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The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions

Jiunn-Rong Yeh* and Wen-Chen Chang**

I. Introduction

The world of constitutionalism has changed dramatically in recent years. Globalization and regional remapping in response to new alliances of emerging democracies are the primary driving forces. In the beginning of this new millennium, one of the most important constitutional enterprises that drew global attention was the writing of the European Constitution. The Constitution for the European Union (“EU”) tested our traditional notion that only nation-states could write constitutions.¹ The enactment of the EU Constitution eventually failed.² The constitutional-making process of the EU, however, continued to progress, and moved not only by formal enactments but also, and perhaps more importantly, by judicial interpretations and informal practices.³

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1. The official name of the Constitution for the European Union is “the Treaty Establishing a Constitution for Europe.” Because the EU is a supranational organization rather than a nation-state, the question of whether the Constitution is a treaty between nations or a federal constitution between states remains hotly debated. For further discussion, see *infra* notes 12-15 and accompanying text.

2. During the ratification process in 2005, the French and Dutch voters rejected respectively the constitutional draft. After the two-year ratification process had passed, the heads of member states signed the Treaty of Lisbon on December 13, 2007 as a proposal to reform the existing EU structure. Many provisions in the Treaty of Lisbon are reflective of the constitutional draft. The date set for ratification for the Treaty of Lisbon is January 1, 2009. See EUROPA—Treaty of Lisbon, http://europa.eu/lisbon_treaty/index_en.htm (last visited Jul. 28, 2008) (providing updates of this process).

3. See Wen-Chen Chang, *Constructing Federalism: The EU and US Models in Comparison*, 35 EURAMERICA 733, 752-66 (2005) (arguing the constitutional-creation process of the EU relies largely upon judicial construction and elite efforts).

We also began to realize that many international regimes or regional cooperative frameworks are now delivering constitutional or quasi-constitutional functions.⁴ The Charter of the United Nations (“UN”) is now being described as a constitution for the international community, and the World Trade Organization (“WTO”) as an economic charter. Even a regional, mainly economic, compact such as the North America Free Trade Agreement (“NAFTA”)⁵ is characterized by some as being “constitutional.” Furthermore, international human rights instruments that are now entrenching domestic legal orders serve constitutional functions.

On the one hand, certain rights have become “*jus cogens*” (compelling, binding law) or “*obligation erga omnes*” (a protecting duty for all states) while others obtain the status of customary international law.⁶ On the other hand, the domestic “constitutionalization” of international treaties has facilitated this trend and not surprisingly, fueled intense debate.⁷ Some national constitutions directly embrace international laws to be part of their laws and many more national judicial bodies have referred to international treaties or transnational norms to which their national political counterparts have not yet agreed. Not to mention, the transnational judicial dialogue that seems to create a constitutional regime merely through conversations between judges.⁸

Sovereign boundaries, against which traditional constitutions are drawn, are gradually being crossed. Increasingly more than ever, many transnational arrangements are assuming institutional as well as dialectical functions within, between, and beyond nation-states.⁹ Transnational constitutionalism has clearly depicted a changing terrain of modern constitutionalism.¹⁰ Faced with these emerging transnational features, we are left to wonder whether and to what extent our traditional understanding of constitutions and their functions are altered both conceptually and practically. We must ask ourselves how would modern

4. For further discussions on the constitutional or quasi-constitutional functions that international regimes may deliver, see *infra* notes 16-20 and accompanying text.

5. The North American Free Trade Agreement is a trade agreement among Canada, the United States, and Mexico that became effective in January 1, 1994. For its text, see http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78 (last visited Jul. 28, 2008).

6. For further discussions, see *infra* notes 21-25 and accompanying text.

7. For the pros and cons, see *infra* note 21.

8. See *infra* notes 29, 30 and accompanying text.

9. See *infra* notes 53-55 and accompanying text.

10. See, e.g., Nicholas Tsagourias, *Introduction—Constitutionalism: A Theoretical Roadmap*, in *TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN MODELS* 1-14 (Nicholas Tsagourias ed., 2007). This edited volume invited scholars to reflect on transnational constitutional features and the development of the European constitutional regime.

constitutional lawyers cope with these new developments, and what lessons shall we learn from these rather distinctive dynamics?

This article is an attempt at theorizing recent transnational phenomena across national borders and responding to new challenges posed by these new developments. Following this, the second part of this article analyzes the development of transnational constitutionalism by identifying its distinctive features, functions, characteristics and perspectives. The third part examines to what extent and in what ways the development of transnational constitutionalism challenges our traditional understanding of modern constitutional law. The third part addresses three problems: accountability, democratic deficit and rule of law. We then try to suggest possible solutions based upon a complex body of transnational and domestic institutions that may provide creative checks and balances in ways that were unimaginable before. We conclude with a perplexing, but nevertheless positive, view of transnational constitutionalism that creates new possibilities for a coming generation of constitutional as well as international legal scholars.

II. The Emergence of Transnational Constitutionalism

Driven by globalization and its related complexities, constitutionalism has developed beyond its traditional confinement i.e. nation-states.¹¹ Today, constitutionalism takes place not only within nation-states but also above and beyond. Perhaps even more importantly, it serves institutional and dialectical functions at both domestic and transnational levels. In the following, we shall define what we mean by “transnational constitutionalism,” identify its particular functions, argue for its distinctive characteristics, and examine this development from diverse perspectives.

A. Features

How exactly has constitutionalism developed above and beyond national borders? Today, many constitutions and quasi-constitutional arrangements have arisen to serve critical institutional as well as dialectical functions that connect states and non-states in many unexpected ways. Three features are distinctive in understanding this new phenomenon. They include: first, the development of transnational constitutions or quasi-constitutional arrangements, second, the

11. See Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 775-78 (1997) (arguing that constitutionalism may develop from treaty to constitution or vice versa); GAVIN ANDERSON, *CONSTITUTIONAL RIGHTS AFTER GLOBALIZATION* 17-33 (2005) (arguing that constitutionalism has developed beyond nation-states and advocating legal pluralism as a solution).

abundance of transnational judicial dialogues, and lastly, a global convergence of national constitutions.

1. Transnational Constitutions or Quasi-Constitutional Arrangements

The first feature of transnational constitutionalism is that constitutions are now being developed even beyond nation-states. These transnational constitutions or quasi-constitutional regimes are developed as a result of constitutional enactments across national borders or through the “constitutionalization” process of international regimes.

One of the most important examples, with regard to a constitutional enactment across national borders, is the EU Constitutional Treaty. Notwithstanding that it is a supranational organization, the EU launched its constitutional-making process in this century but it failed later during the ratification process. The Treaty of Establishing a Constitution for Europe (“Constitutional Treaty”),¹² despite its rather ambiguous terminology, was crafted carefully in a process more like constitution-making than treaty signing. It was drafted in a Convention, passed by an intergovernmental conference in Rome, and required to be ratified by member states where popular referenda might be called. Furthermore, it was expected to function like a Constitution: constructing European citizenship, facilitating democracy, providing effective governance and protecting fundamental rights in the European Union.¹³ While organizing principles may be different from those of domestic constitutions, the EU Constitutional Treaty nevertheless included standard constitutional components including: a bill of rights, judicial review, federalism, separation of powers, and even independent

12. See The Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) [hereinafter Constitutional Treaty].

13. The debate as to whether the European Union needs a Constitution was best presented by Dieter Grimm and Jürgen Habermas. See Dieter Grimm, *Does Europe Need a Constitution?*, 1 EUR. L.J. 282, 297-99 (1995) (arguing that the making of the EU Constitution would not necessarily resolve its democratic deficit, but it was nevertheless inevitable); Jürgen Habermas, *Remarks on Dieter Grimm's "Does Europe Need a Constitution?"*, 1 EUR. L.J. 303, 305-06 (1995) (arguing that a constitutional-creation process that is democratic and deliberative would construct a new European identity and resolve its democratic deficit); see also Michael Wilkinson, *Who's Afraid of a European Constitution?*, 30 EUR. L. REV. 297, 311-13 (2005); see generally LARRY SIEDENTOP, *DEMOCRACY IN EUROPE* 215-31 (2001); J.H.H. WEILER, *THE CONSTITUTION OF EUROPE* (1999); *DEMOCRACY IN THE EUROPEAN UNION: INTEGRATION THROUGH DELIBERATION?* 256-69 (Erik Oddvar Eriksen & John Erik Fossum eds., 2000). But see J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents*, 17 NW. J. INT'L L. & BUS. 354, 392-93 (1996) (arguing that European Constitutionalism does not mark the creation of a new legal order but a mutation of old international law).

commissions or agencies.¹⁴ Even though the enactment of the EU Constitution eventually failed, the direct effect and supremacy status of EU regulations, recognized and sustained by the European Court of Justice ("ECJ"), already prompted EU institutions to act like constitutional bodies.¹⁵

Moreover, many international regimes or regional cooperative frameworks are now also delivering constitutional or quasi-constitutional functions. Treaties or agreements that are regulated by international laws and operating traditionally among states have begun to have features of traditional constitutionalism including: rights protection, power constraints, and even judicial review.¹⁶ For instance, the most popular and powerful mechanism for global trade, the WTO and related agreements, has been characterized by some as a global economic constitution.¹⁷ The guarantee of contractual freedom and private ownership and the establishment of a Dispute Settlement Body, specifically the Appellate Body for the enforcement of treaty-related rights, are reminiscent of liberal constitutions that contain a bill of rights and the notion of judicial review.¹⁸ Similarly, the UN Charter, coupled with major UN human rights treaties, despite being criticized as toothless in the past, has been revitalized and regarded as a functioning constitutional regime.¹⁹ Even regional agreements, such as NAFTA,

14. See Chang, *supra* note 3 (arguing both the US and EU constitutional models have developed into federal arrangements through different mechanisms); see also THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION (Kalypso Nicolaidis & Robert Howse eds., 2001).

