

**From Origin to Delta:
Changing Landscape of Modern Constitutionalism**

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I. Foreword

The world of constitutionalism has changed dramatically in the recent years. Democratic transition and globalization are two driving forces behind this profound change. In the last decade of the twentieth century, many countries struggled to write new constitutions or to amend their old ones as they underwent transitions from their communist or authoritarian pasts.¹ It remains to be examined further whether and in

¹ See generally SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991); BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* (1992); JUAN LINZ & ALFRED STEPAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE* (1996); ANDREW ARATO, *CIVIL SOCIETY, CONSTITUTIONS AND LEGITIMACY* (2000); MARY KALDOR & IVAN VEJVODA EDS., *DEMOCRATIZATION IN CENTRAL AND EASTERN EUROPE* (2002); IAN JEFFRIES, *THE COUNTRIES OF THE FORMER SOVIET UNION AT THE TURN OF THE TWENTY-FIRST CENTURY* (2004).

what ways these new texts have served their transitions to constitutional democracies. As we entered into the new millennium, one of the most important constitutional enterprises that drew a global attention was the constitution-making of the European Union. The Constitution for Europe, a supranational organization but not a nation-state, tested our traditional notion that only state can have a constitution.² In addition, an increasing number of international human rights treaties is cited or referred to in many international or national judicial bodies. The “constitutionalization” of international treaties has recently become a salient phenomenon that fueled intense debates.³ Faced with these new developments, we are left to wonder whether, and if so, to what extent and in what ways our traditional understanding of constitutions and their functions would be altered both conceptually and practically.

As a matter of fact, many transitional states had experienced a rather different version of constitutionalism during and after their democratic transitions.⁴ To illustrate, few examples of successful new democracies made a brand new constitution immediately after their transitions had taken place. Instead, some more contingent or even provincial constitutional arrangements were relied upon in the initial stages of political transitions.⁵ Unlike standard stories that the eighteenth century’s constitutionalism might have, new democracies in East Europe, East Asia,

² The official name of the European Constitution is “the Treaty of Establishing a Constitution for Europe”. Whether it is a treaty between nations or a federal constitution between states is a central debate surrounding the making of the European Constitution. *See* discussion *infra* Part III.A.1.

³ *See* discussion *infra* Parts III.A.2, III.D.2.

⁴ *See* discussion *infra* Part II.

⁵ *See* discussion *infra* Parts II.A.1, II.C.1.

or Latin America failed to catch any particular constitutional moments and found themselves engaged in rather prolonged but nevertheless peaceful processes.

Moreover, these transitional constitutional changes often came as part of political deals negotiated by the former regime and the current reformers. As a result, dark pasts such as South Africa's apartheid, Eastern European countries' communist rules, or South Korean and Taiwan's authoritarian regimes were never denied completely. Rather, in order to move forward, certain legacy continued and even entrenched as part of political gives and takes.⁶ The subject of transitional justice became controversial and difficult to deal with even after transitions.⁷ The last –but mostly mentioned– feature of transitional constitutional developments was the salient role of national high courts or constitutional courts.⁸ Judges were called upon to step into highly-contested political controversies and their decisions were either in lieu of or even supplanted with political solutions. While our traditional understandings of constitutionalism require constitutional codification precede judicial interpretations, what happened during democratic transitions was often the other way around. Responded to initially irresolvable political issues, unconventional judicial solutions were invented and if acceptable, they might be made into constitutional codifications.⁹ These new features that occurred in transitional democracies seemed to offer a new possibility in transitional constitutionalism.¹⁰ In a way, what stands at the center of

⁶ See discussion *infra* Part II.C.2.

⁷ See generally CARLA HESSE & ROBERT POST EDS., *HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA* (1999) (discussing experiences of various countries in their redressing past human rights abuses); RUTI TEITEL, *TRANSITIONAL JUSTICE* (2000) (discussing a great deal of institutional difficulties in dealing with transitional justice).

⁸ See discussion *infra* Part II.A.2.

⁹ See discussion *infra* Part II.D.3.

¹⁰ Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *YALE L. J.* 2009 (1997) (arguing a transitional perspective in constitutionalism). See also Ulrich K. Preuss, *The*

transitional constitutionalism is temporality, in that while traditional constitutionalism demands a new constitution for a clear break, the recently developed transitional constitutionalism allows more variants to establish temporal links.¹¹

Even more interestingly, as temporal dimension in constitutionalism is changing, so is spatial aspect. At about the same time, driven by globalization and its related complexities, constitutions have expanded their territories and developed beyond traditional confinements—nation-states. Now we have no problem to honor that a non nation-state, such as the EU, is writing its own Constitution. We also recognize many international regimes or regional cooperative frameworks, such as WTO, may function quasi-constitutionally in many respects.¹² Some national constitutions embrace directly international laws to be part of their laws.¹³ Many national judicial bodies refer to international treaties or customary international laws to which their national political counterparts have not yet agreed.¹⁴ Sovereign boundaries with which nation-states are supposed to establish their constitutions and being bound by seemed gradually crossed over. Instead, transnational constitutions or quasi-constitutional arrangements began assuming institutional as well as dialectical functions within, between, and outside nation-states.¹⁵ Transnational

Politics of Constitution Making: Transforming Politics into Constitutions, 13 LAW & POL'Y 107 (1991); Jonathan D. Varat, *Reflections on the Establishment of Constitutional Government in Eastern Europe*, 9 CONST. COMMENT. 171 (1992); Arthur J. Jacobson, *Transitional Constitutions*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVE 413-422 (Michel Rosenfeld ed., 1994)

¹¹ See discussion *infra* Part IV.B.2.

¹² See discussion *infra* Part III.A.2.

¹³ For instance, Article 39 of South African Constitution requires courts in interpreting the bill of rights consider international law. Article 7 of the Hungarian Constitution accepts the generally recognized principles of international law and requires the domestic legal system in harmony with the obligations under international law. See also discussion *infra* Parts III.A.2, III.D.2.

¹⁴ See discussion *infra* Parts III.D.2, IV.A.

¹⁵ See discussion *infra* Part III.C.2.

constitutionalism, as some started to characterize these recent developments across national borders, shows a gradually enlarged horizon of modern constitutionalism.

With the rise of transitional and transnational constitutional developments, however, we must examine whether and if so, to what extent and in what ways it would alter our understanding of modern constitutionalism? How would modern constitutional lawyers cope with these new developments? What lessons shall we learn from these rather distinctive dynamics that began around the turn of the century? In this article, we attempt to theorize a changing landscape of constitutionalism that would substantially expand the scope and enrich functions of modern constitutional law. First, we analyze respective developments of transitional and transnational constitutionalism by identifying their features, perspectives, functions, and characteristics. Then we examine to what extent and in what ways the developments in transitional and transnational constitutionalism pose challenges to our traditional understanding of modern constitutional laws. Finally, we shall picture a new constitutional delta thus emerged and try to argue that notwithstanding challenges, the addition of transitional and transnational constitutionalism to traditional understandings has expanded the horizon of constitutionalism and created new opportunities for a coming generation of constitutional lawyers.

II. Transitional Constitutionalism

Traditional constitutionalism views a constitution as the guardian of fundamental rights through constraining government powers, including limited government, separation of powers, checks and balances, and judicial review.¹⁶ The fundamental

¹⁶ See e.g. Louis Henkin, *A New Birth of Constitutionalism: Genetic Influence and Genetic Defects*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 39-53 (Michel Rosenfeld ed., 1994); Nevil Johnson, *Constitutionalism: Procedural Limits and Political Ends*,

theory behind this classical reading of constitutionalism is a clear distinction between law and society, and a conviction that it is not the vocation of law or constitution to stabilize social order and to form political consensus.¹⁷ Instead, a constitution is an end-result, a codified document of social and political consensus. But constitutional experiences of the many transitional democracies in East and Central Europe, South Africa and Asia all demonstrated a trend against this basic assumption.

During democratic transitions, when social consensus disintegrated, transitional societies drifted away from existing legal and social norms. Faced with the crisis of breakdown, transitional societies must substitute new agendas for old legalities that were deeply questioned. Interestingly, in the many transitional states, the agenda of constitutional reforms –either making a new constitution, revising the old one, writing a new bill of rights, establishing a new constitutional court, or reinstating government system– soon became so dominant as to establish a new platform upon which political elites of different positions could work together. In constitutional undertakings, more profound political changes were pushed forward and new social consensus formed gradually. In other words, in a time of great uncertainty and social disintegration, constitutional changes were not merely end results of political transformations. To the contrary, transitional constitutionalism may take up a steering role and serve as a strong mechanism to help form political consensus and transform social values.¹⁸

in CONSTITUTIONAL POLICY AND CHANGE IN EUROPE 46-63 (Hesse & Johnson eds.,1995); Michael J. Klarman, *What's so Great about Constitutionalism?*, 93 NW. U. L. REV. 145 (1998).

¹⁷ Gavin W. Anderson, *Social Democracy and the Limits of Rights Constitutionalism*, 17 CAN. J.L. & JURIS. 31 (2004) (arguing that the rights constitutionalism rests on a view of the autonomy of law that is not always consistent with other democratic traditions).

