Recent developments of international relations and international law in times of globalization have had a profound impact on the form and substance of domestic constitutional law, and on the concept and theory of the constitution itself (Tushnet, 142–64; Peters 2007; Auby, 236–40).

3.1 Constitutional references to international relations and international law

Constitutions have traditionally defined the powers of state organs in foreign affairs, especially with regard to the conclusion of international treaties. Modern constitutions additionally often provide for the binding force of international law within the domestic sphere, sometimes recognize the primacy of international law over domestic law, refer to international organizations, especially to the United Nations, or regulate the state’s accession to international organizations. In the constitutions of EU member states, provision is made for the transfer of sovereign powers to the EU or the pooling of sovereignty within the EU (Grewe). Clauses regarding the International Criminal Court (ICC), concerning its jurisdiction or surrender of persons to the Court, have been introduced. Frequently, special constitutional clauses enshrine international human rights, give them priority over domestic law, or guarantee access to international control mechanisms.

The proliferation of such constitutional references to international law reflects major changes in international relations since the 1980s. First and foremost, the liberalization of world markets in the last three decades led to intensified economic and cultural cross-border activities, with state borders no longer constituting serious barriers to such transactions. The thrust towards a unified global economic space required new legal, including constitutional, norms to satisfy the functional imperatives of globalized markets.

Second, the collapse of authoritarian regimes predominantly, but not exclusively, in Southern Europe in the 1970s and in East and Central Europe after 1989, necessitated the elaboration of entirely new constitutions. Geared to Western models of constitutionalism,
they were ready (or were urged) to pledge fidelity to international law. Third, the international community, or at least its most powerful members, have been supervising regime changes and have induced, accompanied, steered, or even installed new state constitutions, such as the constitutions of Cambodia (1993), Bosnia and Herzegovina (1995), South Africa (1996), East Timor (2002), Afghanistan (2004), Iraq (2006), Kosovo (2008), and South Sudan (2011). Fourth, the creation and power gain of international organizations such as the EU and the ICC have necessitated constitutional adaptations to permit the states’ integration into and cooperation with those regimes.

3.2 Constitutional convergence through internationalization

These factors have led to a ‘permeation’ of national constitutions by international law (Wendel), towards a ‘vertical’ convergence of international law and domestic constitutional law, and thereby also to a ‘horizontal’ convergence of constitutions inter se.

3.2.1 Vertical

National constitutional principles (such as human rights and self-determination/democracy, or the rule of law and good governance) have previously been ‘upgraded’ to international standards, both as principles governing the functioning of the international institutions themselves, and as a point of reference from which to evaluate a national constitution (Franck). These norms thus guide constitution-making, constitutional reform, and judge-made Verfassungswandel. A pertinent example is the international prescription of free and regular elections. The most intense and far-reaching pressure or stimulation of domestic constitutional reform has been exercised by the Council of Europe, the EU, and NATO. Empirical studies have demonstrated that the ‘international socialization’ of states of Eastern and Central Europe took place due to these organizations’ accession conditionalities (Schimmelfennig).

The Treaty of Maastricht of 1992, which founded the EU and which substantially reformed the European Community, triggered constitutional revisions in most of the then 12 member states. The United Kingdom’s current constitutional evolution has, to a significant extent, been induced by European integration and by the Human Rights Act of 1998, which implements the European Convention on Human Rights (ECHR).

3.2.2 Horizontal

Simultaneously, a ‘horizontal’ approximation of state constitutions is taking place. In particular, new state constitutions designed under international guidance are ‘chipped off the same block’, based on the modern canon of fundamental rights, rule of law, democracy, and separation of powers (Thürer, 25). Examples of principles that have travelled transnationally and spread through the case-law are notably human rights, the idea of legitimate expectations, and the constitutional principle of proportionality (Stone Sweet & Mathews).

