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Constitutional Reasoning As Legitimacy of Constitutional Comparison: Comment on Konrad Lachmayer

By Cheryl Saunders[*]

In his interesting article,[1] Konrad Lachmayer offers what he describes as a "new perspective" on the legitimacy of references to foreign law in the reasoning of constitutional and other apex courts, drawing on contemporary conditions of constitutional pluralism.[2] Using the debate between Justices Scalia and Breyer in the United States as a foil, he argues that the concerns of both sets of protagonists are misplaced, because they rely on a state-centered view of constitutions and constitutionalism that is closed to "external influences" and fails to take adequate account of modernity. Instead, in Lachmayer's view, constitutions should be understood as components of a "global network of constitutions" that transcends traditional borders, operating in conditions of pluralism, which both denies the exclusivity of state constitutions and demands "the energetic engagement with diversity."[3] In this understanding, courts, including supranational and international courts, are significant actors in a "dialogic engagement" that contributes to the management of interdependency and helps deal with shared challenges. References to foreign law, as well as international law, are a natural and necessary part of the process. Use of comparative knowledge is "generally legitimate." Legitimacy should be judged on the quality of the constitutional reasoning, with particular reference to "rationality" and "transparency."

To a degree, as Lachmayer notes, he has set up a straw man, by focusing on the controversy over legitimacy in the United States. Not all national constitutional systems regard constitutional law as "closed," at least not in a way that precludes insight from foreign and international legal experience.[4] The apex courts of all common law states, with the exception of the United States, refer to foreign law regularly and without controversy

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[1] Konrad Lachmayer, *Constitutional Reasoning As a Legitimacy of Constitutional Comparison*, 14 GERMAN L.J. 1463 (2013).

[2] *See* Lachmayer, *supra* note 1. All the quotations in this paragraph are from Lachmayer, except as otherwise indicated.

[3] Diana Eck, *What is pluralism?*, THE PLURALISM PROJECT, http://pluralism.org/pages/pluralism/what_is_pluralism (last visited July 2, 2013).

[4] Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 288 (1987).

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in constitutional cases.[5] The constitutional courts of many civil law states also reference foreign and international experience, although the manner and extent to which they do so varies.[6] While the question of legitimacy may still arise if foreign law is misused or misunderstood, these are flaws in the reasoning process.[7] Whether the expected standards of constitutional reasoning in these courts differ from those for which the article contends is an issue to which I return below.

Lachmayer is correct in noting that analyses of judicial engagement with foreign law in constitutional cases typically assume that constitutions and the practices associated with them derive legitimacy through their respective states even though, in many states, this does not preclude a more open-ended approach to law.[8] His argument, by contrast, is that the real world has changed, with implications for the way in which constitutions should be conceived. Much of the value of the article lies in his careful elaboration of this position, on the practical, legal, and theoretical planes. He points to the emergence of new polities at the supra-national level, the rapidly growing significance of the international sphere, the shift of power from states to supra-national and international institutions including the private sphere, and the interdependency of the whole. He grounds his argument in the multiple identities of people within and beyond the states in which they reside, the prevalence of extraterritorial state action in response to transnational challenges, and pressures on the practices of representative democracy that dominated the twentieth century. He notes a shift in values as a response to these realities. These include the increasing emphasis on human rights, rather than merely civic rights, and a burgeoning interest in how national constitutional values of the rule of law and democracy can be adapted for the international sphere. In the face of these developments, he argues that pluralism now offers a more appropriate foundation for constitutional theory and the touchstone for the legitimacy of constitutional comparativism by courts.

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[5] Cheryl Saunders, *Judicial Engagement with Comparative Law*, *in* COMPARATIVE CONSTITUTIONAL LAW 571 (Tom Ginsburg & Rosalind Dixon eds., 2011).

[6] See, for example, the observations of Justice Lee, Jin-Sung on his inauguration as a Justice of the Constitutional Court of Korea on September 20, 2012, Press Release, Constitutional Court of Korea, Justices Kim, Yi-Su, Lee, Jin-Sung, Kim, Chang-Jong, Ahn, Chang-Ho, and Kang, Il-Won Sworn in As New Justices of the Court (Sept. 21 2012), *available at* http://www.ccourt.go.kr/home/english/welcome/news_view.jsp?seq=151.