¹⁸ Ulrich K. Preuss, *supra* note 10, at 113, 119; DANIEL FRANKLIN & MICHAEL J. BAUN EDS., *POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH* 5 (1994).

Operating this way, constitutional functions during democratic transitions would shift clearly from constraining government powers to steering reform agendas or even reconstructing social structures. Transitional constitutionalism works not only as a foundation for democratizing politics but also creates new institutional possibilities for further changes in the next steps. In this part, having observed transitional experiences in the many new democracies in East and Central Europe, South Africa and Asia, we will identify distinctive features of transitional constitutionalism, examine its development from diverse perspectives, discuss its particular functions, and argue for its distinctive characteristics.

A. Features of Transitional Constitutionalism

How is a constitution supposed to function in a rapidly democratizing society? In a time of profound transition, a society has to cope with the past, deal with the current, and look forward to the future. Intense conflicts in interests, values, norms, and priorities abound, and thus any solid, final constitutional solutions may be too far away to get materialized. Constitutional changes during democratic transitions tend to be rather transitory and await new consensus to develop. As a result, transitional constitutionalism presents itself in many significant ways in defiant to traditional functions of constitutions. We identify three features in the following.

1. Transitory Constitutional Arrangements

With the sudden collapse of the Berlin wall, profound transitions became possible for the many communist states in East and Central Europe and quickly spread into other authoritarian states in other parts of the world such as Asia, Latin America or even South Africa. Some constitutional scholars immediately urged these

nations grasp the great opportunities with new constitutions. But these forceful calls for new constitutions were not entirely successful.¹⁹

It was true that the majority of nations succeeded with a new text. Some made a new constitution immediately after democratic transitions took place. Romania, Czech Republic, the Baltic States, Mongolia, and the Philippines were some of the examples.²⁰ Others, however, managed to enact a new text in much later time. South Africa, Poland and Thailand stood as representative cases.²¹ In contrast to those with a new text, a number of new democracies chose to keep their old constitutions with levels of revisions. Hungary, Argentina, South Korea, Taiwan and Indonesia, among others, illustrated such a scenario.²² Among them, some such as South Korea revised their constitution only once, while others such as Hungary and Taiwan undertook constitutional revisions in a rather incremental fashion. Still, complexities existed in some situations. For instance, South Africa and Poland made some transitory

¹⁹ See Bruce Ackerman, *supra* note 1, at 46-68 (urging that post-communist democracies make new constitutions to consolidate political transitions); STANLEY KATZ, *CONSTITUTIONALISM IN EAST CENTRAL EUROPE* (1993) (arguing the ways that East Central European nations made new constitutions or constitution amendments or adopted any particular models are dependent upon their respective traditions and realities). See also VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 287-298 (1999).

²⁰ See Rett Ludwikowski, *Constitution Making in Former Soviet Dominance*, 23 GA. J. INT'L & COMP. L. 155 (1993); Tom Ginsburg, *Political Reform in Mongolia*, 35 ASIAN SURVEY 459(1995); Juan Linz & Alfred Stepan, *supra* note 1, at 293-434 (discussing constitution-making politics in Bulgaria, Romania, former USSR states, and Baltic states).

²¹ South Africa adopted a new Constitution in the end of 1996. Poland and Thailand enacted respectively a new Constitution in 1997. For constitution-making details of South Africa and Poland, see *infra* notes 24-25. Regarding the constitution making of Thailand, see Borwornsak Uwanno & Wayne D. Burns, *The Thai Constitution of 1997: Sources and Process*, 32 U.B.C. L. REV. 227 (1998).

²² South Korea passed major amendments to the Constitution in 1987, supported by a national referendum. For details, see Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. ILL. U. L. J 71 (1997). Hungary enacted major amendments to the 1949 constitution in 1989 and several subsequent revisions were made in 1990, 1993, 1994, 1997, 2000, 2001 and 2002. For the experiences of constitutional changes in post-communist Hungary, see Gabor Haimai, *The Reform of Constitutional Law in Hungary after the Transition*, 18 LEGAL. STUD. 188 (1998); Gregory Tardi, *The Democratization of the Hungarian Constitution*, 9 MSU-DCL J. INT'L L. 369 (2000). Similarly, responding to democratization, Taiwan undertook constitution revisions in 1991, 1992, 1994, 1997, 1999, 2000 & 2005. For details, see *infra* note 26.

constitutional arrangements –such as major revisions of the old constitution or interim constitution– before adopting a new constitution. Czech Republic, on the contrary, proceeded with a new constitution immediately after transition but made subsequent revisions at later stages.²³

One would easily find a transitory feature that commonly existed in transitional constitutional developments. Instead of immediately making a final formal document, many transitional states relied upon a number of more contingent or even provincial constitutional arrangements such as an interim constitution, a series of initial constitutional amendments or even political statements consented by all political parties. The Interim Constitution and the earlier “thirty-four principles” in South Africa,²⁴ “Little Constitution” in Poland,²⁵ and the Additional Articles in Taiwan,²⁶ among others, represented well known cases along the line.

While people in South Africa would have preferred a new constitution to celebrate a new era immediately after apartheid, they actually had to work for some time to achieve initial political consensus –such as “thirty-four principles”–, upon which temporary arrangements and further reforms could be hammered down.

²³ See Rett Ludwikowski, *supra* note 20.

²⁴ Regarding the process of constitution-making in South Africa, see e.g. Christina Murray, *A Constitutional Beginning: Making South Africa's Final Constitution*, 23 U. ARK. LITTLE ROCK L. REV. 809 (2001); D J Brand, *Constitutional Reform- The South African Experience*, 33 CUMB. L. REV. 1 (2002).

²⁵ Regarding the constitution-making in Poland, see Symposium, *The Constitution of Republic of Poland*, 1997 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1 (1997); Daniel H. Cole, *The Struggle for Constitutionalism in Poland*, 97 MICH. L. REV. 2062 (1999).

²⁶ Regarding the developments of constitutional change in Taiwan after democratization, see Jiunn-Rong Yeh, *Constitutional Reform and Democratization in Taiwan: 1945-2000*, in TAIWAN'S MODERNIZATION IN GLOBAL PERSPECTIVE 47-77 (Peter Chow ed., 2002); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 106-157 (2003) (discussing Taiwan's democratization, constitutional change, and especially the role of court during such processes); WEN-CHEN CHANG, TRANSITION TO DEMOCRACY, CONSTITUTIONALISM AND JUDICIAL ACTIVISM: TAIWAN IN COMPARATIVE PERSPECTIVE (unpublished JSD Dissertation, 2001)(on file with author).

Similarly in Poland, political consensus on constitution making notwithstanding, the earlier focus of democratic transitions was actually on rather practical issues such as opening national elections, redistributing political powers, or reinstating the court. In Taiwan, additional articles were enacted first so as to allow the reelection of national assembly that in turn would resume the power to further amend the Constitution.

Transitory arrangements sometimes are imposed from outside. In some more recent cases, the international community intervened in transitional states through international peace accords.²⁷ These peace accords were seen as transitory arrangements that facilitated initial transitional processes to push forward further peaceful elections, public referendum or constitution making. This strategy was employed in the recent transition of Palestine, East Timor, followed by the reconstruction of Iraq.²⁸

In these rapidly democratizing states, transitory or interim constitutional arrangements were made to facilitate political consensus and push forward further reforms. Despite a conventional understanding that a constitution must be created at a revolutionary moment once and for all, these temporary constitutional measures proved to be quite helpful when final, settled constitutional solutions had not yet emerged or agreed upon.

²⁷ Kirsti Samuels, *Post-Conflict Peace-building and Constitution Making*, 6 *Chi J. Int'l L.*, 663 (2006) (arguing a strong link of post-conflict peace-building efforts to the success of constitution making in present strategies of the international community); Zaha Hassan, *The Palestinian Constitution and the Geneva Accord: The Prospects for Palestinian Constitutionalism*, 16 *FLA. J. INT'L L.* 897 (2004) (discussing the Geneva Accord in the process of Palestinian constitution making and arguing their potential conflicts).

²⁸ Iraq council asks U.N. to endorse self-rule plan (Nov.25, 2003), available at <http://www.cnn.com/2003/WORLD/meast/11/24/sprj.irq.main/index.html>; Iraqi Council signs Interim Constitution (March 8, 2004) available at <http://www.nytimes.com/2004/03/08/international/middleeast/08CONS.html>

More importantly, many transitional democracies had a written constitution that was by and large consistent with basic constitutional principles.²⁹ What was needed at the moment of transition was perhaps just putting an end to the domination of the communist party, shifting the power from party-chairman to prime minister, changing electoral rules, strengthening property rights to help transform controlled economy to private market, or establishing a new constitutional court.³⁰ Several changes into the old constitution would suffice to do the job. Once made, these initial changes might serve as a solid foundation for further comprehensive constitutional reforms or even a new constitution. Notwithstanding this incremental practice, these transitional democracies may run the risk of losing a constitutional momentum. In fact, after successful initial changes, a few countries such as Hungary, Poland, South Korea, or Taiwan felt no pressing need to complete with a new constitution.³¹ Before Poland finally made a new Constitution in 1997, many had predicted that the final delivery would fail.³² Till today, the preamble of the Hungarian Constitution openly states its determination to make a new Constitution, despite the fact that it had been revised

²⁹ Stanley Katz, *supra* note 29. Katz argues that it was not of a necessity for a number of East and Central European democracies to make a new constitution. Hungary and Poland, for example, enjoyed a better constitutional tradition and benefited from a rather piecemeal approach. Czech Republic and Slovakia, if not impelled by their separation into two nations, could have also take incremental methods. *See also* Venkat Iyer, *Restoration Constitutionalism in the South Pacific*, 15 PAC. RIM L. & POL'Y J. 39 (2006) (arguing that "restoration constitutionalism" provides a smoother and quicker return to liberal politics than any other modality of transition).

