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Competing Powers in Constitutions: State, International, and Customary Law

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INTRODUCTION

Intra-constitutional struggle is a mainstay of almost all contemporary constitutional regimes, from a typical separation of powers system to the most unique consociational arrangement. Every country that has a constitution must consider the costs and benefits associated with the different constellations of power within its constitutional order. We consider this ubiquitous question of competing powers in the context of legal systems—when the state recognizes systems of nonstate law in the constitutional text itself. While this article most directly focuses on legal pluralism, therefore, it ultimately engages the larger, timeless question about how to allocate political power in fundamental law. Indeed, constitutional codification of power struggles and alternative authorities determines in a credible way a state's identity vis-à-vis domestic audiences and the international community.

Scholarship on legal pluralism is fundamentally concerned with understanding alternative sources of law in competition with state law. Such sources of non-state law are myriad in the 21st century, and include international law, transnational law, customary law, religious law, and still

others (Merry 1988; Tamanaha 2021). The unifying feature of all these sources is that they do not originate from state institutions, but are the product of other actors and institutions that operate independently of the state's institutional framework. Much work addresses questions pertaining to state law's relation to individual sources of non-state law: how domestic legal systems adapt (or not) to developments in international law (Elkins, et al, 2012), or how constitutions address and incorporate traditional political institutions (Holzinger, et al, 2019). Nevertheless, to our knowledge, no prior work examines how the state conceptualizes the legal position of customary versus international law in the context of its own domestic constitutional regime. To probe this issue, we turn to the universe of modern constitutional regimes in operation across the world. We ask whether any relationships—positive or negative—may be detected in a state's receptivity to international law versus customary law.¹ In examining how constitutional texts treat international and customary law as sources of authority, we develop a theory of competing power structures that views constitutions as arenas for negotiating the bounds of these different legal authorities and, ultimately, competing powers.

Prior scholarship conceptualizes states as either strongly or weakly pluralist, depending on their posture toward individual sources of non-state law (Griffiths 1986; Michaels and Pauwelyn 2012; Neo 2020; Swenson 2022). Strong legal pluralism indicates that non-state law operates mostly autonomously with independent enforcing institutions. By way of illustration, customary law may be considered autonomous if norms originating with local tribes or other indigenous peoples are granted jurisdictional status. Weak legal pluralism, indicates that non-

¹ International law is a set of norms, rules, and principles that govern relations between states and other subjects, including individuals, international organizations, sui genesis entities, and others (see Shaw 2021). Scholars diverge with regard to the definition of customary law. But, in general, customary law comprises notions of right and wrong that operate on the local level and do not originate with the state apparatus. These norms are rooted in the values and moral beliefs of the local population (see Ubink and van Rooij 2011, 1).

state law is ultimately subsumed under the state law (Griffiths 1986), in such a way that precludes meaningful autonomy and independent enforcement. Yet, the clear-cut distinction between strong and weak legal pluralism does not always reflect the complicated *de facto* reality. Indeed, a state might be strongly pluralist with respect to one kind of law, while taking a weak pluralist position with respect to another kind of non-state law. For instance, a monist state that by nature is pluralistic in relationship to international law may simultaneously treat customary law as subordinate to state-generated provisions. In addition, it is possible that the state forms its preferences toward nonstate law on the level of individual issues and singular norms. For instance, while rules of customary law regulating marriages may be upheld by the state, those addressing criminal law may be prohibited or shut out. One can thus imagine many possible combinations of weak and strong pluralism in the same constitutional text—a reality that calls for additional theory building and fine-grained analysis.

To paint a more realistic picture of constitutional juxtaposition of state law vis-à-vis customary and international law, we build on theoretical debates about particularist and universalist forces in constitutional law and politics (Hirschl 2014; Jacobsohn 2012). Liberal constitutionalism is widely understood as positing certain norms as universal, whether related to human rights or principles such as the separation of powers and the rule of law (Murphy 2007; Sartori 1962). As such norms are frequently understood as fundamental to constitutionalism, they should be included in all constitutions. International law, as a normative framework of the global order, spanning and encompassing multiple domestic jurisdictions, by definition, largely reflects this same universalist impulse of liberal constitutionalism. However, all constitutions arguably depart from such universalist aspirations in accounting for the particular circumstances of the polity in question, including ethnic, cultural, linguistic, religious, tribal, and other domestic

forces. After all, the very concept of a state and its constitution signifies a uniquely distinct identity (Bambrick and Ewing 2024; Jacobsohn 2010). This nonliberal side of constitutions is further evinced in the way scholars describe constitutionalism in myriad terms that are *not* related to liberalism (Kapiszewski et al, 2023). A state's decision to recognize customary law in its constitutional text can be understood as expressing their particular identity to domestic and international audiences.²

Thus, while customary and international law are both classified as sources of non-state law, the state may relate to them in different ways. Even more fundamental is the reality that though a set of norms has not originated from within the state apparatus, and is considered residing outside of the official state-enacted governance, it does not operate self-sufficiently within the state. Quite the opposite, there are multiple opportunities for interaction between state and non-state law, regardless of these laws' points of origin. One may well expect the state to relate to these two sources of non-state law in different ways, insofar as customary law—with all of its particularist characteristics—is frequently understood as running up against liberal norms (Nussbaum 2012; Sezgin 2013), such as those included in international law.³ Yet, there is a distinct possibility that traditional sources of law, such as custom, and quintessentially liberal international law are mutually supportive in some constitutional contexts. This reality adds nuance to the dichotomous particularist-universalist paradigm described above, suggesting that how constitutional texts relate to customary and international law is not so easily predictable.

² And *ipso facto*, a state's decision to constitutionalize law can be understood as representing a more particularist aspect of their identity. We recognize that constitution-making processes are typically the result of many voices that may identify with the state to a greater or lesser extent. However, for the purpose of this paper, we conceptualize constitutions as encompassing the reality within which the state operates. To this extent, we take constitutions as representative of the state's position.

³ However, some scholars maintain that the relationship between more particularist customary forces and international law is more complicated. For example, Powell has demonstrated that Islamic law and certain elements of international law are mutually supportive (Powell 2019; see also Massoud 2021).

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Our theory of competing power structures conceptualizes the nuanced reality of modern constitutionalism by examining how customary and international law coalesce in constitutional texts. Using natural language processing methods—topic modeling and network analysis—we evaluate the complete universe of contemporary constitutions that simultaneously mention customary and international law. We show that contemporary constitutions treat alternative sources of legal authority in a manner that is extremely attentive to details. Far from embracing a generalistic approach, the state formulates its posture toward alternative sources of legal authority on the level of individual provisions in line with to the confluence of norms, interests, and the socio-legal realities that bear on questions of competing power in constitutions.

THEORY OF COMPETING POWERS IN CONSTITUTIONS

Political scientists have long conceptualized constitutions as outcomes of bargaining processes that pre-commit political actors to certain normative or institutional constraints (Elster 2000; Tullock and Buchanan 1999). For example, constitution-makers may establish a separation of powers system with checks and balances across the branches, with expectation that future actors conduct politics within the constraints of this intra-constitutional system. That constitutions set up structures of competing power thus describes the very essence of what constitutions are intended to do in these tellings (Bessette and Tulis 2009; Burns 2019; Kleinerman 2009; Thomas 2008; Zeisberg 2013). However, constitution-makers might also include pre-commitments to international norms and institutions in order to secure democracy (Ginsburg 2006). In addition, references to local customary law may appear as state authorities may want to prevent any jurisdictional overlaps. The same elements of bargaining,

precommitment, and power struggles highlighted by the traditional precommitment literature analogously figure into this account. Yet, crucial here is the fact that inclusion of international law or customary law in a constitution entails precommitting to certain norms and institutions whose origins, and even authority, exist independent of the constitution itself. Indeed, constitutional texts may articulate structures of competing powers beyond the state and its traditional political branches, outlining competing power structures across legal microcosms. Customary and international law as independent and extra-constitutional sources of law frequently acknowledged in constitutional texts confront state law even as they find articulation within it.

Legal pluralism scholarship is largely defined by the confrontation of different legal systems and traditions. Our theory of competing power structures brings into focus constitutions as arenas where this confrontation, these power struggles, take place. The theory extends arguments advanced in the literature conceptualizing constitutions as something more than merely coordinating separate domestic institutions' sharing power (Neustadt 1960). Indeed, constitutions often delineate the borders of powers between different legal orders and traditions, admitting an extra-constitutional authority within the constitution itself. While the comparative law literature thus understands different legal traditions as competing in the context of the global order (Glenn 2014), we argue that frictions also occur within constitutions.