15. See MONICA CLAES, THE NATIONAL COURTS' MANDATE IN THE EUROPEAN CONSTITUTION 452-63 (2006) (arguing that the direct effects and the supremacy of EU laws have made the EU a constitutional entity and the European Court of Justice ("ECJ") a constitutional court).

16. See Deborah Z. Cass, *The Constitutionalization of International Trade Law*, 12 EUR. J. INT'L L. 39, 49-52 (2001) (arguing that in regards to judicial review the international trade regime has functioned like a constitution); see also Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 573-84 (1997) (arguing that the United Nations Charter has fully obtained the characteristics of a modern constitution).

17. See Cass, *supra* note 16; see also Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. INT'L ECON. L. 19, 20-21 (2000) (asserting that the WTO has already provided constitutional functions); but cf. Jeffrey L. Dunoff, *Why Constitutionalism Now? Text, Context and the Historical Contingency of Ideas*, 1 J. INT'L L. & INT'L REL. 191, 198-203 (2005) (arguing that the call for a world trade constitution will trigger the very politics that constitutionalism seeks to avoid).

18. See Cass, *supra* note 16.

19. See Fassbender, *supra* note 16; see also William H. Meyer & Boyka Stefanova, *Human Rights, the UN Global Compact, and Global Governance*, 34 CORNELL INT'L L.J. 501, 513-17 (2001) (arguing that international human rights treaties and their enforcement mechanisms within the UN constitute a comprehensive human rights regime on a global scale); Ernst-Ulrich Petersmann, *How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?*, 20 MICH. J. INT'L L. 1, 29-30 (1998)

have begun to perform recognizable constitutional functions. NAFTA determines which trade-related policy-making powers are distributed top-down and which private trading powers are given primacy. It is similar to what the principles of economic federalism and the freedom of private contract would demand within any domestic constitutional regime.²⁰

As international treaties perform constitutional or quasi-constitutional functions, certain international norms, particularly human rights instruments, have begun to obtain unprecedented recognition and become far more entrenched into domestic legal orders.²¹ For instance, the prohibition of genocide, the slave trade and, to a certain extent, terrorism, is now deemed to be "*jus cogens*" and binds all states. Furthermore, essential human rights, such as human dignity, have given rise to "*obligation erga omnes*" and demands that all states protect and punish crimes against humanity.²²

Many international human rights are now being regarded as customary international laws that are binding without consent. For

(arguing the constitutionalization of international human rights treaties would provide safeguards for domestic citizens).

20. See David Schneiderman, *Constitution or Model Treaty? Struggling Over the Interpretive Authority of NAFTA*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 294 (Sujit Choudhry ed., 2006) (contending that there exists a constitutional mode for interpreting NAFTA, but arguing against this constitutional mode as it would imperil rather than benefit free trades in the region); see also Lori M. Wallach, *Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standard*, 50 U. KAN. L. REV. 823 (2002) (arguing that, to the extent that regional frameworks such as NAFTA are binding and functioning like constitutions, they must be upheld to the standard of democratic accountability).

21. See generally Harold Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004). See also T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91 (2004) (arguing that Congress should make customary international law applicable in federal courts); Joan F. Hartman, *'Unusual' Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655 (1983) (arguing that denying the binding nature of customary international law would be definitely inadequate); Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999 (2003) (arguing that the supremacy of constitutional hegemony should be reexamined as a single community with a shared set of core values). But see Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283 (2004) (arguing against the U.S. courts' use of foreign and international law); Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT'L L.J. 527 (2003) (cautioning that a direct recognition of international treaties may change the use of the American Constitution to govern and make American law).

22. See IAN D. SEIDERMAN, *HIERARCHY IN INTERNATIONAL LAW: THE HUMAN RIGHTS DIMENSION* 123-45, 284-89 (2001) (arguing that the entire *corpus* of human rights law as *jus cogens* binds all states and gives rights to "*obligation erga omnes*" that demand state protection).

example, the right of an accused to be present for his/her trial and to be privy to the evidence against him even during war time has even been recognized as customary international law by the U.S. Supreme Court.²³ Furthermore, Article 3 of the four Geneva Conventions that include this right, have been widely recognized to be binding as customary international law.²⁴ Similar rights protection during peace time has long been recognized in the International Covenant on Civil and Political Rights ("ICCPR"), and arguably regarded as customary international law.²⁵ Since international norms, in particular human rights instruments, are directly binding without any domestic variations, they function as constitutional within the larger transnational community, because they constitute both the limit to which states exercise their powers and the claim by which citizens may make their appeals to domestic or transnational courts.

2. *Transnational Judicial Dialogue and References*

The second feature of transnational constitutionalism is the abundance of transnational judicial dialogue and references. Such conversations are threefold. The first is domestic judicial reference to international norms including decisions by international tribunals. The second is domestic judicial reference to foreign laws of other nation-states including decisions of foreign national courts. The third is reference made by international tribunals to other international regimes or decisions by other international tribunals.

The domestic judicial reference to international norms and decisions comes from either constitutional mandate or judicial self-assertion. The bill of rights of some national constitutions, were enacted in accordance with or at least inspired by certain international documents.²⁶ Judicial reference to international norms or judicial decisions is consequently

23. See generally *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (stating that the right of an accused, absent disruptive conduct or consent, to be present for his/her trial and to be privy to the evidence against him is indisputably part of customary international law).

24. In *Hamdan*, this stand seems implied. Furthermore, the body of international humanitarian law scholarship undisputedly recognizes this position. See HILAIRE MCCOUBREY, *INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE* 253-77 (2d ed. 1998); see generally HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* (2d ed. 2000).

25. See, e.g., SEIDERMAN, *supra* note 22, at 284-89.

26. See Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15 (2004) (arguing that international human rights instruments passed immediately after a war influence the enactment of many postwar constitutions); see also WILLIAM A. SCHABAS, *INTERNATIONAL HUMAN RIGHTS LAW AND THE CANADIAN CHARTER* (1996) (arguing that the writing of the Charter was greatly influenced by international human rights instruments).

seen as a common practice. In the many new constitutions of third-wave democracies, there has often been a demand for judicial reference to international law or at least international human rights law.²⁷ Some even directly pronounce that international laws are part of their domestic laws.²⁸ This domestic "constitutionalization" process of international norms has facilitated not only judicial conversations regarding external norms but also, the constitutional functions of international norms.

The constitutionalization of international or even foreign norms may occur as a result of judicial self-assertion. More increasingly than ever, national judicial bodies have referred to international norms to which their national governments have not yet agreed or even to foreign norms which are completely outside of their jurisdiction.²⁹ For example, in some recent decisions, the U.S. Supreme Court made reference to norms accepted in the Western European community.³⁰ By making normative links across national borders, courts are actually constructing a constitutional regime under which generally accepted norms, regardless of their national or international origin, may become the supreme law of a transnational land.

Similar conversations may also take place at a transnational level. Inevitably, national and transnational courts are competing with one another for a better understanding of transnational legal arrangements.³¹ National courts are shouldering the work of interpreting transnational norms or even particular foreign provisions.³² As a consequence,

27. See V.S. Vereshchetin, *Some Reflections on the Relationship Between International Law and National Law in the Light of New Constitutions*, in CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE 5-13 (Rein Müllerson et al. eds., 1998).

28. For example, Article 39 of the South African Constitution requires courts in interpreting the bill of rights to consider international law. See S. AFR. CONST. 1996 art. 39. Similarly, Article 7 of the Hungarian Constitution accepts the generally recognized principles of international law. See A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA art. 7.

29. See Cherie Booth & Max Du Plessis, *Home Alone? The US Supreme Court and International and Transnational Judicial Learning*, 2 EUR. HUM. RTS. L. REV. 127 (2005) (arguing that the US courts should join the vibrant transnational judicial dialogue to help advance international legal order); see also Janet Koven Levit, *A Tale of International Law in the Heartland: Torres and the Role of State Courts in Transnational Legal Conversation*, 12 TULSA J. COMP. & INT'L L. 163 (2004) (arguing that state courts also play an important role in transnational judicial dialogue); David Zaring, *The Use of Foreign Decisions by Federal Courts*, 3 J. EMPIRICAL LEGAL STUD. 297 (2006) (presenting empirical evidence of U.S. courts' citation to foreign courts).

30. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002) (referencing the norm accepted by the Western European community).

31. See Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 459 (2003).

32. To view the current interpretive status of the Refugee Convention or I.C.C.P.R., perhaps the best interpretive resource is not the International Court of Justice, but the Canadian Supreme Court. Canada has literally incorporated the Refugee Convention into

national courts might be seen as part of a system of common courts of a larger, transnational community.³³ As a result, transnational norms are becoming even more entrenched in national and transnational schemes. It is precisely through a complex interaction between transnational and domestic decision-making bodies that transnational constitutionalism takes a surprisingly strong hold.³⁴

3. *Global Convergence of National Constitutions*

Finally, the third feature of transnational constitutionalism has to do with the triumph of constitutionalism in the end of the last century. Over two-thirds of the world's population now lives under constitutional democracies. Furthermore a record number of nations in the last decade have either written or rewritten their constitutions consistent with modern constitutional principles.³⁵ As a result, most nations, in all directions of the globe, now have similar constitutions.

Aside from traditional arrangements such as a bill of rights, and the separation of powers, new institutions particularly responsible for guarding constitutions such as constitutional courts, human rights commissions and independent auditors, have all become common features of new constitutions.³⁶ Even nations without written constitutions have begun to either enact one, or at least draft some quasi-constitutional statutes. As a result, insofar as constitutional adjudication is concerned, the distinction between common and civil law courts has become blurred.³⁷

its national law and its Supreme Court has been very active in referring to international human rights norms. See Marley S. Weiss, *International Treaties and Constitutional Systems of the United States, Mexico and Canada*, 22 MD. J. INT'L L. & TRADE 185 (1998).

33. See Martinez, *supra* note 31; see also CLAES, *supra* note 15.

34. See CLAES, *supra* note 15, at 3-14.

35. FREEDOM HOUSE, *DEMOCRACY'S CENTURY: A SURVEY OF GLOBAL POLITICAL CHANGE IN THE 20TH CENTURY* (1999), available at <http://web.archive.org/web/20050307102714/http://www.freedomhouse.org/reports/century.html>.