³⁰ Juan Linz & Alfred Stepan, *supra* note 1, at 3-15; Arend Lijphart & Carlos Waisman, *Institutional Design in New Democracies: Eastern Europe and Latin America* 6 (1996); Cass R. Sunstein, *On property and constitutionalism*, in *CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES* 383-411 (Michel Rosenfeld ed., 1994) (arguing that property rights and judicial enforcement are critical to democratic transitions and constitutional change for East and Central European democracies). *See also generally* STEFAN VIOGT & HANS-JUERGEN WAGENER EDS., *CONSTITUTIONS, MARKETS AND LAW: RECENT EXPERIENCES IN TRANSITIONAL ECONOMIES* (2002).

³¹ Hungary, Taiwan and South Korea have not yet had any new constitutions, while it took Poland about eight years to complete a new constitution in 1997.

³² Daniel H. Cole, *supra* note 25. *See also* Wiktor Osiatynski, *The Constitution-Making Process in Poland*, 12 LAW & POL'Y 125 (1991).

already about eight times. Also, Taiwan remained ambivalent about making a new constitution after seven rounds of constitutional revision in more than a decade.

2. Unconventional Constitutional Adjudication

Another salient feature of transitional constitutionalism is the emergence of unconventional constitutional adjudication. It is understood in two ways. First was widespread establishment of constitutional court with the power of judicial review.³³ The second was unconventional constitutional interpretations rendered by these newly established or reinstated courts. As a matter of fact, the last decade witnessed a record high in the number of constitutional courts created or reinstated throughout former communist or authoritarian regimes in East and Central Europe,³⁴ South

³³ By far, almost all Eastern European countries have constitutional courts and in Asia, many new democracies adopted similar institutions. A brief note on the years of the establishment or reinstatement of constitutional courts is in the following.

Year	Newly Established	Court Reinstated	Judges Reappointed
1978	Spain		
1986		Poland	Philippine
1988	South Korea		
1990	Hungary		
1991	Bulgaria	Russia	
1992	Romania		
1993		Czech Republic Slovak Republic	
1994	South Africa Slovenia Moldova		Taiwan
1997	Thailand		

Source: Author (the web link of various national constitutional courts available at http://www.ccrm.rol.md/wwc_en/)

³⁴ See e.g. Matthias Hartwig, *The Institutionalization of the Rule of Law: The Establishment of Constitutional Courts in the Eastern European Countries*, 7 AM U. J. INT'L L. & POL'Y 449, 449-50(1992); Herman Schwartz, *The New East European Constitutional Courts*, in CONSTITUTION MAKING IN EASTERN EUROPE 163-207 (A.E.Dick Howard ed. 1993); Robert F. Utter & David C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from A Comparative Perspective*, 54 OHIO ST. L. J. 559 (1993); Sarah Wright Sheive, *Central and Eastern*

Africa,³⁵ and Asia.³⁶ The discourse of constitutionalism in these transitional societies was translated into the establishment of constitutional courts and the power of judicial review.³⁷

Precisely because of the transitory nature we discussed above, what constitutional provisions originally said was far less important than what was actually interpreted and affirmed by constitutional courts. With or without expressive textual grounds, constitutional courts were expected to promptly deliver what was needed in a time of transition. That might include constitutional principles consistent with liberal democracies, rights oriented to free market, or redistribution of government powers agreed by all political players. As a result, courts were invited to yield key changes in constitutional norms by their interpretations, and sometimes would even have to step –willingly or unwillingly– into high-profile political controversies.

For instance, without direct and expressive textual grounds, the Hungarian constitutional court was invited to affirm, if not create, the power of judicial review of

European Constitutional Courts and the Anti-majoritarian Objection to Judicial Review, 26 LAW & POL'Y INT'L BUS. 1201 (1995).

³⁵ See e.g. Penuell M. Maduna, *Judicial Review and Protection of Human Rights under A New Constitutional Order in South Africa*, 21 COLUM. HUM. RTS. L. REV. 73 (1989); Brice Dickson, *Protecting Human Rights through a Constitutional Court: The Case of South Africa*, 66 FORDHAM L. REV. 531(1997).

³⁶ See e.g. Tom Ginsburg, *supra* note 26 (discussing constitutional courts of Taiwan, South Korea and Mongolia); Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. ILL. U. L.J. 71 (1997) (arguing that the judicial activism in Korea is to be cherished and encouraged). In addition, Thailand created a constitutional court in the newly written 1997 Constitution. In April 2002, Indonesia passed a constitutional amendment to establish a brand-new constitutional court.

³⁷ See RUTI TEITEL, *TRANSITIONAL JUSTICE* (2000) (discussing the ways that constitutional courts may assist in the establishment of the rule of law in transitions); HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* (2000) (explaining the works of five constitutional courts, Poland, Hungary, Russia, Bulgaria, and Slovakia and affirming the significant roles these courts play in establishing liberal democracy and constitutionalism).

administrative actions and right of informational privacy.³⁸ The Polish constitutional tribunal resorted to a rather abstract principle in rule of law to allow appeals of administrative actions.³⁹ Short of solid textual grounds, these courts sometimes had to rely upon international laws or foreign decisions to establish their reasoning as well as strengthen the legitimacy. The Slovakia constitutional court, for example, referred to international laws to affirm freedom of expression that was not made clear in her Constitution.⁴⁰ The constitutional court of South Africa likewise resorted to international human rights laws and foreign decisions to abolish death penalty, easing fears during the transition that any capital punishment would be utilized for vengeance.⁴¹

Unconventional constitutional adjudication also presented in a form of judicial intervention in transitional politics. Given transitory nature of initial constitutional arrangements, a great deal of institutional inconsistencies or political conflicts would inevitably rise and expect to be resolved by neutral arbitrators.⁴² In a time of transition, a strong presidency would probably breed an uncompromising judiciary as a more cooperative and decentralized system still needs judicial mediation.⁴³ That

³⁸ LASZLO SOLYOM & GEORGE BRUNNER, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT 139-150, 364-370 (2000) (with a collection of selected decisions of the Constitutional Court of the Republic of Hungary).

³⁹ Herman Schwartz, *supra* note 37, at 49-74, 66.

⁴⁰ *Id.* at 194-225, 215 (citing Article 10 of the European Convention of Human Rights).

⁴¹ State v. Makwanyane, 1995 (3) SA 391 (CC) (S. Afr.). For analysis of this case, see e.g. Paolo G. Carozza, "My Friend is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights, 81 TEX. L. REV. 1031, 1056-61 (2003).

⁴² Wen-Chen Chang, *supra* note 26 (arguing that incremental constitutional reforms generate inconsistencies awaiting judicial intervention); Gabor Halmai, *The Reform of Constitutional Law in Hungary after the Transition*, 154 J. CONS. L. E. & CENT. EUR. 154-67 (1997) (presenting the role of courts in mediating institutional inconsistencies particularly concerning executive-parliamentary relationships).

⁴³ Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 794-97 (1997).

was why many constitutional courts –regardless their various government systems– were faced with similar cases involved institutional power struggles.⁴⁴

Especially in times when political costs in steering up transitions ran too high, political players would prefer judicial resolution to political decision-making.⁴⁵ For instance, in the beginning of democratic transitions in Taiwan, political consensus was made that the notorious tenured representatives from China must step down for a new congressional reelection to take place. But such political undertaking was at such extremely high costs that even the ruling Nationalist Party was not in a position to take a strong hold. In the end, it was the constitutional court that rendered a decision to demand the retirement of those representatives and even impose a deadline for national reelection.⁴⁶

In a significant way, the success of transitional constitutionalism in the last decade must credit to the many courts and their unconventional decisions. Instead of people's revolution or politicians' great leadership, the expansion of judicial powers in transitional politics became a persistently dominant feature, which however

⁴⁴ Herman Schwartz, *supra* note 37, at 228-31 (arguing that one of the most important constitutional court activities in East and Central European constitutional courts is allocation of powers, horizontal as well as vertical).

⁴⁵ See e.g. Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91 (2000) (employing cost-analysis in arguing causes of recent judicial empowerments); Tom Ginsburg, *supra* note 26 (arguing an insurance theory by which political branches utilize courts to entrench political interests and avoid political costs). Lee Epstein, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117 (2001) (arguing that political tolerance is the key factor of strong judicial actions).