Local customary law and international law, as alternative loci of legal authority may be conceptualized as a profound threat or a balancing complement to state sovereign authority. This coexistence may cause apprehension and pressures since—if unregulated—there might be overlapping jurisdictions at work within territorial boundaries of one state (Otis 2014). In a way, both customary law and international law have been internalized by many domestic

constituencies, due to high levels of legitimacy associated with values and deep-seated notions of justice they carry. The fact that local customary law and international law seem to thrive in a multiplicity of domestic jurisdictions is particularly relevant because it demonstrates the enduring nature of pluralistic, or mixed jurisdictional settings, where state law co-exists with other types of law. International law penetrates territorial boundaries of a state and affects the lives of natural and juristic persons. Customary law blurs the fault lines between formal state institutions and non-state local authorities. The *de facto* functioning of customary law and international law within domestic jurisdictions contradicts the expectation that there must exist an unshakable, firm, hierarchical pyramid of legal sources with the constitution at the top and official state-enacted subconstitutional legal system below. At times, customary law and international law compete on equal footing with state law over which source of legal authority gets to regulate rights and obligations. In other words, the presence of other legal authorities injects complexity into any presumption of constitutional supremacy.

Customary law

Most would agree that what makes local customary law a compulsory and enforceable norm is a wide-spread, consistent and enduring communal adherence to a particular pattern of behavior, and a belief that the norm constitutes law and thus embodies a legal obligation.⁴ Yet, some actors consider local customs as out of date, trivial, merely of sentimental value, and a threat to modern state governance. In fact, this tendency to juxtapose well-functioning, stable,

⁴ For more discussion of the definition, see Bederman (2010), who conceptualizes custom in the context of domestic legal systems and international law. For a discussion of the role of custom as a binding source of international law, see Shaw (2021).

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3 state law with less-sophisticated, if not rudimentary, customary law, has been a mainstay of legal
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5 rhetoric in many legal cultures, whether contemporary or not (Bederman 2010).
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8 Local customary law continues to play a prominent role in multiple domestic jurisdictions
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10 around the world. Various communities define their identity and everyday life on the basis of
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12 local customs. Indeed, these laws generate legal obligations in most central aspects of human
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14 existence such as marriage, family, land and property, inheritance, succession, resource and food
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16 management (Harper 2011; Zweigert and Kötz 1998). Customary laws are not imposed, but
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18 instead emerge from patterns, practices and truths embedded in the common life of the people.
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20 These laws provide a glimpse into the living nature of domestic legal systems stemming from
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22 socio-cultural elements of a society. Thus, more often than not, people consider customary laws
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24 highly legitimate since they reflect *de facto* conceptions of right and wrong operating at the local
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26 level.
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31 Customary law provisions appear in many constitutions, especially in those countries
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33 where custom has traditionally constituted a salient cradle of legal obligations. Rather than
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35 merely surviving within the larger scope of state law, such customary laws contribute to the
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37 functioning of a domestic legal system, linking state law to conceptions of justice embedded in
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39 local communities. As Bederman (2010, 57) notes, “custom is no mere souvenir of bygone law;
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41 it is an integral and coherent part of any healthy, functioning contemporary legal system.”
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44 However, customary laws—though at times impartial, fair, and respectful of individual rights—
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46 may not always offer optimal solutions to legal questions. Indeed, there are some instances and
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48 substantive areas of law such as criminal liability, where these laws can perpetuate
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50 discriminatory practices and inequality in a society, creating frictions with state law and human
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52 rights norms. Constitutional drafters in some states with significant indigenous populations may
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3 be compelled to discriminate between singular customary laws that do and do not conflict with
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5 state law. Such meticulous, delimitation of customary law’s jurisdiction is especially important
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7 when customary law—empowered by strong customary institutions—is prone to usurp state
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9 authority. In these situations, the state’s attitude vis-à-vis customary law is quite fine-grained and
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11 comprises a basket of rule-level dispositions.
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15 In this context, it is crucial to recognize that not every customary law becomes
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17 constitutionalized. Indeed, in some geographic locations—usually subnational, local areas—
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19 custom continues to live in unwritten form, thus affecting merely a small portion of human
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21 relationships (Holzinger et al 2019; Read 2000). Also, quite frequently, though absent in
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23 constitutions, custom is featured in civil codes or other parts of the subconstitutional system. Yet,
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25 whether constitutionalized or not, customary law significantly contributes to many aspects of
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27 state governance as well as domestic political and social dynamics (Baldwin 2019; Baldwin, Kao
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29 and Lust 2023; de Kadt and Larreguy 2018; Henn 2023).
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35 *International law*
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38 Similar to constitutional provisions related to customary law, those devoted to
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40 international law delegate authority away from the state. However, in an important way, the
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42 latter can potentially shift the locus of authority outside the territorial boundaries of the state to
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44 external actors (Ginsburg et al 2008). Allowing international law to enter into constitutional texts
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46 may also increase accountability of state organs by subjecting them to external evaluations. In
47
48 contrast to the bottom-up origins of customary law, international law trickles down into state
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50 governance from the global level.
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3 Constitutionalization of international law propels its ability to be “international,” or
4
5 universal, as throughout time, sovereign states have resisted any outside interference into their
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7 domestic affairs. While historically, rudimentary references to international law have found place
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9 in some of the earliest constitutive documents, with time such references in a much more
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11 developed form became a mainstay of modern constitutions. There is a plethora of
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13 interconnected reasons that have propelled constitutional regulation of state law’s interface with
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15 the global order and its normative foundations. First, there are more than a few regional
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17 international organizations with the capacity to hold sway over core aspects of domestic
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19 governance. The European Union constitutes a prime example here. Second, since the end of
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21 World War II, the global order has become increasingly legalized and there are several
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23 international adjudicators with jurisdictions potentially affecting not only governments’ public
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25 activities—both domestic and international—but also the activities of individuals (Bambrick
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27 2025, 243-270). Next, international criminal law and human rights law have experienced
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29 unprecedented growth over the past decades, *ipso facto* generating inescapable interaction
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31 between international law and multiple layers of domestic law.⁵ In this context it is also crucial
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33 to note that the late twentieth century witnessed the emergence of supranational mechanisms
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35 allowing companies and individuals to challenge states in a rapidly growing area of investment
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37 disputes.
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45 Consequently, though there are still constitutions that ignore the topic, all these
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47 developments have put great pressure on states to include detailed constitutional provisions about
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49 international law. Of course, although support for international regulation of state activities has
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51 grown with time, especially with regard to human rights law, many policymakers perceive these
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56 ⁵ For an excellent review of these important points, see Bartolini (2014).
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developments as ever-expanding encroachment of international law into internal activities of sovereign states.

As a general rule, states are obliged to conform to international law and are accountable for violations committed by any state organ. Because much of international law generates binding obligations, it may happen that a state within its own jurisdiction fails to behave in accord with its international commitments. In order to guard the exercise of their sovereignty, states design and amend constitutions to provide defense mechanisms against potential noncompliance. These efforts demonstrate just how seriously states guard themselves against potential outside interference.⁶ Similar to customary law, at times, constitutional regulation of international law may be quite fine-grained, as the state delimits its attitude toward specific substantive parts and individual sources of international law. To illustrate, while a state may be quite friendly to international human rights treaties, openly including them into the domestic legal system, the state's outlook on other international law sources may be more cautious.

Alongside state legal structures, international and customary law, as alternative loci of authority, struggle for power in the context of the constitution. Different constellations of power arrangements emerge in constitutions as a result of competition between the three loci of authority.

Moving beyond normative types

⁶ State practice and the jurisprudence of international courts demonstrate that states may not invoke their constitutions, or any other domestic laws as a rationale for evading or violating international law. See, for instance, Article 27 of the 1969 Vienna Convention on the Law of Treaties. For more information on this topic, see Shaw (2021, 114-118).

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3 The rise of legal pluralism across the globe cannot but create opportunities for normative
4 clashes, and endless theorizing about the ideal balance of competing powers amid these clashes.⁷
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6 As Berman puts it “We live in a world of multiple overlapping normative communities,” (2012,
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8 p. 3). A growing body of scholarly work highlights three different approaches—three different
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10 normative types—to ordering competing legal authorities: sovereigntists, universalists, and legal
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12 pluralists.
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17 Sovereigntism describes “the view that sees the nation-state as the only proper locus of
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19 legal normativity” (Galán and Patterson 2013, 787). Taken to an extreme, this understanding
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21 may posit the state as the “only relevant normative community” (Berman 2012, 61).
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24 Sovereigntism might acknowledge other sources of law, but does not conceive of any real or
25
26 meaningful conflict or competition between state law and these alternatives. This is because the
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28 presupposed hierarchy places state law at the top, allowing state actors to acknowledge and order
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30 other would-be authorities as they see fit. While variations of the sovereigntist position are
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32 common, they often operate in tension with the sheer fact of international law. As described
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34 above, international law is binding on states and thus acts as a source of accountability for state
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36 law. Moreover, one might argue that sovereigntists overlook functional or practical authority
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38 enjoyed by customary law or authorities who offer what the state sometimes cannot, namely a
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40 thick sense of community and belonging (Seligman and Montgomery 2019).
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45 In contrast, universalists situate themselves against both sovereigntists and legal pluralists
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47 in presuming that “people are fundamentally the same despite culture and circumstance”
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49 (Berman 2012, 129). Hence, the global community might justly aspire to identify and establish
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51 common norms for different peoples. Those who are confident in the unifying potential of
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56 ⁷ For more on legal pluralism see Rosenfeld (2008).
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international law may find a home in this camp, insofar as it would tend to place a body of transnational, even transtemporal, norms at the top of the legal normative hierarchy. Similar to sovereigntism, universalism is not without critics. In particular, universalism may be predisposed to erase “any sort of normative difference” (Berman 2012, 129), and thereby demote competing legal authorities. As a result, universalism shifts existing balances of power to favor one legal authority—mostly likely international law—over others.

