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Constitution-Making as Transnational Legal Ordering

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In January of 2011, after several decades of civil war, the largely Christian population of South Sudan voted overwhelmingly in a referendum to declare independence from predominately Muslim Sudan. As the country celebrated its independence six months later, it marked the occasion with the adoption of a written constitution. This document served to signal the country's independence on the international stage, to provide a framework for governance and, it was hoped, to underpin an era of peace. It contained a good number of rights, a presidential system of government, and detailed provisions covering everything from local governance to accountability institutions.

Things have not worked out very well for South Sudan on the ground, but it was hardly alone in pinning its hopes to a written constitution. Since at least the turn of the twentieth century, it has become an established norm for new countries emerging on the world stage to adopt such a text. Constitution-making is the quintessential national project, a moment when "We the People" come together to adopt fundamental rules that will govern our collective life and express our distinctive values. In the American telling, constitutional "government proceeds directly from the people," and "is emphatically, and truly, a government of the people."[1]

This common way of conceiving of constitution-making, however, is simply wrong. It ignores the long history of transnational flow of ideas about constitutions and how they should be made. Indeed, the very idea of a formal written constitution is foreign in many parts of the world, including in South Sudan. When one examines the actual processes by which constitutional documents are made, one sees an array of transnational influences, actors, and ideas that provide the very grammar for the project.

[1] *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat) 316, 403–5 (1819).

South Sudan provides a perfect example in this regard. The referendum described above was the product of international negotiations to end the civil war, brokered by the neighboring countries in the Intergovernmental Authority on Development, a regional organization. This produced a Comprehensive Peace Agreement among the warring parties and an Interim Constitution for Sudan as a whole. As documented by Cope (2013), the process of drafting the Provisional Constitution for the new country involved myriad outside actors and advisers, including the United Nations, a Washington-based group called the Public International Law and Policy Group (PILPG), the US Institute of Peace, and many others. When the Provisional Constitution came into effect the day after independence, the occasion was widely celebrated in the country, and numerous advisers came in to help with implementation of the new constitutional framework. In short, the very idea of making a constitution was transnational: the drafting was a transnational process; and the implementation was also to some extent transnational.

While perhaps exceptional in the *degree* of transnational involvement, South Sudan is hardly alone in the engagement of transnational actors, ideas, and institutions in national constitution-making. Indeed, one of our claims is that this is the state of affairs in any contemporary constitution-making exercise, to a greater or lesser extent. This volume seeks to explore these forces, both at the moment of constitution-making and the subsequent practice of constitutionalism in context. Our theoretical framework draws on recent work by Shaffer (2013), working with Halliday (2015; in press) on Transnational Legal Orders (TLO). The TLO framework provides a framework for analyzing "legal norms that are exported and imported across borders and that involve transnational networks and international and regional institutions that help to construct and convey the legal norm within a field of law" (Shaffer 2013: 5).

Drawing on the idea of recursivity, as put forward by Halliday and Carruthers (2007; 2009), the TLO framework recognizes that norms and institutions at different levels interact across time, and mutually inform each other. In the spirit of recursivity, our book seeks not only to investigate what the TLO theoretical framework offers for the study of constitution-making and practice, but also how the study of constitution-making and practice reciprocally informs TLO theorizing.

The remainder of this introduction proceeds as follows. First, we trace the brief history of transnational constitution-making, to counteract the powerful myth of exclusively national content and process. Next, we lay out TLO theory. We then assess how the two interact, arguing that both have something

to contribute to the other. We then briefly summarize the chapters, and conclude with an assessment of what they mean for TLO theory.

THE NATIONALIST MYTH AND TRANSNATIONAL REALITY OF CONSTITUTION-MAKING

Since the rise of the nation-state in the nineteenth century, law has been seen as an embodiment of national values and identity. As Oliver Wendell Holmes (1881) famously put it "[t]he law embodies the story of a nation's development." Or as the inscription of the classic 1815 Courthouse (Domhus) in Copenhagen states, "With Law We Shall Build the Land."