⁴⁶ Interpretation No. 261 (1990/6/21). This interpretation has actually facilitated constitutional revision directed to congressional reform towards full suffrage. For a detailed discussion of this case, see Tom Ginsburg, *supra* note 26, at 145-48; Wen-Chen Chang, *supra* note 26.

resonated with a rather typical worry of counter-majoritarian difficulty in traditional constitutionalism.⁴⁷

3. Quasi-Constitutional Statutes

The third feature of transitional constitutionalism is that constitutional reforms may take the form of statute in lieu of formal constitutional amendment. This is in part due to transitory nature of transitional constitutional developments, and in part due to rather comparable procedures between law-making and constitution-amending in a number of parliamentary transitional states.⁴⁸ As we mentioned above, most transitional democracies had a written constitution that was to a large extent consistent with liberal constitutional principles. What were needed at the most were measures directed to tackling with particular transitional issues, which varied from context to context.

For some, an immediate change of electoral rules, of judicial system, of market institutions, or of central-local relationship was seen as dominant in the course of transitions.⁴⁹ A new constitutional court with strong determination of enforcing constitutional rights would suffice to symbolize a new beginning. Poland for instance

⁴⁷ See e.g. Kim Lane Scheppele, *Constitutional Negotiations: Political Contexts of Judicial Activism in Post-Soviet Europe*, 18 INT'L SOC 219 (2003) (arguing that “counter-majoritarian difficulty” does not exist in the context of constitutional courts in new democracies”); Bojan Bugarcic, *Courts as Policy Makers: Lessons from Transition*, 42 HARV. INT'L L.J. 247, 260 (2001) (discussing anti-democratic difficulty for advanced and transitional democracies); Michael J. Perry, *Protecting Human Rights in A Democracy: What Roles for the Courts?*, 38 WAKE FOREST L. REV. 635 (2003) (defending a strong role of court in both advanced and emergent democracies).

⁴⁸ In a parliamentary system where parliamentary sovereignty is observed, it is often that the parliament enjoys the power of legislative enactment as well as that of constitutional amendment. The respective quorum is, however, different: 1/2 for law-making while 2/3 for constitution amending. This would make constitutional politics undifferentiated from ordinary politics. See Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revisions in Eastern Europe*, in RESPONDING TO IMPERFECTIONS: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 275-306 (Sanford Levinson ed., 1995).

⁴⁹ Arend Lijphart & Carlos Waisman, *supra* note 30, at 2-3; RICHARD ROSE ET AL, DEMOCRACY AND ITS ALTERNATIVES: UNDERSTANDING POST-COMMUNIST SOCIETIES 9-10 (1998); Stefan Voigt & Hans-Juergen Wagener, *supra* note 30.

reinstated a constitutional tribunal long before any constitutional reforms began.⁵⁰ For others, the priority was to redress transitional justice and to take preventive measures from any future dominance of communist parties or authoritarian rulers. Czech Republic for instance denounced the legality of communist party and altered statute of limitation so as to begin prosecutions of criminal acts committed by former officials.⁵¹ In unified Germany, prosecutions against former East German officials were allowed, and the constitutionality of which was affirmed by the German Constitutional Court.⁵² Still others undertook less revengeful measures while drawing a line between the past and the future. South Africa tackled with apartheid by establishing a truth and reconciliation commission long before a new constitution was made.⁵³ In Taiwan and other countries, individual claims for compensation for past rights infringements or property takings were allowed by special laws.⁵⁴

These measures not only directly addressed transitional issues that met particular needs of respective society but also sent signals of a profound transformation as much as –if not more so– a new constitution could. Moreover, they would not necessarily take the form of constitutional amendments. With consensus reached in the parliament, statutes would be delivered at a much speedier fashion and they would be much easier to amend if problems found later. In a time of profound transition with

⁵⁰ Herman Schwartz, *supra* note 37, at 49-52.

⁵¹ This was so-called lustration acts, which triggered constitutional review by Polish Constitutional Tribunal. For the excerpt of the court decision and their relevant discussion, see Vicki Jackson & Mark Tushnet, *supra* note 19, at 347-356.

⁵² For brief discussions of the case, see Ruti Teitel, *supra* note 10, at 2030-2031; Vicki Jackson & Mark Tushnet, *id.* at 347-356.

⁵³ For the establishment and works of the Truth and Reconciliation Commission in South Africa, see STEINER & ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 1216-1247 (2nd, 2000).

⁵⁴ For the discussion of transitional justice in Taiwan, see Naiteh Wu, *Transitional without Justice, or Justice without History: Transitional Justice in Taiwan*, 1 *TAIWAN J. DEMOCRACY* 77-102 (2005)

political uncertainties, political players would understandably avoid running political risks too high. The form of quasi-constitutional statutes with which groundbreaking transitional measures could be undertaken was the best choice. In the many parliamentary transitional states, statute enactment that required a half of parliamentary vote was not seen as too much weak in democratic legitimacy compared to constitutional amendment that required a two-third.⁵⁵ As a matter of fact, these quasi-constitutional statutes were often passed with much higher consensus that required for constitutional amendments.

B. Diverse Perspectives of Transitional Constitutionalism

In order to provide a theoretical account for the functions of constitution in the course of transition, we examine major perspectives of political transition and constitutional change. Each perspective reflects anticipation of a particular role that constitutionalism would play during political transition.

1. Foundationalism

The first perspective treats constitutional change during transition as a foundation for a brand-new democratic political order. In this view, the best and perhaps the only way to complete democratic revolutions is constitution making.⁵⁶ Making a new constitution not only reap the reward of political revolution but also consolidate revolutionary efforts with a set of new rules for a new democracy. It is particularly in the latter sense that this foundationalist view of transitional

⁵⁵ Stephen Holmes & Cass R. Sunstein, *supra* note 48.

⁵⁶ The most well known scholar who advocated this view is Bruce Ackerman. Bruce Ackerman, *supra* note 1, at 46-68. *See also* Stephen Holmes & Cass R. Sunstein, *supra* note 48 (warning that politics in East and Central European states had not provided a good condition for constitution-making, notwithstanding an important and desirable goal); Howard Gillman, *From Fundamental Law to Constitutional Politics--And Back*, 23 LAW & SOC. INQUIRY 185 (1998) (arguing that the concept of the legalized Constitution and the belief in constitutional perfectionism need not to be abandoned).

constitutionalism derives its strong normativity. A foundationalist connects democratic transition with constitutionalism in a moral sense and sees extraordinary mobilization of the people as establishing solid political legitimacy for the new regime. A new constitution would thus provide a moral guidance as well as an integral design of institutions for further progress.

Based upon this view, foundationalists actually reacted to the recent constitutional developments in transitional democracies with grave concerns. They worried that transitory constitutional reforms were selective, compromising and incomplete.⁵⁷ Worse yet, if not handled properly, they might entrench hatred and create new problems, thus even undermining any future comprehensive reform to take place. To them, several Central and European countries such as Hungary or Poland should have caught the very first constitutional moment during the transition to make a brand-new Constitution. And precisely because of such failure, they argue that in these new democracies, a complete, integral new democratic legal order has yet been in quest.⁵⁸

It is clear that foundationalism cannot appreciate fully the transitory, informal and flexible features in the recent transitional developments. While a foundationalist places the focus on moral substance of transitional constitutionalism, in a time of profound change, it is often the process and in particular, the priority, instead of the substance, that would occupy the central debate of developing transitional constitutionalism.

⁵⁷ See e.g. Katharina Pistor, *The Demand for Constitutional Law*, in CONSTITUTIONS, MARKETS AND LAW: RECENT EXPERIENCES IN TRANSITIONAL ECONOMIES 67-86 (Stefan Voigt & Hans-Juergen Wagener eds., 2002) (arguing the importance of constitution and law making in providing workable institutions for transitional states).

⁵⁸ See generally JON ELSTER ET AL., INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES: REBUILDING THE SHIP AT SEA (1998).

2. Reflectionalism

The second perspective views constitutional changes as a tool of consolidating winner's will in the flux of transitional politics. Reflectionalism dismisses any moral ideas in constitutional changes during democratic transition. Instead, it offers practical, even strategic, explanations.⁵⁹ In this view, whether or not a new constitution is made in a time of transition is dependent upon practical political contingencies. Three scenarios are provided.

First, if a clear winning party –emerging after the first democratic election during the transition whose power suffices to make a new constitution– stands firm in transitional politics, it is likely that this party would prefer a new constitution to entrench its winning position in longer term.⁶⁰ But in this way, the making of a new constitution would barely stabilize transitional politics as the losing party would always try to fight back. This scenario offers a best explanation for constitution experiences in several transitional states, such as Romania, Mongolia and former states of Soviet Federation.⁶¹ Notwithstanding a new constitution enacted at the earliest moment, they nevertheless continued to confront a series of serious setbacks and their transitions have not yet been regarded as complete and successful.