The overall approximation is promoted by the (constitutional) judiciary. Increasingly, both international and foreign constitutional law is used as an argument in the national constitutional discourse (Jackson). These processes have been called ‘constitutional

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1 Greece art 28 (1975); Portugal art 8 (1976); Spain art 96 (1978); Bulgaria art 5(4)(1991); Poland art 9 (1997); Romania art 11 (1991/2003).
2 See Al-Ali, with case studies on Afghanistan, Iraq, and Bosnia.
cross-fertilization’ (Slaughter, 1116–19) and a ‘migration of constitutional ideas’ (Choudhry). They entail a considerable expansion of judicial authority at the expense of law-making democratic bodies that may end up in a juristocracy (Hirschl).

Although both types of convergence have happened mostly in Europe, non-European proponents of ‘subaltern cosmopolitan legality’ also advocate a change of perspective on globalized law that ‘shifts from the North to the South, with the South expressing not a geographical location but all forms of subordination (economic exploitation; gender, racial, and ethnic oppression...)’ (de Sousa Santos & Rodríguez-Garavito, 14). Cosmopolitan legalists claim that ‘whoever lives in misery in a world of wealth needs cosmopolitan solidarity’ (ibid), and hence call for an involvement in transnational constitutional discourses that aim at furthering global justice.

3.3 The dark side of internationalization

The phenomenon that ‘international law is now in the process of creating and defining the “democratic State”’ is not a purely positive one (Chimni, 8). Critics, especially in postcolonial countries, suspect a ‘shrinking space for domestic politics in developing countries’. 3 The internationalization of property rights, concomitant processes of the privatization of state-owned property and the intervention-prone internationalization of the human rights discourse are considered as negative examples. From that perspective, the sovereign state should remain a hurdle against the creation of a ‘unified global economic space’ and against the economic power of international organizations that are suspected to limit ‘the possibilities of third-world states to pursue independent self-reliant development’ (Chimni, 7).

Indeed, globalization and global governance belie the national constitutions’ claims of uniqueness, totality, and supremacy, and also undermine the operation of constitutional principles. Global problems compel states to cooperate within international organizations, and through bilateral and multilateral treaties. Previously typical governmental functions, such as guaranteeing human security, freedom and equality, are in part transferred to ‘higher’ levels. Moreover, non-state actors (acting in a transboundary fashion) are increasingly entrusted with the exercise of traditional state functions, even with core tasks such as military and police activity. All this has led to governance exercised beyond the states’ constitutional confines. This means that state constitutions can no longer regulate the totality of governance in a comprehensive way. Thereby, the original claim of state constitutions to form a complete basic order is defeated. National constitutions are, so to speak, hollowed out; traditional constitutional principles become dysfunctional or empty. This affects the rule of law, the principle of social security and the organization of territory, and notably the constitutional principle of democracy.

The impairment of democracy within states through globalization and through the concomitant zoning-up of governance functions is basically three-fold. 4 First, the reduced capacity of nation states to tackle and solve political problems by themselves reduces the self-determination of citizens within their national polity, hence the democratic output. Second, in the age of global interdependencies, state activities have become further reaching and more extraterritorial. This means that political decisions (ranging from the utilization of nuclear power over tax reductions to raising environmental standards) produce externalities by

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3 Cf. Kelly.
4 Seminally, Kaiser.
affecting people across state borders. The democratic difficulty here lies in the fact that the affected individuals have not elected the decision-makers and can in no way control them.

Third, complexities of globalization increase the influence of unelected experts (‘technocracy’). All this means that it is no longer possible for democratic states to be fully democratic in a non-democratic international system. In consequence, if the basic principles of constitutionalism, including democracy, are to be preserved, compensatory constitutionalisation on the international plane must happen (Peters 2006).

3.4 Normative hierarchies between international law and constitutional law

3.4.1 Supremacy of (some) international law over constitutional law

The position of international adjudicatory bodies is that (all) international law supersedes all national law, including constitutional law. However, only very few state constitutions, such as the Constitution of Belgium (1994) and the Constitution of the Netherlands (1983), accept that claim.