36. As a result, comparative constitutionalism has recently become a rising area of research. See generally Symposium, *Contextuality and Universality: Constitutional Borrowings on the Global Stage*, 1 U. PA. J. CONST. L. 583 (1999); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677 (2003); Ruti Teitel, *Comparative Constitutionalism in a Global Era*, 117 HARV. L. REV. 2570 (2004).

37. See Ran Hirschl & Christopher L. Eisgruber, *North American Constitutionalism?*, 4 INT'L J. CONST. L. 203 (2006) (comparing the supreme courts of the U.S., Canada, and Mexico and arguing that they have certain common features despite different legal systems); Thomas Poole, *Back To The Future? Unearthing the Theory of Common Law Constitutionalism*, 23 OXFORD J. LEGAL STUD. 435 (2003) (arguing a rise of common law constitutionalism centered on bills of rights and common law courts).

The global convergence of constitutions has given rise to a common set of constitutional languages. Constitutions may serve as platforms upon which national actors, particularly judges, may interact with one another.³⁸ Transnational normative consensus is more easily to be reached as judges and legal scholars gather around and converse with one another with a common set of constitutional languages.³⁹ Transnational constitutionalism's dialectical function serves public as well as private actors. For example, a common constitutional language may help transnational entrepreneurs negotiate their contracts on easily understood terms and equal footing.

As noted above, the features of transnational constitutionalism do not function separately. Rather, they reinforce one another in complex ways. The convergence of constitutional developments makes it easy for the rise of transnational constitutions, which stimulate even more transnational judicial dialogues.

B. Functions

Evidently, transnational constitutionalism has risen to become a central phenomenon in the horizon of constitutional developments. It is not entirely clear, however, in what ways these new features will serve us. Are they functioning like traditional constitutions or deviating from them? Would they be more constructive and managerial in nature? The following discussion aims at discerning the functions delivered by transnational constitutionalism, which includes: the management of global markets, the substitution of absolute sovereignty, and the facilitation of multiple dialogues.

1. Management of the Global Market

It is undeniable that the rise of transnational constitutionalism has to do largely with economic globalization. The attempt of both advanced nations and quickly developing ones to expand the scale of the global

38. The most important actors are courts as well as sub-national units. See Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994) (arguing that courts are talking to one another all over the world); see also Jackson, *supra* note 26 (using Montana's adoption of Germany's human dignity clause as an example to argue that sub-national entities, such as states, may also play active roles in transnational constitutional dialogues).

39. See generally Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000) (arguing that judges have been interacting and communicating across borders); Ann-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); Paul Schiff Berman, *Judges as Cosmopolitan Transnational Actors*, 12 TULSA J. COMP. & INT'L L. 109 (2004) (arguing that judges should think of themselves as cosmopolitan transnational actors and that is the best way to avoid legal imperialism).

market at an accelerating speed was the key driving force for the development of transnational legal cooperation and frameworks.⁴⁰

To ensure that the broadened market functions, basic rules such as free exchange, market stability, contractual certainty and enforcement, and even a high respect for private property and other market-oriented rights, must be transplanted from more advanced countries to newly developing ones.⁴¹ A broader transnational legal framework and numerous free trade agreements are precisely the products of such demands. For example, WTO agreements are intended to ensure and police free trade rules for the global market. The EU, NAFTA, Association of South East Asian Nations ("ASEAN"), Asia Pacific Economic Cooperation ("APEC"), and other regional cooperative mechanisms perform exactly the same functions only for smaller regional areas.

Transnational rules initially intended to be merely trade-related basics would often grow into a complex set of rules that looked more and more like constitutions. The European Union is the best example. Originally the EU, as merely a coal and steel free exchange framework between France and Germany, experienced a series of transformations in its organizational and functional forms.⁴² During its course of development, the economic community quickly felt the need to establish a neutral arbitrator to enforce rules and mediate disagreements and the need to issue common policies and monitor proper executions. The ECJ, the European Commission and other institutions were thus created, and through their judicial enforcements and interpretations, they gradually transformed this economic organization into a constitutional or at least semi-constitutional regime.⁴³ Similar patterns have been displayed not

40. See generally Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303 (2004) (arguing that the WTO may serve the basic legal framework for a globally extended market); Alfred C. Aman, Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable through Administrative Law*, 28 FORDHAM URB. L.J. 1477 (2001) (arguing a need for developing global laws as a response to globalizing markets); Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398 (1996) (arguing that guaranteeing economic freedom, non-discrimination, and a rule of law extended liberal constitutional principles to the area of international economic policy-making and transnational economic activities).

41. See Maxwell O. Chibundu, *Globalizing the Rule of Law*, 7 IND. J. GLOBAL LEGAL STUD. 79, 84-91 (1999); see also Hans-Jürgen Wagener, *On the Relationship between State and Economy in Transformation*, in CONSTITUTIONS, MARKETS AND LAWS 33-58, 37-40 (Stefan Voigt & Hans-Jürgen Wagener eds., 2002).

42. See Chang, *supra* note 3.

43. See *id.*; see also WEILER, *supra* note 13.

only in the EU but elsewhere.⁴⁴ Reference to constitutional or quasi-constitutional frameworks has even recently been made to the WTO.⁴⁵

The function of transnational constitutionalism in managing a global market has not only affected transnational legal cooperation but has also led to a wider range of constitutional convergence that we described earlier. To illustrate, a broader market invites transnational legal frameworks as it simultaneously demands these market-participating nations to provide similar, if not the same, market-oriented rules and rights. Furthermore, the compliance with transnational legal frameworks would facilitate even more national receptions of liberal, market-oriented rights and constitutional arrangements.⁴⁶

It should not be surprising that some countries rewrote or revised their constitutions either before or after their entry into the WTO. For example, Thailand rewrote its Constitution following its entry to the WTO, and adopted several institutional measures to provide a fairer investment environment.⁴⁷ China, before her entry application to the WTO was approved, took actions to amend her Constitution to earn the trust from the world that it would genuinely abide by a rule of law and show due respects to private property.⁴⁸ More strikingly, amending the Constitution to ensure that an independent judiciary is capable of maintaining trade-related rights and transaction orders, was one of the demanded actions by international financial agencies to resolve Indonesia's economic crisis.⁴⁹

44. These patterns exist in the United States. See Ackerman, *supra* note 11; see also Chang, *supra* note 3. See generally Francisco F. Martin, *Our Constitution as Federal Treaty: A New Theory of United States Constitutional Construction Based on an Originalist Understanding for Addressing a New World*, 31 HASTINGS CONST. L.Q. 269 (2004) (arguing that the Constitution as a federal treaty must be construed through "International Legal Constructionism").

45. See Cass, *supra* note 16, at 49-51 (arguing that the way the WTO's Dispute Settlement Body reads and interprets the WTO's provisions and its members' domestic laws has made the WTO more and more like a constitution).

46. See generally Petersmann, *supra* note 40; Frank Michelman, *W(h)ither the Constitution?*, 21 CARDOZO L. REV. 1063 (2000).

47. See Borwornsak Uwanno & Wayne D. Burns, *The Thai Constitution of 1997*, 32 U. BRIT. COLUM. L. REV. 227, 243 (1998).

48. See Marc Rosenberg, *The Chinese Legal System Made Easy: A Survey of the Structure of Government, Creation of Legislation, and the Justice System under the Constitution and Major Statutes of the People's Republic of China*, 9 U. MIAMI INT'L & COMP. L. REV. 225, 226-37 (2000).

49. By the spring of 2002, the Indonesian Constitution was amended at least three times. See generally Matthew Draper, *Justice as a Building Block of Democracy in Transitional Societies: The Case of Indonesia*, 40 COLUM. J. TRANSNAT'L L. 391 (2002).

2. *Substitution of Absolute Sovereignty*

In the course of modern constitutionalism, sovereignty was first invented as a great legal concept (or fiction) to help transform monarchical regimes of the eighteenth century into parliamentary or popular democracies.⁵⁰ “Sovereignty” is constructed as a fictional personality of a nation with an absolute will/power, while a “constitution” is a founding legal expression of the highest order by such an absolute will/power. The democratization of the eighteenth century made it possible for national sovereignty to be represented by a monarch, a parliament, or a people. Monarchical constitution-making, parliamentary constitution-making and most importantly, popular constitution-making, became conceptually possible and institutionally available to modern constitutional development.

As a result, constitutions became strictly associated with nation-states of absolute sovereignty.⁵¹ This way of constructing constitutions and sovereign nations, however, has restricted our imagination regarding constitutions, and actually undermined modern constitutional functions. It overemphasizes the role of the state in any constitution-related undertaking and denies the possibility of constitution-making across national borders. Worse yet, by making any creative substitute for the state in transnational cooperation nearly impossible, it allowed states to monopolize the constitution making process.⁵² Consequently, any act of transnational cooperation could not become established or well functioning should any state become uncooperative because any human rights abuses that happened in one national border would be free from any external investigation or sanction. Furthermore, any domestic institutional arrangement that substantially affected the international market would not become the business of the international community. These examples have affected the development of international law ever since World War II.

But the recent rise of transnational constitutionalism has changed all that. First and foremost, the making of the European Constitutional Treaty for the first time disconnected the relationship between

50. See Martin Loughlin, *Ten Tenets of Sovereignty*, in SOVEREIGNTY IN TRANSITION 55, 57-59, 73-74 (Neil Walker ed., 2003).

51. A constitution without a state is never possible; but a state without a written constitution is possible in common law traditions. It is, however, in sharp decline. See VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 357-70 (1999).

