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New Constitutions in Light of Globalization

Føroyskt úrtak: Nýggjar grundlógir í ljósinum av alheimsgerð
Alheimsgerð (globalisering) dregur innlendis stjórnarskipanir tveir mótsettar vegir í senn.

(1) Tann økta áviraknin hjá altjóða stovnum á innlendis viðurskifti – eisini tann hjá altjóða fyritøkum, óheftum altjóða felagskapum, og hjá millumlanda stjórnarligum felagsakapum sum Heimshandilsfelagskapinum (World Trade Organization, WTO) – minkar um valdið hjá almennum innlendis stovnum á landsins viðurskifti. Altjóðagerðin ger tí innlendis stjórnarskipanir minni týðandi enn tær hava verið, og gloppa samtundis hurðina fyri stjórnarligum nýskipanum sum øktum heimastýri, stovnum, ið fevna um øki tvørturum landamørk,og fyri fullveldi hjá londum, sum fyrr vóru hildin vera "ov smá" til slíkt.

(2) Og tó, sama økingin í valdinum hjá millumalanda stovnum ger tað eisini meiri týðandi at tryggja,at nóg mikið av valdið verður eftir hjá stjórnarstovnum at ansa eftir teimum altjóða.Har sum valdið er runnið frá stjórnunum til aljóða fyritøkur uttan at nakað mótsvarandi vald er lagt til almennar millumlanda stovnar, er innlendis vald tann einasti møguleikin at ansa eftir privatum altjóða valdi. Harafturat kemur, at nógvir millumlanda stovnar hava eitt sonevnt demokratiskt undirskot, og eru teir tí ikki nøktandi at seta í staðin fyri innlendis demokratiskt sjálvræði. Loksins kann alheimsgerðin gera tað meiri neyðugt hjá tjóðlondum at menna sínar egnu stovnar at skapa karmar hjá fólkinum í landinum at kenna seg sum partur av eini tjóð.

Altjóðagerð ger tí innlendis stjórnarskipanir minni týðandi og meiri týðandi. Spurningurin fyri grundlógarsmiðir in okkara tíð er at menna stovnar, ið megna at taka ímóti avbjóðingunum frá hesum mótsettu toganum, serliga við at styrkja landsins støðu á summum økjum, men samstundis viðurkenna, at innlendis skipanir á øðrum

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økjum fara ikki at megna at ráða á tann hátt, sum stjórnarvaldið higartil hevur verið hildið at megna.

There is an escapable tension in creating a new constitution in the era of globalization. Constitutions are, among other things, assertions of a form of sovereignty.[2] Yet, the conventional wisdom is that globalization either means or brings in its train the reduction of the effective sovereignty of individual nations, in degrees varying from nation to nation. Transnational actors – be they corporations, nongovernmental organizations, or intergovernmental organizations – are said to influence the development of domestic policy to the point where those actors, rather than the purportedly sovereign national law-makers, are the *effective* locations of power. As Susan Strange put it, relative to classical nation states, sovereignty in a globalized world flows upwards – away from the national sovereign to supranational bodies–, downwards – away from that sovereign to local jurisdictions or agglomerations of subnational jurisdictions from different nations (regionalization)–, or even evaporates – flows away from national sovereigns to non-governmental actors like transnational corporations.

The enterprise of creating a constitution in such a world might seem pointless. If sovereignty has fractured, why bother to create a constitution for a now-irrelevant national government?[3] Yet, globalization has another effect, pointing toward the greater importance of sovereign power. As power to affect domestic policies flows outside the national borders, it may become all the more important to *enhance* the power of the national government through constitutional revisions and the like.

Before proceeding further, it may be helpful to clarify my perspective. I am concerned with how institutions work in the world – a functionalist, in jurisprudential terms – and believe that understanding how things works precedes and provides the basis for describing them in abstract or conceptual terms. So, for me, the term *sovereignty* is a label to attach to certain functions that institutions perform. On this view, sovereignty can be shared, and it can be assigned to one institution or set of institutions on some subject, and to another institution or set of institutions on another. Perhaps the term referred in the past to a highly aggregated set of functions lodged in the set of institutions called the *nation-state*. From my perspective, disaggregating those functions – and continuing to use the

[2] They are also ways of organizing power within a society, methods of stipulating how laws can be created, etc.