Other countries treat only international human rights treaties as supreme, notably the ECHR, which is itself a kind of ‘constitutional instrument’. Along this line, the constitutions of several post-transition countries (Romania, Slovakia, and the Czech Republic) explicitly grant international treaties on human rights precedence over domestic ‘law’, plausibly including domestic constitutional law.

Some countries, obviously more concerned about their sovereignty, are more cautious. Argentina has chosen a complex middle course between the legal and the constitutional rank of international human rights instruments: according to a 1994 constitutional amendment,


7 The Constitution of the Netherlands of 17 February 1983 prescribes in art 91(3): ‘Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Houses of the States General only if at least two-thirds of the votes cast are in favour.’ Art 94 explicitly grants precedence to international treaties only over statutes, but prevailing scholarship and some practice supports the view that Art 94 applies also to the Constitution itself. In any case, if parliament determines that a treaty conflicts with the constitution and, under art 91(3) approves a treaty by a 2/3 majority, courts are able to let that treaty prevail over the constitution. But this is different if parliament does not determine such a conflict and hence does not approve a treaty by a 2/3 majority, since that would implicitly mean that the court could review a decision of parliament against the constitution, which is not allowed under art 120 of the Constitution. We thank André Nollkaemper for this clarification.

8 ECHR, Loizidou v Turkey (preliminary objections), Series A 310 (1995), para 75.


international treaties take precedence over ordinary law without having constitutional rank. However, a list of two international human rights declarations and eight international covenants on human rights are declared part of the constitution. All other human rights treaties have constitutional rank only if approved by congress with a two-thirds majority of the members of each chamber. Likewise, an amendment of 2004 to Brazil’s Constitution of 1988 establishes that international human rights treaties and conventions require the approval in each house of national congress, in two rounds, by three-fifths of votes of the respective members, and will have the rank of constitutional amendments.

In the Constitution of Colombia of 1991, two inconsistent principles apply: the supremacy of the constitution and the priority of ‘international treaties and agreements ratified by the Congress that recognize human rights and that prohibit their limitation in states of emergency’. Consequently, fundamental rights of the constitution have to ‘be interpreted in accordance with international treaties on human rights ratified by Colombia’. Pursuant to the jurisprudence of the Colombian Constitutional Court, universal and regional human rights treaties form part of the ‘constitutional block’ of the country’s legal order and hence have constitutional rank (Ramelli). The same applies to the 1917 Constitution of Mexico after the Federal Congress enacted the amendment of 10 June 2011, which implicitly assigns constitutional rank to human rights treaties to which Mexico is a party.

Peremptory norms of international law are in some states accepted as superseding the constitution. The Swiss Constitution makes this explicit. Finally, some state constitutions grant (some) international instruments a status equal to the state constitution.

### 3.4.2 Supremacy of (some) constitutional law over international law

Most states do not grant international law unconditional priority (Peters 2009). Traditional case law often rejects international law’s claim to supremacy over domestic constitutional law.

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13 Art 75(22) of the Constitution of 1853, amended 1994; see Pagliari, 195 et seq.; León. We thank Eduardo Pintore for his advice.

14 Art 5(3) added by constitutional amendment no 45 of 8 December 2004; cf. Maliska.

15 Art 4(1).

16 Art 93(1) and (2).

17 Art 1, see ‘Decreto por el que se modifica la denominación del Capítulo I del Título Primero y reforma diversos artículos de la Constitución Política de los Estados Unidos Mexicanos, Diario Oficial de la Federación, Tomo DCXCIII, No. 8, Primera Sección, 10 June de 2011, pp. 2–5. We thank Alfredo Narváez Medécigo for his advice.