52. See Bardo Fassbender, *Sovereignty and Constitutionalism in International Law*, in SOVEREIGNTY IN TRANSITION 115 (Neil Walker ed., 2003) (arguing that the concept of sovereignty became state-centered, and entailed state equality and sovereign equality after World War II).

constitutions and nations. A constitution now can be made upon something other than a nation.⁵³ Secondly, the transformation of transnational economic frameworks into more solid or even quasi-constitutional regimes altered our traditional understanding that constitutions are political, and that only political entities can make constitutions. Economic or non-economic cooperation can take place in constitutional frameworks.⁵⁴

More importantly, the fact that some of these transnational constitutions or quasi-constitutional arrangements have directly affected or strongly influenced their participating members is evidence of the gradual erosion of absolute sovereignties. Additionally, the recent progress of international humanitarian laws and the practice of many international war crime tribunals that handle internal genocide and civil war devastations are other proof. They stand against the assumption that rights are only ensured by national constitutions. Rather, in today's transnational frameworks, the constitutional rights of citizens in one nation may be better ensured by other nations or even by international legal frameworks.⁵⁵

3. *Facilitation of Multiple Dialogues*

The last function that transnational constitutionalism provides is the facilitation of multiple dialogues on a global scale. In the past, sovereign nations dominated the international arena, and local opinions would have to be screened and selected by a series of representation. In most countries, executive branches and their bureaucracies bore a more active role in representing their people's opinions.⁵⁶ Whether or not legislative powers sufficiently check the executive branch, the people's democratic legitimacy would be less direct, not to mention the concerns and opinions of ethnic minorities and disadvantaged groups would be likely excluded. As a result, many international treaties, transnational arrangements, and

53. See Neil Walker, *Late Sovereignty in the European Union*, in SOVEREIGNTY IN TRANSITION 3 (Neil Walker ed., 2003) (arguing that constitutions may rise without sovereigns).

54. See Cass, *supra* note 16; see generally M.P. MADURO, *WE THE COURT: THE EUROPEAN COURT OF JUSTICE & THE EUROPEAN ECONOMIC CONSTITUTION* (1998).

55. One example is the Alien Torts Claims Act of the United States, 28 U.S.C. § 1350 (2006). For further discussion, see Harold Koh, *supra* note 21. See generally Gordon A. Christenson, *Customary International Human Rights Law in Domestic Court Decisions*, 25 GA. J. INT'L & COMP. L. 225 (1996) (arguing that courts should use a choice of law analysis and take global legal order into consideration); Laura Dalton, *Stanford v. Kentucky and Wilkins v. Missouri: A Violation of an Emerging Rule of Customary International Law*, 32 WM. & MARY L. REV. 161 (1990) (arguing that the Supreme Court should take international human rights law into consideration).

56. See generally STEINER & ALSTON, *supra* note 24.

decisions had for a long time been regarded as systematically biased and partial. This was even truer for many minority and disadvantaged groups. Consequently, the international regime thus suffered great distrust and democratic deficit.⁵⁷

However, the creation of transnational constitutions, such as the European Constitutional Treaty, provide more direct accesses from the bottom up and bypasses traditional state bureaucracy. By participating in a larger framework of transnational politics, local groups are now unexpectedly more empowered to take a position against their local or national governments with the backing of transnational governing agencies or support groups in other nations.⁵⁸ Local and transnational politics becomes more complex and contested as more diverse groups enter into the platform.

Secondly, the rise of transnational constitutions or quasi-constitutional frameworks would challenge traditional power balances among states and make one-state dominance or any institutional monologue increasingly difficult.⁵⁹ For example, while the United States is seen as the most powerful state in the current international makeup, when it works with the EU or NAFTA, one would find that Italy or Spain in the case of the EU, and Mexico in the case of NAFTA, wield the same if not more powerful influence. This is also true of other great powers such as Germany, France or Japan, each of which now have to come to terms with other less powerful states on an equal footing in dealing with regional matters.

This political reconfiguration also applies to transnational governmental and non-governmental institutions. The recently exciting and well documented dialogues between various courts are one great example among many.⁶⁰ At times, conversations between transnational

57. *See id.*

58. *See* Marc Landy & Steven M. Teles, *Beyond Devolution: From Subsidiarity to Mutuality*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND EUROPEAN UNION* 413-26 (Kalypso Nicolaidis & Robert Howse eds., 2001).

59. *See generally* Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 *TULSA L.J.* 15 (1998) (arguing that the consideration of foreign decisions is increasingly popular for courts throughout the world, and that it is not always the courts of the most powerful countries that are the most influential in competing judicial dialogues). For example, the constitutional courts of Hungary and South Africa, have become most recognizable for their judicial dialogue. *See generally* Devika Hovell & George Williams, *A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa*, 29 *MELB. U. L. REV.* 95 (2005) (arguing that Australian courts should use international law in similar ways to South Africa); Duc V. Trang, *Beyond the Historical Justice Debate: The Incorporation of International Law and the Impact on Constitutional Structures and Rights in Hungary*, 28 *VAND. J. TRANSNAT'L L.* 1 (1995).

60. *See supra* notes 26-28 and accompanying text.

courts and national courts may be intense. For instance, some recent dialogues between the ECJ and the German Constitution Court regarding the direct applicability of EU rules when in conflict with the German Constitution, is a good example.⁶¹ These thoughtful conservations, however, may result in a much better understanding of transnational norms, and perhaps deliver some degree of democratic deliberation to transnational legal regimes.⁶²

The last, and somewhat unnoticeable function that transnational constitutionalism provides is through the convergence of national constitutions, which has enabled various nations to collaborate more smoothly. In the past, the most cited or referenced constitutions and courts were the U.S., German, and French Constitutions and their respective courts. At present, however, many more national constitutions are cited or referenced, and they do not always belong to any traditionally powerful states. New constitutions and their interpretive courts such as that of South Africa, Hungary, Poland, or South Korea are a few examples.⁶³ Students of comparative constitutionalism are fortunate to have more diversified and democratized sources for their digestion.

C. *Characteristics: Relativity*

The age of transnational constitutionalism presents a spirit of relativity. Three areas of relativity are illustrated: 1) the relativity between nation-states and partial units, 2) the relativity between public domains and private spheres, and 3) the relativity between external and internal norms.

1. *The Relativity between Nation-States and Partial Units*

The first area of relativity, results from the erosion of state dominance in the course of transnational constitutionalism. Scholars of globalization have long warned that globalization might lead to the dismantlement of the nation-state.⁶⁴ The development of transnational constitutions or quasi-constitutional arrangements taught us, however,

61. For a brief introduction of the struggle between the two courts, see Martinez, *supra* note 31.

62. See *infra* note 92 and accompanying text.

63. See *supra* notes 35-37 and accompanying text.

64. See JEAN-MARIE GUEHENNO, *THE END OF NATION-STATE* (Victoria Elliot trans., Univ. Minn. Press 1995); see also Alfred C. Aman, Jr., *The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 IND. J. GLOBAL LEG. STUD. 379 (2001); Charles Fried, *Constitutionalism, Privatization, and Globalization*, 21 CARDOZO L. REV. 1091 (2000) (arguing that the combination of privatization and globalization impacts the ability of a nation to control).

that states would not be dismantled as they remain key players within these regimes. Nevertheless, as we explained in the above section, transnational constitutionalism has at least unexpectedly led to the political reconfiguration of states and their local units.

With the aide of transnational cooperation, the relationships among nation states and their units would be more dynamic, thus changing their original federalism without any legal or constitutional amendments. Similarly, the more powerful and direct the representation for aboriginal and disadvantaged groups in these transnational frameworks, the more independent and autonomous they would become in their own nations.

2. *The Relativity between Public and Private Powers*

The second area of relativity is found between public and private powers. With a strong influence of economic globalization, the global expansion of private powers and the dominance of private actors on a transnational scheme have been anticipated.⁶⁵ Many economic entities today exert greater influences upon public life than traditional nation-states.

For instance, private transnational corporations through their local investments and managements have made significant impacts, for better or worse, on the human rights standards of local communities.⁶⁶ For example, the Internet Corporation for Assigned Names and Numbers ("ICANN") wields great power over our capacity to speak over the Internet. Similarly, the private International Standardization Organization ("ISO") has been responsible for product standards that directly affect the health and security of global citizens.⁶⁷ In a way, the development of transnational constitutionalism, or even global administrative law,⁶⁸ is a response to the great powers of transnational private actors. Intriguingly, however, many transnational norms have

65. See generally Alfred C. Aman, Jr., *The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism, and Democracy*, 31 VAND. J. TRANSNAT'L L. 769 (1998).

66. See generally SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION (2004) (examining the impact of human rights litigation through the Alien Tort Claims Act on transnational corporations); TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS (Olivier De Schutter ed., 2006) (analyzing the influence of transnational norms on transnational corporations); HUMAN RIGHTS AND THE PRIVATE SPHERE: A COMPARATIVE STUDY (Dawn Oliver & Jörg Fedtke eds., 2007).

67. See generally Walter Mattli & Tim Büthe, *Global Private Governance: Lessons from a National Model of Setting Standards in Accounting*, 68 L. & CONTEMP. PROBS. 225 (2005); James Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 L. & CONTEMP. PROBS. 189 (2005).

68. See generally Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005).

already been established by these transnational private actors, and these norms constitute a significant part of transnational constitutional governance.

The relativity of public and private powers is perhaps best illustrated in the WTO. The organization is a complex system of public powers, but interestingly it aims at leaving a large amount of room for private commercial activities.⁶⁹ This mixed character is also reflected on its membership. On the one hand, the WTO is a public international organization that admits governments on behalf of nation-states for membership. On the other hand, however, it leaves the possibility for “*any government acting on behalf of a separate customs territory*” to join the organization.⁷⁰ In other words, it not only recognizes the erosion of traditional nation-states but also open-up the possibility for the membership of economic entities.⁷¹ Due to this organizing principle, the WTO has been able to escape traditional sovereignty disputes among states. The loosened line between state and non-state actors demonstrates a mix of public and private powers that sustains transnational governance. APEC, an important economic cooperative framework in the Asia-Pacific, also adopts this mix of public/private powers as its organizing principle. Accordingly, it is not surprising that personnel working in these organizations were previously civil servants but rather came from private industry.