[3] As Dan Tarullo pointed out to me, it is easy to exaggerate the claim that globalization has created a new form of fractured sovereignty. Nominally independent nations subject to imperial domination experienced the effective fragmentation of sovereignty decades ago. Acknowledged as actors in the international arena, they had little effective control over effective policy-making within their territories, which is an aspect of what I have called fractured sovereignty.

term *sovereignty* – is a conceptually permissible move.[4] In what follows, then, I refer to the erosion of *effective* sovereignty while acknowledging that the cession of *formal* sovereignty has been extremely rare.

One reason for adopting the functionalist perspective is that it helps us work our way around some obstacles that a more conceptualist perspective has difficulty with. Consider the problems raised in Michel Troper's discussion of the amendment to the French Constitution that allowed France to participate in the European monetary and economic union created by the Maastricht Treaty of 1992.[5] The amendment provides, "France agrees to transfer of power necessary in order to establish a European economic and monetary union.…" Troper observes that older, seemingly more fundamental constitutional pro visions were left untouched. These provisions state that "the law is always an expression of common will," and that "the people exercise their sovereignty via their representatives."

Troper asks how one can reconcile the EU amendment, which, he says, "accepts breach of essential conditions of national sovereignty," with the basic articles that forbid such a breach? He offers three possibilities. The EU amendment might be "an exception" to the basic principles, with the effect that EU actions "are not the expression of common will," implying that the amendment "sacrifce[s] the democratic principles because the French people, once subject to the laws that do not express common will, cannot be considered sovereign." Second, perhaps the EU amendment "merely provides a more specific determination" of the common will. But, Troper notes, sometimes the European authorities will act through a qualified majority vote against the vote of France. So, it would seem, here "a decision taken against France's vote still expresses common will of the French people," not a comfortable conclusion. Finally, Troper says, perhaps the people "enjoy supranational sovereignty which allows them to amend the constitution at any time." This, however, implies that the people's sovereignty is such that they may exercise it "beyond constitutional forms," even with respect to "breaching 'the essential conditions of sovereignty.'"

Troper finds all these approaches disquieting. But, I believe, this is so only because he approaches the question of sovereignty conceptually rather than functionally. If one thinks that sovereignty can be disaggregated – or fractured, the term I used – there is nothing particularly problematic about a nation's people assigning some aspects of sovereignty to institutions not completely under their control. If one

[4] For a similar perspective, see Louis Henkin, International Law: Politics and Values 10 (1995) ("it is necessary to analyze, 'decompose,' the concept [of sovereignty]; to identify the elements that have been deemed to ber inherent in, or to derive from 'sovereignty'").

[5] Michel Troper, "Transformations of European Constitutional Culture," in Constitutional Cultures (Miros?aw Wyrzykowski ed. 2000).

likes, one could say that after the EU amendment France's people are sovereign with respect to all matters not covered by the EU amendment, and that they participate in some other institutional arrangements that have sovereignty over the matters covered by that amendment.[6]

Modern developments in constitutional design (defined broadly) respond to the opposing pulls of globalization. The most important development in this context is the open acknowledgement, through institutional design, of the way in which sovereignty has fractured.[7] The classical tradition of constitutional design offered only two choices – a unitary national state in which all sovereign power resided, and federations in which sovereignty was split between the nation and subnational units, with an allocation in the constitution of specific competencies to the nation and the subnational units coupled with some specification of whether the residue of power (that falling outside specific enumerations) was located in the nation or in the subnational units.