Finally, legal pluralism, understood in a normative sense, suggests that no set hierarchy exists to the different competing power structures of law.⁸ Rather, all legal authorities have equal normative weight and, hence may have some sway in resolving different questions and cases. While the constitution may favor certain sources of law over others, legal pluralism aims to suspend any a priori assumptions about some competing power structures holding priority over others. While sovereigntists and universalists tend to grant foremost authority to one source of law, legal pluralism shies away from such statements.

The dialogue between these three positions demonstrates the range of possibilities for ordering competing legal authorities and the moral priorities that underlie this choice. Though these ideal types are useful for theoretical purposes and normative inquiry, the reality is that actual constitutional regimes likely sit in between these accounts. Constitutionally anchored recognition of alternative sources of authority, such as customary law and international law, *ipso facto* limits state authority in a binding way. The state—arguably the sovereign authority whose purposes and capacities comprise the heart of the constitutive document—concedes to delegate

⁸ The term legal pluralism may be used in either a descriptive or a normative sense. In this paper, we embrace a descriptive understanding, appreciating the fact that different legal authorities exist in the same space and examining the different possibilities for ordering those legal authorities. One may also use the term legal pluralism in a prescriptive or normative sense, however, in contrast with the aforementioned sovereigntist and universalist perspectives. In this understanding, no set hierarchy exists to order the different competing sources of law.

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3 legal regulations to other authorities. In other words, the state deliberately restricts its ability to
4 control the entire domestic legal system. In the case of custom, the authority is handed over to a
5 part of domestic constituency, and in the case of international law, to external actors.
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10 The balance of power between competing sources of legal authority rarely meets the
11 standards of ideal normative types, such as sovereigntism, universalism, or legal pluralism. A
12 single constitution can be friendly to international law, but quite adversarial toward customary
13 law, complicating the legal pluralist perspective. As an example, Malawi's Constitution
14 simultaneously commits to supporting international law and to combatting discrimination of
15 women in customs and practices.⁹ It is also possible that a constitution may in general favor
16 customary law while restricting specific customary norms, the substance of which are considered
17 suboptimal from the perspective of state authority. While Malawi's Constitution commits to
18 eliminating gender-based discrimination, it simultaneously recognizes marriages under
19 customary law.¹⁰ Additionally, a constitution may be friendly to both international law and
20 customary law, as that of Mozambique.¹¹ The range of possibilities are myriad and, indeed, are
21 well-represented in actual constitutional texts. In the section below, we map a range of
22 possibilities for ordering competing legal authorities: that of customary and international law.¹²
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46 ⁹ Malawi's 1994 Constitution, Chapter III 13(k) reads: "To govern in accordance with the law of nations and the rule
47 of law and actively support the further development thereof in regional and international affairs." According to
48 Chapter IV 24.2, "Any law that discriminates against women on the basis of gender or marital status shall be invalid
49 and legislation shall be passed to eliminate customs and practices that discriminate against women."

50 ¹⁰ Chapter IV 22.5.

51 ¹¹ Mozambique 2004 Constitution, Article 43 addresses international law "The constitutional principles in respect of
52 fundamental rights shall be interpreted and integrated in harmony with the Universal Declaration of Human Rights
53 and with the African Charter of Human and Peoples Rights." Article 118 (1) directly recognizes jurisdictional reach
54 of customary law: "The State shall recognise and esteem traditional authority that is legitimate according to the
55 people and to customary law."

56 ¹² Over the past few decades, the scholarship has noted increased propensity for constitutionalization of traditional
57 institutions and local customs (Holzinger et al 2019).
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DATA AND ANALYSIS

We undertake a cross-national study of constitutional texts. As other kind of texts, textual data included in constitutions represent a foundational way of preserving human preferences and norms in the context of state governments. Text-based analyses have limitations: a constitution’s design and its role in the society differs across states.¹³ Judicial approaches to constitutional interpretation vary as well. Consequently, the understanding of a constitution’s *de jure* and *de facto* role may not be the same in all states. The distance between the text and reality may range from considerable to minimal.¹⁴ Also, constitutions are merely a portion of the domestic legal landscape. The sub-constitutional legal system—legislation, statutes, codes, administrative procedures, and so on—play a key role in ordering the society (Powell 2020; Tribe 2008). It is in this part of domestic legal systems that customary law and international are at times addressed, though the constitution may at times be silent on the topic. In sum, though *de jure*, constitutions are at the top of legal hierarchy in most domestic jurisdictions, they tell merely part of the story. While acknowledging the limitations of our study, we treat constitutions as credible signals of state identity and expressive commitments of the state with regard to the state operation (Ginsburg 2006). Competing legal authorities, when featured in constitutional texts, provide crucial information about power struggles over jurisdiction.

To create the text corpora, we identify national constitutions that include provisions pertaining to international law (131) and constitutions with provisions pertaining to customary

¹³ Jaclyn Neo (2020) shows, for example, the robust power of non-state courts that operate in what, on paper, would seem to be only weak legal pluralist states.
¹⁴ See Elkins et al (2009) who argue that while cross-section and overtime differences between constitutional texts can explain their lifespan, such differences do not preclude analytical comparisons.

law (53). Overlapping across these two groups are 36 pluralist constitutions.¹⁵ Among the total of 680 provisions, 474 pertain to customary law, and 206 to international law. It is worth noting that these customary law provisions and international law provisions do not intersect. To identify constitutions that reference international law, we draw from the Comparative Constitutions Project's data, specifically provisions coded as pertaining to "customary international law," "international human rights treaties," and "legal status of treaties" (Elkins, et al. 2024).¹⁶ We rely on Holzinger, et al. (2019) to locate constitutions that contain customary law provisions. Using the resulting 53 constitutions as our starting point, we build a new dataset containing exclusively customary law provisions. First, we searched the text corpora for instances of the following terms: custom, customary norms, tribal law, tribal, local, local practice, traditional, aboriginal, organic, habits. Next, we omitted provisions that concern national, cultural customs and traditions, municipalities as local authorities, territorial boundaries of native lands, and other provisions that did not speak directly to customary law.¹⁷ For the purpose of standardization and textual analysis, we divided each of the constitutions into distinct units using a Python script. This process generally followed the divisions employed in the constitutions themselves, counting as distinct units individual provisions that appeared under the constitution's

¹⁵ These 36 constitutions amount to about 20 percent of national constitutions across the globe. See Table 5 for the list of constitutions.

¹⁶ Elkins, Zachary, et al. 2024. Comparative Constitutions Project. For detailed description of each category, see <https://www.constituteproject.org>. While the data set codes other categories that also relate to international law (e.g., "international organizations," "treaty ratification," etc.), we selected the three aforementioned categories because they capture most clearly international law as a legal system that is separate but potentially overlapping with state law.

¹⁷ Other provisions that did not pertain directly to law which we omitted include provisions that concerned the electing or appointing of chiefs in state institutions unless these also referred to customary *law* as itself source of legal authority (see, for example, Article 237 (2b) of Nigeria's 2011 Constitution: "...such number of Justices of the Court of Appeal, not less than forty-nine of which not less than three shall be learned in Islamic personal law, and not less than three shall be learned in Customary law, as may be prescribed by an Act of the National Assembly"). In contrast, we retained provisions that recognized tribal or indigenous communities as valid and independent sources of legal authority.