It must be reminded, that the development of transnational constitutionalism is characterized by a mix of public/private powers rather than the sole dominance of private powers. However, because a larger space is left for private powers, orderly cooperation and normative governance is simultaneously in great demand.⁷² A freer globalized space requires global law rather than no law.⁷³

3. *The Relativity between External and Internal Norms*

The last and perhaps the most important and noticeable, area of relativity is the interface between external and international norms/institutions. Although “external,” transnational constitutions and quasi-constitutional arrangements directly affect nations and individuals, and this makes them more and more a part of domestic norms. The EU

69. See Cass, *supra* note 16.

70. General Agreement on Tariffs and Trade art. 33, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, available at http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm.

71. As a result, Taiwan, despite its disputed international status, joined the WTO/GATT and, Hong Kong, now a special administrative region of China, also maintains its own membership in the organization.

72. See Cass, *supra* note 16.

73. See Kingsbury et al., *supra* note 68, at 25-27.

laws and their relationship to the internal legal systems of its member states is a great example.⁷⁴

More importantly, as a part of transnational constitutionalism, an increasing number of international treaties are now being made as a direct result of or at least strongly influenced by domestic contexts.⁷⁵ The boundary between international and national laws has been crossed and become blurred. In a great deal of cases, international laws may be more decisive than any domestic constitutional provision or legislative enactment.⁷⁶ But there exists an intricate relationship between international and national laws. Keep in mind that it is often through domestic constitutional provisions or judicial interpretations that certain international treaties are made as a direct result of domestic contexts. Here, internal laws actually assume the function of enabling international laws into the domestic context, thus diminishing the legitimacy problems of external norms. In this way, national and international laws mutually empower each other.⁷⁷

As the boundary between international and national norms becomes blurred, so is that of international and national institutions. Imagine any regional or international court, such as the European Court of Human Rights ("ECHR"), rule that a national law is in conflict with an international law or human rights treaty, and thus, the international norm should prevail. The way that courts interpret and apply these various norms is no different from any domestic high court or constitutional court.⁷⁸ By the same token, when any domestic court uses a transnational constitution or an international law as decisive authority,

74. See *infra* notes 109-12 and accompanying text.

75. See *supra* notes 29-30 and accompanying text (discussing the ICCPR).

76. See, e.g., Hartman, *supra* note 21; see also Dalton, *supra* note 55; Paolo G. Carozza, "My Friend is a Stranger": The Death Penalty and the Global *Ius Commune* of Human Rights, 81 TEX. L. REV. 1031 (2003). See generally Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357 (2005); Daniel Smith, *Continental Drift: The European Court of Human Rights and the Abolition of Anti-Sodomy Laws in Lawrence v. Texas*, 72 U. CIN. L. REV. 1799 (2004).

77. See generally Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004) (arguing that recent interactions between international tribunals and domestic courts could be described as a "dialectical review"); Melissa A. Waters, *Justice Scalia on the Use of Foreign Law in Constitutional Interpretation: Unidirectional Monologue or Co-constitutive Dialogue?*, 12 TULSA J. COMP. & INT'L L. 149 (2004) (arguing for a "co-constitutive" approach to transnational judicial dialogue); David Fontana, *The Next Generation of Transnational/Domestic Constitutional Law Scholarship: A Reply to Professor Tushnet*, 38 LOY. L.A. L. REV. 445 (2004) (arguing that domestic and foreign legal systems should be integrated in a optimal manner). But cf. Martinez, *supra* note 31.

78. See Ahdieh, *supra* note 77.

their acts and interpretations of the law are no less authoritative and no different from that of an international tribunal.

D. Diverse Perspectives

While relatively new, the rise of transnational constitutionalism has already invited intense debates over its function and values. Some celebrate it as the prevalence of transnational normative legal orders and argue that transnational constitutionalism should have already happened a century ago when international law was developed.⁷⁹ Others, however, see this recent development as a dangerous plot by ambitious international actors and a huge threat to traditional constitutionalism.⁸⁰ These defiant reactions, we argue, are reflective of diverse perspectives. Each shows a distinctive understanding, as well as expectations of constitutional functions that will be played out in an expanded new territory.

1. Foundationalism

Similar to a foundationalist's view of transitional constitutionalism, as transcending politics into a high moral normative order, the development of transnational constitutionalism is seen as the complete establishment of normative order. It starts with local ordinances, links to national statutes, and completes with transnational norms that are expected to supersede lower-level norms once in conflict.⁸¹ If local and national legal orders are seen as the consolidation of turbulent political transitions, transnational constitutionalism is perceived as the result of a velvet revolution that was led by global moral activists to rescue unfair and fractioned domestic constitutional orders that had been hijacked by self-interested nation-states.⁸²

In this view, the emergence of transnational constitutionalism is regarded as a noble act that renders a more transcending citizenship to

79. See Koh, *supra* note 21; see also Aleinikoff, *supra* note 21; Hartman, *supra* note 21.

80. See, e.g., Weiler & Trachtman, *supra* note 13; Young, *supra* note 21; Larsen, *supra* note 21.

81. See Koh, *supra* note 21; see also Harold Koh, *The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 1 (2004) (arguing that we should take a transnational perspective in the world of human rights); Vincent J. Samar, *Justifying the Use of International Human Rights Principles in American Constitutional Law*, 37 COLUM. HUM. RTS. L. REV. 1 (2005) (arguing for the prevalence of international and comparative law based upon the universal concept of human rights).

82. See Harold Koh, *Transnational Public Law Litigation*, 100 YALE L. J. 2347, 2398-2041 (1991); see also Harold Koh, *Jefferson Memorial Lecture: Transnational Legal Process after September 11th*, 22 BERKELEY J. INT'L L. 337, 339-41 (2004).

prevent citizens from being exploited by state and non-state actors. The fact that traditional international treaties and agreements have functioned like constitutions simply conforms to such a transnational legal order. Furthermore, the convergence of respective constitutional orders is evidence of this integrative legal process.⁸³

2. *Reflectionalism*

In contrast with the above idealistic picture, a reflectionalist views the development of transnational constitutionalism as a result of political bargains and opportunistic calculations by domestic and international actors.⁸⁴ This is neither more virtuous nor more evil than the give and take of domestic democratic transitions.

A reflectionalist would inquire about why domestic decision makers are so willing to surrender their decision-making capacities to outside institutions and transnational actors? Why would they agree to any transnational constitution or quasi-constitutional arrangement that would in turn reduce their freedom to create domestic policies and perhaps, even undermine their own interests? Imagine when any European member state decided to ratify the European Constitution. It meant that it would relinquish a number of its own policy making capabilities. When any nation allows an international treaty, or customary international law to directly affect its constitution, or allows judicial reference to a foreign law to help interpret its own constitution,⁸⁵ that nation's bill of rights becomes malleable though external influence.⁸⁶ When any domestic constitutional court uses an international treaty or foreign law to establish a binding precedent, the court to a considerable extent has limited its decision-making capacity over its domestic political branches.⁸⁷ At that point, we must ask how has transnational constitutionalism developed and become accepted?

The answer, from the perspective of reflectionalism, lies largely in the complex calculation of external and internal political interests. The

83. *See id.*

84. *See* Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707, 721-34 (2006) (arguing that the acceptance of international treaties or customary international law within domestic legal systems is based upon the strategic calculations of political actors). *See generally* GEORGE W. DOWNS & DAVID M. ROCKE, OPTIMAL IMPERFECTION: DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS (1997); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000). *But see generally* SIMMONS, WHY COMMIT?—EXPLAINING STATE ACCEPTANCE OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS (2002).

85. *See* sources cited *supra* note 28.

86. *See* Young, *supra* note 21.

87. *See id.*

political give and take may vary from context to context, but mainly includes the following calculation.

First, cooperation with transnational legal frameworks carries with it not only obligations but also benefits. A state that demands more international resources or accessibility to the global market would be more likely to cooperate with transnational legal developments; either in the name of trade or human rights. In contrast, a self-sufficient state with a large internal market would be less likely concerned with international cooperation.⁸⁸ This view makes it more understandable that the United States has a rather conservative attitude towards comprehensive transnational legal frameworks as compared to powerful European states such as England, Germany or France. It also shows why China has shown a more aggressive attitude towards international trade cooperation as it produces and sells more.

The second kind of political calculation is similar to what has been uncovered in the transitional context, namely the political calculation of dominant political parties.⁸⁹ In other words, if a current dominant political party is unsure of whether it will remain in power, it would be more likely to commit to transnational constitutionalism even if winning the next election would be restricted considerably.

Finally, new democracies tend to be more open to transnational legal frameworks. In their constitution-making process they are more likely to adopt international laws directly applicable to their domestic environments.⁹⁰ Under the view of reflectionalism, there are external and internal causes for this. Externally, new democracies lack international reputation and thus need more credibility on an international scale.⁹¹ Internally, facing rather fragile transitional circumstances, new dominant political parties need the aide of international legitimacy to stabilize their domestic governance.⁹² This is why we often see young democracies stand on the progressive side of transnational constitutionalism while established democracies tend to be more conservative.

3. *Constructivism*

The above two views stand in sharp contrast with each other. A foundationalist would expect the prevalence of transnational constitutionalism and see the function of transnational constitutions as

88. See Ginsburg, *supra* note 82.

89. See *id.*; see also Teitel, *supra* note 36, at 2028-29.

90. See generally Teitel, *supra* note 36.

91. See generally Ginsburg, *supra* note 84.

92. See Teitel, *supra* note 36, at 2028-29.

virtuous in sustaining a broader political terrain and protecting a wider array of rights. A reflectionalist, in contrast, would reveal the underlying local political interests while recognizing the rise of transnational constitutionalism. The reflectionist would not idealize the function of transnational constitutions but insist that transnational constitutionalism is simply the product of local and transnational politics.

Here, as in a transitional context, neither view presents the entire story. It is true that the development of transnational constitutionalism has to do largely with domestic and transnational political calculations. But reflectionalism fails to understand that once domestic political actors surrender their decision-making capacities to transnational institutions, they leave open a broader space for transnational constitutionalism to develop which is likely to be an irreversible process. Nevertheless, this process would be less likely to be oriented completely by any high moral idea of absolute global constitutionalism, contrary to what a foundationalist would hope for.