Modern developments make a host of new choices available. The nation can share its power with the subnational units, of course, or – as in treaties that create ongoing law-making bodies like the World Trade Organization or the European Court of Human Rights – it can share its power with other nations or supranational bodies. More interesting, perhaps, subnational units can share their power with each other, through pacts between the units of a single nation, or they can share their power with other nations or with the subnational units of other nations. Subnational units can be represented in transnational law-making bodies, and regional governments can regulate the activities of subnational units in different nations.[8]

The relation between globalization and these new options for constitutional design is this. As Alexander Hamilton wrote in the first *Federalist* paper, con-

[6] I understand the existence of a difficulty some scholars of European law have with such a formulation. They believe that sovereignty can only be exercised by a people, and that, there being no European people (yet), the people of France cannot participate in European institutions that exercise sovereignty. Again, I believe that this is the product of a conceptualism that obscures the matters of true interest, such as how to design democratic institutions to make decisions for a population that is not a people, how to design institutions that do not override the differences that constitute the population as an aggregation of different peoples, and the like.

[7] Another important design innovation, which I do not discuss here, is the creation of new *forms* of judicial review that determine whether legislation conforms to fundamental human rights.

[8] *See* John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT'L L. 157, 160 (1997) (describing "sovereignty" as a term used to refer to contested questions of the allocation of power with respect to varying subjects).

stitutional design subjects institutional development to reason and choice rather than force and history. Globalization fractures sovereignty in ways that increasingly put traditional constitutional designs in question, because neither the unitary nation nor the federated nation and its subunits allocate sovereign power in a manner that corresponds to the new distribution of effective power. Today, however, constitution designers can choose – through an exercise of reason – an institutional design that allocates specific powers to subnational units, nations, and organizations of many nations depending on whether effective power over the subject is exercised on the local, national, or transnational levels.[9]

In the remainder of this paper I will address the relationship between globalization, constitutional design, and the division of sovereignty by considering first the possibilities for institutional innovation on the domestic level opened up by globalization, and then the need for developing national and supranational institutions to respond to the diffusion of effective power in a globalized world.

Seen from a domestic perspective, what does a sovereign government do? Obviously no complete enumeration is possible, but one can identify some important heads of power. Domestic governments regulate economic activity – setting conditions for entry into some businesses, specifying appropriate conditions of labor in different industries, and the like. They engage in cultural activities – subsidizing the arts, setting curricula for educational institutions, and the like. They protect the fundamental rights of their members from undermining by the government itself and by private actors. They represent the nation on the international scene – negotiating trade and military defense agreements, stating the nation's position in international fora, and the like.

Classical federalism shows that the actual exercise of these heads of power can be distributed among different institutions within a nation. Principles of subsidiarity, whether enshrined in a constitution or taken simply as guides to policy-development, help allocate governmental power to what is seen as the appropriate level of government. But, modern developments, including globalization, show that these institutional allocations can take place across national boundaries as well.

[9] Probably the only obstacle to constitutional design choices that match some portion of sovereign power to the location of effective power is a traditionalist conception of sovereignty as necessarily unitary. Even federal nations often have had difficulty conceptualizing the division of sovereign power between the nation and subnational units. So, for example, the best modern "explanation" of federalism and sovereignty in the United States is an unelaborated metaphor provided by Supreme Court Justice Anthony Kennedy, who asserts that the framers of the U.S. Constitution "split the atom of sovereignty." United States Term Limits v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). The metaphor is arresting, but it does not provide a good conceptual account of divided sovereignty.

• Consider first one of the primary functions of modern governments, the regulation of the domestic economy. Globalization means that every economic activity is inserted into a world-wide trade system, and this is true no matter how important a specific economic activity might be to a nation's domestic economy. Inevitably, then, domestic economic regulation must take account of the law-making activities of transnational trade organizations. Or, to put it in terms of sovereignty, sovereignty over economic matters is now distributed, with some elements residing in national actors and some in transnational ones like the World Trade Organization.

