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Introduction

Allan Ides

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INTRODUCTION

*Allan Ides**

A basic tenet of constitutionalism posits that governmental authority may be exercised only in accord with previously agreed on principles of superior law. In liberal democracies, that agreement is entered among the sovereign people. In this fashion, the everyday exercise of public power is, at least in theory, limited by democratically established first principles of superior law. Those principles may involve the structure of government, the ceding of power to it, and the imposition of limitations on the exercise of that power. Typically, these first principles may be altered or avoided only through extraordinary and constitutionally established means. When we speak of constitutionalism then we speak of the theory of limits on the exercise of governmental power.

Yet, how does one create a limited government without at the same time creating a superior authority to enforce those limits? In the United States and in most liberal democracies, the only superior authority belongs to the people, who retain the power of constitutional revision. That rarely exercised power aside, the primary enforcement of constitutional principle is the practice of judicial review, a relatively soft mechanism that operates internally within the bounds of the constitutional system. Given that the judiciary possesses no independent means to force compliance with its orders, the effectiveness of judicial review depends largely on the habit of compliance developed within the political culture. Seen from this perspective, constitutional law represents as much a cultural phenomenon as it does a legal regime. Hence, a constitution functions as superior law because of a tacit agreement that it ought to be so, and because of a willingness to accept the hard edges of the otherwise soft practice of judicial review.

* Professor of Law and William M. Rains Fellow, Loyola Law School, Los Angeles.

Many often associate the practice of constitutionalism with domestic law, i.e., with the internal law of the nation state. In part, this may be because constitutionalism is most likely to take root in a culture that is reasonably cohesive and amenable to consensus on a wide array of issues, including the necessity of compliance with adopted constitutional standards. There is, however, no reason that the theory and practice of constitutionalism cannot be applied across national boundaries. But just as domestic constitutionalism depends on a domestic cultural cohesion that habitually accepts the propriety and necessity of constitutional compliance, transnational constitutionalism depends on a similar constitutional culture among those nations agreeing to the transnational constitutional regime. This symposium examines some of the benefits and difficulties confronting the translation of a domestic constitutional dialogue into a transnational context.

Professor Laurence Helfer's contribution to the symposium, *Constitutional Analogies in the International Legal System*, examines the potential analogies between domestic constitutionalism and the international legal system from five different perspectives, each demonstrating the challenge of attempting to translate the "decentralized and disaggregated" system of international law into a cohesive and legitimate transnational constitutional regime. Overall, he demonstrates how the largely decentralized system of international law lacks both a centralizing authority, and how it also lacks an international culture with the habit of what might be called constitutional obedience and consistency. Further, the exit and escape components of many international agreements fail to ensure the permanence typically attributed to a constitutional regime. Professor Helfer's message is not, however, one of despair for those who envision a transnational system of constitutional law. Rather, he offers a realistic appraisal of the challenges facing those who would seek to discover constitutional principle in the myriad institutions, practices, and relationships that comprise the system of international law.

In *Transnational/Domestic Constitutional Law*, Professor Mark Tushnet considers several distinct aspects of our evolving bodies of transnational and domestic constitutional law, two of which this Introduction will highlight briefly. First, Professor Tushnet offers a comparative perspective on the role that other nations' constitutional

law might play in the creation or development of constitutional law within the United States. His approach is both descriptive and critical, advocating a realist view on the use of non-U.S. standards to inform the pragmatic choices that go into the judicial creation of domestic constitutional law, though, beyond realism, he also offers a creative originalist argument for the incorporation of non-U.S. law into the fabric of our constitutional law. This cross-fertilization between separate constitutional cultures, which appears to be in process, may create an important bridge toward the ultimate creation of a shared, transnational constitutional vision. Second, Professor Tushnet considers some of the sovereignty concerns that arise when non-U.S. institutions created by virtue of treaties, such as the World Trade Organization (WTO), are given the authority to coerce domestic compliance with the generally phrased but specifically interpreted provisions of the underlying treaty. He concludes that such sovereignty concerns fail to recognize the role that domestic law plays in the enforcement of such orders. Thus, in Professor Tushnet's view, the domestic constitutional legitimacy of a transnational institution, such as the WTO, remains firmly premised on standard domestic constitutional law.