In the view of constructivism, transnational constitutionalism would proceed as a process over an extended period of time. Transnational constitutionalism would not be developed at one shot, and it would not be victorious all the time as seems to be expected. It would nevertheless evolve over time, proceeding yet experimenting and revising when confronting challenges and setbacks. The recent rise of transnational constitutional developments is a good start, but there will always be obstacles and resistances, which are not necessarily bad. The constructive process of transnational constitutionalism expects intense and constant interactions between national and international constitutional frameworks and encourages both to work with one another.⁹³

III. Challenges and Solutions

The recent development of transnational constitutionalism has not come without suspicions. Some worry that these new constitutional enterprises will circumvent the great virtues of traditional constitutionalism.⁹⁴ Indeed, the relative nature of transnational

93. See Ahdieh, *supra* note 77; see also Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005) (arguing that the relationship between international and domestic legal norms is more appropriately conceived as a "co-constitutive" relationship).

94. See Young, *supra* note 21; see also Larsen, *supra* note 21. In addition, there may be unexpected aversions. See generally Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models*, 1 INT'L J. CONST. L. 296 (2003) (arguing that negative rejection, rather than positive acceptance, plays a major role in transnational exchanges).

developments is a clear indicator of departure. The real question is whether some departures will necessarily become threats or dangers?

Others, however, hold a contrasting view. They appreciate the way that transitional constitutionalism has invented new solutions to unusual and difficult problems posed by the recent transformation of new democracies. Transnational constitutionalism has made unprecedented progress in human history; to call on constitutions on a transnational scale to find creative and significant ways to protect human rights without territorial constraints.⁹⁵ Facing these very different positions, how could one choose any side?

A. Challenges: Accountability, Democratic Deficit, and the Rule of Law

Before we decide on any of the opposing views, we must examine the challenges posed by this new development and see whether and how they may possibly be reconciled. Among the many challenges, we have identified the three most critical ones: accountability, democratic deficit, and rule of law.

1. Accountability

The first salient challenge posed by transnational constitutionalism is its inability to ensure accountability. Traditional teachings in modern constitutionalism require, and rightly so, that any decision must be made with a clear understanding of accountability. Decision makers must be held accountable for their decisions, and with this clear understanding in mind, they are less likely to abuse their power in their decision making. But transnational constitutionalism showed a considerable departure from this requirement.⁹⁶

One of the salient features in transnational constitutionalism is that international treaties or agreements, regardless of being signed, acceded, incorporated or transformed, are increasingly being made directly applicable to domestic contexts. However, this poses two problems concerning accountability: one at an international level, and the other at a domestic level. At an international level, when these treaties or agreements were made, their participating members had no idea that these legal documents would have such far-reaching effects and could not have taken these domestic circumstances into account. As a result, there was no way to ensure accountability at the international level. In

95. See, e.g., Koh, *supra* note 21; Hartman, *supra* note 21; Aleinikoff, *supra* note 21.

96. See Young, *supra* note 21, at 533-38.

the domestic context, international treaties or informal norms to which a nation had not signed are often made applicable by judicial decisions.

2. *Democratic Deficit*

The second, and perhaps the most severe, problem that the new developments have suffered is democratic deficit. The democratic thesis of traditional constitutionalism requires that all decisions and norms must be made and generated with sufficient democratic legitimacy. But this may not be fulfilled in transnational constitutionalism.

Democratic deficit has been diagnosed as the most serious problem that threatens to undermine the entire enterprise of modern constitutionalism. For example, a considerable body of literature exists discussing the democratic deficit issues of the EU and the development of its constitutional governance. Some of the great minds of our time stood in this line.⁹⁷ The direct applicability of international laws or customary international laws has exacerbated this democratic deficit question even further.⁹⁸ Democratic legitimacy suffers greatest when affected parties have no access to influence the norm-generating process. Worse yet, domestic democratic decision-making mechanisms such as the separation of powers, or even federalism, are likely to be undermined as they too would be trumped too easily.⁹⁹

We recognize that democratic deficit was indeed the greatest challenge to transitional and, especially, transnational constitutionalism. But, again, are there any ways to at least improve the situation? Are there any new ways of constructing or understanding democratic legitimacy? Some scholars have argued that the recent democratic deficit debate must be tackled by a brand-new understanding of democratic legitimacy. Take for example the constitution-making process of the EU. In order to ameliorate democratic deficit problems,

97. See, e.g., Grimm, *supra* note 13; see also Habermas, *supra* note 13.

98. See Young, *supra* note 21, at 533-41; see generally Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989 (2004) (arguing that the application of foreign law, conflicts with traditional concepts of popular sovereignty). But see Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006) (challenging the contemporary debate regarding the role of international law in constitutional interpretation based upon an examination of historical Supreme Court practice).

99. See Young, *supra* note 21, at 533-41; see generally Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1999) (arguing that the "Charming Betsy" canon of construction is best viewed as a device to preserve separation of federal powers); Duc V. Trang, *Beyond the Historical Justice Debate: The Incorporation of International Law and the Impact on Constitutional Structures and Rights in Hungary*, 28 VAND. J. TRANSNAT'L L. 1 (1995) (arguing that the Hungarian Constitutional Court imposed constraints on other branches based on international law).

the EU's constitution decision makers decided from the start to proceed with a more open and deliberate constitution-making process by European citizens. Because of this European (re)invention, a revival of the discourse on deliberative democracies or democratic deliberation has now existed for some time. Furthermore, it has inspired many to envision new forms of democratic legitimacy even on a transnational scale.¹⁰⁰

3. *Rule of Law*

The last but not the least challenge concerns the rule of law. In the development of constitutionalism, rule of law was one of the first developed concepts against the potential power abuses of monarchies or bureaucracies. Rule of law, while not entirely uncontested, entails at least the following principles: power exercise according to law, power exercise checked with judicial review, legal certainty, and legal clarity.¹⁰¹ However, these fundamental principles of rule of law, especially legal certainty and legal clarity, have been undermined to some extent in transnational constitutionalism.

One of the most significant principles is legal clarity. Because an increasing number of international norms or practices may be directly applicable to domestic contexts, it would be difficult for affected parties to know exact rules and laws *ex ante*. The principle of rule of law, especially legal clarity, would then become fragile.¹⁰²

Many believe any weaknesses related to rule of law may be supplemented by the strengthening of other aspects such as judicial review and constitutional principles. This may be seen in the recent decisions of the U.S. Supreme Court where the Court has cited international human rights treaties.¹⁰³ Having recognized the potential attacks on rule of law, the U.S. Supreme Court has rendered great efforts to provide lengthy and thoughtful opinions with articulated constitutional principles. In so doing, the weakness in rule of law may be ameliorated.

100. Many opt for more deliberative, dialectic, pluralistic forms of democratic legitimacies. See, e.g., Habermas, *supra* note 13; see also Hans Lindahl, *Sovereignty and Representation in the European Union*, in SOVEREIGNTY IN TRANSITION 87, 101-112 (Neil Walker ed., 2003).

101. See BARRY M. HAGER, THE RULE OF LAW: A LEXICON FOR POLICY MAKERS 19-35 (1999).

102. See Young, *supra* note 21.

103. *E.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003).

B. Solutions: Domestic & Transnational Institutional Checks and Balances

Are there any ways to reconcile the aforementioned challenges, posed by transnational constitutionalism? We think there are some solutions, and a number of them have already been taking place in current transnational complexes. In order to see and understand these current developments, as potentially effective checks and balances to transnational constitutionalism, one must broaden his/her conceptualization of accountability, democracy, and rule of law. More importantly perhaps, one must be willing to depart from the traditional views that are drawn from clear-cut borders between nation-states, and instead, embrace a cross-border vision in the new governance of transnational constitutionalism.

1. Domestic Institutional Checks and Balances

The deficiency of accountability, democracy, and rule of law in transnational constitutionalism may be ameliorated by domestic institutions. Domestic players, particularly courts, have emerged as critical institutions for transnational governance. Let us address potential functions these domestic institutions may play in the complex regime of transnational constitutions and judicial dialogues.

First, we must realize that participation in any transnational governance requires domestic consent. With most constitutions, this consent involves parliamentary confirmation, or, in some cases, checks by elected officials.¹⁰⁴ With stronger than ever influences from transnational frameworks, however, many nation-states now require, a direct public vote, binding or advisory,¹⁰⁵ for an expressive consent to transnational cooperation. Take for example, the ratification of the Constitutional Treaty of the EU. Notwithstanding a failed exercise, about half of the member states opted for a national referendum even without any formal constitutional requirement.¹⁰⁶ A decade earlier, four member states conducted referenda for their accessions to the EU

104. A referendum may be required if a transnational agreement is in conflict with the Constitution or if a constitutional amendment requires a referendum.

105. For example, in the United Kingdom, referenda regarding international cooperation were only advisory but their practical effects were legally "binding."

106. The states include Belgium, Czech Republic, Denmark, Ireland, Luxembourg, Netherlands, Poland, Portugal, Spain and the United Kingdom. See Carlos Closa, *Ratifying the EU Constitution: Referendums and their Implications*, U.S.-Europe Analysis Series, THE BROOKINGS INSTITUTION, Nov. 2004, available at <http://www.brookings.edu/fp/cuse/analysis/closa20041101.pdf>.

through the Maastricht Treaty.¹⁰⁷ A direct public vote prior to the entry of a transnational organization would considerably ease the criticism of democratic deficit.¹⁰⁸ Undoubtedly, a one-time public vote and the democratic support it renders would not necessarily sustain long-term transnational governance. We are expected to see more and more referenda, binding or advisory, for national decisions on major transnational cooperative policies.

