya (2010, article 2); Kosovo (2008, article 19); Kyrgyz Republic (2010, article 6); Lithuania (1992, article 138); Macedonia (1991, article 118); Mongolia (1992, article 10); Mozambique (2004, article 18); Namibia (1990, article 144); Nigeria (1999, sect. 12.1); Paraguay (1992, article 141); Poland (1997, article 91); Qatar (2003, article 68); Serbia (2006, article 194); South Africa (1996, section 231); Swaziland (2005, article 238); Togo (1992, article 138); Ukraine (1996, article 9); and Zimbabwe (2013, article 34).

Taking into account the fact that several contemporary constitutions were adopted following periods in which international treaties were not even mentioned in the former constitutional texts, or were not properly accommodated for in the domestic legal system, it could be inferred that these general provisions can still play a potentially positive role. In particular such constitutional clauses may contribute to domestic legal certainty by emphasising some basic legal conditions necessary for international treaties to be qualified as part of the domestic legal order, thus practically guaranteeing their proper application at the domestic level by local actors.

At the same time, these provisions can hardly solve *per se* the most debated issues with regard to the relationship between treaties and other domestic sources, such as the possibility of attributing priority to international sources in cases of subsequent incompatible domestic acts. For instance, article 37 of the 2002 Bahrain Constitution simply affirms that 'a treaty shall have the force of

[52] E Cannizzaro and B Bonafè, 'Beyond the Archetypes of Modern Legal Thought' in M Maduro, K Tuori & S Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (2014), 78.

law once it has been concluded and ratified and published in the Official Gazette'. In such cases of an absence of clear indications provided by the constitution, the concrete practice developed by domestic actors will take on a pivotal role in resolving potential conflicts with domestic sources.

Finally, it is well known that additional practical problems can arise concerning the application of treaties at the domestic level, such as with regard to treaties including non self-executing provisions. This issue can hardly be resolved by constitutions in general terms, but in some cases the problem has been expressly recognised by contemporary constitutional provisions. For instance, some constitutions provide that treaties are inapplicable to the extent that their provisions are not self-executing, as in article 19 of the 2008 Constitution of Kosovo and other texts.[53] Yet other constitutions provide that self-executing treaties may be directly applied without the need to pass a national act: this is the case, for instance, of the 1996 South African Constitution.[54] These provisions consequently take on a mainly didactic role for national legal actors. Their main purpose appears to be to emphasise the potential interpretative difficulties regarding the application of international treaties in domestic legal systems, taking into account the relevant experiences of other States.[55] Evidently such constitutional provisions cannot have any direct impact in facilitating the subsequent identification by domestic actors of provisions qualified as non-self-executing. Nonetheless they constitute further signs of the potential level of accuracy that some contemporary constitutions possess with respect to the problems posed by the relationship between international and domestic legal orders.

[53] This provision was strongly influenced by the similar article 122.1 of the 1998 Albanian Constitution. See also article 91 of the 1997 Polish Constitution: 'After promulgation thereof in the Journal of Laws of the Republic of Poland, a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute'.

[54] South African Constitution (1996), s 231.4: 'Any international agreement becomes law in the Republic when it is enacted into law by national legislation: but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'. For the difficulties posed by this latter provision, see Dugard, *International Law*, above n 27, 83.

[55] T Buergenthal, 'Self-Executing and non Self-Executing Treaties in National and International Law' (1992) 235 *RCADI* 303.

3 Customary International Law and Contemporary Constitutions

Customs and general principles of international law are fundamental sources of international law, as evidenced by article 38 of the *Statute of the International Court of Justice*. Nonetheless early examples of constitutional texts had the tendency to neither mention them as potentially relevant sources for the domestic legal order nor attribute them a special rank, due to the series of legal and political reasons emphasised above.[56] Contemporary constitutions tend to partly go beyond this approach. Even if it is correct to maintain that a significant number of constitutions still ignore these international sources,[57] nowadays a series of constitutional provisions aim to accommodate such rules within the domestic legal order by modifying positions maintained in previous texts.[58]

In some cases customary international law and general principles of international law have been formally granted a higher status than acts of Parliament. In these, such sources are given a significant *force de resistance* with respect to any potentially conflicting normative solutions provided by the legislature. In this regard, mention could be made of article 8 of the 1991 Slovenian Constitution, which proclaims that '[l]aws and regulations must comply with generally accepted principles of international law'. This position is substantially shared by other constitutions such as: Belarus (1996, article 8); Montenegro (2007, article 9) and Serbia (2006, article 16). In other cases the constitution limits itself to proclaiming that international customary law and, eventually, general principles of international law are accepted as part of the domestic legal system, as maintained by article 9 of the 2002 Constitution of East Timor, which affirms that '[l]he legal system of East Timor shall adopt the general or common principles of international law'. This solution is also adopted, for instance, by the constitutions of: Angola (2010, article 13); Bosnia-Herzegovina (1995, article 3); Cape Verde (1992, article11); Dominican Republic (2010, article 26); Estonia (1992, article 3); Georgia (1995, article 6); Hungary (2011, article Q); Kyrgyzstan (2010, article 6); Mongo-

[56] For an examination of the neglect of customs by early constitutions see Cassese, 'Modern Constitutions,' above n 2, 368-93.

[57] For an empirical political science analysis, see T Ginsburg, A Chernykh & Z Elkins, 'Commitment and Diffusion: How and Why National Constitutions Incorporate International Law' (2008) *U Ill LR* 201, 223-6, 233.

[58] It should be emphasized that, while the broad wording of relevant constitutional provisions could accommodate in the domestic legal system both customs and general principles of international law, in this paragraph mention is mainly made to customary international law due to the scarce reference to general principles of international law in state practice.

lia (1992, article 10); Mozambique (2004, article 18); Namibia (1990, article 144); Russia (1993, article 13); Serbia (2006, article 16); Slovakia (1992, article 1); and Turkmenistan (2008, article 6).

The relevance of the latter provisions should not be underestimated. This kind of constitution clearly favours the direct and automatic application of customary provisions within the domestic legal order, providing for their automatic standing incorporation and implying, for instance, that the enactment of a domestic act would not be necessary for their application. As emphasized by scholars, such a choice regarding national constitutions is almost obligatory due to the nature of such international rules, which emerge gradually in the international sphere and whose application at the domestic level can hardly be limited by the enactment of a specific statute by Parliament with the aim of adopting the content of customary international provisions.[59]

Furthermore, subsequent domestic practice could also infer key additional consequences through similar provisions. One example is the possibility to deduce from such clauses the attribution of a constitutional or infra-constitutional rank to customary international law, thus permitting courts to allow conflicting acts of Parliament to be subordinated to custom, as maintained in the case-law of several States.[60] In some cases this supremacy has been clearly expressed by constitutional provisions attributing to superior courts the duty to rule 'on the compatibility of domestic laws with the universally recognised norms of international law', as maintained by article 149 of the 1991 Bulgarian Constitution or articles 167 and 194 of the Serbian Constitution.

Similarly, customary international law is also qualified as part of the domestic legal system by constitutions adopting the common law approach: article 2.5 of the 2010 Constitution of Kenya, for example, maintains that '[t]he general rules of international law shall form part of the law of Kenya'. This has been affirmed in similar terms in the constitutions of Malawi (1994, article 211) South Africa (1996, section 232) and Zimbabwe (2013, article 326), which also reiterate the basic legal assumption of common law systems, aiming to admit the application of customary international law unless 'inconsistent with the Constitution or an Act of Parliament'. Consequently in such cases constitutions and acts of Parliament laws would prevail in the case of conflicts with customary rules. This position

[59] Cassese, *International Law*, above n 31, 224.

[60] See e.g. the position maintained by the Italian Constitutional Court with regard to article 10 of its Constitution proclaiming that customary laws are part of the domestic legal system: G Cataldi, 'Italy', in D Shelton, above n 34, 343-346.

is clearly influenced by the case-law developed by English courts in this regard, which flows from the doctrine of parliamentary sovereignty[61].

Furthermore it should be emphasised that, in several cases, broad constitutional provisions referring to the role of international law have subsequently been interpreted by relevant national actors as being able to accommodate international customs within the domestic legal system. For instance, mention could be made of article 9 of the 1997 Constitution of Poland, which generally proclaims that '[t]he Republic of Poland shall respect international law binding upon it'. Even if an express reference to customary law is not provided, this rule has constantly been interpreted by Polish courts as confirming the automatic application of general international law within the domestic legal system.[62] Attention should therefore be paid to other constitutional provisions pledging fidelity to international law, as in the case of article 8 of the 1995 Constitution of Kazakhstan, which proclaims that '[t]he Republic of Kazakhstan shall respect principles and norms of international law', adopting a solution maintained by other States as for instance Lithuania (1992, article 135), Ukraine (1996, article 18), and Uzbekistan (1992, preamble and article 17).

In these cases the potential reverse impact on the domestic legal level of these constitutional provisions, aimed at emphasising a declaratory commitment to international law, should be evaluated within each legal system according to relevant practice. This assessment would need to consider the possible auxiliary role that national courts could attribute to such express references to international law in their constitutions, in order to refer to customary law in disputes submitted to their attention when express reference to general international law is lacking from their constitutions.

Consequently, a comprehensive evaluation of contemporary constitutions clearly emphasises permanent difficulties in providing customary international law with an explicit role in domestic legal systems. Once previous 'political' oppositions to general international law had been abandoned by significant groups of States, customary law could have been expected to become a recurrent element in the legal analysis of international law issues within the framework of constitution-making processes, taking into account its constant relevance in international law and in disputes submitted to domestic courts. However this has not been the case. It is probable that general international law is still perceived as an international legal source that is difficult for the individual

[61] J Crawford, *Brownlie's Principles of Public International Law* (8th ed, 2012), 69-70.
[62] See e.g. A Wyrozumska, 'Poland', in D Shelton, above n 34, 486.

States concerned to manage. Therefore, States may be reluctant to formally proclaim its inclusion within domestic legal sources, even if this attitude can hardly preclude its potential relevance at the domestic level. Furthermore, the previous poor record of references to customary international law in early constitutions may also have had an indirect but significant negative impact in this area. Indeed, the phenomenon of cross-fertilisation among the texts of different States, as well as references by constitution-makers to previous versions of their own constitutions omitting the role of customary law, can contribute to the persistence of constitutions that neglect to provide specific recognition for general international law. Finally, for States adopting a common law approach, the absence of express references to customary international law in their constitutions can mainly be interpreted on the basis of the existence of consolidated judicial practice. The latter confirms the doctrine of incorporation, thus maintaining that customs are automatically part of the law of the land even if it should be emphasised that according to this position constitutional provisions and acts of Parliament laws tend to prevail in the case of conflicts with customary rules.[63] Consequently, an express mention of customary law in constitutions could be qualified as unnecessary for the benefit of the domestic legal order.

At the same time, taking into account the previous scenario, the current tendency confirms a partial shift in this area, as the number of States making reference to customary law in their constitutions is certainly higher than prior to the 1990s. This trend could consequently be interpreted as an additional confirmation of the corresponding increase in openness towards international law amongst contemporary constitutions. Furthermore, notwithstanding the apparent indifference of many constitutions with regard to general international law, this attitude can hardly prevent domestic legal systems from taking such rules into account in subsequent domestic practice. Even if general international law has been partly superseded by the adoption of key agreements in areas previously regulated exclusively by customary law, significant issues remain dominated primarily by this latter source, as the law of immunities. Consequently, national legal actors will in any case have to face problems raised by the application of these international rules without the help of clear indications in their constitutions, thus further emphasizing their subsidiary and creative role in the presence of

[63] Crawford, above n 61, 67-71. For further examples of the possibility of applying customary international law even in the absence of express references provided by the Constitution, on the basis of the doctrine of incorporation, see e.g.: B Akinrinade, 'Nigeria,' in D Shelton, above n 34, 461-2; H Onoria, 'Uganda,' in D Shelton, above n 32, 609.

vague or incomplete constitutional provisions.[64]

4 Binding Acts of International Organisations

A final mention must be made of constitutional provisions dealing with unilateral acts of international organisations. As it is well-known, few international organisations can impose their binding acts on Member States: this hypothesis mainly refers to resolutions adopted by the Security Council or acts pertaining to regional organisations, such as the European Union or, similarly, the East African Community. In these cases, the pervasiveness of the law-making powers exercised by some of these international organisations can have a significant impact on the domestic legal order and constitution-making processes should consequently pay increasing attention to such hypotheses.

However, even if scholars have rightly maintained that '[f]or reasons of legal security, it would be advisable for national constitutions to make express provision for the incorporation of binding decisions of international organizations',[65] only in a few cases have contemporary constitutions made express reference to the binding acts of international organisations in order to properly accommodate these sources within their domestic legal orders. In this regard, an early example could be found in article 11 of the 1992 Constitution of Cape Verde which affirms that '[j]udicial acts emanating from competent offices of supranational organizations to which Cape Verde belongs shall take effect in internal law as soon as they have been established in respective legal conventions'. Similarly we can mention article 122 of the 1998 Albanian Constitution. This provides that '[t]he norms issued by international organizations have priority, in case of conflict, over the law of the country when the direct application of these norms issued by the organization is expressly contemplated in the agreement ratified by the Republic of Albania for participation therein'. This solution is also adopted by article 20 of the 2008 Constitution of Kosovo. Furthermore, the regional integration provided for by the EU has also required a series of European States to modify their constitutions, dealing with this phenomenon through a series of specific provisions. This is exemplified, for instance, by the latest constitutional provision adopted in this area, namely Article E of the 2011 Hungarian Constitution, which proclaims '[t]he

[64] J Combacau & S Sur, *Droit international public* (10th ed, 2012), 187.

[65] J Polakiewicz, 'International Law and Domestic (Municipal) Law, Law and Decisions of International Organizations and Courts' (2011) *Max Planck Encyclopedia of Public International Law* (on-line edition), para 5.

law of the European Union may stipulate binding rules of conduct'. However, the specific constitutional issues raised by the EU integration process is beyond the scope of this article.[66]

Accordingly, it is evident that, in the majority of cases, the importance of the phenomenon of integration and cooperation among States within the framework of international organisations and its impact on national legal systems through their binding unilateral acts has been accommodated by national constitutions through a series of generic provisions. These clauses strive to accommodate the influence of supranational organisations, on the one hand, with domestic sovereignty issues on the other, as provided in similar terms by article 172 of the 2010 Nigerian Constitution and article 96 of the 2001 Constitution of Senegal, which admit the possibility of entering into agreements involving the 'partial or total abandonment of sovereignty' in order to achieve international cooperation.

As it is known, such generic provisions allowing the State to accede to international organisations and limiting their sovereign powers have been interpreted as a sufficient legal basis for the participation of States concerned in international organizations and, eventually, provide a constitutional basis for the subsequent applicability of such sources. Nonetheless, taking into account the increasing pervasiveness of such unilateral acts, which can also directly affect the legal position of individuals, current constitution-making processes could have been expected to pay appropriate attention to this phenomenon, by including clear constitutional provisions in this regard. A specific mention of these international sources would have been particularly useful to clarify basic issues, such as their legal position with regard to municipal sources and the conditions necessary for their direct application within the domestic legal system, especially in the light of the diverging solutions reached so far by the case-law of domestic authorities. Consequently the inclusion of specific constitutional provisions devoted to international organizations and their unilateral acts appears to be a fundamental element for evaluation in contemporary constitution-making processes and their absence, considering the relevance of international organisations, can hardly be justified by the novelty of the phenomenon, as maintained by some authors.[67]

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[66] For further references, see European Commission for Democracy through Law, *European Integration and Constitutional Law* (2001). Moreover, see the European national case-studies analysed in D Shelton, above n 34.

[67] See D Carreau & F Marrella, *Droit international* (11th ed, 2012), 536.

5 Conclusion

The analysis provided so far has confirmed that the increased interrelationship between the international and domestic legal orders has become so pervasive that contemporary constitutions can hardly ignore this issue. The significant trend of contemporary constitution-making processes to facilitate the openness of domestic legal systems towards international law cannot be underestimated. As examined above, different mechanisms have been developed in this regard, clearly aiming to favour the subsequent proper application of international sources by domestic actors. A particular mention should be made of the formal primacy accorded by several constitutions to international rules over municipal law (especially with regard to treaties and, in significant cases, also to customs); of the extensive role played by international human rights standards in supporting references to fundamental rights in national constitutions; and of provisions clarifying requirements for international rules to be part of the domestic legal system.

Some common 'ideological' factors can easily be identified as favouring this approach. For example, States that have experienced authoritarian regimes have shown a greater willingness to expressly incorporate international law sources in their constitutions so as to provide domestic legal orders with an external 'safety net'.[68] Furthermore, the constant cross-fertilisation amongst constitutions and their increasing convergence may certainly play a positive role in this regard. It is evident that the ever greater number of texts providing appropriate references to international sources increases the likelihood of these constitutional clauses being replicated in other contexts. In general terms, taking into account the previous scenario regarding constitutions adopted prior to the 1990s, the current tendency confirms a significant shift in this area towards the 'internationalization' of contemporary constitutions.

Nonetheless, constitution-making processes are far from having developed a comprehensive approach, embracing all potential legal difficulties that characterise relations between international and municipal sources. The inconstant attitude of constitution-makers with regard to international law is visible in several constitutions, as even within the same text one can find specific attention being dedicated to some issues, while others deserving of proper analysis are neglected.

[68] See A Cassese, 'Modern Constitutions,' above n 2; E Stein, 'International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?' (1994) 88 *AJIL* 427, 447; D Shelton, 'Introduction', in D Shelton, above n 34, 2.

It seems evident that it is still hard to guarantee a proper and comprehensive role for international law issues during constitution-making processes.

This limit may be the product of different reasonings. First, difficulties in appreciating the complex technical ramifications of the relationship between international and domestic legal orders should not be underestimated, especially with reference to States with a poor record of reference to international law aspects in previous constitutional texts and national judicial practice.[69] Similarly, other key legal issues pertaining to the domestic dimension of a constitution, such as the separation of powers or the relationship between central and local authorities, usually acquire a pivotal role in the drafting process, to the detriment of other topics such as the international law dimension of the future text, which are qualified as less relevant legal technicalities.[70] Furthermore - an element that will be emphasized later on - sovereignty concerns with regard to the potentially intrusive role played by international law probably play a catalytic role in constitution-makers' determination to adopt a reserved stance vis-à-vis international law.

Consequently international law issues have not been part of the main agenda of several contemporary constitution-making processes, despite some of them being driven or supported by external actors. In fact a similar trend can be recognized in the case of internationalised *pouvoir constituent*, where a significant role has been played by international actors through the provision of external technical expertise. A survey of constitutions adopted in these latter scenarios has emphasised that the relationship between international and domestic sources has not been properly analysed in various cases. This element confirms that international law issues could be underestimated for the benefit of other areas qualified as more relevant as they are the subject of possible political pressure exercised by international actors, such as constitutional provisions guaranteeing the rule of law and fundamental rights.[71]

Furthermore, some solutions adopted in contemporary constitutions are also far from being satisfactory from an international law perspective. For instance several contemporary constitutions still formally ignore customary law,

[69] See e.g. A J Bělohlávek, 'The Czech Republic,' in D Shelton, above n 34, 206: 'After the fall of the Iron Curtain, the political leaders drafted the Constitutions with minimal experience in international law, which led them to include some serious systemic flaws'.

[70] See E Stein, 'International Law,' above n 22, 447.

[71] See e.g. M Schoiswohl, 'Linking the International Legal Framework to Building the Formal Foundations of a "State at Risk": Constitution-Making and International Law in Post-Conflict Afghanistan' (2006) 39 *Vand J Trans L* 819.

although it should be mentioned that, in comparison to previous texts, a greater number of States now include references to general international law in their constitutions. A similar concern could be expressed with regard to the binding acts of international organizations.

These international law sources usually fall into a legal black hole in contemporary constitutions as they are substantially ignored in constitution-making processes, as also emphasized with reference to domestic clauses claiming the supremacy of constitutions over international law sources. As analysed above, the trend in contemporary constitutions is mainly to explicitly limit both claims of supremacy and the creation of mechanisms to pre-review the compatibility of values expressed in the constitution with treaties — namely, a source of international law that is easily managed by the State itself. These clauses of supremacy regarding treaties are, in our opinion, far from being irreconcilable with international law. In the case of conflict between treaties and constitutional provisions their final effect is limited to an impasse in the State's participation in the proposed treaty, unless such primacy is claimed after the ratification process, leading to obvious problems of State responsibility in the case of subsequent non-fulfillment of international obligations.

On the contrary the most significant problems may arise with regard to the usually unsettled issue of the relationship between customs and binding unilateral acts of international organisations on the one hand and the constitution and other domestic sources on the other. Constitution-makers prefer to avoid dealing with situations of potentially competing interests by deferring the resolution of eventual conflicts to subsequent domestic practice. Nonetheless this short-sighted attitude, which emphasises the difficulties of managing sources of international law whose efficacy and binding character are far from being subject to the individual will of a State, cannot really help avoid subsequent problems: this is seen in the now classic examples of potential conflicts between the human rights values promoted by constitutions and customs or mandatory unilateral acts of international organisations. As we know, such difficulties in reconciling diverging interests between constitutional values and international commitments have given rise to intense debate.