Of course, no law plays this role more than that of the constitution, the fundamental law. Constitutions are often viewed as engaging the "constituent power" of "We the People" (Landau 2013; Roznai 2017: 123–5). This suggests a distinct fit between a constitution and a particular national community. As Montesquieu might have put it, a constitution must be appropriate for the soil into which it is embedded to be successful. But it also suggests a certain recursivity or feedback between the norms of the constitution and the identity of the people. As reported by Ginsburg in his contribution here, this was a point emphasized by Jean-Jacques Rousseau, namely that a constitution had not only to reflect the norms of the population but could also play a role in building national identity. This two-way interaction suggests something more complicated than simply national norms being reflected in a unidirectional manner in a constitutional text.

One can press on this image in two ways: not only does a constitution interact with its domestic context, but it also interacts with the broader environment of ideas and institutions outside a nation's borders. In practice, we know empirically that there is a long transnational practice that has become more institutionalized over time in the creation of constitutions (Ginsburg, Chapter two; Couso, Chapter nine). Lanni and Vermuele (2012) report that the ancient Greeks would sometimes designate foreigners to draft their constitutional texts. This was not simply a matter of convenience, but promised a certain neutrality in terms of the provisions that were being drafted. Foreigners may be less likely to know the particular culture in which a constitution must operate, but they are also more likely to provide a disinterested view, and to be able to step outside the local milieu of interests and passions. In terms of Elster's (1995) classic framework, foreigners might get us closer to a constitution based on reason, rather than mere passions and interests.

Constitution-making in the modern era begins, of course, with the American experiments from 1776–89. The numerous state constitutions and

the two federal ones drafted during this period surely influenced each other, but also drew from ideological currents from across the Atlantic (LaCroix 2010). Madison himself read widely about the experiences of other republics so as to inform his thoughts on how the new country could survive. Even the authors of the canonical phrase "we the people" were informed by experiences of prior countries. They also influenced and inspired republicans abroad for the next two centuries (Billias 2009). Similarly, the French Declaration of the Rights of Man, with its ringing tones of universality, influenced constitutional thinking throughout Europe as well as Latin America and the Caribbean. Since those early experiences, a rich practice in the diffusion of ideas and institutions has continued and accelerated over time.

Not only do ideas flow across borders but the triggers of constitution-making do as well. As documented by Elkins, Ginsburg, and Melton (2009) and Elster (1995), constitution-making tends to come in waves, often triggered by major geopolitical events. The collapse of the Spanish empire following Napoleon's invasion of Spain, the "springtime of nations" in 1848, World War I, World War II, ensuing decolonization, and the Cold War were each followed by a wave of constitution-making. The timing of constitution-making, then, is to some extent dictated by global and regional forces. In the modern era, this takes the form of post-conflict constitution-making (Hart 2001; Wallis 2013). Increasingly constitution-making is seen as an essential part of post-conflict reconstruction and renewal, and integrated temporally into peace negotiations, as the South Sudan example illustrates. An interesting literature has developed on particular cases, in which the fingerprints of the international community can be found.

Beyond the level of ideas and timing, specific constitutional institutions flow across borders in what scholars call the process of diffusion (Simmons & Elkins 2004). Scholars have noted that the content of these contemporaneous documents tends to be fairly similar, and a similar effect can be found for regions. Globally, Elkins, Ginsburg, and Simmons (2013) have identified a certain set of "core" norms, found in the vast majority of constitutions, to be contrasted with more peripheral ones that may be seen as optional. For most countries, the image of constitution-making as the work of a small group of national authors debating first principles could not be farther from reality.