Transnational frameworks may also be designed to leave space for domestic actions that may serve as checks and balances. For instance, the two principles of “subsidiarity” and “proportionality” codified in the EU Treaty¹⁰⁹ are such mechanisms. The principle of “subsidiarity” demands that the EU act within the powers conferred upon it. Furthermore, in the areas where it does not have exclusive power, it shall only act if its member states fail to take action.¹¹⁰ Moreover, the principle of “proportionality” mandates that any actions taken by the EU must be necessary to achieve its purposes.¹¹¹ Thus, in concurrent areas, by taking prompt and sufficient actions, member states preserve room for their own policy-making. Even in exclusive areas, based upon “proportionality,” member states may still make challenges to the EU authority on substantive grounds by showing that their domestic policies are less restrictive or more effective alternatives. In this way, any criticism of accountability, and democratic legitimacy in transnational

107. The states were Denmark, France, Ireland and the United Kingdom. See generally Thomas König & Simon Hug, *Ratifying Maastricht: Parliamentary Vote on International Treaties and Theoretical Solution Concept*, 1 EUR. UNION POLITICS 93 (2000), available at <http://eup.sagepub.com/cgi/reprint/1/1/93>.

108. The demand for public votes coupled with broader citizen deliberations on decisions concerning national entrance into transnational governance, has been called for by scholars that emphasize deliberative democracy as a fundamental source of legitimacy. Jürgen Habermas is representative of these scholars. See Habermas, *supra* note 13.

109. The full name of the treaty is the Treaty Establishing the European Community as amended by the Treaty of Nice on February 26, 2001. See 2002 O.J. (C 325) 33 [hereinafter European Community Treaty], available at <http://www.ena.lu/>.

110. Section 1 of Article 5 of the European Community Treaty prescribes that “the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.” See *id.* Section 2 stipulates that

[i]n areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Id.

111. Section 3 of Article 5 of the European Community Treaty provides that “[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.” See *id.*

governance, may be eased.¹¹² Domestic policy makers would be accountable to their local citizens if they failed to render more effective policies within their concurrent jurisdiction. The transnational body could also be rendered accountable if its policies disproportionately unmet with organizational purposes. In this process, local policy-makers may also be requested by their local citizens to provide alternatives and thus it would no longer be easy for them to escape from their policy duties.

The last and perhaps most important domestic institution to check and balance transnational policy-making is the judiciary. The relationship between transnational norms, including decisions made by transnational bodies and domestic courts, particularly domestic constitutional courts or supreme courts, has been a perplexing one. On the one hand, the legal status of transnational norms is primarily determined through domestic constitutions.¹¹³ On the other hand, however, transnational norms, including decisions by transnational bodies have increasingly affected national jurisdictions and even the supremacy over national laws. The direct effect and supremacy of the EU laws is a perfect example.¹¹⁴ These two conflicting views call for more examination. The German Constitutional Court entrusted itself to review laws made by European institutions in its famous decision concerning the constitutionality of Germany's accession to the Maastricht Treaty.¹¹⁵ The Court held that any legal instrument that no longer coincided with the Community's purposes should not be binding on German territory.¹¹⁶ This decision created the opportunity for the German Constitutional Court to place significant checks and balances upon the law-making powers of the Community. The decision permits the German Constitutional Court to review the Community's laws and also allows for German courts to review decisions rendered by the ECJ and the European Court of Human Rights ("Eur.Ct.H.R.").¹¹⁷ In a recent decision involving a case where the lower court followed the precedent of the EurCtHR, while the appellate court refused to consider that same

112. See Mattias Kumm, *Democratic Constitutionalism Encounters Institutional Law: Terms of Engagement*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 256, 265 (Sujit Choudhry ed., 2006).

113. Most Western European nations give treaties the status of law, but new Eastern European nations are inclined to give them a higher, if not constitutional, status. See Vereshchetin, *supra* note 27, at 5-13.

114. See, e.g., CLAES, *supra* note 15, at 452-63.

115. See Bundesverfassungsgericht [BVerfG] [federal constitutional court] Oct. 12, 1993, 89 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 155 (F.R.G.) (regarding the Maastricht Treaty).

116. See *id.*; see also 33 I.L.M. 388 (1994) (providing an unofficial translation of the decision).

117. See Kumm, *supra* note 112, at 279-80.

precedent, the German Constitutional Court reasoned that the Treaty provision as interpreted by the Eur.Ct.H.R. must be taken into account in making a decision.¹¹⁸ In other words, the Court established a duty for all German courts to consider decisions by the Eur.Ct.H.R. At the same time, however, the Court held that if a plausible construction of the Constitution established a higher level of protection than the Eur.Ct.H.R., the presumption to follow the decisions of the Eur.Ct.H.R. should cease to apply.¹¹⁹ Here again, we see the possibility for domestic courts to place effective institutional checks and balances, while giving due respect to transnational judicial decisions.¹²⁰

Domestic judicial checks within transnational decision-making may sometimes be quite subtle. For instance, after September 11, 2001, the United Nations Security Council adopted Resolution 1373 to provide counter-terrorism measures including some leeway for investigatory detention and a listing mechanism of individuals and entities that financed terrorist activities.¹²¹ Responding to this urgent international security call, many governments enacted national laws to adopt these measures notwithstanding their grave threats to human rights protection. Interestingly however, a number of national high courts have together put the brake on this repressive international trend. For instance, in *Hamdan v. Rumsfeld*, the Supreme Court of United States found it unconstitutional to try terrorist suspects by a military commission.¹²² In *A v. Secretary of State*,¹²³ the House of Lords found that the power to detain, based upon any suspect's nationality or immigration status, is incompatible with the Human Rights Act and international human rights instruments such as the ICCPR and the European Convention on Human Rights.¹²⁴ Similar judgments can also be found at the Eur.Ct.H.R.,¹²⁵ the ECJ¹²⁶ or other ongoing legal proceedings.¹²⁷

118. See Kumm, *supra* note 112, at 280-81 (discussing *Görgülü v. Germany*, a 2004 decision of the German Constitutional Court, docket number 2 BvR 148/04).

119. See *id.* at 281.

120. See Ahdieh, *supra* note 77.

121. See S.C. Res. 1373, ¶¶ 1-9, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

122. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006).

123. See *A v. Sec'y of State for the Home Dep't* [2005] UKHL 71, [2005] 1 W.L.R. 414.

124. The full name is the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome 4 XI. 1950), as amended by Protocol No. 11 (1998).

125. See *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, 2005-VI Eur. Ct. H.R. 440.

126. See Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Minister for Transport, Energy and Communications, et al.*, 1996 E.C.R. I-3953.

127. There was a similar legal dispute in Canada. A Canadian citizen was listed as a sponsor of terrorist activities and United States officials demanded the citizen be extradited to the U.S. See David Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68 LAW & CONTEMP. PROBS. 127, 140-52 (2005) (discussing the case).

There is still room for domestic institutional checks and balances within transnational constitutional governance. Even in transnational judicial dialogues where judges would seem to be at ease in embracing foreign or international legal sources, domestic political actors are more than capable of mounting an effective opposition. The use of foreign sources or transnational references can be strictly prohibited by domestic legislation. For instance, several legislative bills aimed at prohibiting judicial reference to foreign or international laws have been introduced in the United States Congress.¹²⁸ And it is possible for domestic political actors to enact new laws to reverse judicial decisions that rely heavily upon foreign or transnational legal sources. In addition, legal scholarship, domestic as well as transnational, always provides critical examination of judicial reasoning including transnational references. There is intense debate on the use of transnational references in the American legal community.¹²⁹

One last feature in transnational constitutionalism concerns the global convergence of domestic constitutional institutions. Recall that any domestic institution is established by direct or indirect public consent, and these institutions always run the risk of falling out of favor with the public. Local constituencies serve as watchdogs, making domestic institutions accountable for their performance. Convergence does not always create equivalency. The possibility of variations on the local level helps local powers survive and counterbalance global convergence.

He filed a lawsuit alleging this government action was contrary to the Canadian Charter of Rights and Freedoms. *Id.* The Canadian government resolved the case before it finally went to the Court. *Id.*

128. See, e.g., American Justice for American Citizens Act, H.R. 4118, 108th Cong. (2004); Constitutional Restoration Act of 2005, H.R. 1070, 109th Cong. (2005). Both bills prohibit federal courts from employing the constitution, laws, policies or judicial decisions of any international organization or foreign state, except for the English constitutional and common law or other sources of law relied upon by the Framers of the American Constitution. See Vicki C. Jackson, *Transnational Challenges to Constitutional Law: Convergence, Resistance and Engagement*, 35 FED. L. REV. 161, 161-62 (2007); see also Sujit Choudhry, *Migration As a New Metaphor in Comparative Constitutional Law*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 1, 2-13 (Sujit Choudhry ed., 2006).

129. See Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J. L. & PUB. POL'Y 807 (2000); see also Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. (2005); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004).

2. *Transnational Institutional Checks and Balances*

Checks and balances are possible not only at the domestic level but also, in rather creative ways, at the transnational level. They may emerge from within, between, and even beyond transnational networks.

As discussed above, transnational arrangements are increasingly modeled after and function as domestic constitutions. Consequently, certain check and balance mechanisms may be adopted. For instance, the European Union has a Council with legislative and decision-making powers whose enforcement is carried out by a Commission, and supervised by a Parliament and a Court of Justice.¹³⁰ Just within the EU, institutional checks and balances hold strong.¹³¹ A few divisions of power with varying degrees of checks and balances are also seen in the UN.¹³² The Assembly, the Court of Justice, various Councils and Commissions constitute a large complex that is capable of checking and balancing itself. Most importantly, the majority of transnational bodies today have established a judicial branch that interprets rules, resolves disputes and perhaps even supervises from within. For instance, there is an Eur.Ct.H.R. in the Council of Europe; an Inter-American Court of Human Rights in Organization of American States; a Dispute Settlement Body in the WTO; and judicial committees in numerous international human rights instruments.¹³³ These judicial bodies, whose decisions are either binding or advisory, serve as the primary, checking institutions of transnational networks.¹³⁴ Some observers hope that judicial functions at these transnational levels will gradually grow into a body of global administrative law that provides procedural and substantive protections to individuals affected by transnational decision-making.¹³⁵

130. For an introductory understanding of the functions of the Commission, Parliament, and Court of Justice, see PHILIP RAWORTH, INTRODUCTION TO THE LEGAL SYSTEM OF THE EUROPEAN UNION 62-84 (2001).