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3 separate headings and subheadings. For example, in Peru’s Constitution, our script divided
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5 Article 57 on treaties according to the clauses existing in the text itself.¹⁸
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8 To gauge the state attitude or orientation toward international law and customary law on
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10 the level of each constitutional provision, we manually coded each of the 680 provisions
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12 according to Swenson’s (2022) categorization of legal relationships. In general terms, Swenson
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14 identifies four distinct types of legal relationships ranging from most adversarial or hostile to
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16 most accommodating, or friendly. In *combative* legal pluralist relationships, “state and non-state
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18 systems are overtly hostile to one another” (p. 8). *Competitive* relationships likewise entail
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20 “significant, often deep tensions between state and non-state legal systems;” however, these
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22 “clashes” do not amount to a challenge of state authority, such as the state’s judiciary (p. 9). In a
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24 *cooperative* relationship, non-state authorities enjoy “significant autonomy and authority,” and
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26 state and non-state legal authorities typically “work together toward shared goals” (p. 9). Finally,
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28 in *complementary* relationships, non-state authorities “operate under the umbrella of state
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30 authority and without substantial autonomy to reject state decisions” (p. 9).
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36 Reliance on these categories allows for a more sensitive analysis that captures the
37
38 nuanced power struggle between state law on the one hand, and non-state law on the other.
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40 While Swenson focuses on local domestic systems of non-state law, his descriptions prove
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42 equally useful in examining the relationship between state and international law. This framework
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44 allows us to take a step beyond broad categories often employed in studies of legal pluralism,
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52 ¹⁸ *Peru-0252*: The President of the Republic may formalize or ratify treaties or accede to them without previous
53 approval by the Congress in matters not contemplated in the preceding article. In all such cases, the President must
54 notify the Congress. *Peru-0253*: When a treaty affects constitutional provisions, it must be approved by the same
55 procedure established to reform the Constitution prior to its ratification by the President of the Republic. *Peru-0254*:
56 Denunciation of treaties is within the power of the President of the Republic, who has the duty to notify the
57 Congress. In the case of treaties subject to approval by Congress, such denunciation requires its previous approval.
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such as sovereigntism, universalism, pluralism, and the like, to examine more closely the relationship between state and non-state sources of law.¹⁹

In the final dataset, 14 provisions (3%) are coded as *combative*. All of these relate to customary law, and all but one are found in African constitutions. These provisions employ language of outright prohibition, limiting the reach of customary law in broad or specific terms. In most cases, these combative provisions are rooted in human rights norms. We coded 75 provisions related to customary and international law as *competitive* (34, 7%; 31, 20% respectively). These called for compliance, conformity, or change in line with state law. The competitive provisions typically stipulate that non-state law—whether international or customary—requires some prior review by state authorities, such as constitutional review by domestic courts. Nonconformity with the laws and norms of the state might result in the non-state law’s “denunciation”²⁰ or declaration as “void.”²¹

The dataset includes 228 customary and international provisions that are *complementary* (208, 44%; 20, 10% respectively). All of these articulate the supremacy of constitutional law, and sometimes state law more generally. In some instances, these provisions lay out the precise hierarchy of different sources of law in the polity, with the constitution always appearing at the top. All complementary provisions are distinct from the competitive provisions in that the former focus on the top-down hierarchy between different sources of law, as opposed to the review or outright amendment of non-state law. This aligns with Swenson’s own description of the term “complementary,” in that non-state law operates “under the overarching legal authority” of the

¹⁹ Scholars have developed other typologies as well. See, for example, Forsyth (2007), and Muriaas (2011).

²⁰ See Constitution of Peru, Article 57: “Denunciation of treaties is within the power of the President of the Republic, who has the duty to notify the Congress. In the case of treaties subject to approval by Congress, such denunciation requires its previous approval.”

²¹ See Constitution of Kenya, Article 2 (4): “Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”

state (2022, p. 9). Hence, while this category acknowledges that non-state law is limited in its reach and jurisdiction, complementary provisions may also evoke a more positive understanding that non-state law retains some place in the legal order.²²

Finally, the largest proportion, 363 provisions relating to customary and international law, are coded as *cooperative* (218, 46%; 145, 70% respectively). These constitutional provisions share in common general support or positive posture vis-à-vis non-state law. The overarching tone and content are inclusive and even supportive in contrast with combative and competitive provisions, which emphasize the review process and which approach non-state law with more suspicion and place increased emphasis on the review process.²³ All of the cooperative provisions still presuppose or even reference some procedure for recognizing non-state law as a valid source of authority in the constitutional order (e.g., in dualist countries). Yet, these patterns are unsurprising given a persisting partiality in favor of state-made law in global politics.

In the section below, we discuss topic modeling and the prominent themes we identify in our corpora of customary law and international law provisions. These models offer important insights into the substantive content of these constitutional provisions, including the extent to which different topics tend to appear in more adversarial (e.g. combative, competitive) or accommodating (e.g. complementary, cooperative) textual contexts. Topic modeling is followed by network analysis, where we employ the four legal relationship types to examine, on a country

²² See for example Constitution of Rwanda, Article 95: “The hierarchy of laws is as follows: 1. Constitution; 2. organic law; 3. international treaties and agreements ratified by Rwanda; 4. ordinary law; 5. orders. A law cannot contradict another law that is higher in hierarchy.”
²³ See Constitution of Philippines, Article XIV, Section 17: “The State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies.”

level, the extent to which national constitutions tend to treat international law and customary law similarly or differently.

TOPIC MODELING

Our goal is rather straightforward: to go beyond theoretical conceptualizations present in the literature and map out *de facto* patterns across constitutions. Though there exists a plethora of methods aimed at probabilistic topic modeling, we use Latent Dirichlet Allocation (LDA)—one of the simplest techniques—to analyze patterns in our 680 provisions (Blei, et al. 2003).²⁴ The basic assumption underlying LDA is that texts devoted to the same theme, or topic, are likely to include similar vocabulary. Indeed, words such as “chief,” “traditions,” or “communities” will appear more frequently in customary law provisions, and “treaty,” or “agreement” in international law provisions. We conduct the analysis on two separate corpora—customary law provisions and international law provisions.

We preprocess the raw texts by lower-casing all the words, removing non-alphabetic characters and stop words, tokenizing the text, and only keeping words longer than two characters. To determine the optimal number of topics for each corpus, we evaluated LDA models with different numbers of topics. For each corpus, six topics yielded high coherence scores, and were substantively meaningful. We assigned labels that reflect the words most characteristic to each topic. In this process, we also consulted specific constitutional provisions found to feature specific topics. Every provision in each corpus—that of customary law and international law provisions—was assigned to one of the six topics based on the document-level

²⁴ We use the Distant Reader software (Morgan, et al. 2019) to conduct LDA topic modeling. This software leverages the MALLET package (<<https://mimno.github.io/Mallet/topics>>) in the topic modeling process.

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3 expected topic proportion distributions. Then, using the manual provision-level coding of
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5 different legal relationship types based on Swenson (2022), we categorized each provision as
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7 being most associated with a given topic and a specific legal relationship type.
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12 *Customary law provisions*
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15 Table 1 presents the label of each topic within the customary law provisions corpus, the
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17 proportion of provisions classified for each topic, and ten keywords associated with each topic.
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19 The topic *customary law-state law relations* constitutes the most prevalent topic across all
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21 customary law-related provisions. Constitutional provisions associated with this topic address
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23 many relational aspects— structural, institutional, and legal—of the nexus between state law and
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25 authorities with customary law and authorities. An illustrative example is Article 223 of
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27 Angola’s 2010 Constitution, “The state shall recognize the status, role and functions of the
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29 institutions of the traditional authorities founded in accordance with customary law which do not
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31 contradict the Constitution.” Another provision that provides insights into the *customary law-*
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33 *state law relations* topic is Article 192 of Bolivia’s 2009 Constitution, “Each public authority or
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35 person shall obey the decisions of the rural native indigenous jurisdiction.”
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40 The topic *indigenous communities* appears in the corpus quite frequently. Bolivia’s 2009
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42 Constitution contains several such provisions, all of which address aspects crucial to the
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44 functioning of native communities: natural resources, harmonious coexistence with nature,
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46 cultural identity, and autonomy, and self-governance.²⁵ Interestingly, *ancestral knowledge* and
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48 *land* are the least frequently addressed topics and there are merely 51 and 41 such provisions,
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50 respectively, in our customary law provisions corpus. Bolivia’s 2009 Constitution talks about the
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56 ²⁵ Provisions in Bolivia’s 2009 Constitution that fall in this category include Articles 403, 352, Article 278.II, and
57 Article 2.
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various aspects of ancestral knowledge quite extensively, mentioning “research and practice of traditional medicine,” “practices created from the thinking and values of all the nations and the rural native indigenous peoples” (Article 42), “spirituality,” (Article 86), and “wisdom” (Articles 98 and 100). Customary law provisions associated with the topic *land* incorporate phrases and concepts associated with the use of indigenous land: “land rights” (Marshall Islands, 1979, Article 14(1)), “indigenous custom owners and their descendants” (Vanuatu 2013, Article 73), “communal land” (Zimbabwe 2013, Article 332). Table 2 presents six different topics present in the customary law provisions corpus across the four categories of legal relationships, ranging from most adversarial (*Combative*) to most accommodating (*Cooperative*).