On the one hand these possible clashes seem more the product of the concomitant competing international values at stake, which benefit from the possibility of recurring to domestic mechanisms of control in attempts to solve the issues, rather than the result of an inconceivable relationship between international and domestic legal values. Consequently claims for the supremacy of constitutional values could also have a beneficial impact on international law itself,

which favours the reconsideration of existing norms and procedures that have suffered from intrinsic deficiencies, as was once put to the test by domestic control mechanisms. In this regard, it is sufficient to mention developments within the European Union (EU) system concerning human rights and modifications introduced to the UN's sanction regimes. Unsurprisingly, even an increasing number of international law scholars tend to evaluate the possibility of attributing a potentially priority role to constitutional values positively, as they see them as valuable 'emergency brakes' in the case of international rules that disregard basic fundamental rights, result from international law-making processes qualified as democratically deficient,[72] or, alternatively, admit the protection of core constitutional values as a circumstance precluding wrongfulness.[73] Some of these proposals therefore tend to introduce key elements of legitimacy and rule of law to the international law agenda, favouring the so-called constitutionalisation of international law, i.e. 'an attempt to exercise legal control over politics within the international legal order itself, in order to compensate for the erosion of such control within domestic constitutional orders.'[74]

On the other hand, the difficulties of accepting solutions that favour the primacy of constitutional values over international sources are nonetheless obvious. The potential risks are twofold: (1) jeopardising the basic principle of the supremacy of international law thus represents a risk for the maintenance of its normative role and its effectiveness; and (2) fragmenting international law, chiefly because of the difficulties in identifying core constitutional principles and domestic legal orders that are entitled to demand such a constitutional right to resistance, sometimes exclusively attributed to 'liberal democracies'.[75] In this

[72] See e.g.: T Cottier, D Wüger, 'Auswirkungen der Globalisierung auf das Verfassungsrecht: Eine Diskussionsgrundlage,' in B Sitter-Liver (ed), *Herausgeforderte Verfassung: Die Schweiz im globalen Konzert* (1999) 241, 263-4; A Peters, *Supremacy Lost: International Law Meets Domestic Constitutional Law, Vienna Journal of International Constitutional Law*, vol 3, (2009) 195-6. See also A Noalkamper, 'The Rapprochement between the Supremacy of International Law at International and National Levels,' in R Wolfrum (ed), *Select Proceedings of the European Society of International Law* (2010) 239.

[73] B Conforti, *Diritto internazionale* (2011) 258.

[74] De Wet, above n 7, 1213. See also B Fassbender, 'The Meaning of International Constitutional Law,' in N Tsagourias (ed), *Transnational Constitutionalism: International and European Models* (2007) 307, 308; W G Werner, 'The Never-ending Closure: Constitutionalism and International Law,' ibid, 329, 330.

[75] A von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 *Int J Const L* 397, 398: 'given the state of development of international law, there should be the possibility, at least in liberal democracies, of placing legal limits on the effect of a norm or an act under international law within the domestic legal order if it severely conflicts with constitutional principles'.

latter case the risk of arbitrarily differentiating among States is evident, as only some domestic legal orders would still be obliged to guarantee a blanket priority to international law as they could be identified as *pariahs* of the international legal community, while other more privileged States could adopt an *à la carte* approach towards international obligations. Furthermore, it is well known that the protection of constitutional values was not qualified as a proper circumstance precluding wrongfulness by the ILC in the *Draft Articles on Responsibility of States*, thus reducing the possibility of admitting such a solution.

In conclusion, even if the difficulties of properly accommodating international law sources in national constitutions are still present, it is possible to recognize a substantial trend towards the 'internationalisation' of contemporary constitutions as the most recent texts appear significantly receptive to international law standards and sources. In this regard the cross-fertilization among constitutions plays a relevant role, which is accentuated by states having regional affiliations or sharing similar legal traditions. This conclusion is, however, inherently limited by the characteristics of the current analysis, which has been limited to a formal examination of constitutional provisions in this area. It is clear that such an evaluation should be supplemented by an analysis of the effective attitudes of States towards international rules within their own domestic legal orders. In fact the practice developed by domestic actors (mainly national judges) plays a fundamental role in addressing and resolving legal problems within international and domestic sources and in providing concrete content to constitutional provisions dealing with international law. Nonetheless, the activities of domestic actors and their ability to favour or impede the proper application of international sources at the domestic level is highly dependent upon the formal solutions provided by constitutional provisions. Consequently, this element confirms the crucial role potentially played by constitution-making processes in favouring the effectiveness of international law, as the desirable supremacy of international law over national sources can certainly be facilitated by 'friendly' approaches to international law on the part of domestic constitutions.

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THE BALANCE BETWEEN ISLAMIC LAW, CUSTOMARY LAW AND HUMAN RIGHTS IN ISLAMIC CONSTITUTIONALISM THROUGH THE PRISM OF LEGAL PLURALISM

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Abstract
This article examines how the inclusion or exclusion of Islamic law and Muslim-based customary law affects *de facto* or *de lege* universal human rights. The view adopted is that there is an Islamic form of constitutionalism that should respect Islam, Shari'a law and Muslim customary law. The author therefore suggests a different approach to constitution-making than the transnational constitutional theory and secular theories, looking at the interaction between sources of law and the role for legal pluralism. The originality of the article is to be found in the demonstration that Islamic constitutionalism is not a threat to transnational constitutionalism, or a competitor, but an alternative. The argument is that a constitutional inclusion of Islamic law and Muslim-based customary law is possible if the authoritative sources of Islam are interpreted in the light of the new hermeneutics of Shari'a law. Islamic law and Shari'a-based customary law need to be reformed, taking international human rights law as a yardstick. This approach to interpretation can then promote a more human-rights oriented reading of Islamic legal sources. The aim is to ensure that the Constitution is legitimate in the eyes of all while ensuring that legal pluralism does not undermine State law and violate universal human rights.

1 Introduction

The question of whether or not to include Islamic law in a constitution is a recurrent issue with significant implications for human rights.[1] Islamic

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[1] See e.g.: H Travis, 'Freedom of Theocracy?: Constitutionalism in Afghanistan and Iraq' (2005) 3 *JIHR* 1; L C Backer, 'God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century' (2008) 27 *Miss L Rev* 11; A M Emon, 'The Limits of Constitutionalism in the Muslim World: History and Identity in Islamic Law' (2008) Constitutional Design for Divided Societies; Islamic Law and Law of Muslim World Paper No. 08-09 <http://ssrn.com/abstract=1086767> [accessed 13 December 2014].

law contains norms that bear on human rights such as gender equality and the rights of religious minorities, and these may conflict with both domestic constitutional human rights norms and international human rights norms, for example under the 1948 Universal Declaration of Human Rights. Considering Islamic law also raises the issue of the place human rights norms derived from international instruments such as the Universal Declaration have in domestic constitutions. The focus of academic analysis is usually on the consequences of the constitutional inclusion of Islamic law for universal human rights; yet, customary law is another important element coming into play *de lege* and *de facto*. Customary law inspired by Shari'a law can be a source of law acknowledged and included in a constitution;[2] customary law can also be a competitor to State law, particularly when it is excluded from the constitution. In this article, I analyse the potential effects of including Islamic law in a constitution, but also examine the impact of the constitutionalisation of Islamic law with regard to this other source of law, i.e. customary law as influenced by Shari'a law (hereinafter 'Muslim customary law').

Some scholars have been criticised for approaching constitutionalism of Islamic law from a western perspective, using so-called western-based principles such as democracy, secularism and human rights to understand the role of religious law and customary law in Muslim constitutions.[3] In this article, I seek to demonstrate that there is a set of ideas in Islamic constitutionalism emerging from Islamic law, Shari'a law and Muslim customary law. I seek to reformulate the debate about constitution-making within the context of an Islamic framework, looking at the interaction between Islamic law and Muslim customary law and the role for legal pluralism.

This contributes to the debate on constitution-making by seeking to demonstrate that Islamic constitutionalism is not a threat to transnational constitutionalism, nor even a competitor, but an alternative.[4] Many have understood reli-

[2] The academic debate as to what Shari'a means is not analysed in this paper. Shari'a law is defined in this article as a religious code which sets outs rights and duties which are morally and legally inspired. This broad definition also includes behaviours modeled after the Shari'a, as well as behaviours believed to be modeled after the Shari'a.

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[4] L C Backer, 'Theocratic Constitutionalism: An Introduction to a New Global Legal Order' (2009) 16 *Ind J Global Legal Stud* 85, 104; R Hirschl, 'The Theocratic Challenge to Constitution Drafting in Post Conflict States' (2008) 49 *Wm & Mary LR*, 1179, 1181.

gious law to be an obstacle to the existence of a constitution as supreme law.[5] Yet, this monist approach of the law does not take into account the social factors attached to the resilience of Islamic law and Muslim constitutions as sources of law. For this reason, a legal pluralist approach is preferable to the transnational constitutionalist theory which, as stressed by Baderin,[6] focuses on a liberal monist system. I adopt a novel position with regard to the debate on the constitutional inclusion of Islamic law and Muslim customary law, adopting an adjusted legal pluralist stance which supports a new hermeneutics of Shari'a law. The theory of a new hermeneutics of Shari'a law has been developed since the 19th century and argues for a context-based reading of Islamic legal sources such as the Quran and the Sunna.[7] This then allows Muslim-inspired legislation to keep pace with modern legal issues such as women's rights, surrogacy, or cyber terrorism. This new approach to interpretation, situated within the historical tradition of *ijtihad*,[8] can then promote a more human-rights oriented reading of Islamic legal sources. This has been used, for example, to develop gender-orientated understandings of the Islamic sources of law.[9] This new hermeneutics allows for a mitigation of conservative or hardline classical interpretations of the traditional Islamic sources of law.

In contrast to the models presented by transnationalist constitutional scholars,[10] I argue that the only Muslim constitution which is legitimate is one that takes into account Islamic law and Muslim customary law as sources of law.[11] The concept of 'cultural legitimacy', as theorised by An Na'im, is crucial when developing a constitution, as the relevant society needs to support the constitution and give it cultural legitimacy.[12] The revised pluralist approach advocated in this article illustrates the concept of normative pluralism raised by William Twining,

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[5] See for example Backer, above n 1.

[6] M A Baderin, 'Islamic law and Constitutionalism in Africa: Challenges and Prospects' (2011), ANCL Conference on African Constitutionalism, 'Present Challenges and Prospects for the Future', Faculty of Law, Pretoria, 1-4 August 2011.

[7] The Sunna is made up of the deeds and sayings of the Prophet Muhammad.

[8] Ijtihad is the process of interpretation of Islamic legal sources.

[9] See e.g. Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (1999).

[10] See e.g. Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (1999).

[11] For a review of the different academic stances, see N Sultany, 'Against Conceptualism: Islamic Law, Democracy and Constitutionalism in the Aftermath of the Arab Spring' (2013) 31 *BU Int LJ* 435.

[12] R Shaham, 'Custom, Islamic law, and Statutory Legislation: Marriage Registration and Minimum Age at Marriage in the Egyptian Sharia Courts' (1995) 2 *Islamic L & Soc* 258.

who sees legal pluralism as a species of normative pluralism.[13] This approach follows John Griffith's early definition of legal pluralism as a state of affairs 'in which behaviour pursuant to more than one legal order occurs.'[14] The aim of the article is to comprehend whether this call for legitimacy under legal pluralism undermines State law and whether the conflict between positive Islamic law and customary law weakens a constitution, especially when it comes to the respect and enforcement of universal human rights.

2 Analysis of the Role of Islamic Law in Constitutions

It is important to consider the weight and role of Islamic law and customary law in a country when developing a new constitution for that country. While this assessment is now part of most constitutional endeavours, conflicts between different sources of law need to be understood and interpreted in a new framework for the creation of a successful pluralist constitutional system. In this section, I will first analyse the role of Islamic law in developing a constitution and enforcing it, before going on to engaging with the tensions that arise between different sources of law in this process. The purpose of this analysis is to demonstrate that there are legitimate reasons to include Islamic law in the constitution of a Muslim country, as it is reflective of the identity and values within the political community. However, this religion-inclusive shift is not without consequences when the constitutions are actually put into use. In such constution, the clauses on Islamic law often find themselves at odds with human rights-based constitutional values.

2.1 Considering Islamic law when Developing a Constitution: Motives for Including Religious Law in a Constitution

The inclusion of religious law into a constitution is not a new phenomenon, and is not specific to the Muslim world.[15] Yet, it is in the Muslim world that countries have most directly engaged with the inclusion of a divine, historically received

[13] W Twining, 'Legal Pluralism 101' in B Z Tamanaha, C M Sage & M J V Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (2012) 112, 116.
[14] J Griffiths, 'What is Legal Pluralism?'(1986) 24 *J of L Pluralism* 1, 2.
[15] R Hirschl, *Constitutional Theocracy* (2010) 2.

body of law within the constitutional framework of a modern nation-state.[16] As a result, Islamic constitutionalism is the most developed form of contemporary religious constitutionalism. The Islamic Republic of Iran illustrates this will to enforce Islamic law in the Preamble and Article 2 of its Constitution.[17] Other examples include Article 2 of the Constitution of Egypt, Article 2 of the Iraqi Constitution and Article 3 of the Brunei Constitution.[18] Ahmed and Ginsburg have called these articles 'Islamic supremacy clauses'.[19] Others have described this process as 'constitutional Islamisation'[20] and Hirschl refers to the concept as one of 'constitutional theocracy'.[21] There is an important difference, however, between constitutions in which Islamic law constitutes 'a' source of the law and those in which it constitutes 'the' source of law (that is, the ultimate criterion of legal validity as in cases of Islamic supremacy clauses). Difficulties arise for constitutionalism in either case: a constitution which considers Islamic law as 'the' source of law will not leave room for any other source of law, whereas a constitution which tolerates multiple sources of law, including Islamic law, will face challenges in determining the interactions between these sources, and ultimately the hierarchy between them in the case of conflict.

There are different motivations behind the decision to include Islamic law as 'a' or 'the' source of law in a constitution. Islamic constitutionalism has its roots in the history of Islam and Islamic law, and as such, one motivation is

[16] C B Lombardi, 'Constitutional Provisions Making Shari'a 'a' or 'the' Chief Source of Legislation: Where did they Come from? What do they Mean? Do they Matter?' (2013) 28 *Am U Int Rev.* 743, 733.

[17] Article 2 of the Iranian Constitution: The Islamic Republic is a system based on belief in: 1) the One God (as stated in the phrase *'There is no god except Allah'*), His exclusive sovereignty and right to legislate, and the necessity of submission to His commands; 2) Divine revelation and its fundamental role in setting forth the laws;(…) 4) the justice of God in creation and legislation.

[18] Article 2 of the Egyptian Constitution: 'Islam is the religion of the State and Arabic is its official language. The principles of Islamic Sharia are the main source of legislation.'

Article 2 of the Iraqi Constitution: 1. Islam is the official religion of the State and is a foundation source of legislation: A. No law may be enacted that contradicts the established provisions of Islam; B. No law may be enacted that contradicts the principles of democracy; C. No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution.

Article 3 of the Brunei Constitution: (4) For the purpose of this Article, His Majesty the Sultan and Yang Di-Pertuan may, after consultation with the Religious Council, but not necessarily in accordance with the advice of that Council, make laws in respect of matters relating to the Islamic Religion.

[19] N Feldman, *The Fall and Rise of the Islamic State* (2008) 6.

[20] Ibid.

[21] Hirschl, above n 4.

the desire to rely on and give effect to Islamic law in the constitution from a historical perspective. It ensures continuity with the polity doctrine developed by Muslim scholars regarding state and society: the Prophet's intention was to build an Islamic society in which the law played a predominant role in shaping the interactions between citizens, but also in supporting the role of the leader of that society (The Prophet himself at the time).[22] Reliance on Islamic law in the 21st century is a clear signal that countries adopting an Islamic supremacy clause, or including Islamic law as 'a' source of law among others, wish to locate their existence within this historical continuity, despite the abolition of the Caliphate in 1924. Including Islamic law in a constitution is also a way for a country, or a leader to ensure legitimacy, that is, the historical legitimacy granted by a centuries-old religion. This is illustrated by the maneuvres operated by President Anwar Sadat in Egypt when attempting to win the support of Islamists: he amended the Constitution of Egypt to include 'the principles of Islamic Shari'a' as 'a primary source of legislation'.[23]

The emergence of the nation-state as the primary mode of social organisation and the spread of codification by scholars like al-Sanhuri have compelled the Muslim world to adapt via the codification of Islamic law. Including an Islamic law constitutional clause, then, illustrates a desire to ensure the enforcement of Islamic law in a Muslim state while adapting to the 21st century's nation-state reality; it reflects the choice to continue developing Islamic law through the medium of constitutional law and to seek its enforcement within a Muslim society, adapting it to modern demands. This is why one can speak of 'Islamic constitutionalism' as a historical identity which has been modernised to meet modern challenges. When the Ottomans began reforming Islamic law to adapt it to the modernising expectations of their times, they partly changed the format of Islamic law through codification to adapt the classical legal system to modern reality. Adopting Islamic law as 'a' or 'the' source of law in a constitution is part of a similar strategy. However, difficulties remain in trying to accommodate a divine law within a man-made legal framework, and in ensuring the translation of Islamic law from a jurists' law into positive law.

The reference to Islamic law in a constitution allows countries to keep working in a framework that recognises their identity as well as their historical, religious and cultural backgrounds. As stressed by Otto with regard to the new Iraqi and Afghan constitutions:

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[22] S H Hashmi, *Islamic Political Ethics: Civil Society, Pluralism and Conflict* (2009) 159.

[23] M Abdelaal, 'Religious Constitutionalism in Egypt: a Case Study' (2013) 37(1) *F Wld Aff* 35, 37.

> The new governments of Afghanistan and Iraq desperately needed Shari'a to retain legitimacy in the eyes of their own people. After all the misery their countries had experienced, Islam was one of the few remaining forces that could foster a sense of unity and harmony. When Afghanistan and Iraq redefined themselves in the constitutions of 2004 and 2006, a prominent place was given to Islam.[24]

This was specifically important in the case of Iraq where a neat demarcation from the secular government of Saddam Hussein was needed. In such circumstances, Islamic law becomes a symbol of attachment to a glorious Muslim past, and a sign of return to a history of continuity.

Including Islamic law in the constitution is also a way of framing the actions of a leader or a government: it creates a form of superior accountability.[25] It limits the authority of the leaders by framing their temporal authority within divinely sanctioned bounds.[26] Islamic law becomes the superior legal order to which human-made law has to refer, and by which it must abide.[27] It is also a way of ensuring that there will be no violation of Islamic law by the leader.[28]

In this section, I have presented a few reasons why a country would choose to refer to Islamic law in a constitution. The discussion does not, however, ignore political arguments that these clauses are often the reflection of 'carefully negotiated provisions.'[29] The analysis in this section of the possible motives for including Islamic law in a constitution, and turning it into a source or the source of the law, demonstrates that there is an Islamically-informed constitutional model. This model is different from the one advocated by some transnationalist constitutional legal scholars. Instead, Islamic constitutionalism relies on a different definition of the role of the constitution and adheres to the model imagined by the Prophet,[30] in which adherence to an Islamic principle of

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[24] J M Otto, 'Rule of Law, Adat Law and Shari'a: 1901, 2001, and Monitoring the Next Phase' (2009) 1 *HJRL* 17.

[25] N J Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (2001) 20.

[26] Ibid.

[27] Ibid.

[28] Feldman, above n 19, 122.

[29] Ibid.

[30] A An-Na'im, 'Religion, the State and Constitutionalism in Islamic and Comparative Perspectives' (2009) 57 *Drake LR* 829, 834.

legitimate authority is a fundamental norm.[31]

2.2 The Stakes of Including Islamic Law in a Constitution

While different reasons exist for including Islamic law in a constitution, there are serious ramifications that arise from the adoption of a religious law as a/the source of law, especially in the context of human rights. The 1957 Constitution of Malaysia is an example of a legal document which establishes legal pluralism, prescribing different legal orders by community and subject matter, and in which Islamic law is a source of law. As a result, the Constitution supports a scheme for a dual system of Islamic law and secular law. A parallel system of courts exists, with Shari'a courts at the state level and secular courts at the federal level, the latter of which have the responsibility of protecting fundamental liberties.[32] Article 3(1) of the Constitution states that 'Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation'. Article11 guarantees freedom of religion. Yet, there is debate regarding religious conversion in Malaysia: while conversion is not illegal, some provinces make it an offence on the basis of Islamic law. In five states (Perak, Malacca, Sabah, Terengganu and Pahang), converting from Islam is a criminal offense punished by a fine or a jail term. The state of Pahang punishes apostasy by six cane strikes. The state of Perlis has a rehabilitation year for all apostates before punishing them. The laws of those states are in clear contradiction with the human rights values set forth in the Malaysian Constitution. This tension has become even more visible recently. In the wake of Brunei's decision to implement Islamic criminal law, the Malaysian state of Penang declared its wish to have a stricter enforcement of that branch of law, arguing that the Constitution protects fundamental freedoms but allows for the existence of Islamic courts. The tension in Malaysia demonstrates the complexity of accommodating Islamic law into a federal and secular legal system.

This situation in Iran provides us with a clear insight into the role religion plays in a constitution in which Islamic law is the unique source of the law. Islamic law is at the core of the Constitution of the Islamic State of Iran and influences the entire legal and political system of the country. Religious law is the norm to refer to in order to enact appropriate laws and to prevent the enactment of laws which would negatively impact on the religion (or religious

[31] *Asma Jilani v The Government of the Punjab* PLD 1972 SC 139.
[32] J M Fernando, 'The Position of Islam in the Constitution in Malaysia' (2006) 37 *JSAS* 249.

representatives).[33] The whole aim of the Constitution is not only to establish the Islamic Republic, but to erect watchdogs which will ensure the protection of the Republic. The Guardian Council, set up by Article 91 of the Constitution, plays that role: it is a body made up of twelve experts, clerics and jurists, which checks the constitutionality and Islamicity of each bill presented to Parliament. When the Majles (Parliament) writes up a bill, it is sent to the Council as an instance of substantive control. The bill will then navigate between the two bodies before becoming a law. Different governments and Majles in Iran have undergone this process with several failures, mainly exemplified by the attempt to pass a bill on Convention on the Elimination of All Discrimination against Women (CEDAW) by the Khatami Administration. The political program of Mohammad Khatami, Iran's fifth President, rested mainly on the reform of the laws of the country within the existing constitutional framework, using the aforementioned new hermeneutics of the Shari'a.[34] He aimed at reforming the legislation by relying on new and modern interpretations of Islam. His purpose was to interpret the sources of law in a new light, in order to reform Iranian Islamic law to ensure compatibility with universal human rights without changing the Iranian constitution.[35] Yet, he struggled with his reforms mainly because the Council of Guardians emptied most of the reformist Parliament's bills of their content. The bill which attempted to lead to a ratification of CEDAW is a striking example: when a group of MPs attempted to have CEDAW ratified in 2003, the Council revised the bill several times, changing its content until the bill was finally rejected on the grounds that it was un-Islamic.[36] One of the arguments of the Council was that the Iranian constitution claims a relative equality between men and women in the Preamble, Article 3 and Article 20, and states in Article 21 that women's rights will be protected. These protections are Islamic. Yet, those in favour of the ratification of CEDAW argued that the new hermeneutics of the Shari'a would allow for some reform of Iranian Islamic law, allowing an opportunity to bridge the existing gap between Iranian law and universal human rights standards.[37] Their aim was to empower women beyond Islam, therefore transcending the existing constitutional principles to provide for the universal

[33] Ahmed and Ginsburg, above n 3, 76.