The second scenario often exists in transitional states that undertake major constitutional revisions or go through with a mixed series of constitutional

⁵⁹ Most political scientists take this view in explaining democratic transitions. *See e.g.* Juan Linz & Alfred Stepan, *supra* note 1, at 55-65; Arend Lijphart & Carlos Waisman, *supra* note 30, at 2-3; GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, *TRANSITION FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES* 15-36 (1986); Enrico Colombatto & Jonathan R. Macey, *Path-Dependence, Public Choice, and Transition in Russia: A Bargaining Approach*, 4 CORNELL J. L. & PUB. POL'Y 379 (1995); JOSEP M. COLOMER, *STRATEGIC TRANSITIONS: GAME THEORY AND DEMOCRATIZATION* 129-130 (2000).

⁶⁰ Josep M. Colomer, *id.*

⁶¹ Juan Linz & Alfred Stepan, *supra* note 1, at 55-65.

amendments and quasi-constitutional statutes. Suppose there is not yet any clear winning or losing political party, and suppose neither party is sure of whether it has sufficient powers to push forward a new constitution, it is very likely that major political parties would try to seek their best interests through political bargains. The result is often a negotiated pact between past rulers and reformers or a series of incremental reforms by which major parties play with one another according to their contingent political influences over a longer period of time.⁶² The experience of constitutional reform in South Korea, Taiwan, Hungary, among others, coincides to a large extent with this view.⁶³

Lastly, some even more manipulative measures would probably be undertaken when the communist or authoritarian ruling party is still in dominance but faces a serious danger of losing power very soon. In this scenario, the dominant ruling party would –surprisingly– agree to adopt several progressive constitutional reforms that would play veto powers against future ruling parties. A comprehensive bill of right, a constitutional court with judicial review powers, or even a more decentralized federal arrangement serves greatly such “negative” functions in future transitional politics.⁶⁴ In the view of reflectionalism, the recent spread of judicial powers exercised by

⁶² Josep M. Colomer, *supra* note 59; Wen-Chen Chang, *supra* note 26.

⁶³ Tom Ginsburg, *supra* note 26 (South Korea and Taiwan); Gregory Tardi, *supra* note 22 (Hungary). See also Wen-Chen Chang, *The Role of Judicial Review in Consolidating Democracies: The Case of Taiwan*, 2 (no.2) ASIA L. REV. 73 (2005)

⁶⁴ In an institutional view, constitutional designs such as separation of powers, federalism, or judicial review are seen as vetoing mechanisms against political players. See R. Kent Weaver & Bert A. Rockman, *Assessing the Effects of Institutions*, in DO INSTITUTIONS MATTER? GOVERNMENT CAPABILITIES IN THE UNITED STATES AND ABROAD 1, 31 (1993). For an introduction of institutional approach, see generally TOM GINSBURG & ROBERT A. KAGAN, *INSTITUTIONS AND PUBLIC LAW: COMPARATIVE PERSPECTIVE* (2005).

constitutional court displays not any triumph of modern constitutionalism but merely the result of practical calculations by political parties doomed to losing power.⁶⁵

All in all, reflectionalism views constitutional developments during transitions as reflective of power equilibrium among rivalry political powers. Thus, transitional constitutionalism has little to do with moral foundations but much to do with political manipulations. In some way, this reflective view speaks certain political realities in the time of democratic transitions. But it nevertheless ignores –perhaps unjustly– certain positive functions that constitutional changes may provide in the process of transition. It is often that rule of game in transitional politics is being searched and developed as struggles and questions arise. Thus, transitional constitutionalism may still serve to integrate various political and social agendas –despite potential political maneuvers– and play directional or managerial roles in the course of transitions.

3. Constructivism

The third perspective sees constitutional change during democratic transition as a continual and constructive process.⁶⁶ In this view, constitutional revisions or even a new constitution made during democratic transitions would never stay unchanged. Rather, initial constitutional changes would alter subsequent political situations,

⁶⁵ This account is best advocated by Ran Hirschl. *See* Ran Hirschl, *supra* note 45; RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004). *But see* Michael C. Davis, *Constitutionalism and New Democracies*, 36 *GEO. WASH. INT'L L. REV.* 681 (2004) (arguing that judicial behavior should be explained by factors other than strategic calculus).

⁶⁶ *See also* Ruti Teitel, *supra* note 10, at 2057-58 (arguing that transitional constitutionalism develops not all at once but in fits and starts); Jiunn-Rong Yeh, *supra* note 26 (using Taiwan's constitutional reform experience to explain such a constructive view); Wen-Chen Chang, *supra* note 26 (arguing political origins of incremental constitutional reforms). *See also* Arthur Jacobson, *Transitional Constitutions*, in *CONSTITUTIONS, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVE* 413-22 (Michel Rosenfeld ed., 1994) (arguing that transitional constitutions -albeit embracing principles incompletely- would push forward further progress); ULRICH K. PREUSS, *CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS* 7, 98 (1995) (arguing that constitution-making in East and Central Europe was a rather reflexive process that resolving complex social values and moral conflicts step by step).

where new demands for constitutional reforms would rise and facilitate another round of constitutional changes that would again alter political situations where new changes would be brought about. In short, constructivism holds that constitutional developments during democratic transitions continuously participates in each stage of transformation, consolidates consensus of early stages and induces next stages to take place.⁶⁷

Seen this way, transitional constitutionalism is neither a normative enterprise nor merely political manipulations. It reveals both –practical characteristics and normative–nature.⁶⁸ In a time of turbulent political transition, while a new constitution may not be achieved in one shot, it would nevertheless evolve over time. Initial changes would breed next changes in a rather progressive fashion. In contrast with traditional understandings in that constitution is taken as a stable, most lasting form of law, transitional constitutions are often transitory and anticipates further transformations. It thus entails a sense of instrumentality in its very notion and functions.⁶⁹

This practical and constructive perspective of transitional constitutionalism not only coincided with the experiences of South Africa, but also found its place in Taiwan’s quiet revolution. In South Africa, the earlier constitutional revisions opened the first nationwide election, thus a new Congress was formed. This new Congress then passed an interim Constitution, one chapter of which dictated a comprehensive process –even including a certification by constitutional court– to make a new

⁶⁷ Ruti Teitel, *id.*

⁶⁸ *Id.* at 2063-63.

⁶⁹ *Id.* But some criticizes this instrumental use of constitution, *see e.g.* Katharina Pistor, *supra* note 57, at 81.

Constitution.⁷⁰ Similarly in Taiwan, the first constitutional revision rendered by the old assembly made possible an island-wide reelection, thus a new Assembly being formed rendering subsequent constitutional reforms.⁷¹

It is true that constructivism recognizes the nature of transitional constitutionalism as an incremental process that is constructed and at the same time constructive. But it should not be misunderstood that constructivism precludes any possibility of putting an end to this process, namely a new constitution, for the better. Having recognized intrinsic values of a new constitution, however, constructivists are very practical about time that is needed in such a profound transformation into a genuine constitutional democracy. Changes in constitutional texts may be comparably easy to accomplish, but entrenched cultures or ideologies embedded in previous regimes would not be easy to go away.⁷² Thus transitional constitutionalism would inevitably become sensitive to the process –agenda and priority setting in political transitions.

C. Functions of Transitional Constitutionalism

In the flux of democratic transition, whether any constitutional or extra-constitutional approach would prevail is contingent on the credibility of the existing constitution, the will and vision of political leaders, and even some cultural elements. Once involved, however, constitutional approach would dictate the process.

⁷⁰ It was Chapter 5 of the 1994 Interim Constitution of South Africa. *See generally* Hugh Corder, *South Africa's Transitional Constitution: Its Design and Implementation*, 1996 PUB. L. 291.

⁷¹ Jiunn-Rong Yeh, *supra* note 26; Wen-Chen Chang, *supra* note 26.

⁷² *See e.g.* Daniel H. Cole, *The Struggle for Constitutionalism in Poland*, 97 MICH. L. REV. 2062 (1999) (showing that Poland's constitutional history demonstrates the culturally and historically contingent nature of constitution making); Rett R. Ludwikowski, *Constitutional Culture of the New East-Central European Democracies*, 29 GA. J. INT'L & COMP. L. 1 (2000) (arguing that constitutional functions and structures are largely influenced by cultural environments in East and Central Europe).

Even the old regime may present an institutional possibility that allows for next transformation to happen.

Constitutions during democratic transition are expected to serve functions that depart from traditional understandings which are primarily on limiting government powers and protecting fundamental rights. Instead, transitional constitutionalism is likely to intervene in transitional process such as managing reform agendas or setting up priority. In the following, we summarize three major functions that constitution may serve in transitional moments: managing reform agenda, substituting violent revolution, and facilitating social integration.

1. Management of Reform Agenda

Many new democracies undertook political transitions through formal constitutional revisions. Of course the dynamics of democratization would not necessarily rely upon constitutional changes. Constitutional interpretations rendered by courts and quasi-constitutional statutes enacted by legislatures would also contribute to the process.⁷³ Through constitutional undertaking, however, democratic transitions would be synchronized with agenda setting –managed and observed at a constitutional level. This was precisely what happened in the last wave of constitutional transitions as witnessed in Hungary, South Africa, Taiwan, Indonesia, among others.⁷⁴

In a transitional moment, calls for reform are demanded from all walks of the society. When reforms are astonishingly complex, agendas must be set. But even

⁷³ Ruti Teitel, *supra* note 10, at 2057-58.