131. See Eriksen & Fossum, *supra* note 14, at 257; see also Fritz W. Scharph, *Democratic Legitimacy under Conditions of Regulatory Competition: Why Europe Differs from the United States*, in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 355, 371-72 (Kalypso Nicolaidis & Robert Howse eds., 2001) (arguing that there is no lack of legitimacy in the European Union).

132. See Fassbender, *supra* note 16, at 574-76.

133. Deborah Cass argues that generation of judicial norms plays a key role in the constitutionalization of international laws. See Cass, *supra* note 16, at 42; see also Richard Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 L. & CONTEMP. PROBS. 63, 88-106 (2005) (arguing that establishing judicial bodies in transnational networks is a key approach to developing transnational law).

134. See Stewart, *supra* note 133.

135. For a discussion of developing global administrative law, see generally Symposium, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 1 (2005); Symposium, *Administrative Law without the State: The Challenge of Global*

Interesting and creative ways of institutional checks and balances at the transnational level emerge from between, or even beyond, transnational networks. The transnational governance that we see today is not a single, large, global governing body, but is rather a complex of multiple transnational bodies and networks.¹³⁶ No hierarchy controls their complicated relationships. For instance, on a global scale, the UN supported by its Charter and related human rights instruments may now be seen as a superior governing regime.¹³⁷ In many economic and related areas, however, the WTO wields far more reaching powers.¹³⁸ Similar, and perhaps greater, competitors are regional constitutional or quasi-constitutional arrangements such as NAFTA, the EU, the African Union or APEC. Even within the same regional compact, competing transnational frameworks may co-exist with one another.

In rather unexpected and creative ways, this multiple complex of transnational bodies and networks may exert strong and effective checks and balances among its different parts. The legality of UN policies may be examined at the ECJ, and WTO policies may be challenged at the Eur.Ct.H.R. and vice versa. This is best demonstrated by a very interesting case involving a UN security policy that traveled from the UN Security Council to the EU, then from the Irish Court to the ECJ, and finally to the Eur.Ct.H.R.¹³⁹ An airplane was impounded by the Irish government in accordance with an EC regulation that implemented a UN Security Council Resolution. The airplane operator challenged the impoundment at the Irish court, where a preliminary reference was made to the ECJ to determine the legality of the EC regulation.¹⁴⁰ The ECJ applied a proportionality test to the case and sustained the impounding decision.¹⁴¹ The case, however, was brought to the Eur.Ct.H.R. It was held that government actions taken in compliance with international legal obligations *i.e.* the EU regulation, would be in general justified if the relevant organization, the EU, was protecting human rights in ways that met with the organization's purpose. But the justification for EC regulation is merely a presumption. It can be rebutted if rights protected

Regulation, 37 N.Y.U. J. INT'L L. & POL. 663 (2005); Symposium, *Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1 (2006).

136. See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 171-83 (2004) (arguing for a new world order of governing networks).

137. See Fassbender, *supra* note 16, at 593-615.

138. See SLAUGHTER, *supra* note 136, at 131-65 (describing various international networks and how they are competing yet interconnected at the same time).

139. See *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, 2005-VI Eur. Ct. H.R. 440, ¶¶ 1, 14, 40, 43.

140. See *id.* ¶ 43.

141. See *id.* ¶¶ 49, 149.

in the European Convention of Human Rights are proven to be manifestly deficient.¹⁴² In this case, however, the Eur.Ct.H.R. held that the impounding regulation had not yet exceeded its limits. Regardless of whether we are pleased with the result, it is without a doubt that cases involving transnational decision-making may move from court to court creating a considerable system of checks and balances.¹⁴³

Room remains for transnational institutions to place certain checks and balances upon transnational judicial dialogues. As indicated earlier, judges may be restrained by national laws from using transnational sources, and the use of any foreign source may be closely examined by local legal communities. Similarly, the transnational legal community also serves as a watchman for the movement of transnational legal sources and judicial decisions. The use of transnational sources has been contested in the U.S. and other states, and has been enthusiastically discussed at transnational legal societies and associations. For instance, the International Association of Constitutional Law invited constitutional court judges from various jurisdictions to have conversations on comparative constitutionalism and address problems concerning domestic judicial bodies' reference to transnational laws.¹⁴⁴ These dialogues between judges were published at an international constitutional law journal that received global attention.¹⁴⁵ Scholarly comments in response to those judicial conversations later produced even more volumes.¹⁴⁶ In other words, judges are actually not as free as they might think in referring to transnational legal sources. Their decisions may be double-checked by other transnational or local courts that cite or

142. See Kumm, *supra* note 112, at 282, 285.

143. The only drawback in both the E.C.J. and Eur.Ct.H.R. decisions was that both courts failed to examine the legality and legitimacy of the UN Security Council Resolution. The Eur.Ct.H.R. reasoned that the Irish government directly relied upon the E.C. regulation and not the Council Resolution to make its decision. See *id.* Therefore, the Eur.Ct.H.R. reasoned that only the E.C. regulation required close examination. See *id.*

144. See *Comparative Constitutionalism In Practice: Sixth World Congress of the International Association of Constitutional Law Santiago, Chile, January 12-16, 2004*, 3 INT'L J. CONST. L. 543 (2005). The meeting was held in Santiago, Chile, January 12-16, 2004. See *id.* This conversation ensued over the next four years and was again the key issue at the Seventh World Congress in Athens, Greece, June 11-15, 2007. See Association of Greek Constitutionalists, [http://www.enelsyn.gr/en/enelsyn_program\(en\).htm](http://www.enelsyn.gr/en/enelsyn_program(en).htm) (last visited July 20, 2008).

145. See Symposium, *Constitutional Court Judges' Roundtable*, 3 INT. J. CONST. L. 543 (2005). This volume also includes a debate between U.S. Supreme Court justices on the relevance of transnational sources. See Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT. J. CONST. L. 519 (2005).

146. See generally THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2006).

reference these decisions. Their understanding of transnational sources is examined time and again by other courts and legal scholars. In this way, judges are made accountable. It is precisely this deliberative nature that makes transnational judicial dialogue a huge benefit, rather than a detriment, to judicial accountability at both national and transnational levels.¹⁴⁷

Even global constitutional convergence is not developed in a vacuum at the transnational level. For instance, the development of law and democracy in post-communist European states has been aided tremendously by the Venice Commission, a body of legal experts created by the Council of Europe.¹⁴⁸ With the legal advice and strong influence of the Venice Commission, institutions such as constitutional courts have been adopted despite national differences. Internal critiques and checks of the Commission's advice come from, either the Council or from the EU. Another example is the global implementation of the UN Security Council counter-terrorism resolutions. These UN resolutions have prompted many nations to adopt similar counter-terrorism measures, creating one kind of global convergence. At the same time, however, decisions of many national and transnational courts that condemned their repressive nature, have prompted a reverse trend, paradoxically creating the other kind of global convergence, striking down repressive counter-terrorism measures. It is particularly interesting to observe that with the rise of transnational governance, even local courts become "courts of the transnational community" that not only participate in forming transnational norms but are also capable of changing them.¹⁴⁹

All in all, we should never underestimate the systems of checks and balances that may develop as transnational constitutionalism emerges. Like any other constitutional community, a vibrant civil society coupled with a complex of powers and networks always serves as a genuine check on official powers. It is evident that the vibrant global civil society formed by transnational non-governmental organizations, private

147. See Jackson, *supra* note 128, at 181-82; see also Kumm, *supra* note 112, at 291-92.

148. The commission was created to provide constitutional assistance to member states, to observe their elections and public referenda, to cooperate with their constitutional courts and finally to produce their legal studies and reports. See The Venice Commission, http://www.venice.coe.int/site/main/presentation_E.asp?MenuL=E (last visited July 29, 2008).

149. Cf. CLAES, *supra* note 15, at 58-68 (arguing that with the EU becoming a constitutional community, the national courts of member states become the courts of that community).

corporations or globalized citizens must shoulder the checks and balances on a vigorous and routine schedule.¹⁵⁰

IV. Conclusion

An age of transnational constitutionalism has come before us. The conventional understanding of constitutionalism has been of limited focus; holding the power of government confined to constitutional rules. Inspired by the dynamics of constitutional change in transitional states and transnational networks, however, we have observed a dramatic change in the very notion of constitutionalism that has evolved for a century or two. The globalization and regional remapping in response to new alliances of emerging democracies is a primary driving force. Not only can constitutions function across national borders, but international treaties and regional cooperative frameworks may deliver constitutional or quasi-constitutional functions.

By examining its features, functions and characteristics, we have found that transnational constitutionalism is marked by transnational constitutional arrangements, transnational judicial dialogues and the global convergence of national constitutions. Notwithstanding its main functions in facilitating a global market, the development of transnational constitutionalism nevertheless undermines accountability, democracy, and rule of law at both domestic and transnational levels. However, we argue that a complex of domestic and transnational institutional interactions operates as a functional check and balance to transnational constitutionalism.

Extended from its conceptional origin with limited governmental powers, transnational constitutionalism as we propose in this article, has not only broadened the scope of constitutionalism, but has also presented more institutional opportunities for collective decisions in the era of complex global changes. As transnational arrangements expand into more diversified forms, bear more functions, and spill over into national borders, constitutional lawyers must move beyond traditional ways of understanding constitutionalism. They must instead, teach themselves to be more creative in the new terrain of constitutionalism.

150. See Mary H. Kaldor, *The Origins of the Concept of Global Civil Society*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 475 (1999); see also MARY H. KALDOR, GLOBAL CIVIL SOCIETY: AN ANSWER TO WAR (2003); JOHN KEANE, GLOBAL CIVIL SOCIETY? (2003).