[34] A Van Engeland, 'Bridging Civilizations: The New Hermeneutics of Islamic Law' in H Karim and M Eid (eds) *Engaging the Other: Public Policy and the Clash of Ignorance* (2014).

[35] M Khatami, *Hope and Challenges: The Iranian President Speaks* (1997).

[36] Z Mir-Hosseini, 'Fatemeh Haqiqatjoo and the Sixth Majles: A Woman in Her Own Right' (2004) 223 *Middle East Report* 34.

[37] Van Engeland, above n 34.

protection of women's rights. Unfortunately, in this case, the practice of the new hermeneutics was barred by a constitutional mechanism. This phenomenon of a constitutional body defeating an attempt to protect the constitution while allowing for changes demonstrates that the watchdogs of the Islamic Republic of Iran can be quite radical. It also shows the limits of arguing for a new hermeneutics of the Shari'a when the whole constitutional structure is resistant to changes. The tension between human rights and Islamic law which riddles the Iranian Constitution becomes then an obstacle to any reform.[38] It should, however, be stressed that there have been instances where the new hermeneutics has been successful in Iran. One example is the 2003 changes to child custody laws, allowing the mother to keep custody of both female and male children until the age of 2 years.[39]

The Malaysian and Iranian examples clearly demonstrate that having Islam at the core of the Constitution, whether as 'a' or 'the' source of law, will affect the legal system. In a federal state like Malaysia, the federal secular law finds a mighty competitor. It becomes difficult to uphold human rights principles stated in the constitution when a contradiction arises between secular law and religious law. The conflict between the values of the constitution and Islamic law become visible. In Iran, the entire system is designed to create and maintain the Islamic Republic and prevent reforms from occurring. While these two examples do not imply that including Islamic law will necessarily lead to negative consequences, they do illustrate the type of issues it can raise.

2.3 Consequences for Universal Human Rights

The focus on universal human rights standards as a yardstick in this article should not be seen as an illustration of support for the theories that posit an inherent conflict between Islamic law and universal human rights. The aim is instead to demonstrate that the inclusion of Islamic clauses in a constitution raises the question of how best to accommodate universal human rights law, a man-made law, and Islamic law, a divine law. There is no implicit statement that Islamic law naturally violates human rights: constitutions containing Islamic clauses tend to be rather human rights-heavy.[40]

[38] A Van Engeland, 'Human Rights and Strategies to avoid Fragmentation as a Threat to Peace: Iran as a case-study' (2011) 5 *IJHRL* 25.

[39] A Van Engeland, 'Iranian Women and Legal Pluralism: the Impact on Women's Rights' *YIMEL* (forthcoming).

[40] Ahmed and Ginsburg, above n 3.

The recent constitutional events in Iraq, Afghanistan, and Egypt show that the inclusion of human rights is an important part of the constitutions, which makes it necessary to address exactly how Islamic law is reconciled with contemporary international human rights philosophy. In this article, I seek to build bridges between Islamic law and universal human rights by building on the work on An Na'im, Baderin and Sachedina.[41] The premise is that, while there are differences between the two legal systems, a dialogue can emerge based on the values that Islamic law and universal standards both share. This methodology of working on commonalities complements the new hermeneutics of the Shari'a, which as explained above, seeks to develop a new corpus of interpretations of Islamic legal sources. The purpose of using the new hermeneutics is not only to find those commonalities, but also to develop new interpretations.

For example, freedom of expression exists in Islam. It is, however, conceived differently than in the Universal Declaration of Human Rights, and is limited by the respect for Shari'a. In Iran, this limitation also includes respect for persons representing religious authorities and Islam, such as the Guide.[42] Concretely, this means that citizens can use their freedom of expression as long as they are not blasphemous or do not insult any religious authority or body. A reformed interpretation could support a less limited freedom of expression to encourage freedom of (and from) religion, as well as the freedom to disagree with religious authorities and bodies. The main issue then is how to reconcile the constitutional human rights values present in the majority of Muslim constitutions with an Islamic clause. This issue is directly addressed in the last part , in which I argue that we should step further away from classical understandings of Islamic law.[43]

If we wish to continue working within a nation state framework, it is firstly important to look at the consequences of the presence of Islamic law in the constitution. Beyond the textual intricacies of including Islamic law in the constitution, the effect of having a subjective source of Islamic law in the Constitution, in opposition to the objective approach of State law, can be antagonistic towards universal human rights, as illustrated by Iran and Malaysia.

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[41] A A An Na'im, in A A An Na'im et al (eds), *Human Rights and Religious Values: An Uneasy Relationship?* (1995) 229-242; A Sachedina et al., *Human Rights and the Conflict of Cultures: Western and Islamic Perspectives on Religious Liberty* (1988).

[42] The Guide is the main leader of the Islamic republic of Iran: he is the head of state alongside the President and is the highest religious authority.

[43] A A An Na'im, in A A An Na'im et al. (eds) *Human Rights and Religious Values: An Uneasy Relationship?* (1995) 229-242; A Sachedina et al., *Human Rights and the Conflict of Cultures: Western and Islamic Perspectives on Religious Liberty* (1988).

Only three religions apart from Islam (Christianity, Zoroastrianism and the Jewish faith) are officially recognised by Article 13 of the Iranian Constitution. Citizens holding religious beliefs other than those mentioned in the constitution are ostracised. These three faiths are allowed to practice their religion, but cannot propagate it. While Catholics have been free to practice their faith, Protestants, despite Christianity being constitutionally accepted, have faced prosecution. The main issue religious minorities face within an Islamic republic where the entire system is Islamic is to be subjected to Islamic law. In Iran, Islamic jurisprudence is applied to non-Muslims, unless exceptions are created. In Malaysia and Nigeria, non-Muslims still have the opportunity to go to a secular court at a certain point in the procedure while in Iran, all courts are religious.

The Malay dual court system has affected human rights by creating a double standard in the application of the law. The problem has been furthered by the refusal of secular federal high courts to accept jurisdiction for apostasy cases, even in those cases essentially about fundamental liberties which falls under their jurisdiction. The Lina Joy case is probably the best illustration of the double standard. In this case, a woman who had converted to Christianity was refused a new ID card when she sought to marry a Christian man.[44] Secular authorities indicated she had to go to a Shari'a court for it to issue a conversion order. She went to the secular courts to contest the policy which infringed on her constitutional freedom of religion as protected by Article 11 of the Malaysian Constitution. The High Court,[45] and the Court of Appeal,[46] stated that only an order issued by a Shari'a court could allow her to change her religion and therefore her ID card. Lina Joy then went to the Federal Court of Malaysia, the highest court and the court of last resort in Malaysia, which heard her case in 2007. The Court confirmed that only a Shari'a court could judge cases pertaining to religious conversion.[47] The Court confirmed its previous decision in the 1999 Soon Singh case, in which it was stated that Article 121(1a) of the Constitution grants jurisdiction over religious matters to Shari'a courts.[48] Since the Shari'a courts had jurisdiction over cases of conversion to Islam, it could be understood that they would also be competent for conversions from Islam.[49]

[44] Law Reform (Marriage and Divorce) Act 1976 (Malaysia).
[45] *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Anor* [2004] 2 MLJ 119 [Malaysia].
[46] *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Anor* [2005] 6 MLJ 193 (CA) [Malaysia].
[47] *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Anor* [2007] 4 MLJ 585 (FC) [Malaysia].
[48] *Soon Singh A/L Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* (1999) 1 MLJ 489
[49] *Soon Singh S/O Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999]

The Lina Joy case clearly illustrates how having a dual system of courts can limit the freedom of religion. The message of the secular Federal Court was that, in religious matters, Shari'a law supersedes the freedoms guaranteed by the constitution.[50] This example demonstrates that using Islamic law as a source of constitutional law can be problematic when it comes to enforcing other values present in the constitution. The matter can be even more complex when Islamic law accommodates customary law or when Muslim customary law reclaims its role as a source of constitutional law. It is then important to consider how Islamic law as 'the' source of law deals with Muslim customary law in a dual basic norm system and how Islamic law as 'a' source of law, equal to customary law in the constitution, is affected by what Otto calls the 'triple basic norm', that is the presence of religious law and customary law in a Constitution.[51] An example of a triple norm is Article 2 of the Iraqi Constitution. Such a triple norm exists when a constitution declares that Islamic law (norm 1) must respect customary law (norm 2) and universal human rights (norm 3). The triple norm can be reduced to a dual basic norm when customary law is excluded. The aim of the following discussion is to explore the role of Islamic law and Muslim customary law in the development of constitutions, but also to appreciate how this triple basic norm (Islamic law, customary law and human rights), or the dual basic norm (Islamic law and human rights), once constitutionalised, functions and what must be done when a conflict of laws emerges.

3 Considering Customary Law when Developing a Constitution

Eugen Ehrlich was correct in arguing for jurisprudents to take the 'living law' into account when considering positive law, encompassing usage and custom. However, it is important to address the issues arising from legal pluralism.[52] In an Islamic environment, the inclusion and exclusion alike of customary law in the constitution hold consequences for the application of Islamic law and for human rights. Before engaging with these tensions, however, it is necessary to understand the motives for including Muslim customary law when developing a

1 MLJ 489 [Malaysia].

[50] M Kirby, 'Fundamental Human Rights and Religious Apostasy: the Malaysian Case of Lina Joy' (2008) 17(1) *Griffith LR* 151.

[51] Otto, above n 24, 15.

[52] E Erhlich, *Fundamental Principles of the Sociology of Law* (1937).

constitution. For the purpose of this article, Muslim customary law is defined as the social rules perceived by Muslims as being norms derived from Islamic law, even though these norms are not translated into either (official) Islamic or state law.

3.1 Motives for Including Customary Law in a Constitution

Imposing positive law without taking into account the existence of a variety of local sources such as religion and customary law can make a constitution fail in its mission to represent the political community or 'people'. As stressed by An Na'im, a constitution which considers cultural and religious values is more likely to be internalised and enforced by the community.[53] The factor of 'cultural legitimacy' encourages citizens to abide by State law, even though their mode of life might not be the one of a nation-sate.[54] The above analysis on the inclusion of Islamic law in constitutions has demonstrated a similar trend: a constitution, to be accepted, needs to reflect not only the needs and expectations of people (for example with regard to human rights) but also the cultural, traditional and religious values of a people as a self-perceived political community. The extent to which the latter needs to be included is dealt with in the last part of this paper.

In many Muslim countries, customary law is a reality and various constitutional texts have acknowledged that situation. Pluralism is an empirical reality, and most legal systems in the Muslim world are constructed with the awareness that to maintain social peace and ensure uniformity of law enforcement throughout the country, other sources of law must be taken into consideration. Muslim customary law then becomes a source of the law. One of the reasons why drafters of constitutions in the Muslim world choose to integrate this 'living law' is to encourage a pluralist system which reflects the identity of the population.[55]

Including Muslim customary law is also a way of ensuring the survival of practices and alternative approaches to the law which can sometimes be an enrichment to the legal system. Another reason for including customary law is to ensure that positive law does not oppress indigenous populations.[56] The denial of local culture and systems of laws can be destructive for a community. Menski

[53] A A An-Na'im, *African Constitutionalism and the Role of Islam* (2006) 99.

[54] A A An Na'im, in A A An-Na'im and F M Deng (eds), *Human Rights in Africa: Cross-Cultural Perspectives* (1990) 331-367.

[55] M Ndulo, 'African Customary Law, Customs, and Women's Rights' (2011) 18 *Ind J Global Legal Stud* 87, 94.

[56] W Menski, 425

refers to the African literature on the matter of 'broken heritage' to illustrate this point.[57] During colonisation, many local communities suffered from the lack of consideration of their rules, resulting from Western legal transplants and were impacted by attempts to regulate and control their beliefs, leading to the feeling that the denial or transformation of local customary law could break or destroy a heritage. Including customary law as a source of law is therefore a way of acknowledging the importance of the community's culture.

A customary law-inclusive constitution also avoids 'self-controlling systems',[58] in which individuals or particular groups might be at risk of discrimination.[59] The existence of parallel legal systems can be perceived as competing with the State and this is why it might be necessary to control customary law via the constitution and State law, and why some States have felt the need to 'domesticate' customary law.[60] A balance needs to be found, however, between upholding State law and the need for communities to develop their own laws. Framing the scope of 'self-government' within the constitution is therefore vital for the nation state.[61] This provides powerful reasons for both religious law and customary law to be developed in accordance with the general philosophy of the constitution.

There are also constitutions in which a conscious choice has been made not to include customary law (Iran, Mauritania, the Maldives), while others are unclear about whether or not customary law is a source of law (Afghanistan, Iraq). The deliberate choice to exclude is usually based on the perception that pluralism creates a risk of fragmentation, which would then undermine the Islamic 'supremacy-clause model' constitution. The lack of clarity in a constitution with regard to the role of customary law as a legal source can, however, cause problems and even undermine the State's authority. This is demonstrated below, in the examination the case of Afghanistan.

3.2 The Stakes of Including and Excluding Muslim Customary Law

The inclusion or exclusion of Muslim customary law in a constitution leads to different consequences, as illustrated in Nigeria and Afghanistan. The 1999

[57] Hirschl, above n 15, 191.
[58] Ibid, 421.
[59] F Banda and C Chinkin, *Gender, Minorities and Indigenous People* (2004) <http://www.un-ngls.org/orf/cso/cso6/MRGGenderReport.pdf> [accessed 25 May 2014].
[60] Hirschl, above n 15, 191.
[61] H P Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (4th edn, 2010) 92.

Constitution of the Federal Republic of Nigeria sets up a federal system in which emphasis is put on the 'spirit of mutual coexistence'[62] between the various national communities. In practice, any received English law has to co-exist with Islamic law and different forms of customary law, including Muslim customary law, in different parts of the country. While Section 10 of the Constitution rejects the promotion of a State religion, the federal system has allowed for the existence of state courts to consider matters not covered by federal law, as per Section 6(5) and Sections 275-279 of the Constitution. These articles have been used to legitimate the recourse to Islamic law and Muslim customary law. For example, in some areas of the country, marriage is partly regulated by Muslim customary law. Yusuf speaks of the right of a father to remove a child from a divorced woman after the cut-off age of 2 years old, rather than puberty.[63] The rule is a departure from the Maliki school of Islamic jurisprudence, the predominant school of law in Nigeria, which states that the female child remains with the mother until marriage and the male child until he reaches maturity. This could potentially create a conflict of laws between Islamic law and customary law. The enforcement of stoning is another issue stemming from Muslim customary law in Nigeria: it is sometimes used as a punishment by Shari'a courts. It is clear that stoning is not to be found in Islamic law and is a pre-Islamic customary practice which has found its way into some Muslim customary law and sometimes into State courts and State law stating an Islamic basis.[64] There is certainly debate regarding the conflation of Muslim customary law and Islamic law. It is sometimes difficult to make the distinction between Muslim customary law and Islamic law, as reflected in the case law of Shari'a courts in the Northern parts on Nigeria.[65] Islamic law and Muslim customary law can be perceived as intrinsically linked.[66] The outcome of this congruence is that in some regions, Shari'a courts will apply customary law in the light of Islamic law while in other areas Muslims who have contracted an Islamic marriage will have to go to a customary court.[67]

The Constitution of Afghanistan is an example of a constitution which does

[62] H P Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (4th edn, 2010) 92.

[63] M A Yusuf, 'Impact of Local Government Reforms on Yauri Division' (1973) PhD thesis, Ahmadu Bello, as cited by F A Salamone, 'The Clash between Indigenous, Islamic and Post-Colonial Law in Nigeria' (1983) 21 *JLP* 15, 31.

[64] C Jones-Pauly, 'Law: Articulation of Islamic and non-Islamic Systems' in S Joseph (ed), *Encyclopedia of Women and Islamic Cultures: Family, Law and Politics* (2005) 387.

[65] A A Oba, 'Religious and Customary Laws in Nigeria' (2011) 25 *Emory Int LR* 881

[66] Ibid, 885.

[67] A A Oba, 'The Sharia Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction' (2004) 52 *Am J Comp L* 859, 882.

not clearly refer to customary law as a source of law. While there is a reference to the beliefs of Islam in Article 3 of the Constitution, customary law is not directly identified as a source of law. Yet, it is a source *de facto* and the lack of clear acknowledgment of its role has been seen to undermine State authority.[68] Indeed, the unofficial, unwritten parallel legal system based on customary law leads to many human rights violations,[69] in the different local councils and even in local courts. Many Afghan judges prefer to apply customary law, or are unaware of the relevant State law. While the reasons for ignoring the role of customary law in enacting a constitution can be multiple, one emerges clearly: the fear of granting legitimacy to a potential competitor to State law, especially in a post-conflict setting. However, by ignoring the contribution of customary law, countries which have chosen to rely on Islamic law in their constitution expose themselves to internal contestation, as it is the case in Iran where different ethnic groups would like to rely on their own belief systems. It also dis-empowers the State when it comes to preventing discrimination, as some customary rules can affect gender and vulnerable groups negatively.

Nowadays, the application of Muslim customary law is explained by different factors: the political context; popular support; a lack of engagement with the State legal system; and ethnic motives.[70]

3.3 Consequences for Human Rights

The consequences of including customary law in the constitution are just as problematic as the exclusion of customary law. Informal parallel justice systems which enforce Muslim customary law are a major obstacle to the respect of human rights. It would be a mistake, however, to believe that all customary rules will be discriminatory or violate fundamental rights. Yet, one must acknowledge that Muslim customary law, just as Islamic law, is a subjective source of law, as opposed to objective State law. Interpretations of Islamic legal sources and social pressure place weight on Muslim customary law as well as in Islamic law, and define their content. When Shari'a inspires customary law and when Islamic law inspires law, it is done in a way that reflects a social and cultural identity and a

[68] K Reedy, 'Customary law and its Challenges to Afghan Statehood'(2012) *Mil Rev* 27.

[69] M Lau, 'Afghanistan's Legal System and its Compatibility with International Human Rights Standards' International Commission of Jurists (2003) <http://www.refworld.org/pdfid/48a3f02c0.pdf> [accessed 25 May 2014].

[70] M Lau, 'Afghanistan's Legal System and its Compatibility with International Human Rights Standards' International Commission of Jurists (2003) <http://www.refworld.org/pdfid/48a3f02c0.pdf> [accessed 25 May 2014].

purpose. This is in contradiction with State law in a nation state which claims to remain as objective as possible.[71]

Interpretation and social pressure can have negative effects on human rights as illustrated by the honour murders in Syria. While the Syrian Constitution establishes gender equality, a number of women are still killed for dishonouring their family and their community. This is in retribution for their behaviour deemed to be inappropriate, which can range from talking a male who is not a member of the family to refusing to marry.[72] In parts of Syria, it is believed that the shame should be washed away, and for some people, this can only be achieved by blood.[73] This is an ancient tribal custom which, over time, has been given a societal seal of approval, although it is in contradiction with certain textual elements of Shari'a and Islamic law. A noted case is that of Zahra al-Azzo, who was killed in her sleep by her brother.[74] This case demonstrates that customary law can violate internationally accepted universal human rights. It also demonstrates that on some occasions, State laws and State courts can support customary law; Article 192 of the Syrian Penal Code provides that the judge may excuse or reduce the punishment of a person who commits 'a crime under honour'. Article 548.1 of the Code states:

> Anyone who catches his wife, one of his female ascendants or descendants, or his sister committing adultery or engaging in illegitimate sexual relations with another person and who, without intending to do so, murders, beats or injures his relative and her accomplice, is exempt from punishment.'

Syrian courts have applied these articles, including in Zahra's case, to excuse the murderer. These rules directly contradict Article 45 of the Syrian Constitution, which affirms equal citizenship. Women are said to enjoy the same social status as men, but old practices and hard-line interpretations have led to toleration of honour killings as part of the local culture.

[71] Kelsen, above n 55, 405.

[72] L Abu Odeh, 'Honor Killings and the Construction of Gender in Arab Societies' in M Yamani (ed), *Feminism and Islam: Legal and Literary Perspectives* (1996) 141-194.

[73] A Van Engeland, 'On the Path to Equal Citizenship and Gender Equality: Political, Judicial and Legal Empowerment of Muslim Women' in LC McClain and J L Grossman (eds), *Gender Equality: Dimensions of Women Equal Citizenship* (2012) 390-408.

[74] Zahra was abducted and raped before her marriage by a family friend. Later, a cousin proposed to her, despite this incident, and she got married. Her brother still believed it was necessary to 'wash away the shame' (*ghasalat al arr*) by killing her. *See* K Zoepf, 'A Dishonorable Affairs' *NY Times,* 23 September 2007.