In addition, economic activity spills across national boundaries in ways that make regional regulation sensible. Consider a region composed of industrial areas of three neighboring countries, where each country has a large farming industry elsewhere. Historically, each nation would develop its own regulatory regime for the industry located within its borders, and then – if all went smoothly – there might be coordination and harmonization at the national level. But, the administrative costs of achieving harmonization, and the strategic hurdles of the bargaining process, might be quite substantial. Today, in contrast, those costs and hurdles can be overcome by creating a regional regulatory body to provide a single solution to the regulatory problems in the tri-nation region. Here too sovereignty is fractured, with each nation retaining power to regulate its "own" farming industry while yielding regulatory authority over the industrial region to a new institution.[10]

• The development of a rich body of international human rights law, administered by a number of transnational institutions and monitored by a thick array of transnational NGOs, may make domestic enforcement of fundamental human rights less important.[11] What now may matter more than the identification of those rights is the specification of the "margin of appreciation" that transnational institutions will give national ones because of the peculiarities of the domestic situation. In addition, participation in transnational human rights NGOs was a particularly important means of civic activity in eastern Europe before 1989, serving there as a substitute for unavailable modes of participation in domestic democratic politics. The growth of the transnational human rights culture means that participation in these NGOs now can be a form of democratic participation

[10] The literature I have read devotes most of its attention to informal arrangements between subnational governments, such as trade delegations, "twinning" of cities and provinces, and promotion of tourism. These activities are obviously significant, both economically and for each nation's diplomatic relations, but precisely because of their informality, they do not really implicate the fracturing of sovereignty that is my primary concern.

[11] Great Britain's adoption of the Human Rights Act 1998 indicates that there might be strategic reasons for constitutional revisions that increase the role of domestic institutions in enforcing fundamental rights – there, to avoid the embarrassment of repeatedly being found to have violated the European Convention on Human Rights.

more broadly; people who participate less in domestic democratic governance may participate more in these NGOs, thereby becoming active democratic citizens in a transnational rather than domestic sense.

• Cultural boundaries do not always correspond to national ones, as the development of the so-called Europe of Regions suggests. Subnational units that implement cultural policy might advance their policies more effectively by developing cross-border institutions with subnational units of similar cultural heritage, as has indeed happened in northern Spain and southern France, and in the region encompassing parts of northern Italy, Austria, and Switzerland.

• One might think that representation of the nation in international matters *must* be done by the nation itself. Yet, there are at least a few models of subnational participation in international institutions.[12] A theoretical model is provided in the U.S. Constitution. The states – the U.S.'s subnational units – may not "enter into any Treaty, Alliance, or Confederation," but states may, with the consent of the national legislature, "enter into . . . Agreement[s] or Compact[s]" with other nations. Obviously the line between a permissible "agreement" and an impermissible "treaty" may be hard to define, and practice is so thin as to be unilluminating. Still, the possibility exists. A more realistic model comes from the European Union, where the German länder participate directly in some of the EU's institutions.[13]

The general point I wish to make is that the fracturing of sovereignty – which has become evident as a result of globalization – allows for interesting innovations in constitutional design. Instead of seeing sovereignty as a single unit, we can now see it as an agglomeration of different powers over different subjects. And, more important, instead of thinking that these components necessarily must be combined in a single national unit, we can think about a strategy of mixing and matching elements of sovereignty to achieve the goals sought by the world's people. Some components of sovereignty will continue to reside in nations; others will reside in subnational units (as in classical federalism); still others will reside in transnational

[12] Wholly apart from the important phenomenon of NGOs operating across national borders, and sometimes "participating," at least as officially recognized observers, in fora where national governments are the sole formal decision-makers.

[13] As I understand it, this arrangement derives from the EU's willingness to accommodate Germany's domestic constitutional law so that the EU will be a more effective organization. To the extent that the arrangement results from negotiations and reflects the power balance between Germany and other members of the EU, the arrangement might not be replicable by other members. I use the example, however, to demonstrate the possibility of subnational participation in transnational institutions rather than to suggest that such participation is likely in any particular case.

organizations, either of wide scope such as the WTO or of narrower scope as in regional organizations.

From one perspective, these new institutional possibilities make the creation of a national constitution less important for those who, in the past, favored doing so. One can create almost everything that one might want to accomplish not by creating a new constitution but, now, by devising institutions *within* existing constitutional structures.[14] Yet, a precisely parallel observation might be made about the importance of sustaining the existing constitution: Anything in such a constitution that one thinks worth preserving can be preserved by creating appropriate institutions aggregating the relevant components of fractured sovereignty.