⁷⁴ Ruti Teitel, *id.* at 2060 (South Africa); Jiunn-Rong Yeh, *supra* note 26 (Taiwan); Gregory Tardi, *supra* note 22 (Hungary); Andrew Ellis, *The Indonesian Constitutional Transition: Conservatism or Fundamental Change?*, 6 SINGAPORE J INT'L & COMP. L. 116 (2002).

agendas consented to and negotiated by major political parties would be distrusted and challenged. This is especially true when political trust is weakened during political turbulence. In order to overcome the crisis of trust, constitution becomes the central institution capable of managing transitional agendas.⁷⁵ Once set in the constitution, reform agendas resume a binding status at a constitutional level. In other words, political compromises and negotiations become constitutionally entrenched and transform into normative commitments.

Many reform issues emerge in a time of transition, testing rather fragile political operations. To prevent a breakdown or a stalemate, one would reasonably choose to undertake reforms through an incremental way that deals one or two major issues at a time. For, the decision concerning which issue should be tackled often poses a great challenge to political parties at a negotiating table. An incremental constitutional reform that divides issues into series of constitutional revisions would resolve this dilemma, as decisions between competing issues become a question of timing rather than a question of all or nothing.⁷⁶

This constitutionalized form of agenda setting, however, base not upon a well planned blueprint. Rather, it is through a “muddling through” process without an ex ante “comprehensive rationality”.⁷⁷ But we should note that any institution has its own “institutional capacity”. Once institutions fail to provide sufficient spaces for

⁷⁵ Ruti Teitel, *supra* note 10, at 2057-58; Andras Sajo & Andrew Arato, *Editor's Introduction*, 13 *LAW & POL'Y* 101, 102 (1991).

⁷⁶ Andrew Arato, *Forms of Constitutional Making and Theories of Democracy*, 17 *CARDOZO L. REV.* 191, 230 (1995) (appraising that the extended method of constitution making allowed South African to gain time in dealing with fundamentally complex problems).

⁷⁷ *See generally* Charles E. Lindblom, *The Science of “Muddling Through”*, 19 *PUB. ADMIN. REV.* 79 (1959) (suggesting adaptation model of change). *But cf.* Bruce Ackerman, *Revolution on a Human Scale*, 108 *YALE L. J.* 2279 (1999) (arguing “revolutionary transformation”-mass movement on behalf of grand ideals- as an alternative model of change).

agendas at hand to develop, the dynamics of transition may flow out of the existing available constitutional institutions.⁷⁸

2. Substitution of Violent Revolution

In a time of profound transition, the relationship between revolutions and constitutions becomes an enchanting issue. Calls for revolution would run high when existing institutions fail. The more capable existing institutions deal with transitions, the less likely democratizing politics would turn revolutionary. In other words, if undertaken successfully, constitutional reforms would substitute for violent revolutions.⁷⁹

In Taiwan for example, while confronting with legitimacy crisis, the people chose not to overthrow the former regime or declare independence.⁸⁰ The opposition instead came to the negotiating table and agreed to undertake constitutional reforms. Apart from street protests and violent strategies, the opposition decided to take part in the new round of national election authorized by the existing Constitution whose legitimacy had been denounced. In so doing, reforms within the existing legal framework in lieu of violent revolution resumed a central place in transitional politics. As a consequence, political dialogues or at times some turbulent interactions between political parties were tailored to the undertaking of constitutional discourses and preparations for the next round of constitution reforms.

⁷⁸ This is the “spillover effect” of institutional capacity. See generally Jiunn-Rong Yeh, *Institutional Capacity-building Towards Sustainable Development: Taiwan’s Environmental Protection in the Climate of Economic Development and Political Liberalization*, 6 DUKE J. COMP. & INT’L L. 229 (1996).

⁷⁹ Ruti Teitel, *supra* note 10, at 2067-69.

⁸⁰ Jiunn-Rong Yeh, *supra* note 26; Wen-Chen Chang, *supra* note 26.

The reasons for Taiwan –among others– could conduct democratic transitions in such a relatively quiet manner were complex. But it is beyond question that a series of constitutional revisions scattered in some ten years provided an institutional capacity in reform and subsequently avoided violent revolutions. Perhaps costs remained uncounted. In Taiwan, the former regime was not changed until the presidential election in 2000 –ten years after democratic transitions had begun–. In other new democracies, transitional process was criticized as prolonged and former regimes seemed to come back rather easily.⁸¹ Notwithstanding drawbacks, transitional constitutionalism that presents in ways apart from traditional understandings of constitutions proves to facilitate transitional processes in peaceful ways rarely seen in human history.

3. Facilitation of Social Integration

Traditional constitutionalism assigns functions of a constitution to be restraining government powers and protecting basic rights. It establishes a premise upon a society where social cohesion is largely maintained and social consensus is achieved through prevailing social norms and conventions.

In a time of transition, however, social consensus collapses and social norms become distanced to changing social nexuses alien to existing social and political systems. The existing regime is on the brink of breakdown, and larger political reforms, if not revolutions, would be demanded to reconstruct a new political community. Whether various groups of social and political identities would be willing

⁸¹ Juan Linz & Alfred Stepan, *supra* note 1, at 293-434 (discussing some setbacks for transitions in Bulgaria, Romania, former USSR states, and Baltic states); Robert Sharlet, *Transitional Constitutionalism: Politics and Law in the Second Russian Republic*, 14 WIS. INT'L L.J. 495 (1996) (argues that Russia will continue to be an authoritarian state for some time notwithstanding continual progress of democratization).

to join political reforms and peacefully (re)negotiate or even (re)construct their shared values and a new collective political identity becomes a central challenge to democratic transitions.⁸² In this process, searching for a new set of shared values and norms that would bind the society together again becomes imperative. Constitutional reforms by which a new democratic political order would be established may provide such a new set of values as well as a broader negotiating space for constructing an emergent political identity.⁸³ It is in this sense that transitional constitutionalism provides a function of social integration, which was witnessed in the transitional experiences in East and Central Europe,⁸⁴ South Africa,⁸⁵ Taiwan,⁸⁶ among others.

In addition, constitutional courts –if seen as a neutral, deliberative institution– may also help re-establish a rational discourse and rebuild political trust and social cohesion. Despite rather chaotic transitional politics, constitutional courts may provide a stabilizing function by way of their groundbreaking decisions with articulated principles and values.⁸⁷ In this way, courts may become the center of

⁸² Ulrich K. Preuss, *supra* note 10, at 109-113; Andrew Arato, *Dilemmas Arising from the Power to Create Constitutions in Eastern Europe*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVE 413-422 (Michel Rosenfeld ed., 1994) (arguing various model of constitutional making facilitate to various extent the construction of a new political community); Michel Rosenfeld, *Constitution-Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example*, 19 Cardozo L. Rev. 1891 (1998) (arguing that negotiated changes by which groups of various identities are embraced facilitate successful construction of a new collective political identity).

⁸³ Ulrich K. Preuss, *id.* at 113; Michel Rosenfeld, *id.* at 1917-19.

⁸⁴ See Michel Rosenfeld, *id.* (arguing recent constitutional reforms in East and Central Europe, particularly in Poland and Hungary, followed the Spanish model that was good for (re)negotiation of political identity).

⁸⁵ Hugh Corder, *supra* note 70, at 299-300.

⁸⁶ Jiunn-Rong Yeh, *supra* note 78, at 269-70.

⁸⁷ Kim Lane Scheppele, *Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic Than Parliaments)*, in RETHINKING THE RULE OF LAW IN POST-COMMUNIST EUROPE (Wojciech Sadurski et al eds., forthcoming) (arguing that courts in transitional democracies are actually more democratically sensitive); Andras Sajó, *Preferred Generations: A Paradox of Restoration Constitutions*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVE 335-351, 350 (Michel Rosenfeld ed., 1994) (arguing judges instead of

transitional constitutionalism and capable of signaling a great beginning. South African constitutional court for example, among other courts in successful new democracies, shouldered successfully such a function and became renowned and respected worldwide.⁸⁸

Lastly, transitional constitutionalism may facilitate social integration in quite an unusual way. For, a living constitution serves as prima facie evidence of a viable constitutional state. In undertaking constitutional reforms and resorting to constitutional discourse for political resolutions, constitutional culture is likely to be materialized, which would in turn construct a constitutional identity as well as strengthen statehood. Take Taiwan as an example. Because of her rather unique situation, Taiwan has been handicapped in international proclamation. But the decade's democratic transition has established Taiwan as a new democracy in line with the many others and helped her regain the confidence in participating in the international community.

In the future, a constitutional identity may replace nation-state –a rather controversial concept– in transnational collaborations. The European Union with her Constitution would be capable of dealing with other constitutional democracies in the world. This is a key link of transitional constitutionalism to transnational constitutionalism as we shall demonstrate further in the following part.

political founders become key figures in the recent democratic transitions of East and Central Europe). But, there exists a critical view on judges taking leading roles in democratization and constitutional change, *see* Bruce Ackerman, *supra* note 1, at 109-12.