The acknowledgment of legal pluralism in a constitution is important to uphold social peace and protect local sources of law. Excluding religious and customary sources of law seldom works to the advantage of any society, as illustrated by the numerous examples above. However, it must be acknowledged that some religious and religiously-inspired customary laws are in direct antagonism to universal human rights. To be framed properly in a nation state constitutional era, Islamic law and Muslim customary law need to undergo changes. That is to say, to co-exist with state law and universal human rights law in a pluralist constitutional system, both Islamic law and Muslim customary law must move yet further away from classical readings of Islam and Islamic law.

4 Islamic Law versus Customary Law: Tensions and Impact on the Constitution and Human Rights

There are sometimes clear discrepancies between Muslim customary law and Islamic law. They can affect the general philosophy of the constitution, as illustrated in Afghanistan. These conflicts emerge when Islamic law is the main source of law in a constitution that also considers customary law, which in turns contradicts Islamic law. Conflicts can also occur when Islamic law does not tolerate any competitor and excludes Muslim customary law.

The first step is to differentiate Islamic law from Muslim customary law. While many scholars conflate them, the two sources of law are of different origins and purposes. Islamic law is a divine law which seeks to respect the word of God in a man-made context. Customary law is 'the body of rules which are recognised as obligatory',[75] and is designed by and for the community. So, one law is divine while the other is organic. To place them in the context of a nation state's constitution means working within Otto's triple basic norm (or dual norm) and finding solutions to potential conflicts of laws.

4.1 Tensions between Sources

One cannot ignore the fact that the citizen will often find himself caught between the dual basic norm (Islamic law versus Muslim customary law) or the triple basic norm (Islamic law, Muslim customary law, and human rights) with the potential

[75] T O Elias, *The Nature of African Customary Law* (1972) 55.

for a double violation of human rights: one can be victimised once by Islamic law and another time by customary law, or by both when they are in conflict. As an illustration, in Afghanistan, a woman can be the victim of an interpretation made of Islamic legal sources that forces her to marry and she can then be the victim of a customary rule that compel her to remain inside at all times. Both Islamic law and Muslim customary law can only remain as constitutional sources of the law in a constitution that enshrines universal human rights if both undergo an in-depth reform.

Before looking at a methodology for reform, it is important to understand the nature of the conflict of laws which emerges. The co-existence of Islamic law and Muslim customary law or the *de facto* implementation of customary law can lead to conflict between the two types of law. In a country which stipulates Islamic law as the source of the law, there is no other competitor and Islamic law controls the legal system. This is the case in Iran where Islamic law is the only source of the law and where customary law is ignored.[76] This causes significant tensions with the different ethnic groups in Iran. In contrast, there is a plurality of sources of law in Afghanistan which has caused conflicts, consequently undermining the State's authority. While several parts of the country are difficult to access in order to ensure the rule of law, there is no legal vacuum as Muslim customary law is applied in these places.[77] As a result, Afghan law is a mix of international law (Article 57 of the Constitution), Statutory law (which is a mix of civil and Islamic law), Islamic Hanafi law (Article 130 of the Constitution) and, *de facto* Muslim customary law. There are areas where local judges and local councils apply customary law rather than domestic law. For example, there is a clash of norms between the Islamic law and the customary law on the matter of inheritance. The Pashtu customary law states that women do not have the right to inherit. Islamic law, on the other hand, considers that women have a share of the inheritance.[78] Another illustration is provided by Welchman's analysis of competing legal systems in the Palestinian Occupied Territories, wherein she considers case studies and analyses how the three bodies of law interact.[79] A last example of a conflictual enforcement of Islamic law and Muslim customary law

[76] Z Nejadbahram, 'Women and Employment' in T Povey and E Rostami (eds) *Women, Power and Politics in 21st Century Iran* (2012), 73, 80; Hadi Enayat, *Law, State, and Society in Modern Iran: Constitutionalism, Autocracy, and Legal Reforms* (2013), 28.

[77] A Wardak, 'Jirga: a Traditional Mechanism of Conflict Resolution in Afghanistan' (2003) <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan017434.pdf> [accessed 25 May 2014].

[78] A J Arberry, *The Koran Interpreted* (1963).

[79] L Welchman, 'The Bedouin Judge, the Mufti, and the Chief Islamic Justice: Competing Legal

can be found in Darfur, as demonstrated by Unruh who analyses how Islamic land law conflicts with customary law.[80]

In another example, a woman saw her husband leave to join the Taliban in Afghanistan.[81] When he did not return from the war after 9 years, the village council allowed the woman to re-marry, considering the husband had deserted her. She re-married and had 2 children. The first husband returned, and the woman was accused by the very same village council of committing adultery (*zina*), on the basis of Hanafi law which states that a woman is considered divorced after 99 years have passed since the birth of the husband. The move from case law to classic Hanafi law was justified on the customary rule that a woman needs to protect her honour. The woman consequently had to flee to ensure her survival, as the village council intended to stone her in accordance to customary law. This area of the law is highly contentious, but there is a judicial agreement that Hanafi law is too stringent and Afghan courts have instead relied on Maliki law which sets the cut-off period of waiting at 4 years.[82] Yet, the council at hand had changed its initial decision which was in line with domestic case law to switch back to a mix of classic Hanafi law and customary law.

It is interesting to note that scholars have attempted to reconcile different sources of law at the time of colonisation, with varying degrees of success. There is much to learn from their experience, from their misunderstandings of local laws and from their analysis of the interactions between State law and other legal systems. The Dutch scholar Van Vollenhoven analysed the role of local customs (*adat*) in what used to be the Netherlands East Indies (Indonesia), and concluded that it was a legal system in itself. He called it *adatrecht*, the law of the customs. In his mind, Islamic law was absorbed by this *adatrecht*, and therefore approached by Vollenhoven as being an inherent part of customary law,[83] which demonstrates a misunderstanding of the concept of Shari'a. The French had a different approach in Algeria, which was to transplant their legal instruments and codify Islamic law. Customary law was then considered as a 'deformation' of Islamic law.[84] It should be noted that the codification of Islamic

Regimes in the Occupied Palestinian Territories' (2009) 38 *JPS* 6.

[80] J D Unruh, 'Land and Legality in the Darfur Conflict' (2012) 5 *African Security* 105.

[81] J D Unruh, 'Land and Legality in the Darfur Conflict' (2012) 5 *African Security* 105.

[82] M H Kamali, *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary* (1985) 187-9.

[83] W R Roff, 'Customary Law, Islamic Law and Colonial Authority: Three Contrasting Case Studies and their Aftermath' (2010) 49 *Islamic Studies* 455, 457.

[84] W R Roff, 'Customary Law, Islamic Law and Colonial Authority: Three Contrasting Case Studies and their Aftermath' (2010) 49 *Islamic Studies* 455, 457.

law did not prevent the practice of customary law,[85] a situation reminiscent of Afghanistan today. The last example is Roff's example of British India, where an Anglo-Muhammadan law was created. The British compiled customary laws by district to ensure the application of a uniform customary law.[86] When Islamic law and customary law conflicted, customary law would supersede Islamic law on the basis that Anglo-Muhammadan law would be applied unless 'the law has been modified by custom'.[87] We can conclude that since conflicts of laws already existed before the time of colonization, the addition of an extra layer of law, State law, led to legal pluralism as an obvious choice for India's post-colonial constitution. These conflicts of laws affect citizens and need to be resolved in a manner which protects both the constitution and the nation state. This will be illustrated below.

4.2 Addressing Issues that arise when Including Islamic Law and Muslim Customary law in Constitutions

A constitution should not be developed *ex nihilo* and should consider the historical, social and cultural context as well as other sources of law of the country.[88] Legal pluralism facilitates the development of a constitution by considering cultural, traditional, customary and religious values.[89] It should be stressed that Griffiths disagrees with the attempt to have legal pluralism and State positivism work together:

> [F]ormal acquiescence by the State in a situation of legal pluralism in this weak sense adds a formidable layer of doctrinal complexity on top of complexity normally incident to a supposedly uniform state legal system. The resulting state of affairs is regarded by almost everyone concerned as profoundly defective. It is the messy compromise which the ideology of legal pluralism feels itself obliged to make with recalcitrant social reality.[90]

[85] J R Henry and F Balique, *La Doctrine Coloniale du Droit Musulman Algérien: Bibliographie Systématique et Introduction Critique* (1979) in Roff, above n 84, 458.
[86] Ibid, 460.
[87] Ibid, 460.
[88] J W Burgess, *Political Science and Comparative Constitutional Law* (1983) 90.
[89] An Na'im, above n 53, 99.
[90] Griffith, above n 14, 7.

Griffiths seeks to tackle this complexity by demonstrating that Islamic law, as a unique 'normative phenomenon',[91] can absorb both legal pluralism and State positivism due to its flexible nature, and that religious law becomes State law on incorporation in the constitutional text. But if this is the way forward, a yardstick has to be set as to which of those values are acceptable, especially with regard to the respect and enforcement of universal human rights law. This yardstick can be found in Islam itself, which provides the relevant tools to make a distinction between the acceptable and the non-acceptable. While interpreting Islamic legal sources to create law and customary law, one can use Islamic instruments which can then serve as yardsticks. These instruments include, for example, *maslaha* which is the public good, or *darura* which means necessity, amongst other Islamic legal principles. Both of these principles are instruments used in Islamic law to either contextualise Islam or interpret Islamic legal sources. Interpreting legal sources while relying on these tools can help us find a solution for the above-mentioned problem of punishment for adultery (*zina*); instead of attempting to re-interpret the Quran when it comes to the punishment of adultery (an impossible move since the Quran is the word of God and is not fallible), one can extend the new hermeneutics of the Shari'a to the inclusion of *maslaha* (public interest). It could be argued that the punishment of adultery by strikes should be prohibited on the basis that it does not serve the public interest. The punishment prescribed in the Quran is then mitigated in its enforcement by the principle of *maslaha*: it is not in the public interest or for the well-being of the community to enforce such harsh punishments. Shari'a law will in turn be transformed by the reforms operated within Islamic law and Islam, influencing customary law in a positive way. It is crucial to determine whether *maslaha* and other Islamic legal principles constitute a new normative order or not: while it is clear that they do not constitute norms by themselves, there is a debate as to whether they are principles of law or sources of law. As principles, *maslaha* and *darura* (and other such interpretive devices) could be used to contextualise interpretations of the Quran and the Sunna. The public good (*maslaha*) would then become the general context in which one interprets Islamic legal sources. If *maslaha*, or any other Islamic legal instrument, is considered as a source of law, we then begin shaping a new normative order. The aim of that new normative order is to ensure a swift conciliation with universal human rights law. Yet, it creates the risk of departing from the very nature of Islamic law by turning elements which are meant to be principles into sources of law (i.e. rules). These principles

[91] Twining, above n 13, 116.

are there to serve as yardstick, and not as norms. Islamic principles should play a role in the evolution of Islamic law and Muslim customary law in order to create new opportunities for interpretation. These new interpretations could build bridges with universal human rights while upholding the Islamic identity of a constitution. Changing the nature of Islamic law, or its order of legal sources, should not be a strategy. Rather, by encouraging a new hermeneutics of Islamic law and Muslim customary law, we actually promote new values which will be closer to those reflected in human rights standards. This would allow us to work on the real issue, which is interpretation.As stressed by An Na'im,[92] the issue is not with Islam and Islamic law but with the way we interpret Islamic legal sources and understand them. The next step is to decide on the direction of the hermeneutics. The different principles in existence, such as *maslaha*, serve as yardsticks, acting as a baseline from which differences between interpretations of Islamic law and universal human rights can be reconciled in a hermeneutic process.

With a methodology and a yardstick determined, a test needs to be established with regard to the selection of acceptable norms. The experience with regard to customary law in some African countries is enlightening. In Nigeria, a customary rule is tested through a repugnancy clause to ensure that a rule is socially acceptable. A test of compatibility with statute law is then performed, followed by a test of compatibility with public policy.94 This example would call for similar tests with regard to Islamic law and Muslim customary rules. There is a precedent of such a test being applied in Ghana, where the State applies a Muslim customary law to change inheritance law with a gender focus.[93]

4.3 The Necessary Framework to Enforce Changes

that The argument is that such reforms of Islamic law and Muslim customary law are only possible within a strong nation state. Indeed, Islamic law and customary law are, as stressed by Sultany, subjective sources of law which are prone to manipulation. This is why only a strong nation state can address issues of enforcement of both sources of law within a constitutional framework. This also entails that States actually comprehend the nature of their own legal sources and are able to adopt them successfully within a nation-state framework. A strong critic of this stance is Hallaq, who believes that the modern nation state cannot accommodate Islamic law as some inherent inconsistencies, such as

[92] Ibid, 99.
[93] Ibid, 53.

the codification of Islamic law, will inevitably arise.[94] He refers to the Islamic Republic of Iran, which he perceives to have failed 'both Islamic governance and the modern state as political objects.'[95] He also denounces the restructuring of Shari'a law at the hands of the State, to this extent disapproving the suggestion made in this article to use a new hermeneutics of the Shari'a to transform the law. While Sultany's fear of manipulations and Hallaq's suspicions with regard to the capacity of modern nation State to cope with Islamic law's nature are well grounded, the new hermeneutics coupled with the use of Islamic principles such as *maslaha* does in fact allow for Islam to exist within the apparatus and structure of the modern state given the correct interpretative approach is applied. These new interpretations can solve the tensions between customary law, Islamic law and human rights (both domestic and universal), as the focus is set on conciliation.

The State has positive obligations towards human rights and towards its citizens.[96] The need to have a strong State concerns all three branches of power in a government. In Afghanistan, for example, only an accelerated judicial reform controlled by the State and an in-depth judicial review performed by trained judges will ensure conformity, not with classical Islamic law, but with a newly reformed Islamic law. The outcome of this argument is that it is necessary to take Islamic law through a new period of reform, similar to the one the Ottomans led. To acheive this purpose, it is necessary to take yet another step away from classical Islamic law. Conformity with classical doctrine cannot be upheld in a nation state and Islam cannot be a fundamental norm outside of that modern constitutional context. Once this is established, boundaries to the power of executive, the judiciary and the parliament should be well-defined as these bodies will dictate the content of the laws (Islamic law) and the role of Muslim customary law.

As emphasised by Rabb:

> The central question that Islamic constitutionalism evokes in the context of law-making and adjudication concern how to interpret Islamic legal texts within the particular governmental arrangement outlined by the constitution and executed by institutional actors.[97]

The enforcement of the yardstick developed above can be performed when drafting laws or making judgments. The main obstacle then becomes classical

[94] W B Hallaq, *The Impossible State: Islam, Politics and Modernity's Moral Predicament* (2012) x.
[95] Ibid, 2.
[96] Nmehielle, above n 70, 754.
[97] I A Rabb, '"We the Jurists": Islamic constitutionalism in Iraq' (2008) 10 *U Pa. J. Const. L* 527.

Islamic law. The Egyptian Supreme Court has, for example, declared that some classical principles of Islamic law could not be altered, with regard to child custody and the cut-off age.[98] Yet, the key is to move away from classical Islamic law and the idea that areas of Islamic law and Islam exist which cannot be changed. This move from classical Islamic law has already occurred to a certain extent. The author suggests that if we wish to maintain Islamic law and Muslim customary law within a constitutional framework and if we wish to keep them as sources in a nation state, we must move away from an approach to constitutionalism which takes classical Islam as the fundamental norm to develop instead a rights-based constitutionalism via *ijtihad*. However, we should not ignore that relying on State courts could be problematic. It has been reported that the court's intervention in Muslim customary law has a tendency to influence the rule with a view to homogenise it without actually reflecting its real content. [99] Another issue is the training of the judges which often fall back on classical interpretations of Islamic law and customary law due to a lack of knowledge. As reported by Lau, Weinbaum had stressed this issue by stating 'where formal statutes exist, judges typically lack the training and research resources required to identify appropriate provisions of the law.'[100] While this view was expressed in 1980, the issue is still in existence nowadays.

The innovative proposed methodology will also defeat the argument that referring to religion in a constitution leads to the establishment of theocracy which in turn turns into despotism[101] or the argument that customary law is oppressive of human rights. Instead, a new version of Islamic law and customary law will be promoted, once that completes the already existing positive values in these legal systems. It could create an all-encompassing revised legal pluralism which is more adapted to the 21st century mode of governance and perceptions of the role of a constitution. However, this strategy will not allow us to move away from the criticisms that religion and customary law constitute subjective sources of law, prone to manipulation. The new hermeneutics of the Shari'a is itself a form of manipulation of the sources, principles and methods in existence within Islam. This weakness should be acknowledged. It could be counter-balanced by the fact that there would no further need for a controlling authority outside of

[98] Abdelaal, above n 23, 39.

[99] E S Nwauche, 'The Constitutional Challenge of the Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana', (2010) *Tulane Eur & Civ L Forum* 25, 37-63, 43-44.

[100] Lau, above n 73.

[101] As rejected by Backer, above n 4, 104.

the religious realm, since changes would come from religion itself and would be monitored by the three branches of power.[102] The new hermeneutics of the Shari'a would also be a very slow process to develop as each rule would have to be addressed at a time. Besides, addressing the idea that 'religion divides and does not compromise. It tolerates but cannot accept equality among those of different faiths'[103] would entail a reform of the way other religions are perceived in Islam. As stressed by Baderin 'pluralism is considered as conflicting with constitutionalism on grounds that it can be internally segregate and thus impeded on the ideals of constitutionalism and possibly hinder good governance and social cohesion under a uniform system of law'. This concern would then have to be addressed using interpretation (*ijtihad*), being aware of the length of the reform.

This work demonstrates that far from constituting a threat to transnational constitutionalism, and far from that idea that 'the point is to subordinate these differences within the matrix of superior normative values represented within transnational constitutionalism, so that the populations of states that seek to politicize their religion will do so only in a manner that retains the superiority of secular values',[104] Islamic law and Muslim customary law can develop in a new direction. Rabb has addressed all these fears and the use of the new hermeneutics to counter such argument that secularism is the only viable option in the field of religion and constitution. [105] The author furthers that mitigating Islamic law and customary law via secularism would cause the imposition of a foreign model, when Islamic instruments are available as an alternative. An Islamic-based reformed constitutionalism could also construe its own perceptions of universal human rights in a way that leads to bridging the different legal systems to later embracing universal rights.

5 Conclusion

"We the people" is an important part of any constitution, and also happens to be at the very core of Islam: Shari'a is guiding Muslim believers in all aspects of their lives, including the law. The main difference is that in some Muslim constitutions, the people are represented via religion and/or Muslim customary law. It is undeniable that the presence of both Islamic law in and customary

[102] Ibid.
[103] Backer, above n 1, 37.
[104] Hirschl, above n 4, 1181.
[105] Rabb, above n 101.

law in a constitution raises issues, especially with regard to the respect and enforcement of universal human rights. It is also true that their presence is necessary as it reflects the will of the people. Sultany questions this understanding of a constitution, asking whether we know what the people want; whether a constitution should or should not reflect an identity; whether interpretation does not lead to indeterminacy; and whether the dominance of Islam does not lead to a 'dominance of the religious divide, an anti-democratic form of secular escapism and depolitisation of essentially political questions.'[106] The author believes, in response to the two first concerns, that legal pluralism is a necessity in any legal system which seeks to be legitimate, a point which was well-understood during the drafting of the new Iraqi and Afghan constitutions. Islam is by nature subjective and subject to interpretation due to its flexibility: the author perceives that element has positive and we should take advantage of it. Eventually, relying on Islamic law and Shari'a-influenced customary law is a way of relying on a local identity and avoiding the transplantation of yet another model of law. Indeterminacy remains a real issue caused by the very nature of Islamic law, a flexibility which also allows for reform: while this technique of the new hermeneutics is successful most of the time, issues remain.[107] For example, the Shari'a punishment for adultery, *zina*, is clearly prescribed in the Quran 24:2.[108] While the punishment prescribed, flogging, is in clear contradiction with human rights,[109] a verse of the Quran cannot in itself be re-interpreted. The new hermeneutics focuses only on the human understanding of divine law, and not on divine law itself. The methodology of the new hermeneutics consequently encounters limits in terms of adapting Islamic law to the 21st century demands.

[106] Sultany, above n 11.

[107] A Van Engeland, 'Transcending the Human Rights Debate: Iranian Intellectuals' Contemporary Discourses and the New Hermeneutics of the Sharia' (2011) 4(1) *MEJCC* 72.

[108] 'The [unmarried] woman or [unmarried] man found guilty of sexual intercourse – lash each one of them with a hundred lashes, and do not be taken by pity for them in the religion of Allah, if you should believe in Allah and the Last Day. And let a group of the believers witness their punishment.'

[109] A A An Na'im, 'Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment' in A A An-Na'im (ed), *Human Rights in Cross-Cultural Perspectives* (1992) 19-43.

BOOK REVIEWS

Fresh Water in International Law. By Laurence Boisson de Chazournes. Oxford University Press, Oxford, 2013. 288 pp. £70.00 (hardback).