Consider the spread of rights, a canonical symbol of universalism that also retains local character. Law and Versteeg (2011) have shown that rights provisions have spread around the globe. Elkins and his co-authors (2013) show that some rights, such as freedom of expression, have become nearly universal, while others have not. Some have argued that there is a kind of global script at work, whereby nation-states use constitutions to participate in global

discourses. Scholars in the world society tradition of sociology, for example, emphasize the global interdependence of policy and institutional choices, so that constitutional texts respond to external forces as much as internal ones (Boli-Bennett & Meyer 1978; Go 2003). In this vein, Beck et al. in this volume show that constitutional rights provisions are not selected at random but are drawn from global templates such as the Universal Declaration of Human Rights. Elkins, Ginsburg, and Simmons (2013) show how the rights provisions of national constitutions are coordinated through the content of international treaties, such as the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Thus, the very menu from which designers choose is internationally constituted, influenced by global norms, and embodied in human rights treaties. The proliferation of international law and institutions enhance and support these transnational diffusion and modeling processes (Shaffer & Coye in press).

Even the parts of constitutions most conventionally thought of as reflecting national content – the preambles – are themselves transnationally constructed. Ginsburg, Rockmore, and Foti (2014) show that the language in preambles tends to flow across time and space. One can discern global trends in constitutional thinking by examining preambles: socialism rises in the twentieth century but falls in the twenty-first, to be replaced by references to the market, or to God who had earlier fallen in popularity after the nineteenth century. Similarly, Law in this volume identifies ideological clusters found in the latent patterns of language used in the texts.

The *process* of making constitutions is also affected by transnational norms and forces. International organizations with constitution-building programs have emerged, including International IDEA. These not only shape the content of constitution-making but the very process of making them. External organizations compile handbooks about how to design processes (Interpeace 2011) and case studies of how they operate (Miller & Aucoin 2010). Especially important in this regard is the norm that participation is required in constitution-making. The United Nations, in particular, has been pushing participatory constitution-making, and some ground it as a right in international law (Hart 2001). As Saati (2015) discusses, this norm rests on thin empirical grounding – participatory constitutions are not always more enduring or more effective (see also Moehler 2010). But the fact that even process is subject to transnational involvement shows the depth to which the field has been transformed.

Finally, constitutional implementation is increasingly a transnational enterprise. External actors – states, human rights organizations, international

organizations, religious groups, and others – monitor the performance of constitutions. The Organization of American States, for example, was quick to judge the 2009 deposing of Honduras' sitting President Manuel Zelaya as a coup. One novel actor in this regard, described by Craig in this volume, is the Venice Commission, an organ of the Council of Europe, which has built a good deal of moral authority as a monitor of constitutions in the 47 nations in its ambit, and has now spread its activities beyond Europe to provide constitutional advice.

The involvement of international actors has become increasingly intense in recent decades, with more diverse sets of actors and norms entering the field. In every phase of the constitutional process – the triggering of constitution-making; design of the constitution-making procedures; drafting the text; adoption of the constitution; and implementation – constitution-making involves interaction between transnational actors and local parties. It involves both importers and exporters of norms, resistance, adaptation, normative settlement and unsettlement.

The constitutional process involves not just the design of a national legal system, but debates over particular norms that engage transnational actors in particular sub-fields, such as property rights, individual and social rights, gender rights, minority rights, the place of religion, and so forth. Contests and debates arise over the alignment of particular constitutional norms and practices with the underlying issues conceived as problems that law must address. While intense clashes arise in many of these areas, others exhibit normative settlement. A consensus exists, for example, on the need to have some rights provisions in a constitution, as well as on the need to at least give lip service to democratic processes. But the entire dynamic raises important empirical questions. To return to the South Sudan example, has the constitution not worked out very well because of its shallow local roots?

THEORIZING TRANSNATIONAL ASPECTS OF CONSTITUTION-MAKING

As the above description makes apparent, there is a burgeoning literature on constitution-making but to date little attention to characterizing the processes as a transnational legal practice. This book aims to build and apply transnational socio-legal theory regarding these practices to enhance collective research and understanding, including for normative interventions.

We are not, of course, the first to tackle this problem. Existing theoretical approaches include world society theory, which has documented how constitutions embody what they characterize as global forms; neo-colonial theory

(Hardt & Negri 2000; Fitzpatrick 2006; Gordon 1999); and theories of transnational expertise that document and critique expert governance (Kennedy 2016). These theories tend to be top down in their appraisal. To the extent they are applied to constitution-making, they also tend to stop at the moment of the creation of constitutional texts, rather than integrate constitution-making into a broader process of constitutional construction and ordering.