Table 1: Customary law: Topics

Topic label	Percentage	Keywords
Customary law-state law relations	31%	law customary traditional constitution custom rules local parliament chiefs state
Indigenous communities	27%	indigenous rural native peoples law constitution nations jurisdiction communities rights
Customary law in courts	13%	court law traditional customary courts council practice appeal judicial jurisdiction
Customary practices	11%	customs rights traditions public practices women constitution promote states culture
Ancestral knowledge	9%	knowledge cultural ancestral traditional wisdom communities protect practices state develop
Land	9%	land lands state ownership owners property rights customary whether custom

Notes: The table presents the label of each topic, the proportion of provisions classified for each topic in the customary law provisions corpus, and ten most frequent keywords associated with each topic.

Table 2: Customary law: Topics over types

Type	Customary law-state law relations	Indigenous communities	Customary law in courts	Customary practices	Ancestral Knowledge	Land
Combative	18.6%	1.9%	0.5%	55.4%	14.8%	8.7%
Competitive	32.9%	21.9%	12.5%	19.4%	6.4%	6.7%
Complementary	32.8%	25.8%	16.9%	8.4%	5.2%	10.8%
Cooperative	30.5%	28.1%	12.9%	5.7%	16.1%	6.7%

Notes: Rows correspond to the four legal relationships, and columns feature topics of the customary provisions. For each legal relationship type, the numbers indicate the percentage of provisions associated with specific topic within the customary law provisions corpus.

The topic *Customary practices* is by far addressed most frequently in combative provisions. This finding reflects the state’s tendency to eliminate customary practices that conflict with constitutional norms. We see the state assuming most adversarial posture particularly in areas such as women’s rights and criminal liability, where traditional customary law—often grounded in outdated notions of patriarchy and collective responsibility—clashes with modern legal solutions. These patterns bear out in the provisions themselves—for example, Article 35 (4) of Ethiopia’s 1994 Constitution states, “The State shall enforce the right of women to eliminate the influences of harmful customs. Laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited.”

In contrast, language about *indigenous communities* and *customary law in courts* frequently appears in complementary and cooperative constitutional provisions, indicating the state’s accommodating and even supportive attitude. This reality suggests that the state is often inclined to create legal space for native, indigenous communities and authorities, at least on a general or conceptual level. Things become more contentious when we move from such broad or conceptual expressions of recognition, to concrete considerations regarding the actual *de facto* practices of local communities. Overall, the state authority seems inclined to respect traditional

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3 authorities and support the thriving of indigenous communities except in areas where exercising
4 traditional norms encroaches on fundamental principles of modern legal systems—e.g.,
5 individual criminal liability, equality in the context of marriage, rights of a child—in a word,
6 laws that more directly threaten modern state governance.
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12 A sizable portion of the topic *customary law-state law relations* is addressed via
13 combative and competitive provisions, indicating that the state aims to establish the superiority
14 of its own structures, institutions, and legal processes. Interestingly, however, this topic also
15 appears in complementary and cooperative provisions. Thus, in some, but not all cases,
16 customary structures and institutions seem to be supported by the state. A good example of such
17 state-supported processes are customary dispute resolution mechanisms in specific noncriminal
18 cases.²⁶ In many jurisdictions, the state embraces and even reinforces the workings of local
19 traditional courts, conflict management by local chiefs and other customary authorities
20 (Holzinger, et al. 2019; Neo 2020). Afterall, in most domestic jurisdictions, the state judiciary is
21 inundated with cases. Thus, in societies with robust customary authorities, judges are likely to
22 see delegation of their powers to other authorities as beneficial.
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38 Similar patterns emerge in the context of *land* and *ancestral knowledge*, which appear
39 across adversarial and accommodating provisions. Conceptually, these topics comprise a variety
40 of aspects associated with administering customary law, from native land to traditional sources
41 of value and knowledge. Depending on the degree of their encroachment on state authority,
42 conflict with state commitments, and other such factors, some aspects of these topics will be
43 fostered by state authorities and some will be suppressed. In contrast with *customary practices*,
44 most of which take relatively concrete form, and topics such as *indigenous communities* and
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55 ²⁶ For example, see Zimbabwe's 2013 Constitution, Article 282(1e), recognizing traditional leaders' authority to
56 "resolve disputes amongst people in their communities in accordance with customary law."
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customary law in courts which may simply acknowledge these entities and thus remain abstract, matters relating to *customary law-state law relations*, *land*, and *ancestral knowledge* straddle this concrete-abstract divide. It is in processes and organization that communities and authorities become more embodied, assuming increasingly tangible or well-defined mechanisms and legal arrangements. In other words, provisions of this nature allow communities to go beyond mere recognition and instead institutionalize toward certain ends and functions, all of which may in some instances come across as threatening to state authority.

Ultimately, the state has no choice but to address alternative authorities that exist within the territorial boundaries of the state. To this extent, a constitutional text may well support the idea of customary law, which is quite simply an empirical reality for many constitutional orders. However, the state is likely to be less accommodating when it comes to particular practices it wishes to exclude from the binding legal system.

International provisions

Table 3 presents the labels of each topic within the international law provisions corpus, the proportion of provisions classified for each topic, and ten keywords associated with each topic. The topic *international norms* constitutes the most prevalent topic in the corpus with “international,” “law,” “treaties,” legal,” “force,” “norms,” “system,” “agreements,” constitution,” and “laws” as associated words. Provisions associated with this topic address international law as a system of norms that broadly relate to the domestic legal system. An illustrative example is Article 9(1) of 2002 Constitution of Timor-Leste, which mentions “norms provided for in international conventions, treaties, and agreements.” Similar in tone is Article

6(3) of the 2010 Constitution of the Kyrgyz Republic, which discusses “universally recognized norms of international law.”

Similar to *international norms*, the next two topics, *human rights* and *treaty status* are featured in international law provisions quite frequently. The language of most provisions associated with the *human rights* topic refer broadly to universal human values. There are also multiple invocations to the Universal Convention of Human Rights, the United Nations and its Charter.²⁷ Provisions featuring the *treaty status* topic discuss the process of integrating international law into the domestic legal system, including review, approval, and consultation procedures. In contrast with the *international norms* topic, these provisions address more detailed procedural matters and the role of specific state institutions in approving a treaty.

Legal conformity is the fourth most frequently addressed topic in our international law textual corpus. These provisions regulate broad issues of consistency between the domestic legal system and international law. Some constitutional provisions take a positive stance on the relationship and express commitment on the part of the state to interpret its domestic laws in light of the state’s international obligations. In contrast, others describe processes for filtering out specific norms or rules of international law perceived as running against existing domestic laws.

Human development is featured in international provisions quite frequently. As associated features suggest, this topic pertains to many aspects of human wellbeing in the context of domestic and international policymaking, such as “political, economic, social and cultural [matters]” (Article 145 of 1992 Constitution of Paraguay), “free choice” (Article 25b of the 2014 Constitution of Bangladesh), or raising “the standard of public services” (Article 169(4) of the

²⁷ The 1990 Constitution of Benin in its Preamble talks about the United Nations Charter. The 2007 Constitution of Mozambique and the 2016 Constitution of Papua New Guinea mention the Universal Declaration of Human Rights (Article 43 and Article 39.3C, respectively).

2011 Constitution of South Sudan. Finally, the topic *multilevel relationships* is featured in relatively few constitutions. These provisions speak about interconnections between international, regional, federal, state, and local laws, sometimes addressing the resolution of jurisdictional conflicts between the various levels of governance.²⁸

Table 3: International law: Topics

Topic label	Percentage	Keywords
International norms	24%	international law treaties legal force norms system agreements constitution laws
Human rights	21%	rights human international constitution charter treaties ratified fundamental nations united
Treaty status	21%	treaty president international republic treaties agreement court constitutional assembly national
Legal conformity	18%	law parliament international constitution treaty agreement act unless convention part
Human development	12%	development respect states justice public peace human equality affairs principles
Multilevel relationships	4%	federal laws district national local enacted international senate state commission

Notes: The table presents the label of each topic, the proportion of provisions classified for each topic in the international law provisions corpus, and ten most frequent keywords associated with each topic.

Table 4: International law: Topics over types

Type	International norms	Human rights	Treaty status	Legal Conformity	Human development	Multilevel relationships
Combative	0	0	0	0	0	0
Competitive	18.3%	0.9%	48.5%	24.2%	2.7%	5.4%
Complementary	41.2%	15.0%	12.3%	30.4%	0.9%	0.2%
Cooperative	20.2%	28.5%	14.4%	14.7%	16.9%	5.3%

Notes: Rows correspond to the four legal relationships, and columns feature topics of the international law provisions. For each legal relationship type, the numbers indicate the percentage of provisions associated with specific topic within the international law provisions corpus.