Water scarcity is increasingly becoming an issue of global concern, as population growth, increased water usage, pollution and climate change exert strain on available water resources. It is in this light that international lawyers have, in recent years, turned greater attention towards the regulation of freshwater and its uses. Nonetheless, the international legal regime governing the uses of fresh water leaves much to be desired. The core of this regime, the 1997 United Nations Convention on the Law of Non-Navigational Uses of International Watercourses[1] (which only just obtained the requisite 35 ratification for it to come into force in May of this year), has come under intense criticism for its vagueness and indeterminacy.[2]

Boisson de Chazournes' *Fresh Water in International Law* is a timely and valuable contribution to this field. It comprehensively covers all aspects of the international legal regime governing the use of fresh water, eschewing the traditional dichotomy between navigational and non-navigational uses (13-25) and analysing the disparate legal regimes governing different sources of fresh water, including transboundary river systems (26-36), transboundary aquifers (37-39), ice formations (39-46), as well as atmospheric fresh water (46-48). In its eight chapters, *Fresh Water in International Law* methodically and incisively analyses relevant hard-law and soft-law instruments, case-law, State practice and doctrine in different areas of international law that are relevant to the management and use of fresh water resources, and it accomplishes this in an integrated and holistic manner. This sets the book apart from the volume co-edited by the author with Leb and Tignino and published only a year earlier

[1] Hereinafter UN Watercourses Convention or UNWC. Not yet in force. Adopted on 21 May 1997, UN DOC A/RES/51/229

[2] See e.g. A Wolf, 'Criteria for Equitable Allocations: The Heart of International Water Conflict', (1999) 23 *Natural Resources Forum* 3; L Caflisch 'Regulation of the Uses of International Watercourses' in MA Salman and L Boisson de Chazournes (eds), *International Watercourses–Enhancing Cooperation and Managing Conflict*, (1998), 16; JW Dellapena, 'The Customary International Law of Transboundary Fresh Waters' (2001) 1 *Int J of Global Environmental Issues* 264, 288; A Al-Khasawneh 'Do judicial decisions settle water-related disputes?' in L Boisson de Chazournes, C Leb and M Tignino (eds), *International Law and Freshwater. The Multiple Challenges*, (2012), 341, 357

under a very similar title, which investigates the same areas of international law but as discrete categories.[3]

Chapter 1 discusses the unique physical characteristics of fresh water and their implications for the legal regulation of its uses. The following five chapters explore the evolution of the law governing freshwater under five principal trends: (1) *regulation* of the different sources and uses of fresh water, which has occurred at three levels: the universal, the regional and the basin-specific; (2) the *economization* and commodification of fresh water; (3) the *environmentalization* of fresh water; (4) the *humanization* of fresh water; and (5) the *institutionalisation* of fresh water through the proliferation of basin commissions and other governance mechanisms. The book therefore underscores the complexity and multiplicity of legal regimes governing the use of fresh water and how these regimes interact to form a corpus of principles for the management of fresh water resources. Chapter 7 discusses international dispute settlement mechanisms, highlighting the growing number of adjudicatory mechanisms engaged in the resolution of water-related disputes. Finally, chapter 8 offers some insights into the future development of the law governing fresh water resources. For limitations of space, this review will focus on two important themes that emerge from Boisson de Chazournes' discussion: (1) the legal characterisation of water and the theoretical underpinnings of the international regulatory regime, and (2) the intersection between international investment law and the human right to water.

Chapter two - on 'regulation' of fresh water - analyses the legal aspects of various uses of fresh water, such as navigation, irrigation, energy production, fishing and other human needs. Presented as though it were relatively uncontroversial, the discussion of the theoretical underpinnings of the different regimes for the regulation of fresh water exposes a point that is underexplored in the literature, namely that these theoretical foundations differ depending on the source of fresh water and its use. Water is sometimes understood as a resource appurtenant to land (subject to the principles of sovereignty and title to territory, which are akin to real property rights in domestic law). At other times, it is regulated under the notions of restricted sovereignty, *res communis* or even *res nullius*. This dichotomy is pertinent in the regulation of water as a liquid, solid (ice) or gas (clouds). For example, in the case of boundary rivers separating two opposite States, the principle of sovereignty becomes paramount: the river is divided in accordance with the median line or geographical thalweg, taking into account traditional rights

[3] L Boisson de Chazournes, C Leb and M Tignino (eds), *International Law and Freshwater. The Multiple Challenges,* New Horizons in Environmental and Energy Law (2012).

(8-13). Fishing activities are subject to the principle of 'shared natural resources' (which is derived from the principle of 'permanent sovereignty over natural resources'). The principles of sovereignty of aquifer States and of 'shared natural resources', similarly, proved formative in the development of the law governing the use of confined groundwater (transboundary aquifers) (38). These principles have recently been codified by the International Law Commission (ILC) in the non-binding Draft Articles on the Law of Transboundary Aquifers. Finally, regional human rights mechanisms have considered the 'right to water' as a property right.

In stark contrast, within the context of navigation, the principle of sovereignty gives way to the freedom of navigation (with its regional variations) and the 'community of interest' doctrine, which is based on the concept that all riparian States have a common legal right to utilise the entire navigable course of a transboundary river (14-16). The 'community of interests' doctrine – derived from the Roman law principle of *res communis* - has also been extended to the non-navigational uses of fresh water. The work of the ILC on the topic of Non-Navigational Uses of International Watercourses, which culminated in the adoption of the 1997 UNWC, eschewed traditional theories based on competing sovereignty over the water in a transboundary river, adopting instead the notion of restricted sovereignty based on the principles of 'equitable and reasonable use' and 'no-harm' (20-21, 30). This applies to a transboundary river as well as connected groundwater. In fact, the 'shared natural resources' principle was completely discarded from the ILC's draft articles in light of its links to the concept of sovereignty.[4]

Equally, Boisson de Chazournes highlights that a number of different doctrinal approaches exist for the legal regulation of fresh water in its solid and gaseous states. Traditionally, glacial formations were not considered fresh water resources but were rather understood as an element of sovereignty and territory (and hence treated as mineral resources). For example, icebergs are generally governed by the UN Convention on the Law of the Sea,[5] with the implication that icebergs in the territorial sea fall under the sovereignty of the coastal State while those in the exclusive economic zone are governed by the principles on exploitation of mineral resources. Icebergs in the high seas are *res nullius* and are therefore theoretically open to appropriation by all States. Icebergs

[4] See J Evensen, 'Second Report on the law of non-navigational uses of international watercourses', (1984) ILC *Ybk* 1984/II(1), 110, para 48. See also, 'Summary records of the meetings of the thirty-ninth session of the ILC', 2002nd meeting, 22 May 1987, ILC *Ybk* 1987/I, para 9 (Beesley).

[5] 10 December 1982, UNTS 1833 (1994).

in the Antarctic Ocean, however, are subject to a special legal regime under the Protocol of Madrid on Environmental Protection to the Antarctic Treaty. Under this regime, icebergs cannot be subjected to exploitation activities permissible in relation to mineral resources (42). A second doctrinal approach treats icebergs as islands whereas a third approach views icebergs through the prism of the common heritage of mankind doctrine (as a resource that can only be utilised for peaceful objectives, while the benefits of exploitation must be shared 'equitably') (42-43).

Similarly, doctrine has approached the legal regulation of atmospheric fresh water (in the form of clouds) under the competing theories of property rights (sovereignty over clouds in the airspace above the territory of a State), *res communis* (clouds are 'objects that belong to all') and *res nullius* ('the first to seize them has the right to exploit them'). The *lex lata* approach is to consider clouds *res nullius*; however, this remains an underexplored area of law (46-48).

Boisson de Chazourne's analysis of these disparate legal regimes exposes the theoretical confusion of the *corpus juris* governing the management and use of fresh water resources. This is exacerbated by the lack of a single legal instrument that governs all uses of fresh water in its different forms. The ambiguity inherent in the legal characterisation of water has important implications. For example, if flowing water were to be approached under the prism of sovereignty, it would be subject to prescriptive rights, which protect the earliest user. Under the principles of *res communes* and restricted sovereignty, however, water would be considered common property or would be subject to the principle of 'equitable and reasonable use'. As for water in its solid form, approaching it from a sovereignty lens complicates its legal regulation as different legal regimes apply to the different regions and spaces where ice forms (41). For this reason, several sources of freshwater have remained unregulated by international water law. As an example, glaciers are regulated under the UNWC only to the extent that they form part of a transboundary river 'system', whereas 'fossil glaciers' which do not flow into a river are not legally regulated (even though they often traverse international boundaries). In other words, international water law only recognises glaciers as an accessory attached to the international hydrographic system through the water cycle (46). This plurality in the conception of the nature of water rights at the inter-State level complicates efforts to devise legal norms and principles to regulate the uses of fresh water globally.

A second theme that emerges in *Fresh Water in International Law* is the interaction between international human rights law, on the one hand, and international investment law, on the other, in relation to fresh water. Boisson

de Chazournes addresses these two areas of law in two discrete chapters titled 'Humanization of the Law Applicable to Freshwater' (chapter 5) and 'Economization of the Law Applicable to Fresh Water' (chapter 3). Although these chapters indicate that there is some overlap in the application of these different areas of law to the use of fresh water (156), more can be done to highlight the intersection between them.

Boisson de Chazournes states, rather optimistically, that recent developments have witnessed the 'emergence and consolidation of a right to water' (6). She highlights that the law relevant to the management of fresh water - initially conceived in the context of inter-State relations – is increasingly concerned with how a State manages and distributes water within its own boundaries. Specific global and regional instruments, such as the 1997 UNWC, the transboundary aquifers Draft Articles and the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes[6] prioritise vital human needs over other uses of a watercourse (147). The UN General Assembly and Human Rights Council reaffirmed the human right to water, which includes access to safe drinking water and sanitation (149). Boisson de Chazournes states that although this right has been recognised, it suffers from ineffective implementation (153). Throughout this discussion, however, the normative challenges to the right to water are underemphasised. The right to water is not explicitly recognised in the 'International Bill of Rights', and is only mentioned briefly in the context of adequate living conditions under article 14(2) of the Convention on the Elimination of Discrimination Against Women and in the context of the right to health under article 24(2) of the Convention on the Rights of the Child. Although the Committee on Economic, Social and Cultural Rights has issued General Comment 15, which recognises the human right to water as derived from the rights to an adequate standard of living and highest attainable standard of health, placing the 'right to water' under the rubric of economic, social and cultural rights allows States to construe it as a right that is to be progressively realised.[7] These challenges are not apparent in Boisson de Chazournes' analysis.

The 'right to water' seems, at first blush, to be fundamentally at odds with the concept of 'privatization' of water services. It is in this area that the intersection between international human rights law and international investment law in the regulation of fresh water is particularly prominent. In investment disputes,

[6] Adopted 17 March 1992, entered into force 6 Oct 1996, 1936 UNTS 269

[7] See H L Bray, 'ICSID and the Right to Water: An Ingredient in the Stone Soup' (2014) 29(2) *ICSID Review* 474, 477.

States often try to justify particular measures against investors through an alleged conflict between a State's human rights obligations and its obligations under a bilateral or regional investment treaty. ICSID tribunals have repeatedly found, however, that measures to protect the ecology or to respect the human right to water do not trump a host State's investment obligations.[8] Since 2006, and in response to a dispute regarding the distribution of water and sewage services, amicus curiae have been allowed in proceedings before ICSID. This indicates a growing recognition of the weight of public interest concerns in water-related disputes (221-223).

A multiplicity of other fora provide judicial remedies in cases of the violation of the right to water. The Inter-American Court for Human Rights, for example, has enforced the right to water of indigenous peoples' under the right to property and the right to life (175, 229-230). Other regional human rights mechanisms have also addressed the right to water 'through a teleological interpretation of [their] constitutive instruments' (228), effectively stretching the limits of their jurisdiction to cover water-related disputes. In addition, States are increasingly resorting to the International Court of Justice and to inter-State arbitration under the auspices of the Permanent Court of Arbitration to resolve water-related disputes. This has not yet lead to conflicting or incoherent jurisprudence. In any case, Boisson de Chazournes argues that potential conflicts could be mitigated through resort to principles such as *lis pendens*, *res judicata* and forum *non-conveniens* (246).

Aptly titled 'Looking Ahead', the eighth and final chapter of *Fresh Water in International Law* pulls together all the themes discussed in the previous chapters, taking a novel approach to the regulation of fresh water as an integrated whole rather than through the prism of different areas of international law. Boisson de Chazournes accomplishes this well, exposing the multifaceted nature of water governance and highlighting the importance of interdisciplinary approaches. By thoroughly analysing all aspects of the international regulation of water, including recent developments that have eroded the state-centricity of this regulatory regime, *Fresh Water in International Law* is an important resource for all those seeking to understand the fundamentals of what might be termed 'international water law'.

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[8] See e.g. Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic, ICSID Case No ARB/03/19, Decision on Libaility (30 July 2010) para 252; Azurix Corp v Argentine Republic, ICSID Case No ARB/01/12 (14 July 2006), para 261; Metaclad v United Mexican States, ICSID Case No ARB(AF)/97/1, Award (30 August 2000), para 103-111.

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The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital. By Kate Miles. Cambridge University Press, Cambridge, 2013. 464 pp. £75.00 (hardback).

The success of history writing is judged, like any other social activity, in terms of its intention, its performance and its effects. The intensity of the conceptual debate about the writing of history, which continues to the present day, reflects the historian's understanding of the social significance of history writing. To defend one's own idea of history writing is to defend the history that one writes. For a historian to modify a society's idea of its own past is to succeed in justifying that historian's own idea of history.

Allott, 'International Law and the Idea of History'[1]

As any legal discipline matures, its students begin to realize that the road travelled may reveal as much about their subject as the road ahead. This is as much the case for international law as for any other legal system. As a relatively young field, international law's attempts to grapple with its own origin myths have materialized relatively recently[2] but what the history of international law lacks in terms of its own history it has made up for in explosive growth.

One sub-discipline that has thrived through international law's engagement with its past has been the so-called Third World Approaches to International Law (*TWAIL*). Broadly speaking, TWAIL functions as a 'broad dialectic of opposition to international law' that seeks to expose its subject as 'a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the

[1] Philip Allott, 'International Law and the Idea of History' (1999) 1 *JHIL* 1, 16.

[2] The leading periodical in the field, the *Journal of the History of International Law* was only founded in 1999. This may be compared with, *inter alia*, *Revue d'Histoire du Droit* (founded 1918), the *American Journal of Legal History* (founded 1957) and the *Journal of Legal History* (founded 1980). However, sustained calls for further research into the history of international law were made by leading international lawyers as early as 1902: see e.g. Lassa Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 *AJIL* 313, 313–14. More generally, see Martti Koskenniemi, 'A History of International Law Histories', in B Fassbender & A Peters (eds), *The Oxford Handbook of the History of International Law* (2012) 943.

Third World by the West'.[3] Whatever one's views as to the merits of such a polarizing thesis, even the most enthusiastic international lawyer must admit that, to a certain degree, international law has been arranged around a monolithic Eurocentrism and that Western diplomatic and mercantile priorities—as asserted through a combination of guile, incentive and overwhelming force—form the basis of the system as we know it.

This realization is instantiated in the book presently under review. In *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*, Kate Miles does not identify as a TWAIL scholar *per se*, but uses the revelations provided by TWAIL figures such as Antony Anghie,[4] and specialists in colonial legal studies such as Lauren Benton,[5] to shine a bright light on one of the most rapidly developing areas of international law, the law of international investment. Since the early 1990s and the signal jurisdictional decision of the tribunal in *Southern Pacific Properties (Middle East) Ltd v Egypt* (the original 'arbitration without privity' to quote Jan Paulsson[6]) the modern regime of international investment law has been one of the dominant subjects within international law. Hundreds of orders, interim awards and awards have been handed down by investment arbitration tribunals, rendering it one of the most successful international dispute resolution systems of all time, whilst at the same time raising potent questions about sovereignty, globalization and diplomatic protection. But despite this fluorescence, the history of the international investment regime has been the subject of relative neglect. True it is, scholars such as Muthucumaraswamy Sornarajah[7] and Zachary Douglas[8] have attempted to uncover the presumptions and foundations of the system of investment protection, but there has not yet been any book length work that traces the origins of that system beyond the pre-existing system of diplomatic protection.

Part I of the present volume addresses precisely this topic, and does so in impressive detail and with a command of the historical materials on offer. Miles' work is firstly remarkable in tracing the origins of the present system of

[3] Makau Mutua, 'What Is TWAIL?' (2000) 94 *ASIL Proc* 31.

[4] Antony Anghie, *Imperialism, Sovereignty and the History of International Law* (2004).

[5] Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (2002); Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (2010).

[6] Jan Paulsson, 'Arbitration Without Privity' (1995) 10 *ICSID Rev—FILJ* 232.

[7] M Sornarajah, *The International Law on Foreign Investment* (3rd edn, 2010) ch 1.

[8] Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 *BYIL* 151.

investment law into the Early Modern Period (chapter 1). It was there, in the 17th century, that the interests of certain European states coincided with that of the mercantile classes to create the great trading companies of the East and West Indies. At that time, these states began to shape international law as to protect these companies (33–47). Notwithstanding the fact that the *Alabama* claims between the United States and Great Britain was the first 'true' international arbitration, the early history of this form of dispute settlement is very much one intended to safeguard the interests of Western investors in the developing world—witness, *inter alia*, the *Paraguay Navigation Company* claim, the *Finlay* arbitration, the *Delagoa Bay Railroad* arbitration and, of course, the Venezuela Mixed Claims Commissions (47–69). One minor omission in this respect is the decision of President Huber of the Permanent Court of International Justice in the *Sino-Belgian Treaty* case and the Chinese response thereto,[9] which would have been a useful addition to Miles' discussion of unequal treaties (25–28).

From this point, Miles examines the evolution of investment law in a changing political environment (i.e. in the context of domestic politics) and the challenges that such developments posed to the nascent system of investor protection (chapter 2). Agrarian reform in the Soviet Union and Mexico (74–7) is examined, followed by a discussion of the wider implications of the decolonization process that emerged from the Second World War (78–93). Interestingly, Miles situates decolonization in the context of a wider conversation between North and South, with Southern demands for regulatory autonomy met with legal (79–84) and institutional (84–93) responses by the North in a bid to reinforce foreign investor protections. The end point of this phase, of course, was the conclusion of the ICSID Convention[10] in 1965, which provided in that institution the cornerstone of modern investment arbitration.

Following this, Miles discusses the legal proposals put forward by the New International Economic Order (e.g. permanent sovereignty over natural resources and the Charter of Economic Rights and Duties of States) in a bid to meet developed economies on their own terms (93–100). The chapter closes with a discussion of the modern phenomena of social movements and grassroots activism emerging to challenge the foreign investment regime (100–119), with particular attention given to environmental groups.

By taking such a long view of the matter, Miles gives life to the claim—often

[9] Further: Jerzy Stucki, *Interim Measures in the Hague Court: An Attempt at a Scrutiny* (1983) 35ff.

[10] Convention on the Settlement of the Investment Dispute between States and Nationals of Other States, 18 March 1965, 575 UNTS 159.

attributed to Mark Twain, though there is no evidence he ever said it—that 'history does not repeat itself; but it does rhyme'. Her historical analysis of investor-state relations exposes a dialogue between different interest groups and the multitude of ways in which attempts by developing states to reign in the system of investment protection imposed upon them (to a greater or lesser extent) by the West were met with an institutional and legal response designed to reinforce that system. At the same time, however, one is conscious of the fact that the developing world actively courted—or was even reliant upon—foreign investors and their capital. The result is similar to the response of the famed riverboat gambler William 'Canada Bill' Jones (*c.* 1840–1880) on being told that the faro game in which he was playing in Baton Rouge, Louisiana (although some accounts place him in Cairo, Illinois) was rigged: 'I know it's crooked, but it's the only game in town'.[11]

That being said, Miles does not address two of the more recent developments in this respect that may, in time, qualify as game-changers. First is the so-called 'backlash' against investment arbitration that has led several Latin American states—Bolivia, Ecuador and Venezuela—to attempt to exit the ICSID system. A second, related development is the recent series of cases brought against developed countries by investors that has caused those states to question their own participation in the system, e.g. the political handwringing prompted in Australia by the initiation of the *Philip Morris Limited v Australia* arbitration under the Hong Kong–Australia BIT.[12] It should be noted, however, that such an omission is entirely understandable given Miles' date of publication, which arrived in the midst of the unfolding crisis—and this notwithstanding, she still mentions the broad parameters of the dispute (185–186).

All of the above encompasses Part I of the book under review. Parts II and III, however, deal with more present concerns. Part II concerns questions of contemporary interaction between investors and states, particularly in the context of environmental disputes, and further discuses how these interactions replicate the patterns of engagement seen in Part I. Chapter 3 examines points of friction between these two groups, including BHP's activities in Papua New Guinea (135–140), Texaco's operations in Ecuador (140–146), the catastrophe engineered at Bhopal through the negligence of Union Carbide (146–150) and the investor-led response to attempts by developing states to better regulate

[11] Elkan Allan & Hannah Mackay, *The Poker Encyclopedia* (2007) 78.

[12] See e.g. Albert Monichino & Alex Fawke, 'Australia and the Backlash Against Investment Arbitration' (2013) 19 *Australian ADR Reporter* 28.

environmental risk through the framing of such regulation as a form of indirect expropriation, a breach of fair and equitable treatment or a breach of national treatment (154–178). It also examines the phenomenon of 'regulatory chill' that this response has supposedly engendered (178–187). Finally, the chapter examines a new frontier on which this dialogue may again be replicated, the interaction between investment law and international efforts to combat climate change (187–209). Chapter 4, conversely, covers what Miles refers to as emerging points of 'synergy' between these two groups, most significantly through soft law instruments such as the Corporate Social Responsibility (*CSR*) movement (215–239) and sustainable finance initiatives (239–286).

In Part III, Miles turns her attention towards the future of international investment law, discussing how the historic inequalities identified in Part I and the progress through soft law instruments seen in Part II might be leveraged so as to generate substantive change to the present system of investor-state arbitration. Miles examines the steadily accelerating transfer of legal rules between different areas of international law (293–331) the rise of global administrative law, so-called (331– 338) and the plethora of non-state actors entering the arena (338–346), concluding that each of these must be utilized if the 'patterns of imperialist origins' contained in the DNA of investment law are to be addressed. She also examines other strides towards equality that have been taken in treaty drafting, unpacking the IISD Agreement for Investment for Sustainable Development (351–367), the 2008 Norwegian Model BIT (367–368) and a proposed codification of the evolving principles of CSR in a multilateral convention (368–372). Other suggestions proffered include reform of the existing system of dispute settlement in investor-state disputes, encompassing increased standards of transparency (373–376), rules for the avoidance of conflicts of interest by arbitrators (376–378) and the introduction of an appellate system for the complete review of investment arbitration awards (to the extent that ICSID *ad hoc* Committees did not already provide such a service) (378–382).