Professor Vicki Jackson's article entitled, *Transnational Discourse, Relational Authority and the U.S. Court: Gender Equality*, presents a detailed examination of the transnational constitutional discourse on gender equality. Her approach is both descriptive and normative. As to the latter, she convincingly argues that this transnational discourse represents a fundamental aspect of constitutionalism even within the seemingly independent realms of domestic constitutional law. As she phrases it, "What is different here is the sense of joint purpose, of being embedded not only in a community of nations making decisions about similar issues under similar domestic constitutional instruments but of an overarching legal order of internationally recognized human rights norms that, whether or not domestically incorporated, provides reason to strive to meet the international standard and to be mindful of other interpretations in doing so." (page 70) She further argues that even in constitutionally mature cultures, such as the United States, judicial consideration of non-binding transnational and comparative sources both contribute both to the content of domestic constitutional law and to the international development of shared fundamental principles of

law, particularly in the context of human rights. Thus, according to Professor Jackson, such materials should not be seen as merely persuasive authorities to be followed or ignored at will, but as a form of required “relational” reading that should play an interactive role in the development of domestic and world-wide constitutional jurisprudence.

The European Union (EU) is often cited as the quintessential exemplar of a functioning, supranational institution. Professor Peter Lindseth’s contribution to this symposium, *The Contradictions of Supranationalism: Administrative Governance and Constitutionalization in European Integration Since the 1950s*, challenges that view. Presenting a historical perspective on European integration, Professor Lindseth argues that the current status of European integration is best seen as an instrumentalist extension of the administrative governance that has developed in Europe at the national level, and not as the creation of a new and democratically-legitimized constitutional order. Thus, instead of creating what might be characterized as a transnational or supranational constitutional entity, the EU reflects more the collectivist administrative interests of the member nation-states, each represented by its own national executive — typically the titular head of that nation’s administrative apparatus. Moreover, according to Professor Lindseth, while each nation-state is constitutionally legitimized by its own “demos,” the so-called supranational state has, as of yet, no such identifiable European demos and therefore no independent constitutional legitimacy. Professor Lindseth does not deny that the EU exhibits certain elements of constitutionalism — for example, the work of the European Court of Justice. Rather, he takes the view that current status of the EU as a supranational institution is far from complete. In his words, “Although European integration has clearly involved contradictory elements of both constitutionalization and administrative governance, my own sense is that the socio-legal character of the EU tips in favor of the latter” (page 91) Professor Lindseth’s historical perspective serves as a powerful reminder that the label of constitutionalism must be grounded in the reality of the system so described and not in some idealized version of that system.

In *Theories of Justice, Human Rights, and The Constitution of International Markets*, Professor Ernst-Ulrich Petersmann presents a

carefully constructed philosophic and normative argument asserting that the international constitutionalization of a non-discriminatory rules-based market is an essential component in the global protection of human rights. "From a human rights perspective, international justice refers, above all, to human rights and democratic procedures that justify the allocation and protection of equal basic rights, and the distribution of scarce resources necessary for personal self-development of individuals as morally and rationally autonomous social human beings." (page 7-8) Moreover, "[a]s human rights protect individual and democratic diversity, effective protection of human rights inevitably gives rise to market-based information mechanisms and coordination mechanisms whose proper functioning requires national and international constitutional constraints of 'market failures' as well as of 'government failures' in economic markets no less than in 'political markets.'" (page 32) At a descriptive level, Professor Petersmann sees various international institutions, including the European Union and the World Trade Organization, as playing an essential role in this process of constitutionalizing human rights. With respect to the WTO, for example, Professor Petersmann observes that "all four categories of constitutional elements in modern international law" are evident within the structure of that organization—namely, separation of powers, supremacy, the creation of substantive rights, and compulsory jurisdiction over disputes arising under it. (pages 37-38) Having examined the philosophic premise for the constitutional protection of human rights at an international level, Professor Petersmann further argues for the need to strengthen the international, constitutional protection of existential, democratic, and instrumental human rights beyond that available within the European Union and through the WTO.

While the contributors to this symposium offer five different perspectives on the "emerging transnational constitution," some more sanguine than others, it seems clear that something's happening here. At the very least, the principles and nomenclature of constitutionalism have become part of the international dialogue on human rights, perhaps suggesting that we are potentially in the middle of a process of significant constitutional change on a transnational scale. Whether that international culture of constitutionalism will take root and bear lasting fruit remains to be seen.

