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Restraining power through courts

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Restraining Power through Institutions is an important contribution to the literature on international institutions. In this short commentary, I consider Grigorescu's argument as it relates to judicial restraints on power. My commentary begins by reflecting on the conceptualization and measurement of judicial restraints on power. While Grigorescu focuses on judicial independence, I consider an alternative – self-bindingness – and its implications for the book's core argument. I then reflect on the separateness of within-level and across-level processes that shape the evolution of governance. I offer a word of caution: the analytical distinction between within- and cross-level processes may lead us to underestimate the interconnectedness of domestic and international developments.

Grigorescu argues that domestic courts were created to restrain power. He suggests that the developments leading to judicial restraints on power depended on second-ranked and weaker actors, while the most powerful actors, or G1 actors, were reluctant to accept institutional restraints. Moreover, Grigorescu argues that similar dynamics account for the evolution of international courts as restraints on power, however, the international level is centuries behind the domestic level.

I would suggest that much of this argument depends on the particulars of Grigorescu's conceptualization and measurement of judicial restraints on power. Grigorescu focuses primarily on judicial independence to understand the restraining power of courts. Scholars of judicial politics, however, would mostly likely focus more on the powers or functions of courts. Judicial independence concerns the extent to which power controls courts, not the reverse. Moreover, scholarship suggests the rules guaranteeing independence are not necessarily indicative of independent judicial behavior (Ríos-Figueroa and Staton 2014). For this reason, a focus on judicial power or functions might be a better indication of whether courts restrain power. In particular, courts serve multiple functions. Courts act as mechanisms for dispute

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resolution and enforcement (i.e., social control) (Shapiro 1981; Stone Sweet 1999). Put in slightly different terms, courts can have "other-binding" roles, whereby a sovereign binds others actors (e.g., firms, individuals, etc.) through adjudication (Alter 2008). Historically domestic courts have been more typically other-binding institutions. In addition, courts have "self-binding" roles, meaning the sovereign itself is bound by the decisions of adjudication. Self-binding roles require courts to restrain power. In practical terms, self-binding roles relate primarily to the power of constitutional review.[1] If we measure courts' restraining power based on whether they have self-binding roles, as opposed to their judicial independence, we might reach different conclusions about the contributions of major powers as well as the timing of the development of courts' restraining power.

First, assuming courts were first and foremost institutions for the resolution of disputes and enforcement of the sovereign's will, G1 powers benefit from the development of courts because peaceful dispute resolution and the enforcement of rules enable greater social control and political stability. Shapiro (1981) recounts how early courts in medieval England were promoted and used by powerful actors for dispute resolution and enforcement, such that judges were referees in private disputes or enforced the sovereign's rules on others. When William the Conquer rose to power, he "was glad to preserve the English legal system" as it existed under the Anglo-Saxons (Shapiro 1981, 80). Later under the Anglo-Norman rule, "[t]he first really distinctly judicial court arose out of the king's habit of doing personal justice as he traveled through the countryside. It became quite inconvenient for suitors to troop along after the king on his progress, waiting for him to settle their cases" (84). Permanent, centralized and professionalized courts were more efficient. It is most likely on this account that the Magna Carta included a provision "that a permanent place be designated for the hearing of 'common pleas'," or disputes between private persons over which the monarch had no personal interests (84). Thus, an important aspect to the development of courts concerns their other-binding roles, especially dispute resolution and enforcement, which G1 actors supported.

Second, the hallmark of the restraining power of domestic courts is whether they have self-binding roles, namely constitutional review. The most well-known theoretical accounts for the evolution of constitutional review emphasize the role of current holders of power, who empower courts not in coordination with weaker actors but to control them. "Insurance theory" suggests that constitutional review developed because current powerholders face political uncertainty and constitutional review provides insurance that fundamental rules of governance will be upheld if and when political opposition rises to power (Ginsburg 2003). In another well-regarded account, constitutional review has evolved as a means of "hegemonic preservation," such that current powerholders' (along with economic and legal elites) will retain

[1] Constitutional review requires a court to determine whether a legislative act violates to the constitution. If the court determines there is a violation, the act is nullified. It is called "judicial review" in the American legal system. By some interpretations, administrative review, whereby a court can declare that an administrative policy or action is contrary to the law, can be seen as a "self-binding" role as it is effectively a check on the exercise of power by an agent of the sovereign. By other interpretations, it is "other-binding" because it is a process of ensuring that an agent, as an entity other than the sovereign, adheres to the law.

ideological control when oppositions come into power (Hirschl 2004). Both of these accounts maintain G1 powers are the key actors driving judicial restraints on power.