In sum, Miles' work is remarkable. But the reviewer feels a nagging sensation, expressed reluctantly, that it is also structurally confused and that the volume's disparate parts do not speak to each other as much as one would like. This is instantiated by the observation that the book's title is only really explored in Part I, and appears to be of tangential significance at best in the remainder of the volume. If Miles' aim was to highlight the deep inequalities that exist in modern investment law and to use these as a base from which to call for wide reaching reform, then it might be thought that using a third of the book to detail the former message somewhat distracts from the balance of the volume

that addresses the latter, as the inequalities in question are not exactly a secret. If, alternatively, her aim was to catalogue in unprecedented detail the enormity of these inequalities, then a lengthy call for reform and an assessment of its possibilities is also distracting. The reviewer gets the sense that Parts II and III formed the planned core of the project when it was first laid down, but that on commencing her research (which earlier formed the basis of her doctoral dissertation) Miles became enraptured by the historical aspects of her topic, producing an extended section of such insight and novelty that it nearly took over the book by reverse. The natural consequence of this mission creep is that Miles has in fact written two books—both equally elegant and meritorious—and then attempted to combine them. Whilst the results remain impressive, the joinery is less than seamless.

But, structural quibbling aside, Miles' work provides a fascinating insight into both the historical origins of investment law and the road of reform that lies ahead. The result is full of light and shade—light in the sense that Miles sees clearly the steps that must be taken to revive the perceived respectability of investment law before the backlash causes further damage, and shade in the sense that Miles (perhaps more than any other scholar) understands that the origins of the discipline in gunboat diplomacy have written a measure of inequality into the very marrow of the field, such that removing entirely it may kill the patient. This notwithstanding, Miles' solutions are eminently sensible. She does not propose—as some scholars and politicians have done—junking the present system and starting again, but rather identifies certain processes that are already underway in international law that might be guided so as to level the playing field, as well as several more ambitious reforms that might be possible once the necessary level of political will is demonstrated. In so doing, Miles is not proposing the second coming of Carlos Calvo, but calls for investors and states to work together to the ultimate benefit of both and with an understanding of what has come before. Seen in such a way, *Origins of International Investment Law* is more than an accounting of its subject's past—it further seeks to guarantee its relevance into the future. As such, it is recommended reading for those on both sides of the investor-state divide who see the best days of the field as yet to come.

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FEWER COMPLAINTS, MORE SATISFACTION: *CYPRUS V. TURKEY*

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Keywords
European Court of Human Rights, Inter-State Complaint Procedure, Just Satisfaction

1 Introduction

On 12 May 2014, the European Court of Human Rights (*ECtHR* or *the Court*) awarded, for the first time in its history, just satisfaction under Article 41 of the European Convention on the Protection of Fundamental Rights and Freedoms[1] (*ECHR* or *the Convention*) within the context of an inter-state complaint procedure under ECHR Article 33. In the case of *Cyprus v Turkey 2014*,[2] the Court's Grand Chamber ruled that Turkey has to pay EUR 90 million to Cyprus in respect of the non-pecuniary damage suffered by the relatives of 1,456 missing persons (€30 million) as well as the enclaved Greek Cypriot residents of the Karpas peninsula (€60 million). The sums are to be distributed by the Cypriot Government to the individual victims under the supervision of the Committee of Ministers of the Council of Europe (*CoM*).

The decision of the Court is based on its principal judgment on the merits of 10 May 2001 (*Cyprus v Turkey 2001*). The Grand Chamber found numerous violations of obligations of the ECHR and its protocols by Turkey in regard to the above mentioned groups, arising out of: the Turkish military operations in the northern part of the island in July and August 1974; the continuing division

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[1] European Convention on the Protection of Fundamental Rights and Freedoms, 04 November 1950, ETS No 5.

[2] *Cyprus v Turkey (just satisfaction)* [2014] ECtHR 25781/94.

of the territory of Cyprus; and the activities of the so-called 'Turkish Republic of Northern Cyprus'. In its 2001 judgment, the Court had held unanimously that the application of ECHR Article 41 was not ripe for deliberation and had adjourned consideration of the issue accordingly.[3] The procedure concerning the execution of the principal judgment is currently pending before the CoM.

One might argue that the CoM's obvious difficulty tackling this politically delicate situation encouraged the Court to take this new step. The distribution mechanism in the operative part of the judgment puts a certain pressure on the CoM and can be understood as a shift of power to the ECtHR. Thus, *Cyprus v Turkey 2014* not only clarifies the range of application of ECHR Article 41, but also has strong implications for the Convention system's institutional balance. Whether it really marks the beginning of 'a new era in the enforcement of human rights'[4] remains to be seen. It certainly adds a new item to the Court's tool kit, not only from an institutional point of view, but also in the context of the workload the ECtHR faces.

Several questions as to the applicability of ECHR Article 41 in inter-state proceedings in general, and in the specific case at hand, fell to the Court to be decided. This article focuses on the innovative statements in the judgment and relevant separate opinions, and seeks to put these in a broader perspective.

2 Applicability of ECHR Article 41 in Inter-State Cases under ECHR Article 33

2.1 Remedies under the Convention

Under the Convention, the ECtHR has no explicit competence to order remedial measures. The Court has repeatedly emphasized that its judgments are essentially declaratory in nature,[5] confined to legal findings of observance or breach of the Convention. Under ECHR Article 46(1) (in conjunction with ECHR Article 19), the High Contracting Parties undertake to abide by the Court's final judgments in any case to which they are parties. ECHR Article 46(2)–(4) confers the supervision of the execution of judgments upon the CoM. According to ECHR Article 41, however, the Court may, under certain circumstances, award just

[3] *Cyprus v Turkey (merits)* [2001] ECtHR, 25781/94, operative part VIII.

[4] *Cyprus v Turkey (just satisfaction)* [2014] ECtH, 25781/94 (Joint Concurring Opinion of Judges Zupančič, Gyulumyan, David Thór Björgvinsson, Nicolaou, Sajó, Lazarova Trajkovska, Power-Forde, Vučinić and Pinto De Albuquerque).

[5] *Verein gegen Tierfabriken Schweiz v Switzerland* (*No 2)* [2009] ECtHR 32772/02, para 61.

satisfaction to the injured party. This is the case if the Court finds a violation of the Convention or its additional Protocols, and if the internal law of the High Contracting Party only provides for partial reparation. From a historical view, it should be noted that former ECHR Article 50 (now ECHR Article 41), as well as former ECHR Article 24 (now ECHR Article 33), have been—unlike the individual complaint procedure—compulsory provisions of the Convention from the time of its entry into force.[6]

As a general principle, only an obligation of result follows from the duty to abide by the final judgments. It is up to the state to decide how the judgment is executed as long as the violation is ended and the consequences are erased. These rather narrow effects have been broadened by the Court to enhance its effectiveness. Should the Court classify the circumstances as appropriate, it would indicate (or even order) individual or general measures to provide redress.[7] Furthermore, the Court developed the pilot judgment procedure based on ECHR Article 46(1) to tackle systemic problems in a state's legal system.[8] The concept of a more extensive interpretation of ECHR Article 41 therefore follows and expands upon an already established path.

2.2 Applicability of ECHR Article 41 to Inter-State Complaint Procedures under ECHR Article 33

The Court firstly recalls, when examining the applicability of ECHR Article 41 to inter-state complaint procedures under ECHR Article 33,[9] that until now it had dealt with this issue only once in the case of *Ireland v United Kingdom*.[10] However, there was no necessity to explore this question in that case as the applicant government had *expressis verbis* declared not to raise any claims for monetary compensation.[11] The Court then moves to a historical approach, reiterating that the general logic of the rule of ECHR Article 41 was not substantially different from the logic of reparations in public international law.[12]

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[6] ECHR Article 41 differs by wording, yet not by substance from former ECHR Article 50.

[7] D Harris, M O'Boyle, E Bates & C Buckley, *Law of the European Convention on Human Rights* (2nd edn, 2009) 862.

[8] See e.g. D Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* (2011) 167.

[9] *Cyprus v Turkey (just satisfaction)* [2014] ECtHR 25781/94, paras 39 ff.

[10] *Ireland v United Kingdom* [1978] ECtHR 5310/71.

[11] Ibid, para 245.

[12] *Cyprus v Turkey (just satisfaction)* [2014] ECtHR 25781/94, para 40.

2.2.1 ECHR Article 41 as *Lex Specialis*

While the Court acknowledges the specific nature of ECHR Article 41 as *lex specialis* in relation to the general principles of international law,[13] it nevertheless invokes general rules on international liability, namely the right to adequate reparation for the breach of a commitment undertaken by a government;[14] the right of an 'injured state' to obtain compensation from the state that has committed an internationally wrongful act for the damage caused by it;[15] and the power of an international court or tribunal with jurisdiction in respect of a claim of state responsibilities to award compensation for the damage suffered.[16] It does so by means of interpreting[17] the provision of ECHR Article 41 and its applicability to the present inter-state complaint procedure.

As Koskenniemi has pointed out in the ILC 'Report on the Fragmentation of International Law',[18] there are two ways of understanding the rule of *lex specialis.* A special rule may be either considered an application of a common standard in a given circumstance or it may be considered a modification, setting aside or overruling of the latter.[19] While it can be stated that the law of state responsibilities in principle remains applicable to human rights treaties,[20] there are in general, and regarding the ECHR in particular, certain differences to the concept of remedies in international law. The special character of an international obligation undertaken in a human rights instrument, such as the ECHR, is distinct from ordinary treaties in international law, which merely set out reciprocal rights and obligations between the contracting states.[21] By

[13] Ibid, para 42.

[14] *Factory at Chorzów* (1928) PCIJ Ser A No 17, p 17.

[15] *Gabčíkovo-Nagymaros Project* (*Hungary v Slovakia*), ICJ Reports 1997 p 7, 81.

[16] *Fisheries Jurisdiction Case* (*Federal Republic of Germany v Iceland*), ICJ Reports 1974 p 175, 32.

[17] Cf H Birkenkötter, 'Some Reflections on the ECtHR's First Award on Inter-State Satisfaction' (*Verfassungsblog,* 15 May 2014) <http:// www.verfassungsblog.de/en/reflections-ecthrs-first-award-inter-state-atisfaction/#.U_GtnoCSyEw> [accessed 18 August 2014]; but cf H P Aust, '*Der EGMR als regionaler IGH?* Entschädigung und Bestrafung im Staatenbeschwerdeverfahren' (*Verfassungsblog,* 14 May 2014) <http://www.verfassungsblog.de/der-egmr-als-regionaler-igh-entschaedigung-und-bestrafung-im-staatenbeschwerdeverfahren/#.U_GwAoCSyEw> [accessed 18 August 2014].

[18] M Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, ILC *Ybk* 2006 II(2); cf UN Doc A/CN.4/L.682, 35, para 56.

[19] Ibid, para 57.

[20] D Shelton, *Remedies in International Human Rights Law* (2nd edn, 2005) 50.

[21] W Karl, 'Just Satisfaction in Art 41 ECHR and Public International Law: Issues of Interpretation and Review of International Materials', in A Fenyves et al (eds.), *Tort Law in the Jurisprudence of*

contrast, the ECHR is focused on the rights of individuals. Under the ECHR, the inter-state complaint procedure constitutes no exception. This tool is not traditionally seen as serving a claimant of reciprocal rights under the ECHR in pursuance of their individual national interest, but rather as a method of collectively guaranteeing the compliance with the rights and freedoms set forth in the instrument and its additional protocols.[22]

Article 55 of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts[23] expresses that, to the extent that special rules and procedures exist, these rules override the general rules of international law. In the commentaries, ECHR Article 41 is expressly mentioned as an example of such a rule of *lex specialis*.[24] However, it is the special rule that determines to what extent the general rule is displaced[25] and a full derogation of general legal consequences of wrongful acts—in the sense of the concept of 'self-contained regimes'[26]—cannot arise from the ECHR.[27] The Court has repeatedly highlighted that:

> [the provisions of the Convention] cannot be interpreted and applied in a vacuum. Despite its specific character as a human rights instrument, the Convention is an international treaty to be interpreted in accordance with the relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties (…)[28]

Matters of treaty interpretation are governed by the Vienna Convention on the Law of Treaties[29] (*VCLT*), namely Articles 31–33, which are considered to

the European Court of Human Rights (2011) paras 4–8.

[22] *Austria v Italy* [1961] 788/60, RDC, (1962) 4 *ECHR Ybk*, 116, 138.

[23] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Ybk* 2001/II(2), 26, Art 55.

[24] Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Ybk*, 2001/II(2), 31, 140, Art 55, para 3.

[25] Karl, above n 21, para 4/50; see also *Amoco International Finance Corporation v Iran* (1987-II) 15 Iran-US CTR 222.

[26] Cf B Simma, 'Self-contained regimes' (1985) 16 *NYIL* 111, 117, 129ff.

[27] Karl, above n 21, para 4/53.

[28] Cf *Cyprus v Turkey (just satisfaction)* [2014] ECtHR 25781/94, para 23; see also M Villiger, 'Articles 31 and 32 of the Vienna Convention on the Law of Treaties in the Case-Law of the European Court of Human Rights', in J Böhmer et al (eds), *Internationale Gemeinschaft und Menschenrechte: Festschrift für Georg Ress zum 70. Geburtstag* (2005) 317ff (with further references).

[29] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

be declaratory of customary international law. VCLT Article 31(1) stipulates that treaty terms are to be interpreted in accordance with their ordinary meaning in their context and in the light of the treaty's object and purpose. According to VCLT Article 31(3)(c), relevant rules of international law applicable in the relations between the parties shall be taken into account together with the context.

2.2.2 Interpretation of ECHR Article 41

The Court applies the VCLT rules of interpretation when elucidating its understanding of the terms 'injured party' in ECHR Article 41. It first reiterates, by means of grammatical interpretation, that the term 'party' has to be understood as one of the actual parties to the proceedings before the Court. The Court sets aside the argument of the respondent government that the wording of Rule 60(1) of the Rules of Court implies that only individual applicants are entitled to request the award of just satisfaction, for this provision is of lower hierarchical value. Furthermore, Rule 60(1) only reflects the obvious reality that, until now, awards have been granted solely to individual applicants to the Court. The Court then distinguishes the present case from the aforementioned traditional understanding of the main purpose of the inter-state complaint procedure by outlining that, *in casu,* the applicant government denounces violations by another contracting state of the basic human rights of its nationals. Here the Court draws parallels between the present case, the individual-complaint procedure under ECHR Articles 34 ff, and the instrument of diplomatic protection as part of the general law on state responsibility. The Court cites Articles 1 and 19 of the Draft Articles on Diplomatic Protection[30] as developed by the International Law Commission and refers to the International Court of Justice's judgment in the *Diallo*[31] case.[32]

Diplomatic protection can be described as 'the procedure employed by the state of nationality of the injured person to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted.'[33] It is questionable whether or not this reference is well founded.[34] Under traditional

[30] Draft Articles on Diplomatic Protection, ILC *Ybk* 2006 II(2), cf UN Doc A/61/10, 16, Arts 1 and 19.

[31] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Preliminary Objections, ICJ Reports 2007 p 582, 599; *in passim,* Compensation, ICJ Reports 2012 p 324, 344.

[32] *Cyprus v Turkey (just satisfaction)* [2014] ECtHR 25781/94, para 46ff.

[33] Draft Articles on Diplomatic Protection, ILC *Ybk* 2006 II(2), cf UN Doc A/61/10, 21, 24, para 2.

[34] See I Risini, 'Can't get no just satisfaction? The Cyprus v. Turkey judgment of the European Court of Human Rights (*CJICL Blog,* 23 May 2014) <http://cjicl.org.uk/2014/05/23/cant-get-just-satisfaction-cyprus-v-turkey-judgment-european-court-human-rights/> [accessed 18 Au-

international law, the instrument of diplomatic protection is perceived—by legal fiction—as asserting the right of the applicant state to ensure, in the person of its subjects, respect for the rules of international law.[35] However, today it is understood to also assert the rights of a state's injured nationals.[36] Nevertheless, the system of diplomatic protection leaves it up to the respective state of nationality to exercise the protection; it is a right of the state, and although the individual is directly affected, he or she only plays an indirect role.[37] This contrasts with the special nature of the Convention as a human rights instrument, containing rights for the individual that can be invoked both individually and—after the exhaustion of local remedies—directly by any person claiming to be a victim of a wrongful act imputable to a state party. Therefore, under the Convention there is no need for the legal fiction still necessary in general international law for the claims of diplomatic protection.

Here it could be argued that the *lex specialis* rule applies insofar as to derogate from this legal fiction. Under the Convention, it is the individual that is injured by a violation of one or several Convention rights and should therefore, under the Convention, be the beneficiary. Interestingly, however, the Court does not mention Article 48(1)(a) of the ILC Draft Articles on Responsibility of States[38] in this context, which provides that a state other than the injured state is entitled to invoke the responsibility of another state, if the 'obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group'. This rule can be read as a right to exercise protection on behalf of an injured individual who is not a national. It would, therefore, cover the aforementioned traditional understanding of the instrument of inter-state complaint procedures under the Convention as a tool of collective guarantee, which is not limited to invoking rights of the applicant states' nationals. Combined with the fact that the Court speaks of the individual as 'primarily' being injured, it could be speculated that the Court supports a 'Vattelian-approach' regarding the question of applicability of ECHR Article 41 to inter-State cases: Vattel had argued that 'whoever ill-treats a citizen indirectly

gust 2014].

[35] Cf V Künzli, 'As If: The Legal Fiction in Diplomatic Protection' (2007) 18 *EJIL* 37, 38 ff.

[36] Draft Articles on Diplomatic Protection with commentaries, ILC *Ybk* 2006 II(2), cf. UN Doc. A/61/10, p 20, 25, para 3; C F Amerasinghe, *Diplomatic Protection* (2008) 73 ff.

[37] J Dugard, 'Diplomatic Protection', in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2009) MN13, 68.

[38] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Ybk* 2001/II(2), 26, Art 48.

injures the State, which must protect that citizen.'[39] As will be shown, when applying Article 41 in the present case, the Court rejects such a reading of the decision.

3 Application in the Present Case

Once the question of applicability in general was answered, it was up to the Court to establish the criteria according to which just satisfaction can be awarded in an inter-state case. Resorting to an almost classic technique of international tribunals, the Court does not determine precise and specific requirements, but states that this has to be assessed on a 'case-by-case basis'.[40] This certainly allows for adjustments and further developments of more or less any kind; on the other hand, a lot of academic work will be needed as there are only very few inter-state cases.

The Court holds that there can be no automatic award of just satisfaction. As to the case before it, the ECtHR refers to the given situation and takes into account:

> [*I*]nter *alia*, the type of complaint made by the applicant government, whether the victims of violations can be identified, as well as the main purpose of bringing the proceedings insofar as this can be discerned from the initial application to the Court.[41]

Obviously, this wording leaves a wide discretion to the Court. A closer analysis of these criteria illustrates that the type of complaint the Court refers to alludes to the difference between general issues like systemic problems or administrative practices on the one hand, and the concrete violation of Convention rights by the respondent state on the other. In the former category, the Court indicates that it might be inappropriate to award just satisfaction.[42] The latter can be compared to situations resulting in individual complaints and, accordingly, the application of ECHR Article 41 is well founded.[43] The rationale supporting this view is basically that these proceedings serve as a replacement

[39] E de Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle* vol I, Book II (1758) para 71.
[40] *Cyprus v Turkey (just satisfaction)* [2014] ECtHR 25781/94, para 43.
[41] Ibid.
[42] Ibid, para 44.
[43] Ibid, para 45.

of one or more individual complaints. This might be a hint towards the real background of the judgment.

The identification of the victims of the violation is a convincing criterion. When inter-state complaint procedures are aimed at the award of just satisfaction, they only serve as a placeholder or a vehicle to facilitate individual protection that normally would stand on its own.[44] It is not directed at any loss by the applicant state; it is only intended to be used to make good the losses of individuals. Therefore, the Court rules that while the sum awarded as damages is granted to the applicant state, the amount of money depends on the number of individuals and the violations they suffered. What is more, the applicant state is obliged to ensure transfer of the respective amount to each individual through an effective mechanism.[45] This feature can be found in Article 19 of the Draft Articles on Diplomatic Protection, too, but there it is only formulated as a recommendation and not an obligation. Here the Court rejects the aforementioned Vattelian-approach and stresses the idea that when just satisfaction is awarded as a result of inter-state complaint procedures, the applicant state merely plays the role of a transmission belt for what could as well be proceedings started by individual persons.[46] This stands in line with the special character of the ECHR as an effective human rights instrument as well as the subsidiarity of the Convention system. The latter is underlined by placing the burden on the applicant state in relation to the individualisation of the victims and the specification of the respective sum to be distributed.

This part of the Court's reasoning could be considered flawed to a certain extent. If the just satisfaction that is claimed represents the aggregate satisfaction sums for all victims, then the number of victims must be known. It is undisputed that, in the present case, the actual figures are not clearly established and the Court held that awarding a lump sum would be appropriate. However, this result seems acceptable as the amount of damages under ECHR Article 41 is usually fixed on an equitable basis.[47] Extending this equitable approach without establishing the exact number of beneficiaries does not put the whole idea into question, as it has never been understood as a mathematically precise task rather than an approximation to what could be deemed as 'just'. On the contrary, it fits well

[44] Ibid, para 43.
[45] Ibid, paras 58ff.
[46] Ibid, para 46.
[47] Cf F Bydlinski, 'Methodological Approaches to the Tort Law of the ECHR', in A Fenyves et al (eds), *Tort Law in the Jurisprudence of the European Court of Human Rights* (2011) paras 2/174 ff with further references to the case law.

with the Court's established technique of determining the amount awarded in a discretionary manner.