²⁸ By way of illustration, see the Preamble of Benin’s 1990 Constitution, and Article 133 of Mexico’s 1917 Constitution.

Table 4 present patterns regarding topics that dominate the international law provisions modeled across the four legal relationships types. Of note is the fact that none of the provisions are combative. Indeed, most states across most issue areas recognize international law as a system that promotes widely accepted standards of contemporary governance.²⁹ Thus, setting aside the effectiveness of constitutional provisions, constitutional language devoted to international law is seen as positive and constitutes a useful strategy to solidify a state's reputation as a supporter of the global order (Ginsburg, et al. 2008). Moreover, combative provisions' adversarial stance toward international law would signal to domestic audiences that the state is openly unwilling to curb its own sovereignty in light of the state's preexisting international commitments. Arguably, overt antagonistic constitutional language concerning international law can harm the state's reputation vis-à-vis other states, and the international community as a whole. After all, most would agree that the key role of international law is the maintenance of interstate peace and rule of law. These patterns contrast sharply with customary law provisions, some of which are combative. From the standpoint of modern governance, certain local customs are, simply put, obsolete. Thus, constitutionally embedded combative language directed toward such practices benefits the state as it signals the state's aspiration to reform its domestic legal system according to contemporary standards.

The bulk of competitive language in the corpus of international law provisions is devoted to the topic *treaty status*. "Treaty" appears as a top word associated with topic. And indeed, treaties cover a variety of subjects, with some limiting state sovereignty more than others. There are certain areas of international law that substantially overlap with the state's competences and

²⁹ Granted, there are states who do not accept legitimacy of specific international norms. A good example is Islamic law states' attitude toward international criminal law. These states also place many Islamic law-based reservations on their commitments to specific international human rights instruments (see Powell 2022).

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thus potentially create conflicting jurisdictions and interests: human rights, environment, criminal law, sovereignty over territorial and maritime areas, to name a few. It is in areas such as these that the state might view international treaties in a competitive light. Moreover, with time the interface between international and domestic law has increased, covering additional substantive areas originally left to exclusive state competence. Some states see this reality as an unwelcome encroachment.

 In contrast, the topic of *human rights* appears most frequently in cooperative provisions. For decades, international law has been considered a lodestar for many conceptions of individual and collective rights. Thus, in many ways language embedded in international law provides an aspirational benchmark for modern societies. Granted, as the literature shows, rights-related provisions full of aspirational language are relatively easy and cheap to embed in constitutions (Chilton and Versteeg 2020; Powell and Staton 2009). The fact that *human development* also appears predominantly in cooperative provisions reflects this same phenomenon.

 The topics *legal conformity* and *international norms* both appear with greatest frequency in complementary provisions. Recall that complementary provisions articulate hierarchies of different sources of law that operate in a particular country, with the constitution generally appearing at the top. Insofar as *legal conformity* concerns how the various powers in play relate to each other, this topic cannot but raise questions of hierarchy, with the state claiming its place among other authorities, domestic and international alike. *International norms* deal with broad concepts to which international law commits and, moreover, commits the state. The state may use a constitution to situate international norms in the domestic context and articulate how state authority thinks about those norms—which norms are dispositive, which carry greatest and least weight, etc. Thus, as a constitution establishes the particular space in which international norms

operate, this topic is likely to be discussed in terms of hierarchy as well. These mentions—and particularly *legal conformity*—occasionally take competitive form, but the fundamental takeaway is that the state is largely putting these international matters in what it takes to be their proper place. Interestingly, discussion of *multilevel relationships*, the least frequent topic, is rather evenly distributed across competitive and cooperative provisions, with slightly more pronounced presence in competitive provisions.

The next section focuses on the network analysis. We employ the four legal relationship types to examine, on a country level, whether constitutions ultimately are more adversarial or accommodating to customary provisions and international provisions, respectively. By conducting these two analyses, of customary and international law provisions, alongside each other, we are able to address this issue in relative terms—namely, to examine whether constitutions tend to be *more* friendly to international law than customary law or vice versa, or perhaps treat these different kinds of provisions similarly.

NETWORK ANALYSIS

We use network analysis to visualize how each national constitution treats international and customary law as alternative sources of authority according to the legal relationship types (combative, competitive, complementary, cooperative). We wrote a Python script to analyze the constitutional provisions and generate edge tables representing relationships between them. By laying out the edges as a force-directed graph, and adjusting the nodes' labels to reflect the number of in-degree edges, we visualize patterns of relationships in the context of customary law provisions and international law provisions (see Figures 1 and 2, respectively).

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We first tabulate by country the number of customary law provisions and international law provisions that are associated with each legal relationship type (Table 5). Both the closeness of nodes and the edges’ thickness indicate the strength of the association between a particular constitution and legal relationship type. Moreover, a node will appear closer to the center of the graph when it is associated with a greater number of other nodes. The thickness of the edges and distance between nodes are shaped by the raw number of provisions expressing a particular relationship in relative terms to other countries. An illustrative comparison is that between Bangladesh and Peru on the one hand, and Ghana and Marshall Islands on the other hand in the customary law graph (Figure 1). Despite the fact that all of Bangladesh’s and Peru’s customary law provision are cooperative, the nodes representing these countries are located relatively far from the cooperative node because each constitution contains a total of merely 2 customary law provisions. In contrast, although a considerably lower percentage of Ghana’s and the Marshall Islands’ customary law provisions are cooperative (68 percent and 70 percent, respectively), their nodes sit very close to the cooperative node.

Customary law provisions

Figure 1 facilitates identifying the nature of the relationships between clusters of constitutions and customary law. Two distinct clusters of constitutions become apparent. In the middle of the network are constitutions with a majority of complementary provisions. Nigeria’s and Colombia’s constitutions are informative examples of the state’s complementary posture vis-à-vis customary law. All of the provisions dealing with customary law in these two constitutions are complementary. Further left, but still in the middle region are constitutions with mostly cooperative provisions. Bolivia’s 2009 constitution contains a total of 98 customary law

provisions, 58 of which are cooperative and 34 of which are complementary. This signals the Bolivian state's positive and accommodating attitude toward customary law. The competitive provisions appear sporadically in constitutions (7% of the customary law provisions corpus). Merely two constitutions—that of Benin and Rwanda—address customary law exclusively in such a manner, and they both do so sparingly (two provisions and one provision, respectively). In other constitutions, a small portion of provisions display a competitive posture of the state toward customary law. Chad and Kenya constitute good examples in this context (23% and 41% respectively).

Finally, combative provisions—only 3% of the textual corpus—do not dominate any state's conceptualization of customary law as an alternative source of legal authority. Instead, these provisions are interspersed throughout the corpus. Sudan's 2019 constitution definitely takes the lead here with 50% of its customary law provisions coded as combative. Of note is the fact that Sudan's constitution contains only two customary-law provisions. Yet, both these provisions address customary law in a comprehensive manner, a reality which magnifies these provisions' effect.³⁰ Malawi's 1994 constitution and Somalia's 2012 constitution come next with 29% and 20% combative customary law provisions.

International law provisions

Network analysis of international law provisions corpus is quite informative as well. The most pronounced cluster is situated in the middle of the graph. It comprises constitutions whose international law provisions are exclusively or preponderantly cooperative. South Sudan,

³⁰ Article 49(4) states, "The state works to combat harmful customs and traditions that reduce the dignity and status of women." According to Article 66, "All ethnic and cultural groups have the right to enjoy their own private culture and develop it freely. The members of such groups have the right to exercise their beliefs, use their languages, observe their religions or customs, and raise their children in the framework of such cultures and customs."

Bangladesh, Benin, and Columbia, among others, belong to this group. By way of illustration, the provisions regulating international law in the 1949 Constitution of India embrace a very positive posture toward international law.³¹ On the left side of the graph are constitutions with international law provisions expressing a variety of stances vis-à-vis specific aspects or parts of international law. Ecuador's 2008 constitution is a good example: while six of the international law provisions are cooperative, three are complementary and two are competitive. Zimbabwe's 2013 Constitution is also revealing with the majority (eleven) of its international law provisions expressing the state's competitive posture, eight cooperative and one complementary.³² At the top left of the figure is the 2003 Constitution of Rwanda, with the majority of its provisions taking a complementary stance toward international law and one provision, pertaining to treaty ratification, taking a competitive stance.³³

Discussion

Taken together, Figures 1 and 2 thus show the myriad possible combinations of state postures toward customary and international law. Though the aforementioned ideal normative types embraced by scholarship—sovereignism, universalism, and pluralism—are useful for normative inquiry, the reality is that many contemporary constitutions lie in between these accounts. Overall, as our network analyses demonstrate, constitutions seem to take a relatively

³¹ Article 253: “‘Legislation for giving effect to international agreements’ Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.”