> I will hold fast to the ideas and spirit of the Constitution and do my best to figure out, referring to the judicial systems of other countries as well as our own Constitution and legal system, a constitutional solution to the conflicts and disputes of our time and to find the right path for the people.

Id.

[7] Cheryl Saunders, *The Use and Misuse of Comparative Constitutional Law*, 13 IND. J. GLOBAL LEGAL STUD. 37 (2006).

[8] *See* Glenn, *supra* note 4, at 268.

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There is no doubt about the reality of these developments. Equally, there is no doubt that they have implications for the conception of constitutions, for constitutional doctrine and theory, and for the practices of constitutional law. The case might have been strengthened further by reference to a range of other indicators, including the recent proposal for the establishment of an International Constitutional Court by Tunisian President Moncef Marzouki.[9] It is also possible to cite examples that illustrate interdependency, the need for mutual comprehension, and the scope of overlap and inconsistency between national constitutional norms. One example, drawn from Australian experience, is the potential for the citizenship laws of one state to affect the exercise of democratic rights in another state by persons who hold citizenship in both states.[10] Another example, also drawn from Australia, involves consideration of the meaning and the limits of the validity of extraterritorial national law where there is potential for conflict with the domestic law of another state.[11] An example of a more general kind, to which the article refers in passing, is the need to harmonize the various national understandings of the rule of law in adapting it for international purposes.[12]

The difficulty is that while these developments are significant, they are not (yet?) sufficient in terms of either depth or coverage to convincingly support a claim that the paradigm has changed. It may be that the scholarly debate to which articles such as this one contribute will, in time, prove to have been a tipping point. Nevertheless, for the moment, the practice of states and, albeit less consistently, of international institutions, assumes the traditional paradigm. Relevant for present purposes, governments and legislatures are primarily responsive to national electorates. The elected branches appoint members of courts. Courts are independent, but keep an eye on the climate of national opinion. National institutions operate within an international context, and are likely to be conscious of their own limitations—whether they acknowledge them or not—and increasingly consider transnational law. Nevertheless, the microcosm of which national courts are a part and which shapes their conception of legitimacy still centers on the state, making unilateral change of focus implausible. Lachmayer acknowledges the continuing relevance of state-based institutions, including constitutions. In part, his claim is relatively mild: Their authority is not "exclusive" anymore. But his argument for the legitimacy of judicial use of

[9] *Tunisian President Marzouki Proposes International Constitutional Court*, QATAR NEWS AGENCY, Sept. 28, 2012, http://www.qnaol.net/En/Pages/default.aspx?web=/QNAEn/Foreign_News/Politics4/Pages/TunisianPresidentMarzoukiProposesInternationalConstitutionalCourt.aspx. The proposal was made in the General Debate of the 67th session of the General Assembly of the United Nations, on September 28, 2012.

[10] Sykes v. Cleary, 1992, 176 CLR 77 (Austl.) (originating from the High Court of Australia).

[11] XYZ v. Commonwealth, 2006, 227 CLR 532 (Austl.) (originating from the High Court of Australia).

[12] The author correctly points to differences in the German concept of the Rechtsstaat and common law formulations of the rule of law, although formulation of the latter in terms of "independence of the judiciary" is misleading or, at least, incomplete.

foreign law, founded on a theory that focuses primarily on pluralism, goes further. Its ambiguity blurs the reality that this is a time of transition, in which it is far from clear how the old order can, will, and should be accommodated with the new.

The difficulty is exacerbated by the uneven spread of some of the phenomena to which the author refers. Most obviously, deep regional integration is experienced only by the member states of the European Union and regional human rights systems exist only in parts of the world. International institutions have more general application, but typically, at least for the moment, have more shallow penetration. Regional integration in Europe has been the catalyst for perceptions of constitutional pluralism, as theorists from different national traditions wrestled with the apparent conundrum of a constitution for a supra-national polity and the relationship between European and national courts.[13] The debate has been intellectually fascinating and invigorating, it has stimulated new ideas, and it has spilled over European borders to some degree. Nonetheless, in most of the world, constitutional law remains dominated by national constitutions even if they are now affected, to varying degrees, by international law. National judges deciding constitutional cases in these states may take the international context into account, but they do so within a framework that meets the needs and expectations of their own jurisdiction. This framework typically is a product of culture rather than the legal system, and thus is susceptible to evolution over time.