18 Art 139(2) and 194(2) Swiss Constitution (Bundesverfassung).

19 This appears to be the case for Austria and Italy. Revision of art 50 of the Austrian Constitution, with a new clause 4, amendment through Änderungsgesetz Bundes-Verfassungsgesetz (in force since 1 January 2008), art 1, no 13 (Bundesgesetzblatt für die Republik Österreich, Teil I, of 4 January 2008, no 2, 7; www.ris.bka.gv.at). See the explanatory comment in no 314 der Beilagen XXIII.GP – Regierungsvorlage – Vorblatt und Erläuterungen, on Z 10, Z 11, and Z 13 (art 50), para 4. See art 117 of the Italian Constitution as amended on 18 October 2001: ‘(1) Legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European Union law and international obligations.’ (Emphasis added.)
law.\(^{20}\) Granting only international treaties had the rank of federal laws was standard for constitutions created in the spirit of the principle of national sovereignty before the wave of international human rights covenants was stimulated by the UN Declaration of 1948. For example, the Indian Constitution of 1950 assigns the rank of ordinary law to international treaties, agreements or conventions transformed into domestic law by Parliament.\(^{21}\) The same applies, albeit indirectly, to the 1947 Constitution of Japan, which defines the constitution as the supreme law of the nation without any exception with respect to international law.\(^{22}\) Even under the relatively new Constitution of South Africa of 1996, which is deeply committed to the protection of human rights, international treaties including human rights treaties approved by the National Assembly and the National Council of Provinces have no higher rank than that of ordinary laws.\(^{23}\) However, when interpreting the Constitutional Bill of Rights, courts must consider international law;\(^{24}\) thus, international human rights treaties assume a quasi-constitutional rank.

With regard to young, mostly post-transition state constitutions, ‘a clear tendency towards “de jure recognition” of the primacy of international law by new constitutions … but not [a placement of international law] above the constitution itself’ has been noted (Vereshtin, 29, 37). Examples of state constitutions that claim the superiority of state constitutional law over international law (or parts of it) are the Constitutions of Russia,\(^{25}\) Belarus,\(^{26}\) Georgia,\(^{27}\) and South Africa.\(^{28}\) Some state constitutions grant international law priority over ordinary statutes, but not over the domestic constitution itself (see e.g. the Greek Constitution,\(^{29}\) the Constitution of Estonia,\(^{30}\) the Constitution of Poland\(^{31}\) and the Constitution of Paraguay\(^{32}\)). The Lithuanian Constitutional Court ruled that Lithuania’s Constitution of 1992 is superior to international treaties.\(^{33}\) Finally, EU member states’ courts have tended to refuse the

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21 Art 253.
22 Art 98(1)
23 Art 231(2) and (4).
24 Art 39(1); see infra sec 3.5.
28 Constitution of South Africa of 8 May 1996, art 232 on customary international law.
31 Art 91 of the Polish Constitution of 2 April 1997.
33 Constitutional Court of Lithuania, case no 17/02-24/02-06/03-22/04 on the limitation of the rights of ownership in areas of particular value and in forest land, 14 March 2006, para 9.4. Engl. at <http://www.lrkt.lt/Documents1_e.html>.
application of EU law when this would infringe the ‘constitutional identity’ of the member state.  The domestic constitutional actors’ assertion of the supremacy of the state constitution as a whole, or of core constitutional principles, over international law is normally accompanied by those domestic actors’ procedural claim to have the final word on this question.  Technically, this ‘final word’ is normally clothed in a scrutiny of the relevant domestic acts or statutes that transfer powers to the EU, against the yardstick of the states’ constitution.  In particular, the German Constitutional Court has also directly subjected EU Acts to constitutional scrutiny, based on the argument that these Acts ultimately depend on a previous transfer of powers to the EU by a treaty that is in turn dependent on legislative consent, which means that EU Acts manifestly transgressing this consent must be considered unconstitutional, especially if they affect the ‘constitution’s identity’ (‘ultra-vires control’).

3.5 The ‘direct effect’ and ‘indirect effect’ of international law

Another constitutional issue is the ‘direct effect’ (‘direct applicability’ or ‘self-executingness’) of international law (notably of the provisions of international treaties).  Domestic courts in various legal orders rely on quite similar criteria to grant or reject such an effect, namely on the intentions of the contracting parties and of the domestic bodies participating in the ratification process, and on the content, objective, and wording of the relevant treaty provision.  A state’s attitude towards direct effect has eminent constitutional implications because it concerns the distribution of powers among courts, the executive, and parliaments, and also affects the constitutional principles of legality and democracy.