³² The topic *legal conformity* is prevalent across these three groups, characterizing four competitive provisions, four cooperative provisions, and the one complementary provision. Only among the competitive provisions is *legal conformity* slightly exceeded by the topic *treaty status*, which characterizes five provisions.

³³ Article 170, states “Where an international treaty or agreement contains provisions which are conflicting with the Constitution or an organic law, the power to ratify or approve that treaty or agreement cannot be exercised until the Constitution or the organic law is amended.”

friendly stance with respect to both customary and international law. In both figures, nodes representing positive legal relationships are prominently featured in the center. In the context of customary law provisions, the cooperative and complementary nodes appear closest to the center indicating that more constitutional provisions are characterized by these friendly legal relationship types. In contrast, the combative and competitive nodes are located on the periphery (Figure 1). Similar patterns obtain in Figure 2, where the cooperative node is clearly central. Again, we note that the combative category has no presence in the corpus of international law provisions.

Notwithstanding these broad patterns, a more complex arrangement become apparent when our analysis shift to the level of individual countries. Often, a given country's nodes appear in a different position in Figure 1 and in Figure 2 relative to the nodes signifying the four legal relationship types. For example, in Figure 1, Benin appears closest to the competitive node, but in Figure 2 it is closer to the cooperative node, suggesting that Benin's constitution is friendlier to international law than to customary law. Moreover, Benin's edge in Figure 1 is finer than its edge in Figure 2. This indicates that Benin's constitution discusses international law more extensively than it does customary law. Hence, when it comes to both the qualitative relationship type and sheer number of mentions in the constitutional text, it is safe to conclude that Benin's constitutional text is weakly pluralist when it comes to customary law but strongly pluralist toward international law. To draw further from our earlier theoretical discussion, one might say Benin's constitutional text reflects elements of universalism in its cooperative stance vis-à-vis international law, but also displays potential sovereigntist tendencies in that it discusses customary law only scantily and always in competitive terms.

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Additional nuance emerges with regard to the numerical presence of constitutional provisions associated with the four level relationship types. For example, the legal relationship type may well be positive (cooperative or, perhaps, complementary) while the number of mentions of nonstate law are few. Conversely, the legal relationship type may be negative (competitive or combative) while the constitution mentions nonstate law extensively. The Zimbabwe Constitution’s treatment of international law, discussed above, is instructive in that it is most proximate to the competitive node and also has a very thick edge (see Figure 2).

These network analyses additionally reveal how many constitutions’ provisions span the combative, competitive, complementary, cooperative relationship-types. In Figure 1, Malawi, Chad, and Kenya, appear almost exactly in the center of the four legal relationship nodes. Similar patterns surface for Ecuador, Bolivia, and Chad in Figure 2. These multifaceted arrangements call into question the justifiability of any generalized, sweeping statements concerning the way state law treats sources of nonstate law. Our analyses show the need for greater nuance insofar as the constitutions themselves reveal a high level of fine-tuning on these matters.³⁴ These findings further suggest that constitutional actors themselves conceptualize these questions in a detail-oriented, meticulous way. Rather than embracing customary law or international law wholesale, constitutional drafters make distinctions on the level of each provision according to the confluence of substantive norms, political interests, and the vast array of other forces that bear on questions of competing power in constitutions.

³⁴ This nuance is perhaps more pronounced in the customary law provisions. Our dataset reveals that constitutions devote more space to discussing customary law in general. Moreover, 15 constitutions out of the 36 in our dataset have at least three types of relationships toward customary law. International law provisions are somewhat less varied in that regard, with only 5 constitutions having three relationships-types (see Table 5). Our discussions on customary law and international law above already suggest some reasons for this finding, including the fact that customary authorities and law operate entirely within a state’s boundaries. Also, states have an interest in fostering appearance of constitutional friendliness toward international law.

CONCLUSION

Competing powers inhere in national constitutions in various forms. How constitutions address and ultimately codify these competing powers shapes the very identity of the state and constitution, and does so in relation to domestic and global audiences.³⁵ These are timeless and ubiquitous issues of potentially high consequence in the context of any domestic jurisdiction.

This paper intervenes in these big questions by examining how constitutions balance competing legal authorities, specifically that of customary law and international law. We go beyond normative and theoretical discussions of legal pluralism by examining provision-level patterns that emerge in contemporary constitutions. While these legal pluralist constitutions comprise a subset of the world's national constitutions, they embody conflict and competing powers on a truly fundamental level. Indeed, states espousing legal pluralism in constitutions admit alternative sources of norms and authority into their most fundamental law. Insights from our study can perhaps be generalized to other types of authority clashes in constitutional regimes, both historical and in the modern period. After all, state authority does not operate in a vacuum. There are other sources of authority—of institutional or legal nature—that challenge the all-encompassing reach of the state.

We recognize that similar to any other efforts to gauge patterns appearing in text, our choice to focus on constitutional texts has limitations posed by socio-legal realities of every domestic jurisdiction. The text by itself does not paint a complete picture of how a constitution is interpreted and applied in practice. Moreover, we recognize that a constitution can be silent with regard to alternative sources of law if, for example, a state chooses to regulate such matters

³⁵ On constitutional disharmony and identity, see Jacobsohn (2010).

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through statutory law. Unquestionably, such cases can shed considerable light on our understanding of the competing legal authorities. There are also jurisdictions where, despite some constitutional language devoted to customary law, indigenous people and their customary laws are disregarded. For instance, while Nicaragua’s 1987 Constitution dedicates several articles to indigenous peoples and their rights, the Nicaraguan state continues to flagrantly undermine these constitutional commitments. Still, we maintain our initial study of the universe of relevant constitutions offers an important starting point, one that may serve as a foundation for later qualitative studies that capture such important details. Indeed, constitutions serve as fora where issues of alternative authorities are actually negotiated and different orderings are articulated.

Constitutions offer a window into the practical realities of what prior scholarship lays out in theoretical terms. They are one place where we may find an answer to how political-legal actors negotiate “the global disorder of normative orders” (Walker 2008). And indeed, this paper is the first empirical study, to our knowledge, examining how these competing sources of authority coalesce in constitutions.

Tables and Figures

Table 5: Tabulating how constitutions relate to custom and international law

	Total provisions							Customary law provisions				International law provisions			
country	provisions	custom	international	combative	competitive	complementary	cooperative	cCombative	cCompetitive	cComplementary	cCooperative	iCombative	iCompetitive	iComplementary	iCooperative
Angola	32	9	23	0	9	7	16	0	1	7	1	0	8	0	15
Bangladesh	8	2	6	0	0	0	8	0	0	0	2	0	0	0	6
Benin	13	2	11	0	3	0	10	0	2	0	0	0	1	0	10
Bolivia	107	98	9	0	8	36	63	0	6	34	58	0	2	2	5
Chad	25	17	8	2	5	3	15	2	4	2	9	0	1	1	6
Colombia	14	7	7	0	1	7	6	0	0	7	0	0	1	0	6
DR Congo	11	8	3	0	1	6	4	0	0	6	2	0	1	0	2
East Timor	5	1	4	0	0	1	4	0	0	1	0	0	0	0	4
Ecuador	43	32	11	0	3	16	24	0	1	13	18	0	2	3	6
Ethiopia	8	6	2	1	1	4	2	1	1	4	0	0	0	0	2
Fiji	13	11	2	0	1	7	5	0	0	7	4	0	1	0	1
Gambia	7	6	1	0	0	2	5	0	0	2	4	0	0	0	1
Ghana	36	25	11	2	0	6	28	2	0	6	17	0	0	0	11
India	17	15	2	0	0	7	10	0	0	7	8	0	0	0	2
Kenya	19	17	2	0	7	0	12	0	7	0	10	0	0	0	2
Kyrgyz Republic	7	1	6	0	1	1	5	0	0	1	0	0	1	0	5
Liberia	4	3	1	0	2	2	0	0	1	2	0	0	1	0	0
Malawi	20	14	6	4	0	9	7	4	0	8	2	0	0	1	5
Marshall Islands	24	23	1	0	3	5	16	0	2	5	16	0	1	0	0
Mexico	22	18	4	0	4	9	9	0	2	9	7	0	2	0	2
Micronesia	7	6	1	0	0	6	1	0	0	6	0	0	0	0	1
Mozambique	9	4	5	0	0	2	7	0	0	2	2	0	0	0	5
Nigeria	14	12	2	0	1	12	1	0	0	12	0	0	1	0	1
Papua New Guinea	27	21	6	1	1	10	15	1	0	10	10	0	1	0	5
Paraguay	15	9	6	0	1	5	9	0	0	3	6	0	1	2	3
Peru	11	2	9	0	2	0	9	0	0	0	2	0	2	0	7