The claim for pluralism must similarly be qualified in relation to contemporary constitution-making theory and practice. The networking characteristics of constitutions have been reinforced by many recent constitution-making exercises through, for example, the direct incorporation of international human rights norms, provisions for regional integration, and a new eclecticism in constitutional transplants, under the influence of international advisors or in consequence of the greater accessibility of the global range of constitutional models. But while constitution-making has been prolific over the last two decades, it has left some old constitutions untouched. Not all the new constitutions were made in conditions that exposed them to the same measures and means of international influence. And, in any event, the internationalization of constitution-making is in tension with widespread acceptance of the need for ownership of new constitutions by the people of the state concerned, through popular participation at multiple points in the process, in part to create sufficient unity to enable diverse groups to live peacefully together.[14] Popular consent remains the dominant theory of legitimacy for new constitutions, despite

[13] For an early and influential contribution, see Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317 (2002). But compare a recent skeptical analysis by, Martin Loughlin, Professor of Public Law & Head of the Department of Law, London School of Economics, Paper Presented at University College Dublin: Constitutional Pluralism: An Oxymoron? (June 30, 2012).

[14] U.N. Secretary General, *Guidance Note of the Secretary General: United Nations Assistance to Constitution-making Processes*, ¶ 3, 4 (April 2009).

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international involvement, which typically is downplayed. From this perspective, while there are indicators of pluralism, they are unevenly spread and their implications are unclear.

The extent of the impact of globalization on national constitutions is itself a subject for comparative inquiry. Konrad Lachmayer's argument for constitutional pluralism comes from a European perspective that arguably is at one end of a complex spectrum. I am conscious that my commentary on his argument is informed by conditions in Australia, which, by any view, is at the other end of the spectrum. A global theory of constitutional pluralism nevertheless needs to take account of both, as well as of variations in between. In Australia, as throughout Asia and the Pacific, there is little formal regional integration and no regional human rights system. The Australian Constitution, like others elsewhere in the world, is old and well established. The common law legal family, of which Australia is a part, is diversifying.[15] The proportion of cases that require reference to foreign or international law for their resolution, on account of the global conditions to which Lachmayer refers, is almost certainly increasing. So far, this is accomplished within a framework of reference that assumes the supremacy within Australia of the Australian Constitution and that takes a somewhat dualist stance on the status of international law.[16] The analysis is sometimes awkward or strained and there are occasions on which one might wish the courts to go further. Nevertheless, abandonment of this framework, to engage more extensively with non-Australian sources in the name of constitutional pluralism, would disturb the delicate balance of authority between the courts and the elected branches and jeopardize their capacity to carry out an already sensitive role.

Like many other apex courts, the Australian High Court refers readily to foreign law in constitutional and other cases, even when it is not strictly necessary to do so in order to resolve the questions before the Court.[17] Emeritus Justice Laurie Ackermann, formerly a Justice of the Constitutional Court of South Africa, once described the purpose of recourse to foreign law in these circumstances as "seeking information, guidance, stimulation, clarification, or even enlightenment . . . keeping the judicial mind open to new ideas."[18] In many jurisdictions there is no objection to this practice in principle, even in the absence of a theory of constitutional pluralism. Nonetheless, objections might arise from the manner

[15] Lord Bingham of Cornhill, *The Break with the United Kingdom and the Internationalisation of the Common Law*, *in* CENTENARY ESSAYS FOR THE HIGH COURT OF AUSTRALIA 82 (Peter Cane ed., 2004).

[16] For the exchange between Justice McHugh, broadly representing the majority, and Justice Kirby, see, Al-Kateb v. Godwin, 2004, 209 CLR 562 (Austl.) (originating from the High Court of Australia).

[17] Cheryl Saunders & Adrienne Stone, *Reference to Foreign Precedents by the Australian High Court: A Matter of Method*, *in* THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES 13 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013).

[18] Laurie W. H. Ackermann, *Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jorg Fedtke*, 80 TUL. L. REV. 169, 183 (2005).