Third, previous literature suggests the timing on the expansion of constitutional review is much more contemporary than estimated by Grigorescu. Specifically, constitutional review did not develop broadly until the mid-twentieth century, except in rare instances (like the United States and Norway) (Ginsburg 2008). Still to this day, however, some states, including the United Kingdom do not grant their judiciary the power of constitutional review.[2] Thus, Grigorescu's book invites future research to improve our understanding of what enable courts to restrain power (e.g., Squatrito, 2025).

International courts also have other-binding roles, namely dispute resolution, and self-binding roles (Alter 2008). Again, measuring restraining power based on judicial functions leads to a slightly different perspective on who supported judicial empowerment and when it developed. The earliest international courts that are discussed by Grigorescu had significant limitations to their self-binding roles. Compulsory jurisdiction that applies to all states is the hallmark of an international court's restraining power (Alter 2008). These early international courts were politically significant for their other-binding roles. At the same time, they were promoted by G1 powers. The Permanent Court of Arbitration (PCA) is a case in point. It was established in 1899, and as discussed by Grigorescu, it was promoted strongly by the United States. Grigorescu suggests the US was perceived as a second-ranked power at the time, even though it was the most dominate state (130–131). Considering the PCA was primarily a dispute resolution mechanism, we need not split hairs over whether the US was a G1 power or not. The PCA – despite its name – is not a court but an organization that administers international arbitration and other modes of dispute resolution (e.g., mediation, fact-finding, etc.). In practical terms, the PCA has little capacity to constrain state power, as noted by Grigorescu, because it does not have compulsory jurisdiction and parties to a dispute must request the PCA to administer an arbitration. Disputing parties voluntarily request and consent to the formation of an ad hoc arbitral tribunal that is supported administratively by the PCA. Other early examples of international courts are the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ). However, both of these courts had minimal self-bindingness, or ability to restrain power; neither of these courts had/has compulsory jurisdiction, or the right of petition for private citizens.[3] For instance, the jurisdiction of the ICJ is not compulsory on all states. Rather, states must give expressed acceptance of its compulsory jurisdiction, and therefore consent to the Court's self-binding authority. A minority of states have done so. The US withdrew its acceptance of compulsory jurisdiction from the ICJ in 1986, and today only 74 states recognize the compulsory jurisdiction.[4] Thus, the capacity of the ICJ to constrain powerful actors is limited, irrespective of its judicial

[2] Administrative review in the UK is called judicial review.

[3] This would also lead to self-binding roles for international courts (Alter 2008).

[4] See "Declarations recognizing the jurisdiction of the Court as compulsory", ICJ, https://www.icj-cij.org/declarations, January 2, 2025. Along with the US, three other P5 states do not recognize the compulsory jurisdiction (France, China and Russia).

independence. The ICJ is therefore only "other-binding" for G1actors, a role that they have interests in supporting.

Some international courts do have self-binding roles or the capacity to restrain power (Alter 2008). This was in fact the case for the world's first international court, or the Central American Court of Justice (CACJ, briefly discussed by Grigorescu). It was created in 1907 for the purpose of resolving disputes between its five member states (El Salvador, Costa Rica, Guatemala, Nicaragua, and Honduras) (Ripley 2018). It restrained states as its jurisdiction was compulsory. Also, the US exerted heavy influence over the establishment of the CACJ, which was a G1 actor for the involved states. Thus, the CACJ is a case of an international court with restraining power, and it was promoted by a G1 actor. As Central America faced several episodes of conflict in the years leading up to the CACJ's creation, the US had strong interests in the establishment of a court to ensure peaceful dispute resolution. In addition, the empowerment of CACJ, measured by self-bindingness, preceded the expansion of domestic empowerment of courts. Overall, measuring the restraining power as self-bindingness, as opposed to judicial independence, therefore leads to different conclusions about who promotes institutional restraints on power and the timing of its development.

My second main reflection about Grigorescu's book relates to whether within- and cross-level processes are separable. Grigorescu posits that the development of courts and other institutional restraints on power evolved within societies through similar processes, and by extension, international society follows a similar trajectory of development as the domestic. Thus, his story is primarily a story of how each society evolves independently. Co-evolution, interdependent developments or transnational processes are largely absent from his account of the domestic and international evolution of governance.