Besides, or as an alternative to, a ‘direct effect’ of international law, its ‘indirect effect’ is acknowledged in state practice.  Clashes between domestic constitutional law and international law are reduced to a minimum through consistent interpretation of state constitutions.  For example, the Portuguese Constitution, the Spanish Constitution, the Romanian Constitution, and the South African Constitution explicitly require that the state constitution must be interpreted in conformity with international human rights law.  Notably, the South African Constitutional Court has become famous for its universalist approach to

36 See, e.g. German BVerfGE 89, 155 (1992) – Maastricht; BVerfG of 30 June 2009 – Lisbon.
37 BVerfG, 2BvR 2661/06, 6 July 2010, paras 55–56 – Honeywell.
38 We understand by direct effect the legal mechanism that a domestic body (especially a court) may apply an international rule directly, and that this application can render a contrary rule of domestic law illegal.
39 Art 16 (2) of the Portuguese Constitution of 2 April 1976.
40 Art 10 (2) of the Spanish Constitution of 29 December 1978.
42 Art 233 of the Constitution of South Africa of 8 May 1996.
See Constitution of South Africa of 8 May 1996: art 233 (Application of international law): ‘When 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.’ Article 39 on Interpretation of Bill of Rights: ‘(1) When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.’ (Emphasis added.) See du Plessis, 309–40 with further references.


46 Suresh, para 60.

47 Human Rights Act of 1998, s 3(1), see also s 2 (1).


complemented by the – inverse – consistent interpretation of international law in the light of domestic constitutional law. In the EU, the principles of loyal cooperation and respect of national identity of the member states (Art 4 (2) and (3) EU) already form a possible legal basis for a European principle in that sense.

3.6 Pluralism as promise and peril

The examples of national constitutions and case-law have demonstrated that there is indeed a worldwide constitutional practice highly responsive to international law but jealous of safeguarding at least domestic core constitutional principles against international intrusion. In parallel, a growing body of international legal scholarship has begun to call into question the unconditional supremacy of international law over domestic constitutional law, notably in the event of a conflict with constitutional core values (Cottier & Wüger, 263–64; Nollkaemper; von Bogdandy & Schill).

3.6.1 A pluralism of perspectives

The new label given to these judicial practices and scholarly proposals is the label of pluralism. Pluralism here refers first of all to perspectives and denies the existence of an absolute external observer standpoint. The consequence is that there is no absolute vantage point from which to decide where the rule for deciding a conflict sits and what its content is. The plurality of perspectives is accompanied by a plurality of legal orders, a plurality of legal actors claiming ultimate authority, and a plurality of rules of conflict. In this intellectual framework, there is no legal rule to decide which norm should prevail, in other words there is no supremacy. There is also no legal meta-rule to resolve the competing claims to authority raised by the international and the domestic constitutional actors. Different legal actors, for example courts, necessarily belong to one of the various orders, therefore necessarily speak from their own perspective, and can only apply a rule of priority residing in their own legal system. In the absence of an overarching, institutionalized power that could decide a conflict, the different actors’ perspectives are – in legal terms – equally valid and consistent: there is no conflict of validity. But unlike (academic) observers who may simply diagnose plurality and leave it there, the participants in the legal process must resolve upcoming conflicts and must decide which of the contrary rules to apply. Under the premise of pluralism, such conflicts in norm application cannot be decided by legal argument, but are ultimately resolved politically.

3.6.2 Mechanisms of coordination

The task ahead is therefore to identify and to develop further the procedural mechanisms of reciprocal restraint, respect, and cooperation needed for the adjustment of competing claims of authority, in order to realize what has been called a ‘pluralisme ordonné’ (Delmas-Marty). Besides, substantive common principles underlying both international law and national (constitutional) law might be fleshed out.