As regards the third yardstick against which the applicability of ECHR Article 41 is measured, namely the question of the main purpose of bringing the proceedings, curiously the Court does not further elaborate on it. Although it remains unclear what this means exactly, it seems to indicate the introduction of some subjective element, or the construction of a 'will' of the applicant state. Besides any explicit pronouncements during the course of the proceedings, this will be very difficult to detect and establish. It can be understood as a reference to a *bona fide* element: under certain circumstances, states should be prevented from raising just satisfaction claims that appear *prima facie* justified.

4 Further Analysis

4.1 Punitive Damages?

The concurring opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić, provokes an even deeper consideration of what the underlying aim of just satisfaction in inter-state cases is or should be. Is it about making good on incurred losses or is there also an element of prevention and punishment? This question leads to the idea of punitive damages and whether the Court is free to take into account aspects going beyond a narrow interpretation of what just satisfaction can be. For the two concurring judges, the 'punitive nature of this compensation is flagrant'.[48] They make a strong effort to illustrate this argument with extensive theoretical reasoning. Although it is debatable whether or not punitive damages are an acceptable tool for the Court, from our point of view it does not seem to be the case that the amount awarded in the judgment has any punitive character. As stated earlier, the sum has been based on considerations of equity.

According to ECHR Article 41, the competence of the Court to award just satisfaction solely applies where the internal law of the High Contracting Party concerned allows only for partial reparation. This means that just satisfaction is merely intended to serve as a tool for full reparation, i.e. to make good on losses suffered. Furthermore, the Court has consistently rejected claims for punitive

[48] *Cyprus v Turkey (just satisfaction)* [2014] ECtHR 25781/94 (Concurring Opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić) para 13.

damages.[49] Bearing in mind the innovation the judgment presents, it would not have been recommendable to take even more daring steps in expanding the competences of the Court as it might provoke adversarial reactions by the state parties without any compelling reason.

4.2 Tackling the Backlog of Cases through the Awarding of Just Satisfaction in Inter-State Complaint Procedures

4.2.1 Pilot Judgments

A dimension of the *Cyprus v Turkey 2014* ruling that could easily be overlooked is a certain similarity to the pilot judgment procedure as developed by the Court, on the invitation of the CoM, by interpretation of ECHR Article 46(1).[50] Pilot judgments allow systemic failures in a state's legal order in contravention of the Convention to be efficiently dealt with by using one individual complaint to decide on a larger number of parallel cases. Despite being more or less generally accepted both by scholars and practitioners, pilot judgments deviate from the principle of individual justice that pervades the Convention system. In an equivalent manner, the awarding of just satisfaction to a large number of victims in one single judgment that stems from a single inter-state procedure does not focus on the individual situations. By its statement that the victims must be identifiable, the Court ensures that the claims do not get out of hand, but still allows for a combined decision on numerous potential applications—in this case a figure of at least four digits.

4.2.2 Individual Claims on Similar Matters

Another interesting question tackled in this context is what the findings of the Court in its ruling on just satisfaction mean for potential and pending individual claims regarding the same matters. The Court had stated in the case of *Varnava et al v Turkey*[51] that ECHR Article 35(2)(b) and Article 37(1)(c) could not be applied, even though a judgment had been delivered in the inter-state case of *Cyprus v Turkey 2001*. The Grand Chamber founded its reasoning on a narrow approach to the principle of *res iudicata*, according to which not only identity of the merits

[49] *Akdivar et al v Turkey* [1996] ECtHR 21893/93, para 38; *Orhan v Turkey* [2002] ECtHR 25656/94, para 448.

[50] See Haider, above n 8, 134ff.

[51] *Varnava et al v Turkey* [2009] ECtHR 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90.

of the claim, but also of the parties introducing the dispute, is required for the matter to be considered substantially the same:

> It [would] therefore not be the case that by introducing an inter-State application an applicant government thereby deprives individual applicants of the possibility of introducing, or pursuing their own claims.[52]

This would clearly speak against an assumption of preclusion of individual claims. Interestingly though, the Court further elaborated this by reasoning that the findings in the inter-state application did not specify in respect of the individuals concerned.[53] It also took into regard that the Court has the competence in individual applications to issue just satisfaction awards for pecuniary and non-pecuniary damage suffered by individual applicants.[54] Therefore, it could not be said that the individual applications were precluded as they were considered to give rise to issues and outcomes differing from those of the inter-state case of *Cyprus v Turkey 2001*.[55] As this has substantially changed due to the ruling at hand, where the Court awards just satisfaction based on the fact that the individual beneficiaries are at least specifiable, the Court takes the foundation from this reasoning in *Varnava et al v Turkey*. One could therefore argue that because of the findings of the Court in the present ruling, potential claimants would possibly now be barred from filing their own applications. Those applications already filed could be struck out of the Court's list of pending cases. Insofar as applications of the aforementioned categories are based on the same factual circumstances, a new application would now have to be considered substantially the same as the matter that has already been examined by the Court (cf ECHR Article 35(2)(b)) or that has been solved (cf ECHR Article 37(1)(b)) as part of the inter-state procedure.

Similarities can be drawn to the case of *Koç et al v Turkey*, where a settlement between Denmark and Turkey had been reached and the Court struck the case out of the list.[56] However, it should be kept in mind that a reading like this would stand in contradiction with Article 16 of the ILC Draft Articles on Diplomatic Protection,[57] according to which:

[52] Ibid, para 118.
[53] Ibid, para 119; cf *Cyprus v Turkey (merits)* [2001] ECtHR 25781/94, para 133.
[54] Ibid, para 119.
[55] Ibid.
[56] [2002] ECtHR 40802/98.
[57] Draft Articles on Diplomatic Protection, ILC *Ybk* 2006 II(2), cf UN Doc A/61/10, 16, Art 16.

> The right of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles.

Against the background of the Court's findings in *Varnava et al v Turkey* and its workload,[58] however, an understanding in the former sense would not only be justifiable from a legal point of view, but also a very welcome, if not necessary, development in order to ensure the effectiveness of the Convention system. By awarding just satisfaction to a large number of individuals through the vehicle of one single judgment based on ECHR Article 41, the Court might move away from an individual approach to just satisfaction to a more constitutional one.[59] This is consonant with the Court's request to the Cypriot Government to set up an effective mechanism for the distribution of the awarded just satisfaction.[60] In the future, potential individual claims for satisfaction would then have to be addressed to the Republic of Cyprus, as the matter of just satisfaction is shifted to the national level. This is an outcome that is surely in harmony with the wording of ECHR Article 41, which refers back to the national legal order.[61] The reaction of the Court could therefore be seen as standing in line with other recent measures in respect to reducing its caseload.

4.3 Cyprus v Turkey 2014 as an Illustration of the Relationship between the Court and the Committee of Ministers

The judgment also contains some institutional implications. The Court touches only very briefly upon the role of the CoM in supervising the execution of judgments,[62] but these short remarks seem to indicate an inter-institutional, quasi-constitutional conflict between the Court and the CoM. Through the vehicle of just-satisfaction proceedings, the Court, many years after the principal judgment,

[58] For a further discussion see, R Wolfrum & U Deutsch (eds), *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (2009).

[59] P Mahoney, 'Thinking a Small Unthinkable: Repatriating Reparation from the European Court of Human Rights to the National Legal Order', in L Caflisch et al (eds), *Liber Amicorum Luzius Wildhaber: Human Rights – Strasbourg Views* (2007) 263, 266ff.

[60] See *Cyprus v Turkey (just satisfaction)* [2014] ECtHR 25781/94, para 59.

[61] See in favour: Mahoney, above n 58, 263, 272ff.

[62] *Cyprus v Turkey (just satisfaction)* [2014] ECtHR 25781/94, para 27, para 59 and para 62ff.

reopens the case and undertakes to give statements on the (non-)execution of its own judgment. ECHR Articles 46(3) & (4) empower the Court to interpret its rulings, but only after this task is referred to it by the CoM. Accordingly, the decision lies with this institution and the Court acts as a service provider. In the judgment at hand, the Court modifies this relationship to a certain extent when it changes the benchmark of what the CoM is supposed to supervise. In the principal judgment, the ECtHR held that Turkey acted in breach of several articles of the ECHR, but ordered no specific remedial action to be taken in the operative part of the judgment. Accordingly, there was room for discussing how and when Turkey would abide by the judgment, jeopardizing any effective supervision by the CoM.[63] Although this remains unchanged, a further, most specific duty is placed upon the Turkish authorities, namely the payment of EUR 90 million to Cyprus as the applicant State. During the supervision of its execution, no sound argument can be brought forward against the payment; non-payment would amount to a flagrant breach of Turkey's obligation under ECHR Article 41. By raising the pressure against the respondent state, the Court also diminishes the margin the CoM enjoys when fulfilling its task under ECHR Article 46(2), resulting in less room for political considerations.

The Court partially steers the CoM's work not only by adding a new operative part that is more precise but also by assigning a whole new specific task to the CoM. More specifically, the Court expressly puts the setting up of an effective mechanism for the distribution of the EUR 90 million by the Cypriot government under the control of the CoM. Possibly as a reaction to the rather ineffective supervision process (thus far), it also includes a time-limit of eighteen months for the distribution and, therefore, for a reaction of the CoM. The latter is in a position to alter the time limit but at least it will be compelled to take a stand when the period elapses. It remains to be seen whether this step results in a shift of power from the CoM—which is vested with an almost unfettered discretion as to its supervisory role—to the Court.

5 Conclusion

The reviewed judgment has been hailed as 'a new era in the enforcement of human rights' and an 'important step in ensuring respect for the rule of law in Europe', as

[63] As the Court stresses, the execution of the principal judgment is still pending before the CoM and that it has not been complied with yet: *Cyprus v Turkey (just satisfaction)* [2014] ECtHR 25781/94, paras 5 & 63.

well as 'the most important contribution to peace in Europe' in the history of the Court.[64] Despite its innovative approach and the strengthening of the position of the Court as one of constitutional significance, we do not share this euphoria yet. First, the judgment can only be seen as a starting point for a new strand of the Court's jurisprudence, second, a rapid development cannot be expected as the inter-state complaint procedures form only a very small number of cases brought to the Court. Such complaints are often seen as an 'antagonism' towards another European partner and therefore stand not only at variance with the Council of Europe's underlying 'ethos of cooperation and interdependence',[65] but also with the limitation set forth by the Court in the present case for applicability of ECHR Article 41. It operates only for complaints that are motivated by good faith.

[64] *Cyprus v Turkey (just satisfaction)* [2014] ECtHR 25781/94 (Joint Concurring Opinion of Judges Zupančič, Gyulumyan, David Thór Björgvinsson, Nicolaou, Sajó, Lazarova Trajkovska, Power-Forde, Vučinić and Pinto De Albuquerque).

[65] S Greer, *The European Convention on Human Rights* (2006) 24.

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A COMMENT ON THE PUBLIC MORALS EXCEPTION IN INTERNATIONAL TRADE AND THE *EC - SEAL PRODUCTS* CASE: MORAL IMPERIALISM AND OTHER CONCERNS

Elizabeth Whitsitt[*]

Abstract
Public morality concerns are ripe for consideration in international trade disputes. The long-awaited WTO decisions in *EC – Seal Products* afforded the world's leading international trade arbiter the opportunity to consider, among other things, application of the public morals exception in GATT and the TBT Agreement to the EU's 2009 ban on the importation and marketing of seal products. While the EU's seal products ban was ultimately held to be discriminatory and thus did not meet the requirements of GATT Article XX's chapeau, the reasoning enunciated by the Appellate Body (and WTO Panel) would have allowed the ban as being justified under the right to protect public morals. That same reasoning, however, lacked a measured analysis weighing the competing moral considerations about animal (seal) welfare against protecting the traditional and cultural practices (seal hunting) of impacted indigenous communities with short shrift being paid to the indigenous community interests. In result, the WTO's most recent rulings on public morals effectively legitimizes the moral imperialism inherent in the EU's seal products ban.

Keywords
Trade law, environmental law, public morals exception

1 Introduction

Public morality concerns are ripe for consideration in trade disputes before the World Trade Organization (*WTO*). In the recent *EC – Seal Products* decisions from the WTO Panel and Appellate Body (*AB*),[1] the world's leading international trade arbiter was asked to sanction the EU's 2009 ban on the importation and marketing of seal products (*EU Seal Regime*). The ban was ostensibly

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[1] Panel, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Docs WT/DS400/R, WT/DS401R (25 November 2013) (*EC – Seal Products*); AB, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* WT/DS400/AB/R, WT/DS401/AB/R (22 May 2014) (*EC – Seal Products*).

implemented to address the EU's moral concerns about the welfare of seals, but was criticised harshly by Canada, where sealing is a vital cultural practice for its indigenous Inuit communities, as well as by Norway. Thus the stage was set for a significant debate, pitting animal rights activists seeking to stop certain seal hunting practices against indigenous communities (actually, their respective state governments) seeking to protect their long held traditional and cultural seal hunting practices.

The EU Seal Regime is delineated in two pieces of legislation—the Framework Regulation and the Implementation Regulation.[2] Briefly summarised, the measure bans the sale of seal products in all EU member states, subject to certain explicit and implicit exceptions. Explicitly, the measure permits the sale of seal products in the EU market if those products are: (i) derived from hunts carried out by indigenous peoples (*IC Exception*),[3] (ii) derived from hunts that were conducted for the sustainable management of marine resources, (iii) or personally imported into the EU by travellers.[4] Implicitly, the measure also permits the import of seal products into the EU for processing and re-export, a convenient loophole that protects commercial interests within the EU.

In 2011, Canada and Norway commenced WTO dispute settlement proceedings against the EU over the EU Seal Regime. The primary claims were that the

[2] Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products, 2009 *OJ* L 286, 36 (*Framework Regulation*); Commission Regulation (EU) No 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products (*Implementing Regulation*) (collectively *EU Seal Regime*).

[3] Framework Regulation, Art 3(1), which states: 'The placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence. These conditions shall apply at the time or point of import for imported products.'

[4] See Framework Regulation, Art 3(2) which reads:

> (a) the import of seal products shall also be allowed where it is of an occasional nature and consists exclusively of goods for the personal use of travellers or their families. The nature and quantity of such goods shall not be such as to indicate that they are being imported for commercial reasons;
>
> (b) the placing on the market of seal products shall also be allowed where the seal products result from by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources. Such placing on the market shall be allowed only on a non-profit basis. The nature and quantity of the seal products shall not be such as to indicate that they are being placed on the market for commercial reasons.

Seal Regime was discriminatory and posed an unnecessary obstacle to trade contrary to the General Agreement on Tariffs and Trade (*GATT*)[5] and the Agreement on Technical Barriers to Trade (*TBT Agreement*).[6] After hearing the case and subsequent appeal, respectively, both the WTO Panel and the AB determined (albeit for different reasons) that the EU Seal Regime is justified under the right to protect public morals, specifically on the grounds of protecting animal welfare. Both bodies also found, however, that the purported Inuit[7] and other indigenous communities[8] exception to the ban was discriminatory in the way it is applied, and should be modified in order to fully comply with the EU's international trade obligations.

The WTO Panel focused its analysis on the TBT Agreement.[9] Specifically, it found that the IC Exception was discriminatory as it was designed to benefit seal products harvested by Greenland's Inuit communities over Canadian Inuit communities.[10] At the same time, the Panel determined that the EU was entitled under Article 2.2 of the TBT Agreement to ban the importation and marketing of seal products because it was aimed at, and made some contribution toward, addressing EU public moral concerns over animal welfare.[11] Moreover, it determined that alternative and less restrictive measures (i.e. labeling seal products harvested through a humane hunt) were not reasonably available given

[5] General Agreement on Tariffs and Trade, 30 October 1947, 58 UNTS 187 (*GATT*).

[6] Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 3, Annex 1 (Agreement on Technical Barriers to Trade) (*TBT*).

[7] See Framework Regulation, Art 2(4) where 'Inuit' is defined as 'indigenous members of the Inuit homeland, namely those arctic and subarctic areas where, presently or traditionally, Inuit have aboriginal rights and interests, recognised by Inuit as being members of their people and includes Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland) and Yupik (Russia)'.

[8] See Implementing Regulation, Art 2(1) where 'Other indigenous communities' is defined as 'communities in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions'.

[9] For a brief synopsis and comment on these developments see E Whitsitt & N Bankes, 'The WTO Panel Decision on the EU's Rules on the Marketing of Seal Products: Who Won and Who Lost?' (*ABlawg*, 10 January 2014), <http://ablawg.ca/2014/01/10/the-wto-panel-decision-on-the-eus-rules-on-the-marketing-of-seal-products-who-won-and-who-lost/> [accessed 31 October 2014].

[10] Panel, *EC – Seal Products*, above n 1, paras 7.303–315, 7.460.

[11] Ibid, paras 7.415 et seq. Note the Panel concedes that public morals are a legitimate objective notwithstanding that TBT Art 2.2 of the TBT Agreement does not expressly refer to public morals.

the challenges associated with the establishment of appropriate standards and any subsequent implementation and monitoring of such a program.[12] All of these findings heavily influenced the Panel's brief analysis of the EU Seal Regime under GATT. While the Panel determined that the EU's ban on the importation and marketing of seal products could be justified as 'necessary to protect public morals', it also found that the EU Seal Regime did not meet the requirements of GATT Article XX's chapeau due to the discriminatory design and application of the IC Exception.[13]

While the AB subsequently upholds some of the Panel's findings on appeal, the AB departs from the WTO Panel's reasoning in significant ways. Most importantly, the AB takes steps to clarify and distinguish between the analyses of measures challenged under GATT versus the TBT Agreement.[14] Overturning one of the fundamental findings of the WTO Panel, the AB held that the EU Seal Regime is not a 'technical regulation' as defined in Annex 1.1 of the TBT Agreement.[15] As a result, it was held that the TBT Agreement does not apply and the AB's decision on the validity of the EU's Sealing Regime turns entirely upon GATT.

In its final report, the AB confirmed that the IC Exception violated GATT Article I:1 on grounds that the EU Seal Regime detrimentally affects the conditions of competition for Canadian and Norwegian seal products when compared to Greenlandic seal products.[16] The AB further upheld the Panel's conclusion that the EU could provisionally justify its Seal Regime on public moral grounds. However, it went on to find that the EU Seal Regime, in particular the IC Exception, did not meet the strictures of the chapeau in GATT Article XX.[17]

Given the apparent competing public policies or more specifically public moral concerns, one might have expected the WTO Panel and subsequently the AB to conduct a measured analysis weighing moral considerations about seal welfare against protecting the traditional and cultural practices of communities that have been hunting seals as a way of life for centuries. The WTO Panel and AB, however, manage to avoid such complexities with short shrift paid to the

[12] Ibid, paras 7.493ff.

[13] Ibid, paras 7.630–7.639, 7.644–7.651.

[14] For a brief synopsis and comment on these developments see E Whitsitt & N Bankes, 'Sealing: It's a moral not a technical issue and animals outweigh indigenous communities,' (*ABlawg*, 12 June 2014) <http://ablawg.ca/2014/06/12/sealing-its-a-moral-not-a-technical-issue-and-animals-outweigh-indigenous-communities/> [accessed 31 October 2014].

[15] AB, *EC – Seal Products*, above n 1, paras 5.58–5.59.

[16] Ibid, paras 5.90, 5.95.

[17] Ibid, paras 5.320, 5.337–5.338.

Inuit and indigenous community interests in the case. As a result, the WTO's most recent rulings on public morals effectively legitimises the moral imperialism inherent in the EU Seal Regime, whereby the dominant EU culture defines and imposes its morality onto foreign indigenous communities without meaningful consideration of their interests and in the face of effectively destroying their ability to benefit from traditional and cultural seal hunting practices.

This comment on the *EC – Seal Products* decision is organised as follows. This Introduction (1) section is followed by an explanation on the importance of construing objectives under the public morals exception (2) along with a brief overview of the WTO Panel and AB decisions interpreting the objectives of the EU Seal Regime (3). The comment then proceeds to argue that the decision-makers' narrow construction of the objectives of the EU Seal Regime result in conflicting judicial authorities (4) and is contrary to the text of the legislative instruments outlining the EU Seal Regime (5). Finally, this comment asserts that the WTO Panel's and AB's lack of a clear and balanced identification of all of the EU Seal Regime's objectives results in analytical shortcomings that are critical to the analysis of the public morals exception (6) and legitimises a measure that operates in a morally imperialistic manner (7). The final section provides concluding remarks (8).

2 The Importance of Construing Objectives under GATT Article XX(a)

In recognition of a WTO member state's right to implement domestic regulations, many of the covered agreements of the WTO contain exceptions or limitation clauses, which allow for implementation of trade-restrictive policies in circumstances that are thought to be necessary or appropriate to achieve that state's legitimate objectives.[18] GATT Article XX is one such example. An assessment of a claim of justification under Article XX involves a two-tiered analysis, in which a measure must be provisionally justified under one of the subparagraphs of Article XX and then appraised under its chapeau.[19] For a measure to be provisionally justified under one of the subparagraphs, WTO jurisprudence confirms that the

[18] See e.g. GATT Art XX; TBT Art 2.2.

[19] AB, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R (29 April 1996) 22 (*US – Gasoline*); AB, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (12 October 1998) paras 119–120. See also AB, *United States – Measures affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R (7 April 2005) para 292 (referencing a two-tiered approach

challenged measure must 'address the particular interest specified in that paragraph' and that there must be a sufficient nexus between the measure and the interest protected.'[20] A WTO member wishing to justify a measure under GATT Article XX(a) must demonstrate that it has adopted or enforced that measure 'to protect public morals' and that the measure is 'necessary' to protect those morals.