To what extent are within-level and cross-level processes separable? Have transnational or international factors influenced domestic developments? If so, should we theoretically expect external factors (including domestic developments and transnational diffusion) to also influence the development of institutional restraints on power at the international level?

Scholars have long argued that the international sphere influences domestic governance (Gourevitch 1978). Comparative politics research also reveals shows processes of transnational diffusion (e.g., emulation) explain how states evolved in similar trajectories (Huang and Kang 2022; Simmons et al. 2008). This is not to say that all developments were the result of diffusion or that patterns of evolution always flowed from West to East (Huang and Kang 2022; Sharman 2024). However, it does lead us to question whether power dynamics *within* societies were uniformly the leading cause of institutional restraints on power.

To address these concerns, it is worthwhile to think about domestic institutional restraints in non-Western societies. My recent exploration into courts in the global South reveals that courts were often imported during the colonial era (even though precolonial societies had modes of dispute resolution or enforcement). Imperial courts were imposed on colonies, for example, across the British empire and included regional courts of appeal and the British Privy Council as a court of last resort. Imperial courts typically existed alongside traditional dispute resolution.

Thus, a crucial factor shaping the develop of judicial power across the globe was a G1 actor – the external colonial oppressor. Moreover, imperial justice led to a certain element of homogenization or type of diffusion across societies that was externally driven; at the same time, there were important feedback loops that led the local traditional or customary law in each colony to inform imperial justice elsewhere (Ibhawoh 2013). This meant that domestic legal processes were intertwined with external powers and transnational developments. Even if we take a step back to the English legal system in the medieval times, we can see how it was the result of transnational processes as England was ruled by Romans, Saxons, and Normans. Other domestic courts have also been products of international factors, like transnational diffusion. For instance, the Japanese Supreme Court, as well as Japan's overall constitutional order, was significantly influenced by the US (Kades 1989). Or, constitutional review that swept Europe in the mid-twentieth century is linked to the diffusion of Kelsenian legal thought (Stone Sweet 2000). That is, the within-level processes were simultaneously cross-level processes due to ongoing modes of diffusion.

We can also question the extent to which international developments are isolated from one another and whether domestic influences have an influence over international developments. Recently established international courts and other global governance institutions are intricately linked to both domestic experiences (Squatrito 2017; Tallberg et al. 2016), including colonial legacies (Caserta and Madsen 2016) and transnational diffusion (Alter 2012; Lenz 2021). Studies into international courts reveals that designers had to make decisions regarding the extent to which they should replicate features of courts from their imperial past or emulate successful models from other regions (Lenz and Reiss 2024; Squatrito 2025). The East African Court of Justice (EACJ), created in 2000, has important ties to colonial legacies in East Africa, when the British empire established and relied on the East African Court of Appeal (EACA) as part of its colonial system of governance. When the states of East Africa gained independence, they retained the East African Court of Appeal (EACA) as part of the East African Community that was created in 1967. This community collapsed in 1977. In 1999, the current East African Community was established, which included a new international court – the EACJ. The Caribbean Court of Justice (CCJ), the judicial organ of the Caribbean Community is also intricately connected to the colonial past of the Caribbean nations (Caserta and Madsen 2016; Squatrito 2025).

To be clear, Grigorescu does not deny cross-level diffusion happens. Yet, it is worth noting that it may be exceedingly difficult to truly disentangle these processes, as the international has long had impact on the domestic sphere and vice versa. Moreover, a focus on only within-level processes may distort the significance of vital channels of influence over the establishment of governing institutions as well as what role various actors have and what shapes their motivations and perceptions. Moravcsik's (2000) well-known explanation of the empowerment of the European Court of Human Rights highlights the significant entanglements between the domestic and international in leading to institutional constraints on power. He argued that new democracies, and not the most powerful states, were the core proponents of the ECtHR, but this was not for the purpose of restraining powerful states but domestic opposition. The creation of the African Court on Human and Peoples' Rights

(ACtHPR), which has self-binding roles, is intricately linked to the colonial past, the path toward independence, commitments to African unity as well as pressures from the United States and international nongovernmental organizations (Squatrito, 2025). In other words, the domestic influences were intimately link to legacies of external forces and operated alongside contemporary international pressures to lead to the ACtHPR.

Overall, Grigorescu's outstanding analysis presents new avenues for research. When and how are within- and cross-level processes interconnected? If international factors and processes have shaped domestic institutional developments, and the international follows a similar trajectory, should we not expect external factors, such as domestic influences or transnational diffusion, to impact the international institutional restraints on power? Such a question becomes evident due to Grigorescu's contribution.

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