⁸⁸ Ruti Teitel, *supra* note 10, at 2060. *See also* Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 *UNI. PENN. J. CONST. L.* 205 (1998); Margaret A. Burnham, *Cultivating a Seedling Charter: South Africa's Court Grows Its Constitution*, 3 *MICH. J. RACE & L.* 29 (1997).

D. Characteristics of Transitional Constitutionalism: Relativity

If there is one word to catch the spirit of transitional constitutionalism, that must be relativity. Three sets of relativity are of special notice here: the relativity between constitution making and constitution amending, between formal and informal channels, and between constitutional adjudication and constitutional revision.

1. The Relativity between Constitution Making and Constitution Amending

Traditional constitutional theories view constitution making and amending as two distinctive routes in constitutional reform.⁸⁹ In this traditional view, the making of a new constitution symbolizes a new beginning with a clear break with the past. In contrast, constitution amendments are made within the existing regime legality. In terms of process, constitution making is often a result of revolution or other extra-legal means and involves a pronouncement or reaffirmation of national sovereignty, followed usually by a public referendum. Constitutional revisions, on the other hand, would not always involve the change of sovereignty and follows rather normal constitutional politics. As a result, it is argued that while everything may be altered in the making of a new constitution, substantive restrictions remain vital in constitutional amending. For instance, name, national flag or territory of a state, among other matters critical to state identity must not be altered through constitutional revisions.

This traditional distinction between constitution making and amending, however, was crossed over in the recent development of transitional constitutionalism.

⁸⁹ See generally SANFORD LEVINSON ED., *RESPONDING TO IMPERFECTIONS: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* (1995); Vicki Jackson & Mark Tushnet, *supra* note 19, at 260-288.

As we discuss earlier, the call for new constitutions in the last wave of democratic transitions was not entirely successful. Some had opted for a new constitution in spite of insufficient consensus or preparatory works. Mongolia, Romania, the Philippines, and the Baltic States represented some of typical examples. Others however decided to live through their transitions in short of a new constitution. They instead made a major constitutional revision at once or undertook a series of incremental amendments. South Korea, Hungary, Taiwan, among others, illustrated such examples.

More importantly, in their constitutional revisions, these new democracies set up neither substantive nor procedural limits. Take South Korea for example. The 1987 constitutional revision that gave birth to an entirely new government structure with a new constitutional court was followed by an unprecedented public referendum.⁹⁰ In Hungary, the first major constitutional revision of the earlier 1990s altered her name from People's Republic of Hungary to Republic of Hungary, suspended the official privileged status of the communist party, and most importantly, added a long list of fundamental rights. The provisions added at the time amounted to the size of a new constitution, but they were done with a single act of constitutional amendment.⁹¹ Likewise in Taiwan, more than one third of constitutional provisions were altered in seven rounds of constitutional revisions in fifteen years.⁹² Having no new constitutions, these new democracies have nevertheless operated their new regimes in entirely new frameworks.

⁹⁰ Kyong Whan Ahn, *supra* note 22.

⁹¹ Gabor Haimai, *supra* note 22; Gregory Tardi, *supra* note 22.

⁹² Jiunn-Rong Yeh, *supra* note 26.

It should also be noted that constitutional revisions may lead making of a new constitution. In her ten-year transitional period, South Africa employed a strategy of “constitution making by stages” – amending the Constitution first, making an Interim Constitution and then creating a new constitution. This process, albeit prolonged, proved successful in that it avoided excessive political impacts and social costs generated by once-and-for-all reform.⁹³ The Polish Constitution followed the similar pattern. Poland promulgated a “Little Constitution” through constitutional revisions and it did not make new constitution until democratic transition was rather consolidated. The new constitution was passed in 1997 with incentives of joining the European Union.⁹⁴

Having observed constitutional practices in the last wave of democratic transitions, we argue that the traditional distinction between constitution making and constitutional revision has become relative. In a time of profound change, all kinds of institutional possibilities are actually open. Transitional constitutionalism not only allows more varieties in constitutional changes but also more importantly encourages much more open process to achieve such key collective decisions.

2. The Relativity between Formal Channel and Informal Channel

The second relativity stands between formal and informal channels in the undertaking of constitutional transitions. During the course of democratic transitions in the 1990s, informal mechanisms were utilized as a way to induce and facilitate further formal reforms. One of the most renowned examples was “Roundtable

⁹³ Andrew Arato, *supra* note 76, at 230; Christina Murray, *supra* note 24; D J Brand, *supra* note 24.

⁹⁴ See generally Symposium, *The Constitution of Republic of Poland*, 1997 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1 (1997).

Talk”.⁹⁵ It was first introduced in Poland, then mimicked by Czechoslovakia and Hungary, and spread into the many transitional democracies. During these roundtable talks, critical principles concerning a new constitution or constitutional revisions were laid down and agreed upon.

This practice, however, was rather inconsistent with what a traditional constitutional lawyer would expect before such a profound change took place. Based upon traditional constitutionalism, either a constitutional convention or other similar formal settings are required for deliberations of constitution making or profound constitutional changes. Only through formal discussions, their results would become binding and legitimate. Formality not only counts for validity but also demands responsibility for decision making and accountability for its consequences. Why, then, would recent transitions rely so much upon informal mechanisms?

In a time of turbulent transition, both former regime and reformist party face up great pressures for reform. Neither is likely to loosen its own stands. Yet if that continues, intense conflicts or political stalemate may appear, running the risk of regime breakdown. Thus, informal mechanisms are important as a way to ease political tensions and make peaceful negotiations possible.⁹⁶

It is precisely due to this informality that important political parties or alliances are willing to come to the negotiating table to decide on groundbreaking political changes. In such an informal mechanism, governing powers are rather free from institutional limits or pressures and thus would be more willing to make compromises with reformists. Albeit legally nonbinding, these roundtable resolutions bear great

⁹⁵ See generally JON ELSTER ED., *ROUNDTABLE TALKS AND THE BREAKDOWN OF COMMUNISM* (1996)

⁹⁶ Ruti Teitel, *supra* note 10, at 2068-70; Andrew Arato, *supra* note 82, at 185-94.

weight in political trust. Once realized in preliminary transitory measures, they would earn credibility and even become critical in the follow-up reforms. The thirty-four principle in the course of South Africa's constitutional reform was such a best example.

3. The Relativity between Constitutional Revision and Constitutional Adjudication

Finally, relativity is found between constitution revision and constitution adjudication. In democratic transition of the last decade, judicial powers interfered actively in the process of transition and made a great deal of unconventional adjudication. A number of constitutional courts such as that of South Africa, of Hungary, of Taiwan or of South Korea offer great examples.⁹⁷

This relativity stems, among other things, from the fact that new parliaments lack the capacity of resolving complex political controversies and thus fail to deliver promptly constitutional resolutions so desperately needed in a time of turbulent transitions. In contrast, if supplemented with experiences and credibility, judicial solutions by constitutional courts or high courts are likely to be faster and effective. This provides even stronger incentives for political institutions to do away with high-profiled controversies.⁹⁸ As a result, judicial resolutions may replace political decisions and thus the line between constitutional revision and constitutional adjudication would be crossed.

The other more radical relativity existed in the constitutional transition of South Africa. Based upon the authorization of the Interim Constitution, the Constitutional

⁹⁷ See discussion *supra* Part II.A.2.

⁹⁸ Ran Hirschl, *supra* note 45; Tom Ginsburg, *supra* note 26; Lee Epstein, *supra* note 45.

Court bore the competence to certify the new Constitution by examining whether it complied with the thirty-four principles and other basic guidelines of modern constitutionalism.⁹⁹ The certification of constitutional court was made into the process of constitutional reform. As a matter of fact, the South Africa Constitutional Court did exercise this power and even nullified several provisions in the new Constitution and sent them back for redrafts.¹⁰⁰ Also, the Taiwanese constitutional court declared constitutional amendments unconstitutional and annulled them uncompromisingly.¹⁰¹ This unprecedented judicial decision was –rather surprisingly– observed by political actors who agreed to make new constitutional amendments according to the judicial ruling.¹⁰²

Yet the intersection between constitutional revision and adjudication is not without danger. In fact, in the many new democracies, major decisions rendered by judges confronted both counter-majoritarian crisis¹⁰³ and institutional limitations. After all, constitutional adjudication entails decisions –dealing with single issue– by unelected judges. Constitutional revisions represent collective decision-making –tackling complex and multiple issues– by elected representatives. Judicial solutions may be quick to develop, but political decisions through democratic deliberations –albeit time-consuming– would be more beneficial to consolidating democracies in a longer term.

⁹⁹ Margaret A. Burnham, *supra* note 88.

¹⁰⁰ *Id.*

¹⁰¹ Interpretation No. 499. For details, *see* Wen-Chen Chang, *supra* note 26.

¹⁰² Wen-Chen Chang, *id.*

¹⁰³ Bojan Bugarcic, *supra* note 47. *But see* Kim Lane Scheppele, *supra* note 47.