TLO theory, in contrast, aims to address the overall process through which norms settle and unsettle, and how these norms align with issues to be addressed.[2] These processes are dynamic and often recursive, and allow for the tracing of dynamics over time. The processes often involve constitution-making episodes, which (a) stretch from initiation of a constitutional writing/revision episode through ultimate settling or unsettling, and thereby (b) take into account recursive cycles in which "constitution-writing" is one, but only one, of many key constitution-making moments and activities. TLO theory thus pushes students of constitution-making to identify moments of settlement, and to define the relationship among discrete episodes of constitutional activity.

This volume applies the theoretical framework of TLOs to the study of constitutional norms to assess what the TLO framework can help reveal for the analysis of, and engagement with, constitution-making and practice, and how the study of constitution-making can inform TLO theory. The TLO framework brings together three concepts: (i) it focuses on the issue of *order*, a central concept in the sociology of law regarding the creation and settling of generalized normative behavioral expectations; (ii) it studies the role of *law* in such ordering processes, involving the use of legal form and legal institutions; and (iii) it examines the *transnational* nature of the normative ordering. Bringing these three concepts together, it defines a transnational legal order as "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions" (Halliday & Shaffer, 2015). That legal order could be the constitutional order itself, or it could be legal norms included within constitutions, such as human rights, women's rights, minority rights, property rights, religion, and so forth. In the latter case, a single constitution can comprise norms that are part of multiple TLOs.

The book reveals how these norms and patterns are rhetorically constructed. For example, there are core norms in a liberal, democratic constitutional prototype addressed by Scheppele and Landau. Similarly, there are central

[2] On the issues of normative settlement and issue alignment, see Halliday and Shaffer, *Transnational Legal Orders*, Chapter 1.

features pushed by a socialist TLO, such as existed in the Soviet era, and in Bolivarian constitutions involving different transnational networks (as discussed in the chapter by Law). Taking the chapters together, the book investigates the extent to which we see moves either toward the transnational emergence of a single constitutional TLO; or to rival liberal and socialist constitutional TLOs; or to multiple, competing TLOs addressing distinct sub-issues; or to insurgent TLOs, such as the authoritarian one addressed by Scheppele and Landau that takes a liberal form, but compromises liberal norms.

A transnational legal order is not static, and the concept does not posit an international or transnational form that is simply transposed in a top-down manner. Rather, a TLO results from processes of transnational legal ordering that involve the interaction of international, national, and local law and practice on each other (Shaffer 2013). From a TLO perspective, one assesses the role of importers and exporters of constitutional norms and how they interact over time, leading to the rise and fall of different constitutional orders. Constitution-making dynamics, in other words, can be viewed as multi-directional. They involve dynamics inside states (Kumarasingham and Couso chapters), across states, between states, and with international organizations, and transnational networks.

TLO theorizing assesses attempts, successes, and failures of creating TLOs in different issue areas to address "problems." Such problems are social constructions that reflect different interests, values, perspectives, and social understandings. Participants in transnational legal ordering aim to address and order "problems" through law, often in contests among actors. Problems addressed in constitution-making range from reduction of tribal or religious conflict, the mitigation of social conflict, the reduction of poverty, the subjugation of women, and the arbitrary exercise of power by the coercive powers available to a state. There is no inherent teleology in TLO theory; many efforts at TLO construction fail locally, nationally, and transnationally because they are successfully contested and blocked.

TLO theory calls on scholars to address practice as well as form. In the context of constitution-making, research will be directed to the development of constitutional conventions through practice, as well as constitutional texts. Written constitutions only tell us so much, and so TLO theory calls us to address constitutional practice that gives rise to conventions that are normalized, but that later can become contested. In this way, the TLO framework addresses, from a sociological perspective, how settlement and unsettlement give rise to a new normal.

This focus on iteration maps onto one of the interesting features identified by comparative constitutional scholars. In his account of "post-

sovereign constitution making," Andrew Arato (2016) explains how constitutions are now produced in a more iterative manner, with multiple steps that allow for learning and adjustment. Not only has the process opened up spatially, through transnational influences, but it has also opened up temporally.