Philippines	7	5	2	0	1	4	2	0	0	4	1	0	1	0	1
Rwanda	10	1	9	0	2	8	0	0	1	0	0	0	1	8	0
Somalia	6	5	1	1	1	1	3	1	1	1	2	0	0	0	1
South Africa	23	18	5	0	1	12	10	0	1	10	7	0	0	2	3
South Sudan	27	21	6	1	2	12	12	1	2	12	6	0	0	0	6
Spain	8	4	4	0	1	2	5	0	0	2	2	0	1	0	3
Sudan	3	2	1	1	0	0	2	1	0	0	1	0	0	0	1
Tuvalu	10	7	3	0	1	4	5	0	1	4	2	0	0	0	3
Vanuatu	26	20	6	0	0	13	13	0	0	13	7	0	0	0	6
Zimbabwe	42	22	20	1	12	9	20	1	1	8	12	0	11	1	8

Figure 1: How constitutions relate to customary law

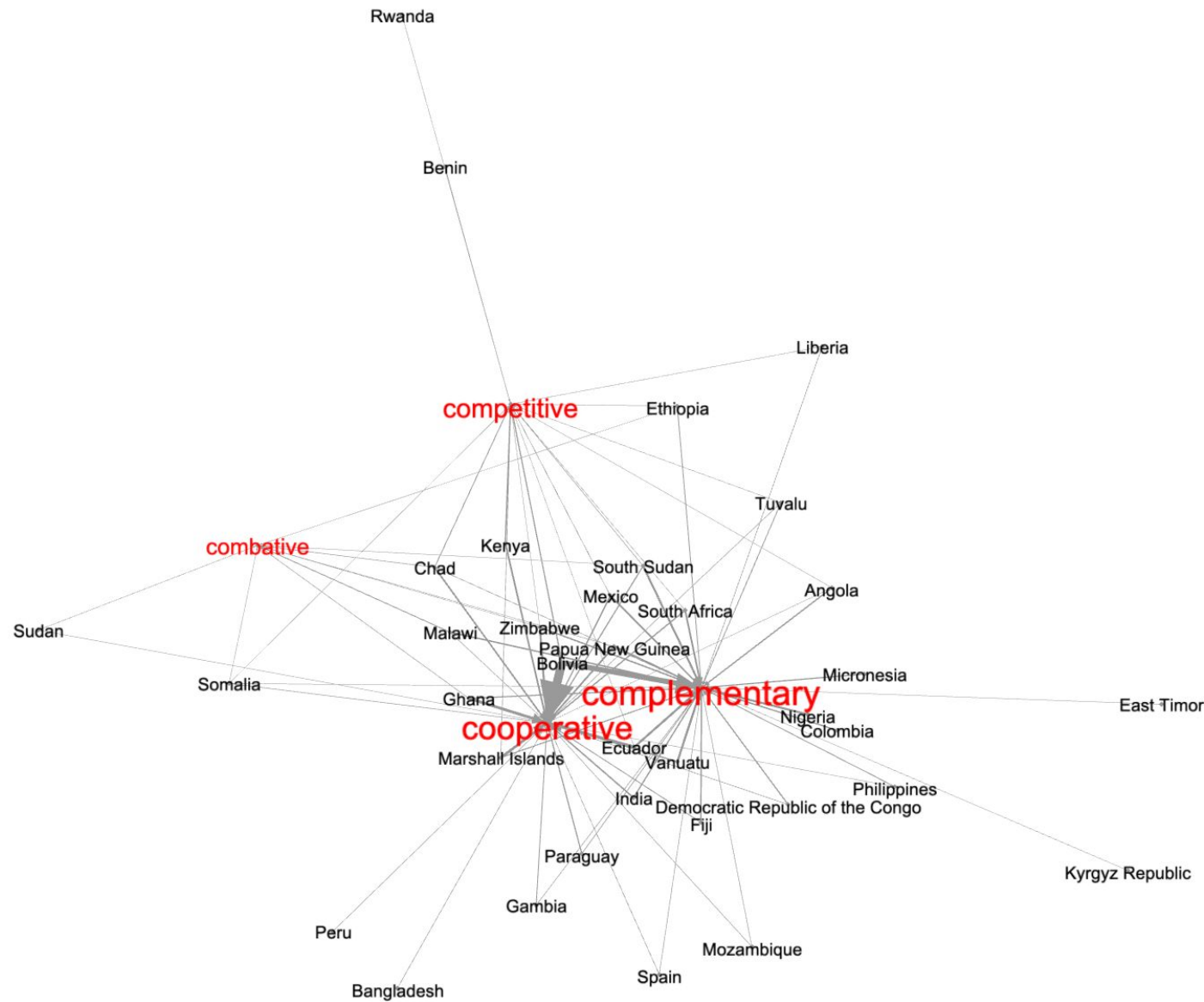
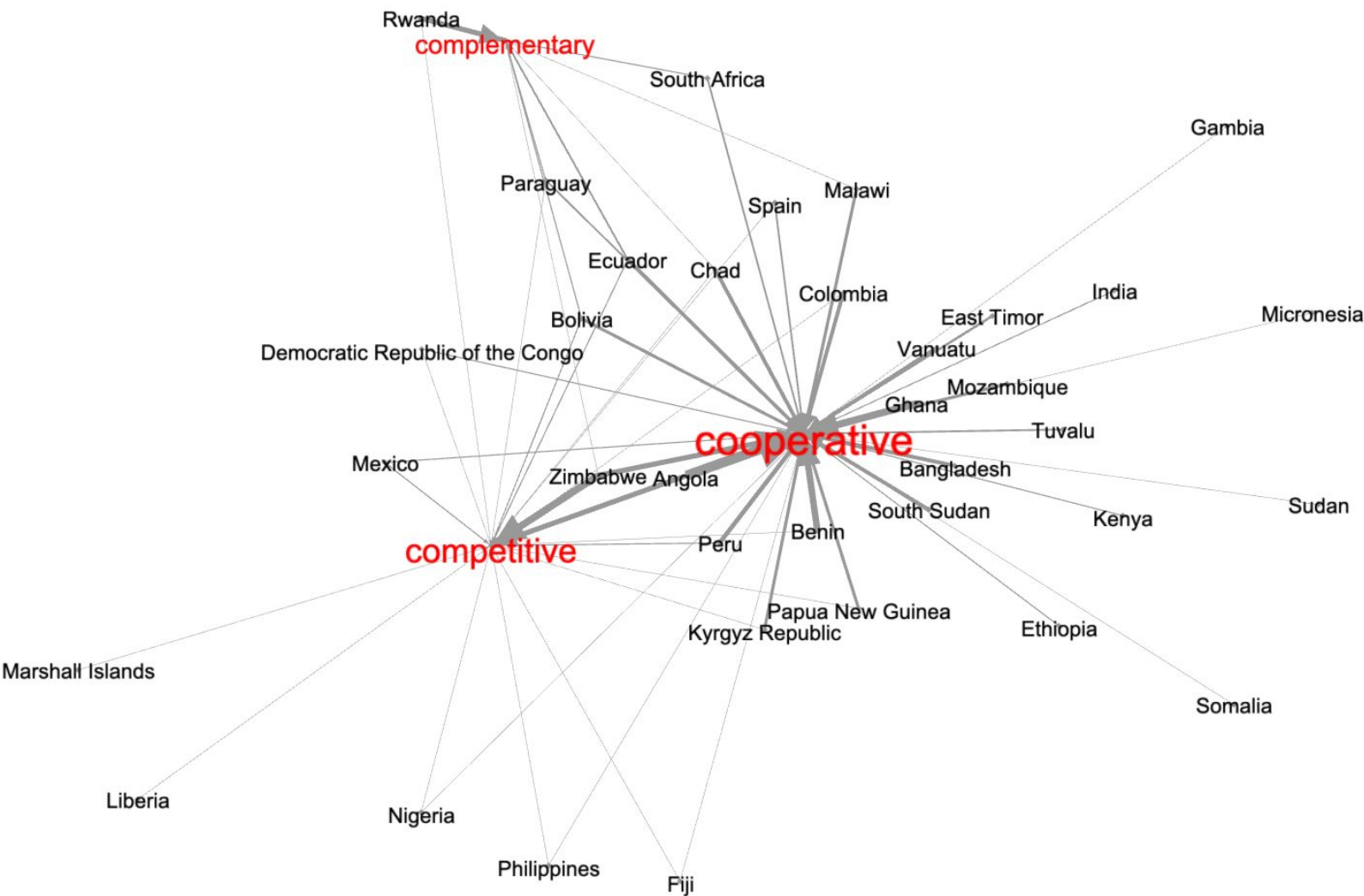


Figure 2: How constitutions relate to international law



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