Perhaps, though, something like a distinctive national identity cannot be created through institutional innovations of fractured sovereignty. Constitutions are methods of asserting sovereignty, but they are also means by which one declares nationhood, the existence of one's nation in the international arena on the same level as all other nations. There is something to this claim, but less now than in the past. The reason is the acknowledgement of the significance of what has come be to known as asymmetric federalism. In symmetric federalism, each subnational unit has the same powers and is subject to the same rules. The United States is the prime example of symmetric federalism, in which each subnational unit is treated equally.[15]

Asymmetric federalism recognizes the particular importance of one or more of the nation's subnational units, by some combination of giving that unit a larger role than others in the national government, perhaps including a veto over national-level decisions that affect its particular interests, and giving it powers within its territory that other subnational units lack. So, for example, long-standing proposals for constitutional revision in Canada would recognize Québec as a "distinct society" within Canada.[16]

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[14] At least to the extent that one is able to persuade other participants in the existing constitutional scheme to agree. But, of course, creating a new constitution – after independence – also requires a certain kind of agreement from those participants anyway.

[15] So, for example, each state receives two Senators, and the only provision of the current U.S. Constitution that asserts its own unamendability purports to bar amendments that deprive states of equal suffrage in the Senate.

[16] The Canadian example illustrates as well some of the political constraints on the creation of asymmetric federalism. The proposals to recognize Québec as a distinctive society have been enormously controversial, and have not been adopted despite a long campaign for them. And, the precise meaning of the term *distinct society* has remained unclarified. Supporters of asymmetric federalism hope that recognizing Québec as a distinct society will give Québec more power over its own destiny, which is precisely what opponents

So far I have been discussing the ways in which modern innovations in constitutional design allow for responses to fractured sovereignty by re-constitutiing institutions within existing constitutional frameworks. The argument has been that fractured sovereignty diminishes the importance of the kind of sovereignty recognized in traditional constitutions, and so diminishes the importance of new constitutions under conditions of globalization. I turn now to the other side of the argument, that globalization suggests the importance of *strengthening* traditional institutions of governance rather than acknowledging the fact that such institutions have weakened.

The basic argument is straightforward, and focuses on the "evaporation" of sovereignty, meaning here the transfer of effective power from governments to transnational corporations and institutions. As before, I focus on economic regulation, self-government, culture, and the nation-defining aspects of constitution-making.

• Many people in many nations have become accustomed to various forms of regulation of economic activity. Such regulation becomes difficult as sovereignty evaporates. Transnational corporations readily shift their investments to jurisdictions where they find it easier to operate. That in turn induces other nations to be more accommodating, by structuring their regulation in a way that the transnational corporation finds acceptable. The ability of a nation's people to impose the forms of regulation they think most appropriate diminishes.

There are two obvious responses to this problem. The first is to shift regulatory authority from the domestic arena to a transnational forum in which the aggregate power of many nations can offset the power of transnational corporations. If corporations flee one jurisdiction to obtain more favorable regulations from another, a transnational regulatory body can insist that the corporation comply with the same regulatory requirements wherever it is located. The second is to enhance *domestic* regulatory power. Such enhanced power might be used, for example, simply to bar the transfer of work overseas.

Neither response is unproblematic. The difficulty with shifting power to a transnational institution is that such an institution may find it difficult to develop appropriate world-wide regulations. Many efforts to develop transnational regulation have foundered on the fact that the interests of the world's nations differ. In particular, less developed countries often believe that their people would become better off more rapidly were economic activity to be subjected to a lower level of

fear. Occasionally, defenders of the phrase assert that it would do no more than give symbolic recognition to the importance of Québec, which may be less than supporters of asymmetric federalism

regulation than more developed countries think desirable. In addition, transnational corporations may be able to influence the development of regulatory policy in transnational bodies, to the point where the regulatory power of such bodies does little to offset the power of the transnational corporations.