One of the virtues of this more dynamic approach is that it integrates the international and local levels. One of the phenomena that comparative scholars have identified is that constitutions tend not to last very long in most environments, but also that sequential constitutions in a country's history tend to borrow from each other as well as from international norms. The TLO orientation by treating international and national dynamics in the same framework, promises a richer understanding of how processes unfold over time.

To traditional black-letter scholars, the constitution as written stands by itself and is presumed to be effective; to some critical scholars, it results from some set of (dark) forces imposed on innocent and pure local contexts; and to some historical scholars, it sets in motion dynamics of refinement and development over time. The promise of the recursive approach to TLO construction is that it builds all these attributes into a dynamic framework that brings the insights of each temporal fragment of the process together.

The recognition of more dynamism raises important questions for legal theory. We are accustomed to thinking about constitutions as embodying a nationally situated constituent power that provides the basis for the making of law. Constitutions provide the *grundnorm*, the rules for the making of other rules (Kelsen 1960). H. L. A. Hart (1961), for example, places the constitution at the center of his concept of a legal system in that the constitution provides the secondary norms that give validation to primary norms that regulate behavior and facilitate coordination. In this way, the constitution constitutes a legal system. But if these constitutional norms are themselves constituted in a recursive and transnational manner, then their normative grounding as foundational (from the perspective of legal theory) becomes less clear.

In addition, the view of national constitutions as frameworks for legal systems of distinct sovereign states makes possible the field of comparative law (Michaels in press). In the last decades, the sub-field of comparative constitutional law has flourished (Hirschl 2014). Yet, once constitutions are viewed as part of dynamic processes of transnational legal ordering, the comparators become less stable. The very practice of comparative constitutionalism can participate in the dynamic shaping of the constitutions being compared. These practices can catalyze and contribute to constitutional change as part of ongoing transnational processes.

IDENTIFYING TLO BOUNDARIES

A central but challenging step in TLO analysis is to identify the boundaries of any given TLO. From the studies in this book, one can see different TLOs in competition with each other regarding constitution-making and practice, as well as efforts to establish a dominant liberal TLO.

With regard to constitutional texts, the chapter by Law finds evidence of different prototypes with different constitutional cores. Broadly speaking, one can see rival liberal-democratic and socialist constitutional orders. In addition, they show evidence of different heritages in constitutional orders involving colonial legacies and legal families. These give rise to parliamentary and presidential systems, and different roles for judicial review. Alternatively or complementarily, one sees evidence of constitutions as vehicles and opportunities to advance different substantive norms that themselves involve differentiated TLOs, such as TLOs for different human rights (Beck et al.), for gender, for property rights, for intellectual property protection, and for stakeholder participation (Saati).

In other words, the TLO framework opens the possibility of imagining constitution-making and implementation as social sites for contests among competing actors, each championing distinctive ideals which converge on some norms but deviate sufficiently on others that they appear as rivals. Ginsburg (Chapter two), Scheppele (Chapter seven), and Landau (Chapter eight), in particular, show that constitution-making can bring into tension multiple contenders for TLO primacy. Ginsburg suggests that the constitution-making process can be conceived of as an arena in which norm entrepreneurs in multiple TLOs – such as over different types of rights – contest substantive norms. In this sense, a constitution, conventionally conceived as the embodiment of national values and a framework for a national legal order, is in fact a transnational legal arena for contests over particular legal norms. The constitution-making process is, in other words, an arena for political and social struggle over the rules of the game. At any constitution-making moment local, national, and transnational actors are all drawn into this contest.

If the national and global enterprises of constitution-making are to be seen through a lens of contesting actors who champion norms for rival TLOs, then the core norms that are contested will include: (i) substantive norms (e.g., different human rights); (ii) procedural norms about the operation of governance (e.g., representation and modes of decision-making, such as elections); (iii) institutional norms (such as the structural allocation of power among institutions); and (iv) process norms about the very ways in which constitutions