Some of these mechanisms are already in place. As mentioned, domestic (constitutional) courts take into consideration international law in good faith and interpret the domestic

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52 Mattias Kumm has suggested the following principles: legality, subsidiarity, due process, good governance, democracy, and human rights. Kumm, 258–326, 273–310.
constitutions in the light of international law (see above). This practice should be regularized.

Second, courts should be asked to give reasons for any non-application of international law, and these should be accepted as valid only if the application of international law risks violating the core principles of the domestic constitution (‘constitutional identity’).

Third, the Solange and Bosphorus strategy should be generalized. Courts should employ a legal presumption that a legal act performed by a body rooted in ‘another’ legal system is in conformity with their ‘own’ standards, coupled with the reciprocal recognition of such acts, ‘as long as’ some minimum requirements are not undercut. In this scheme, domestic courts refuse to revisit (judicial or quasi-judicial) decisions taken by an international body on the basis of the rebuttable presumption that the international regime offers a functionally equivalent legal protection to that in domestic constitutional law.

Fourth, the international bodies should grant a margin of appreciation to national decision-makers with a strong democratic legitimation, and should themselves interpret international law in the light of domestic constitutional law.

3.6.3 Balancing in the concrete case instead of a formal hierarchy

Fifth, and most importantly, conflicts between international law and constitutional law should be resolved by balancing in the concrete case, not on the basis of a normative hierarchy. Less attention should be paid to the formal sources of law, and more to the substance of the rules in question. The ranking of the norms at stake should be assessed in a more subtle manner, according to their substantial weight and significance. Such a non-formalist, substance-oriented perspective implies that, on the one hand, certain less significant provisions in state constitutions would have to give way to important international norms. Inversely, fundamental rights guarantees should prevail over less important norms (independent of their locus and type of codification). This approach is in fact already implicitly present in the emerging national constitutional practice of treating international human rights treaties differently from ordinary international law, either by granting them precedence over state constitutions, or by using them, more than any other category of international law, as guidelines for the interpretation of state constitutions. Admittedly, this new approach does not offer strict guidance, because it is debatable which norms are ‘important’ in terms of substance, and because it does not resolve clashes between a ‘domestic’ human right on the one side and an ‘international’ human right on the other. However, the fundamental idea is that what counts is the substance, not the formal category, of conflicting norms. Such a flexible approach appears to correspond better with the current state of global legal integration than does the idea of a strict hierarchy, particularly in human rights matters. From this perspective, international law and constitutional law find themselves in a fluent state of interaction and reciprocal influence, based on discourse and mutual adaptation, but not in a hierarchical relationship.

3.6.4 Risks and opportunities

It would be naïve to expect that identical norms will be interpreted and applied identically by all actors. Any interpretation of a constitutional norm by a national constitutional court or by

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54 ECHR, Hatton v UK, appl. no 36022/97, 8 July 2003, para 97.
an international tribunal is likely to be influenced to some extent by the acting body’s institutional bias. Moreover, the practical impact of the meaning given to a norm in a judgment or decision will depend on the institution’s legal and political authority. It is therefore misleading to celebrate the openness of the question ‘who decides who decides’ and the lack of ultimate authority. While it is true that such openness in theory constitutes an additional mechanism for limiting power, it seems more likely that legal openness tends to result in the political dominance of the more powerful actors, which are normally the domestic ones. Therefore, pluralism in the sense just described bears the real risk of reinforcing the perception that international law is only soft law or even no law at all.

On the other hand, constitutional resistance might constitute an ‘emergency brake’ and thereby one condition for the opening-up of states’ constitutions towards the international sphere. In the long run, reasonable resistance by national actors – if it is exercised under respect of the principles for ordering pluralism, notably in good faith and with due regard for the overarching ideal of international cooperation – might build up the political pressure necessary to promote the progressive evolution of international law in the direction of a system more considerate of human rights and democracy.

References

Additional reading