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of use in the course of constitutional reasoning. Lachmayer's article prompts the question of what, if any, are the differences between the standards of reasoning that he advocates on the assumptions of constitutional pluralism and those applicable to courts that rely on state-based sources of legitimacy, in relation to references to foreign law. The inquiry is complicated by at least two factors. First, there are subtle differences in the use of foreign law between courts that are comfortable with the practice, suggesting that standards may vary in response to local factors. Second, the cases in which courts need to engage with foreign or international law to resolve the issues before them appear, anecdotally, to be increasing.

There are some similarities in the standards of reasoning that Lachmayer identifies and those that might be regarded as ideal for national courts, operating in accordance with state-based theories of legitimacy, when they draw on foreign law.[19] Both should be "transparent, public and comprehensible."[20] Neither is necessarily directed to "best practice" with a view to homogenizing global constitutional law. In neither standard of reasoning is the focus of analysis confined to similarity and difference. While traditional comparative considerations may play a greater role in state-centered reasoning, awareness of difference is likely to play some part even under assumptions of pluralism. In both, the relevance of recourse to external sources should be explicit, at least where these are necessary to the resolution of the case.

The most potentially significant difference between the two standards of reasoning lies in Lachmayer's elaboration of the standards of rationality as informed by the demands of pluralism. He attributes three purposes to comparison: (1) To facilitate "necessary adaption and delimitation between . . . different constitutions," (2) to enable "navigation of the particular constitution in the international network of constitutions," and (3) to "address global challenges to constitutional law."[21] To these ends, he argues that courts should "concretize the particular reason for referring to constitutional knowledge from other constitutional orders," explain how the "constitutional knowledge was acquired," and argue how it "is relevant in a comparative manner in the concrete case."[22] There is undoubtedly a difference in emphasis here, from the use of comparative experience for analogical purposes and more generally as a source of ideas, in many common law jurisdictions. The difference may be diminished in cases where the issues before the court

[19] The warning of Emeritus Justice Kate O'Regan should be borne in mind nonetheless: Courts should avoid "shallow comparativism" but to "forbid any comparative review because of perceived risks associated with [comparative method] would be to deprive our legal system of the benefits of the learning and wisdom to be found in other jurisdictions." NK v. Minister of Safety and Security 2005 (6) SA 419 (CC) at para. 35 (S. Afr.).

[20] Lachmayer, *supra* note 1.

[21] Lachmayer, *supra* note 1.

[22] Lachmayer, *supra* note 1.

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require engagement with foreign or international law for their effective resolution. It might be noted in passing that exactly how constitutional knowledge is acquired by a court, and how its accuracy is tested, will vary in accordance with different curial procedures.

There are at least two additional points on which differences between the two approaches are more difficult to assess. First, on state-centered assumptions, lesser authority is accorded to foreign than domestic law and the authority of international law depends on the state's own legal normative framework. The relevance of authority is not entirely clear in Lachmayer's approach, but the logic of pluralism suggests that it may have lesser importance. The second point concerns the choice of jurisdictions for comparative purposes. Where the issue before the court requires recourse to foreign, international or even private law the choice is likely to be straightforward on either approach although, again, Lachmayer's analysis does not explicitly deal with this point. Where foreign law is used either as a source of ideas under a state-based approach or to address global challenges on assumptions of constitutional pluralism, there are choices to be made, that are to be judged by the respective standards of rationality.

Konrad Lachmayer is to be congratulated for drawing attention to the implications for constitutional law of the growing interdependence of the constitutional systems of the world, both horizontally and vertically. It is doubly welcome that he does so with reference to the relatively neglected field of comparative constitutional reasoning. There is no doubt that the phenomena that he describes are creating pressure for structural and conceptual change. Nonetheless, it is premature to predict the outcome in terms of a form of constitutional pluralism that apparently requires a dramatic shift in the focus of legitimacy. It may be, instead, that the boundaries of the judicial practices that are acceptable by reference to state-based theories will simply continue to expand in the face of global realities. In the end, it may not make much difference in practice, despite the divergence of the respective theoretical foundations. In the interim, as Lachmayer suggests, there is considerable insight to be gained from a closer study of how the interdependence of constitutional orders, broadly conceived, is manifesting itself before courts of all descriptions and of how, including how well, constitutional reasoning is responding to the challenge.