The difficulty with enhancing domestic power is that doing so fails to grapple with the sheer fact of globalization. It might be possible to limit disinvestment in a particular industry, thereby keeping the capital in *that* industry at home. But, it is likely to be impossible to inhibit disinvestment in all industries or, more to the point, to persuade foreign investors to invest in a nation that has just exercised its power to bar the transfer overseas of work in a particular industry. More generally, domestic regulatory (and revenue-raising) efforts are subject to discipline by transnational corporations, by transnational institutions, and by other national governments subject to lobbying pressures from locally important transnational corporations.

• More governing power may reside in transnational institutions today. Many of those institutions, though, suffer from the well-known democratic deficit. Transnational elites understand the problem and have made modest moves toward increasing the democratic legitimacy of their institutions, and as noted earlier participation in transnational NGOs is an additional remedy for the democratic deficit. On some matters, such as economics, the transfer of governing power to transnational institutions has, to this point, meant a reduction in the self-governing power of people everywhere. New constitutions can respond to this reduction by developing domestic institutions that engage the self-governing capacity of a nation's citizens – albeit, as must be true in an era of globalization, a capacity that can be exercised over a small range of issues than earlier. In contrast, the development of international human rights norms might *require* the development of new domestic institutions through which those norms can be enforced, the international institutional mechanisms being as yet inadequately developed to be effective enforcement mechanisms.

• The globalization of culture – or, perhaps more accurately, the Americanization of world culture through the distribution of the products of the U.S. culture industries such as film and television – can induce efforts to constitutionalize cultural protection. Here the primary methods seem to be various forms of local-content regulation for the media. On the constitutional level, such regulations must be accommodated to general norms of free expression. Doing so is relatively easy at the technical level, that is, in terms of drafting appropriate constitutional provisions that specify that cultural preservation efforts are consistent with the constitutionalized norms of free expression.

Cultural preservation nonetheless may be difficult to accomplish. Technology – such as direct broadcast systems for television – makes it difficult even to measure local content much less to control the amount of non-local content a nation's citizens receive. And, again, transnational institutions may find domestic cultural preservation regulations inconsistent with legalized norms applicable to the nation's regulatory system. So, for example, a transnational human rights court might find local-content regulations inconsistent with international free expression norms and (depending on how stringent the regulations are) outside the margin of appreciation. Or, a transnational economic court might find such regulations to be unjustified interferences with the free flow of goods across national borders.

• Even after sovereignty fragments, a core remains. That core is the simple fact of national existence. New constitutions may effectively establish the core of sovereignty, though they may do little else. Yet, here too one should not expect too much of constitution-making in a globalized world. The downside of establishing national existence through constitution-making is that the nation thus created may be – to use a perhaps overly disparaging image – little more than a new tourist destination, with its own stamps (but not even, today, its own currency). And yet, the world's supranational institutions are organized in large part on the basis of state sovereignty, understood as the core of national existence. The fact that the core does remain intact means that constitutions may be important to the extent that they create the domestic institutions to support the nation's appearance in international institution-making arenas.

The upshot of my argument is that globalization makes domestic constitutional arrangements simultaneously less important and more important. Globalization means the fracturing of sovereignty and the flow of effective power away from domestic institutions. These phenomena make domestic constitutions, understood as the expression of some sort of unitary sovereignty, less important, but they also make some aspects of sovereignty more important. Earlier constitution-makers could build upon a conceptual foundation in which the idea of sovereignty was well-understood and unitary. Designers of constitutions in a globalized world face a new challenge. But, globalization's fragmenting of sovereignty has produced institutional innovations that respond to that fragmentation. Today's constitution-makers can allocate portions of sovereignty to different institutions (and levels of institutions) in ways that would have been quite difficult to achieve in the past. The real task for those who would make a new constitution in a globalized world is to design institutions that distribute portions of sovereignty in ways that respond to their nation's real needs.[17]

[17] Some of these institutions will be regional, some transnational, and some purely domestic. To the extent that the institutions require collaboration among nations, contemporary constitution design is both a problem of domestic politics and a problem of diplomacy.