As the AB has explained on various occasions, the necessity analysis involves 'weighing and balancing' a series of factors, including the importance of the objective and the contribution of the measure to that objective.[21] Thus, while it seems trite to say, one cannot stress enough the importance of properly construing the objectives of a measure when assessing whether it is a justifiable violation of WTO law. Nonetheless, as elaborated on below, the WTO Panel and AB narrowly construed the objectives of the EU Seal Regime in this case – an interpretive error that resulted in the existence of conflicting jurisprudence as to the primary or main rationale of the EU Seal Regime and perhaps more importantly, is inconsistent with the very text of the EU Seal Regime.

3 The WTO Panel and Appellate Body Narrowly Construe the Objectives of the EU Seal Regime

In assessing the legality of the EU Seal Regime, both the WTO Panel and the AB were required to identify the ban's objectives. For the WTO Panel, this discussion occurred in its assessment of the EU Seal Regime as an unnecessary obstacle to trade under Article 2.2 of the TBT Agreement[22] and subsequently informed its analysis of the public morals exception under GATT Article XX(a).[23] In its analysis, the WTO Panel narrowly construed the objectives of the EU Seal

to similar justification provisions under GATS) (*US – Gambling*).

[20] AB, *US – Gambling*, ibid.

[21] AB, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R WT/DS169/AB/R (11 December 2000) para 164 (*Korea – Beef*); AB, *US – Gambling*, ibid, para 306; AB, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS322/AB/R (3 December 2007) para 182 (*Brazil – Retreaded Tyres*). Other factors to consider under the necessity test include the trade-restrictiveness of the challenged measure and whether there are less trade-restrictive alternatives that could make a similar contribution to the challenged measures objectives: see e.g. AB, *US – Gambling*, ibid, para 307 (referring to *Korea – Beef*, para 166). See also AB, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R (16 May 2012) para 321 (referring to *US – Gambling*, ibid, para 307).

[22] Panel, *EC – Seal Products*, above n 1, paras 7.372–7.411.

[23] Ibid, para 7.631.

Regime. Unlike the issue of seal welfare, the evidence submitted by the EU did not show that the interests addressed by the IC Exception were grounded in the concerns of EU citizens (i.e. public morals). As a result, the WTO Panel determined that the EU Seal Regime as a whole was intended to protect animal welfare with the IC Exception, among other exceptions, conceptualised as ameliorative provisions included in the measure solely as part of the political maneuvering necessary to pass the legislation within the EU.[24]

On appeal, the AB supported the WTO Panel's strict characterisation of the objectives informing the EU Seal Regime. Indeed, the AB took great pains to explain that the WTO Panel did not identify seal welfare as the *only* motivation behind the EU Seal Regime.[25] According to the AB, the WTO Panel concluded that the *main or principal* rationale for adopting the EU Seal Regime was to address public concerns on seal welfare. Moreover, the AB found that 'although the panel rejected the contention that [indigenous communities] and other interests reflected independent objectives of the EU Seal Regime, [it did] not understand the Panel to have excluded the role of [indigenous communities] and other interests in the design and implementation of the measure.'[26]

4 Narrowly Construing the Objectives of EU Seal Regime Needlessly Results in Conflicting Authorities

In contrast to the WTO Panel's and AB's conclusion that the main or principal objective of the EU Seal Regime was to protect seal welfare, other judicial authorities have determined that the principle objective of the EU Seal Regime was regulatory harmonisation. In *Inuit Tapiriit Kanatami and Others v European Commission*, seal harvesters comprising a coalition of Inuit bands and aboriginal individuals, as well as industry associations from Canada, Norway and Greenland challenged the validity of the Framework and Implementing Regulations under EU law. [27] In dismissing that action, the General Court upheld both Regulations

[24] Ibid, paras 7.385–402.

[25] AB, *EC – Seal Products*, above n 1, paras 5.144–5.148.

[26] Ibid.

[27] See e.g. Case T-18/10, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, Order of the General Court of 6 September 2011 (currently under appeal); Case T-526/10, *Inuit Tapiriit Kanatami and Others v. European Commission*, Judgment of the General Court (Seventh Chamber) of 25 April 2013 (*Tapiriit v EC*).

on the basis of Article 95 of the EC Treaty and observed that the principle objective of the EU's Regulations 'is not to safeguard the welfare of animals but to improve the functioning of the internal market.'[28] Particularly compelling for the Court were recitals 6 to 8 of the EU's Framework Regulation, which, according to the General Court, evinced a decision by EU legislators to harmonise rules about the commercial activities associated with seal products within the Union.[29] This supported the Court's conclusion that the EU's measure was not *ultra vires* the power of the Union legislature.[30] Finding that the applicants' arguments were grounded on 'the erroneous assertion that the objective of the regulation is the protection of animal welfare', the Court concluded that the EU Seal Regime was consistent with the principle of subsidiarity.[31]

It is not clear why this decision of the EU General Court and the objective of regulatory harmonisation were not addressed in the WTO decisions on the legality of the EU Seal Regime. In its report, the Panel indicates that neither Norway nor Canada pressed the issue.[32] There is also no indication that the parties raised arguments discussing this point on appeal, a fact that likely explains its absence the AB's decision on objectives. Indeed, the existence of such conflicting decisions is a natural consequence of international law's increasingly fragmented character.[33] This is not to say that the WTO Panel and AB were bound by the *Tapiriit v EC* case or that they needed to enforce—or even endorse—the ruling the EC General Court.[34] Still, it seems odd that such a decision would be ignored—especially when it rules on a matter (i.e. the objectives of EU's ban on seal products) so crucially important and relevant to the WTO's decision about the public morals justification of the EU Seal Regime. It seems plausible that WTO decision-makers could at the very least have discussed the ruling of the EC

[28] See *Tapiriit v EC*, ibid, para 35.
[29] Ibid, para 39.
[30] Ibid, paras 79–102.
[31] Ibid, para 83.
[32] Panel, *EC – Seal Products*, above n 1, para 7.389.
[33] See Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law*, ILC, 58th Sess, UN Doc A/CN.4/L.682 (2006).
[34] The jurisdiction of WTO panels is limited to claims under WTO Agreements. A number of provisions in the Dispute Settlement Understanding support this proposition. See e.g. Marrakesh Agreement Establishing the World Trade Organization, 1869 UNTS 401, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes (*DSU*), Arts 1.1, 3.2, 7.111. See also DSU Art 17.6 which clarifies that appeals must be limited to issues of law and interpretations addressed by the relevant panel.

General Court as part of the applicable law in this case, if only to acknowledge that the EU Seal Regime was put in place to address numerous objectives.[35]

5 Narrowly Construing the Objectives of the EU Seal Regime is Inconsistent with the Text of its Constituting Legislation

Contrary to WTO Panel and AB decisions, which in effect determined that the main or principal objective of the EU Seal Regime was to protect seal welfare, the text of the Framework Regulation highlights the fact that there are multiple objectives to the EU Seal Regime. The Framework Regulation comprises 21 preambular paragraphs and 8 operative articles. The preamble is important in ascertaining the premises and intent of the regulation as well as establishing the legal basis for the Framework Regulation in EU law. Those introductory paragraphs demonstrate that the EU's law is intended to address a number of objectives, including but certainly not limited to, the protection of seal welfare.

The preamble begins by reciting the history of the community's concerns with respect to sealing (cruel hunting of sentient beings) and the adoption of the prohibition on imports of skins from harp seal and hooded seal pups in 1983.[36] Animal welfare concerns are also mentioned in other paragraphs of the preamble, which articulate the concerns raised by citizens within the EU and governments over the hunting of seals.[37] Thus, it is unquestionable that one of the propelling forces behind the EU Seal Regime is public unease about the potential for seal harvesting to perpetuate cruel and inhumane treatment of animals and a desire to prevent such treatment wherever possible. Nonetheless, moral concerns about animal welfare are not the only objective addressed within the EU Seal Regime.

Another objective also identified in the Framework Regulation is avoiding the potential for inconsistent regulation in the trade of seal products within the EU. In particular, the preamble notes that member states are passing or intend to pass domestic measures that regulate trade in seal products and expresses the

[35] Nothing in the DSU or WTO rules precludes a panel from addressing other relevant judicial decisions in deciding the case before it (see DSU Arts 7.1, 7.2). This proposition in relation to the applicability of international rules to WTO law is hotly debated, however. See e.g. Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003) 466–72 & n 82.

[36] Framework Regulation, paras 1–2.

[37] Ibid, paras 4–5.

concern that such a patchwork of initiatives may 'adversely affect the operation of the internal market in products which contain or may contain seal products, and constitute barriers to trade in such products.'[38] More particularly, the preamble acknowledges that this potential for disjointed regulation may affect trade in goods where consumers cannot readily tell if such goods include ingredients from seals, such as leather goods or Omega-3 capsules and oils.[39] Thus, in recognition of both moral concerns about animal welfare and promote harmonisation of the EU's internal market rules, the preamble refers to the general rule prohibiting the placement of seal products on the market.[40] The preamble effectively acknowledges that this is an extreme solution but justifies it on the basis of assessments conducted by the European Food Safety Authority, which indicate that the conditions of the seal hunt cannot provide assurances that seals will only (i.e. exclusively) be harvested in a manner that satisfies concerns as to animal welfare.[41] For the same reason labeling solutions are also ostensibly unable to offer the requisite assurances.

Balanced against the objectives of protecting animal welfare and promoting regulatory harmonisation within the EU, the preamble of the Framework Regulation further articulates the need to facilitate trade in seal products under certain conditions. One such condition is the IC Exception. Unlike the marine resource management and travellers exceptions, which receive only brief mention in the preamble, the IC Exception features more prominently within the preamble. The rationale for the IC Exception is outlined in paragraph 14 of the preamble:

> The fundamental economic and social interests of Inuit communities engaged in the hunting of seals as a means to ensure their subsistence should not be adversely affected. The hunt is an integral part of the culture and identity of the members of the Inuit society, and as such is recognized by the United Nations Declaration on the Rights of Indigenous Peoples. Therefore, the placing on the market of seal products which result from hunts traditionally conducted by Inuit and other indigenous communities and which contribute to their subsistence should be allowed.

Accordingly, the EU legislators recognised the moral concern of preserving seal hunts by Inuit and other indigenous communities. They also did so by

[38] Ibid, paras 5–6.
[39] Ibid, para 7.
[40] Ibid, para 10.
[41] Ibid, para 11.

expressly referencing the United Nations Declaration on the Rights of Indigenous Peoples (*UNDRIP*), which among other things, recognises the rights of indigenous peoples 'to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities'.[42] Indeed the EU argued before both the WTO Panel and the AB that EU law-makers considered that the subsistence of Inuit and other indigenous communities and the preservation of the their cultural identity outweigh, from a moral point of view, the risk of suffering inflicted upon seals as a result of inhumane hunts conducted by those communities.[43] In determining that the IC Exception was discriminatory, the WTO Panel acknowledged that 'seal hunting represents a vital element of the tradition, culture and livelihood of Inuit and indigenous communities'.[44] However, it paid short shrift to the international instruments recognising those rights and rejects the EU's arguments tying the economic and social interests of Inuit and indigenous communities to moral concerns.[45] The AB does little to remedy this failing and instead defers to the WTO Panel's margin of discretion to weigh the evidence and make appropriate findings about the objectives of the EU Seal Regime.[46]

For similar reasons as those discussed above in relation to the *Tapiriit v EC* case, the decisions of the WTO Panel and AB regarding the objectives of the EU Seal Regime are troubling. Given the EU Seal Regime's explicit reference to the UNDRIP and the EU's arguments that indigenous rights enshrined in that document and other international law instruments outweigh seal welfare, one might have expected the WTO decision-makers to consider those instruments when interpreting the objectives of the EU Seal Regime.[47] Indeed, a failure to do so at the panel level is arguably a reviewable error of law. While the UNDRIP

[42] UN Declaration on the Rights of Indigenous Peoples, [without reference to a Main Committee (A/61/L.67 and Add.1)] GA Res 61/295, Art 20(1). See also the following provisions of the Declaration which recognize the rights indigenous peoples to pursue traditional economic activities, such as Inuit seal hunts, consistent with the EU's international obligations (i.e. GATT): Arts 19, 20, 21, 25, 27, 37, 38, 40 and 46.

[43] See Panel, *EC – Seal Products*, above n 1, paras 7.278, 7.292–7.294; Appellate Body, *EC – Seal Products*, above n 1, para 5.143.

[44] Panel, *EC – Seal Products*, ibid, paras 7.295–7.298.

[45] Ibid.

[46] AB, *EC – Seal Products*, above n 1, paras 5.162, 5.167. This finding was in response to Norway's arguments on appeal that the Panel's analysis of the objectives of the EU Seal Regime was inconsistent with its obligation to make 'an objective assessment of the matter' in accordance with DSU Art 11 (see paras 5.150ff).

[47] See above n 35.

is not a binding source of law, some of its provisions are instructive when considering the objectives of the EU Seal Regime. As noted above, the UNDRIP explicitly recognises the right of indigenous communities to freely purse their traditional and other economic activities. Moreover, states are expected to take measures to facilitate those activities. Consequently, it is difficult to see how the protection of Inuit and other indigenous communities (including their right to economically benefit from their seal hunting practices) could fail to be recognised by the WTO Panel and AB as an objective of the EU Seal Regime. As elaborated on below, that failure critically impacts the analysis of the public morals exception.

6 Narrowly Construing the Objectives of the EU Seal Regime Critically Impacts the Analysis of the Public Morals Exception

As mentioned at the start of this comment, both the WTO Panel and AB determined that the EU Seal Regime was provisionally justified on grounds that it was put in place to protect a public moral concern for animal welfare.[48] Inextricably linked to its discussion about the objectives of the EU Seal Regime, the WTO Panel's consideration of public morals centres around its discussion of the EU Seal Regime as an unnecessary obstacle to trade and subsequently informs its analysis under GATT Article XX(a). Having defined the objective of the EU Seal Regime as solely related to seal welfare, the WTO Panel considered whether that objective could be considered a moral concern as defined and applied within the EU according to its own systems and values. To do this, the WTO Panel reviewed a number of pieces of evidence, including the legislative history of the EU Seal Regime, measures taken by the EU and its member states concerning animal protection, conventions on animal welfare within the EU and various international instruments. On the basis of that evidence the WTO Panel concluded that 'animal welfare is an issue of ethical or moral nature in the [EU].' In response to arguments by the EU regarding the need to protect Inuit and indigenous community seal hunting practices, the WTO Panel found that there was not enough evidence demonstrating that the EU public attributed a higher

[48] In both cases, the EU Seal Regime was unable to overcome the requirements of the chapeau of GATT Art XX. In both instances, concerns were raised about the even-handedness in the design and application of the IC Exception (See Panel, *EC – Seal Products*, above n 1, para 7.650; AB, *EC – Seal Products*, above n 1, paras 5.320, 5.377–5.378).

moral value to the protection of Inuit interests when compared to seal welfare.[49]

The AB subsequently upheld the WTO Panel's conclusion that the EU Seal Regime could be justified because it is necessary to protect public morals under GATT Article XX(a). On appeal, Norway and Canada did not challenge the WTO Panel's finding that the protection of animals (particularly seals) is a matter of public morals in the EU. Numerous other arguments were raised, including challenges to the WTO Panel's analysis of 'necessity' under GATT Article XX(a) and whether the EU Seal Regime needs to make a material (not just some) contribution to its stated animal welfare goals. But, for all of those arguments, little mention is made of the interests of Inuit or other indigenous communities. This is an inevitable consequence of narrowly construing the objectives of the EU Seal Regime and, while it may at first seem to be an insignificant detail, it critically impacts the analysis of the public morals exception.

Recall that the necessity analysis under GATT Article XX involves 'weighing and balancing' a series of factors, including the importance of the objective and the contribution of the measure to that objective.[50] Now consider an alternative scenario in which the WTO Panel and AB considers that the EU Seal Regime has multiple objectives (i.e. seal welfare and the protection of Inuit seal harvesting) and that both objectives are tied to moral concerns. Under the GATT Article XX test for necessity, both of those objectives and the corresponding competing moral concerns at issue – in this case animal welfare and protecting (or at least not destroying) seal hunts by Inuit and other indigenous community – would be assessed and weighed together. In so doing, it is conceivable that the WTO Panel and the AB could rank the objectives of the EU Seal Regime and, relying on the EU's arguments in the case, determine that the protection of seal hunts by Inuit and other indigenous communities is more important than animal welfare. In that alternative scenario, it seems highly unlikely that either the WTO Panel or the AB would still find that the EU Seal Regime contributes to that objective given findings that the IC Exception within the Regime favours the Greenlandic Inuit seal hunt.

Alternatively, it is also possible that the WTO panel and AB could conclude that neither objective is more important than the other. In such a situation,

[49] Panel, *EC – Seal Products*, ibid, para 7.299.

[50] AB, *Korea – Beef*, above n 21, para 164, AB, *US – Gambling*, above n 19, para 306 and AB, *Brazil – Retreaded Tyres*, above n 21, para 182. Other factors to consider under the necessity test include the trade-restrictiveness of the challenged measure and whether there are less trade-restrictive alternatives that could make a similar contribution to the challenged measures objectives: see e.g. AB, *US – Gambling*, above n 19, para 307 (referring to AB, *Korea – Beef*, above n 21, para 166).

the EU Seal Regime would need to protect both public moral concerns in order for it to be provisionally justified under GATT Article XX(a). Recall, however, the factual findings that the EU Seal Regime only made some contribution to the protection of animal welfare because (i) indigenous seal hunts employ the same 'inhumane' techniques as commercial hunts,[51] and (ii) the measure permits the import of seal products into the EU for process and re-export regardless of the hunting technique employed.[52] Consider also the WTO Panel's finding that the IC Exception was designed to exclude seal products from the Canadian Inuit due to their reliance on commercial processing and distribution chains that would be unavailable once the EU's ban was put into effect.[53] Again, it is difficult to envisage an outcome in which the EU Seal Regime could be found to be contributing to both animal welfare and the protection of the Inuit seal harvest.

Thus, under either alternative scenario, consideration of the EU Seal Regime's objective to protect the seal harvest by Inuit and other indigenous communities would likely result in a finding that the EU Seal Regime is not necessary to protect public moral concerns within the EU. In contrast are the actual decisions of the WTO Panel and AB, which found that the EU Seal Regime was provisionally justified under GATT Article XX(a) but unable to meet the requirements of the chapeau. Under the alternative scenarios posited, it would not be necessary to examine whether the EU Seal Regime results in arbitrary or unjustifiable discrimination or is a disguised restriction on trade. Such a result seems more fitting for a measure put in place to protect certain interests within the EU at the expense of Canada's Inuit communities.

7 Narrowly Construing the Objectives of the EU Seal Regime Legitimises a Measure that Operates in a Morally Imperialistic Manner

By framing the GATT Article XX(a) analysis entirely in terms of the legitimacy of animal welfare as a moral concern, both the WTO Panel and AB subordinate the moral concerns of Inuit and other indigenous sealing communities to those of the EU. Particularly troubling is the WTO Panel's assessment that the evidence in the case did not demonstrate that the EU public attributes a higher moral value to the protection of Inuit interests when compared to seal welfare. By

[51] Panel, *EC – Seal Products*, above n 1, paras 7.444–7.448.
[52] See e.g. ibid, paras 7.53, 7.455.
[53] Ibid, paras 7.314–7.315.

accepting that the EU public is the only reference point from which to assess the existence of a moral concern, the interests of indigenous communities are marginalised. The inevitable result is that a state implementing a trade measure, which in this case is also the historically dominant culture, effectively defines the relevant moral concerns to the exclusion of minority interests. Thus, by avoiding complicated questions about balancing moral concerns for seal welfare against moral concerns about the protection of indigenous communities (see section 6), the WTO Panel and AB give legitimacy, albeit unintentionally, to a measure that operates in a morally imperialistic matter. Under the EU Seal Regime, the dominant EU culture defines and imposes its morality onto the foreign Canadian Inuit communities without any meaningful consideration of their interests and even if it means the destruction of a traditional economy.

8 Conclusion

At the time of writing this comment, how the EU will respond to the AB's decision remains uncertain. Given some of the findings of the WTO Panel and AB in this case, it is difficult to imagine the EU implementing anything other than a more restrictive ban that effectively precludes indigenous populations in sealing nations, including Canada, from trading seal products outside their own communities. Thus, the decision will likely only embolden the EU's initiative to deny market access to seal products under the guise of animal welfare concerns. To some, this recent addition to WTO jurisprudence is seen as a welcome development insofar as it facilitates pluralistic state policy-making within an institution that is continually working to balance goals of trade liberalisation, while at the same time maintaining some amount of regulatory autonomy for WTO members.[54] For others, the WTO's decision creates a sense of unease.

While there is no question that a concern for animal welfare is one of the motivations behind the EU Seal Regime, it was not the only consideration. Indeed, a review of the EU Seal Regime that was eventually approved by the European Parliament and the Council of Ministers demonstrates that it was a legislative attempt to balance conflicting interests within the 28-member state union. Contrary to the express text of that legislation, however, the WTO Panel and AB narrowly determined that the main or principal objective of the EU Seal

[54] See e.g. R Howse & J Langille, 'Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values' (2012) 37 *Yale JIL* 367.

Regime is animal welfare. As outlined above, the Panel and AB pay little attention to the interests of indigenous communities in their decisions. Most unsettling is the narrow construction of the intended objectives of the EU Seal Regime. By confining the rationale of the EU Seal Regime to animal welfare, the Panel and AB avoid complicated questions about balancing moral concerns for seal welfare against moral concerns about the protection of indigenous communities. This results in analytical shortcomings that are critical to the analysis of the EU Seal Regime under the public morals exception. Moreover, and perhaps more importantly, narrowly construing the objectives of the EU Seal Regime legitimises a measure that operates in a morally imperialistic manner. Under the EU Seal Regime a dominant culture defines and imposes its morality onto a foreign indigenous culture without any meaningful consideration of their interests and even if it means destroying their ability to benefit from their traditional seal hunting practices.