III. Transnational Constitutionalism

Besides the development of transitional constitutionalism, the other profound change in constitutionalism almost happened at the same time. Driven by globalization and its related complexities, constitutionalism has developed beyond its traditional confinements—nation-states.¹⁰⁴ Today, constitutionalism takes place not only within nation-states but also above and beyond nation-states, and perhaps even more importantly, it serves as institutional and dialectical functions at domestic as well as transnational levels. In the following section, we shall define what we mean by “transnational constitutionalism”, examine its development from diverse perspectives, identify its particular functions, and argue for its distinctive characteristics.

A. Features of Transnational Constitutionalism

How exactly constitutionalism has 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 connected states and non-states in many traditionally unexpected ways. Three features, as we identify, are distinctive in understanding this new phenomenon.

1. Transnational Constitutions

First, constitutions have developed beyond nation-states, and perhaps more importantly, they created a number of creative and unconventional ways to connect states, their traditional subordinates, even non-state or transnational actors. One of the

¹⁰⁴ Bruce Ackerman, *supra* note 43, at 775-778 (arguing that constitutionalism may develop from treaty to constitution or vice versa). *See generally* GAVIN ANDERSON, *CONSTITUTIONAL RIGHTS AFTER GLOBALIZATION* (2005) (arguing that constitutionalism has developed beyond nation-states and advocating legal pluralism as a solution).

most important examples is the European Constitution. Notwithstanding a supranational organization, European Union launched its constitution-making process beginning this century and has now been in the process of ratification.¹⁰⁵

The Constitutional Treaty¹⁰⁶ –despite its rather ambiguous terminology– was crafted carefully in a process more like constitution-making than treaty signing: drafted in a called Convention, passed by an intergovernmental conference in Rome, and ratified by at least half of the members with popular referenda. It was not only deemed as a Constitution but also expected to function like a Constitution: constructing European citizenship, resolving democratic deficit, providing effective governance and protecting fundamental rights in the European Union.¹⁰⁷ While organizing principles and enforcing mechanisms are not the same, European constitutionalism has undeniably stood as a particular form of constitutionalism that covered from a bill of rights, judicial review, federalism, to separation of powers, and even some independent commissions or agencies.¹⁰⁸

¹⁰⁵ For the updates of ratification, see http://europe.eu.int/constitution/ratification_en.htm (last visited Sep. 30, 2006).

¹⁰⁶ The official name is “the Treaty of Establishing a Constitution for Europe”..

¹⁰⁷ The debate as to whether the European Union needs a Constitution was best presented by Dieter Grimm and Juergen Habermas. See Dieter Grimm, *Does Europe Need a Constitution?*, 1 EUR. L. J. 282 (1995) (arguing that while the making of the EU Constitution would not necessarily revolve its democratic deficit, but it was nevertheless inevitable); Juergen Habermas, *Remarks on Dieter Grimm’s “Does Europe Need a Constitution*, 1 EUR. L. J. 303 (1995) (arguing that a constitution-making 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 (2005) (arguing that while there are some reasonable concerns against European state and constitution, it is more important to contemplate substitutive approaches); but J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and its Discontents*, 17 Nw. J. Int’l L. & Bus. 354 (1996) (arguing that the European constitutionalism does not mark the creation of a new legal order but a mutation of old international law). See generally J.H.H. WEILER, *THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” AND OTHER ESSAYS ON EUROPEAN INTEGRATION* (1999); ERIK O. ERIKSEN & JOHN E. FOSSUM, *DEMOCRACY IN THE EUROPEAN UNION: INTEGRATION THROUGH DELIBERATION?* (2000); LARRY SIEDENTOP, *DEMOCRACY IN EUROPE* (2001).

¹⁰⁸ Wen-Chen Chang, *Constructing Federalism: the EU and US Models in Comparison*, 35 EURAMERICA 733 (2005) (arguing both the US and EU models -notwithstanding differences- work for the establishment of a federal constitutional scheme). See also generally KALYPSO NICOLAIDIS &

2. Transnational Quasi-Constitutional Arrangements

The second –and mores astonishing– feature of transnational constitutionalism is the presence of quasi-constitutional arrangements at a supranational level. Treaties or agreements that are regulated by international laws and operate traditionally among states have begun to present some features of traditional constitutionalism: rights protection, powers constraint, and judicial review, to name some of the most important ones.¹⁰⁹

The most popular and decisive treaty for global trade –World Trade Organization and its agreements– has been recently characterized as a world constitution.¹¹⁰ Some of its important provisions that guarantee free contract, private ownership, and appeal tribunals established for their enforcement are representative of critical features in liberal constitutionalism: a bill of negative rights and the institution of judicial review.¹¹¹ Similarly, the Charter of United Nations coupled with major UN human rights treaties, although long being criticized as toothless, has been revitalized and seen in a very different light –more like an effective constitutional regime that is binding in a traditional constitutional sense.¹¹²

ROBERT HOWSE EDS., *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* (2001).

¹⁰⁹ See Deborah Z. Cass, *The Constitutionalization of International Trade Law*, 12 EUR. J. INT'L L. 39 (2001) (arguing the international trade regime has functioned like a constitutional regime mostly in the function of judicial review); Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529. (1997) (arguing that United Nations Charter has obtained fully characters of a constitution required by modern constitutionalism).

¹¹⁰ Deborah Z. Cass, *id.* See also Markus Krajewski, *Democratic Legitimacy and Constitutional Perspective of WTO law*, 3 J. WORLD TRADE 167 (2001) (arguing that the WTO functions like a world economic constitution). *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 (2005) (arguing that the calls for a world trade constitution will trigger the very politics that constitutionalism seeks to avoid).

¹¹¹ Deborah Z. Cass, *id.*

¹¹² Bardo Fassbender, *supra* note 109. See also William H. Meyer & Boyka Stefanova, *Human Rights, the UN Global Compact, and Global Governance*, 34 CORNELL INT'L L.J. 501 (2001) (arguing that

Regional agreements, such as the North American Free Trade Agreement (NAFTA)¹¹³, have already begun to perform recognizable constitutional functions as trade-related policy-making powers were distributed from the center to peripheries and a strict line was drawn to preserve private trading areas.¹¹⁴ As international treaties and agreements obtain constitutional status and exert much stronger powers to their parties and non-parties alike, customary international laws and certain norms of transnational moral status have begun to enjoy unprecedented recognition.¹¹⁵

For what reasons and in what ways these international treaties or agreements would become more like constitutions shall be discussed in the following. For our present purpose, it is sufficient to take notice that it is a result of a set of complex intertwinements between supranational and domestic decision-making capacities.¹¹⁶

international human rights treaties and their enforcement mechanism within 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 (1998) (arguing a constitutionalization of international human rights treaties).

¹¹³ The North American Free Trade Agreement is a trade agreement among Canada, the United States, and Mexico that became effective in January 1, 1994.

¹¹⁴ 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, they must be treated as well as operating in accordance with democratic accountability).

¹¹⁵ Harold Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004); Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999 (2003) (arguing that the supremacy of constitution should be reexamined in the world as a single community with a shared set of core values); 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); 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). *But see* 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 decision-making structure on the American constitution); 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 use of foreign and international law by the U.S. courts).

¹¹⁶ See discussion *infra* Parts III.C.3, III.D.2.

3. 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 world population now lives under constitutional democracy, and a record number of nations in the last decade wrote or rewrote their constitutions consistent with modern constitutional principles.¹¹⁷ Most nations –west and east, north and south– created similar constitutional institutions. Aside from traditional arrangements such as a comprehensive bill of rights and a loose or strict separation of powers, new institutions particularly responsible for guarding constitutions such as constitutional courts, human rights commissions, and independent auditors were among the common features of this constitutional development.¹¹⁸ Even nations without written constitution tradition began to enact constitutions or quasi-constitutional statutes to their legal framework, and as a result, common law courts today were no more different than other courts.¹¹⁹

Precisely because of this global convergence of constitutional governance, constitutional language and institutions are now easier to understand and work with

¹¹⁷ The report of the “democratic century” by the Freedom House is available at <http://www.freedomhouse.org/reports/century.html> (last visited Sep. 30, 2006).

¹¹⁸ As a result, comparative constitutionalism has recently become a rising area for research. *See generally* Symposium, *Contextuality and Universality: Constitutional Borrowings on the Global Stage*, 1 *UNI. PENN. 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).

¹¹⁹ Ran Hirschl & Christopher L. Eisgruber, *North American Constitutionalism?*, 4 *INT’L J. CONST. L.* 203 (2006) (comparing supreme courts of U.S., Canada, and Mexico and arguing their 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).

and constitutions have served indispensable platforms upon which nations and their institutional actors may interact reciprocally with one another.¹²⁰ Constitutional norms and practices travel rather easily from one nation to another as constitutional court judges or human rights commissioners gather and discuss in some corner of the world¹²¹. Even when private entrepreneurs of various nations do business with their contractual terms, it would be more convenient now for them to read each other's constitutions to find out whether their business-related rights would be secured and enforced. Thus, the success of constitutionalism has unexpectedly created a dialectical mechanism across nations, which we identified as the third feature –and mostly dialectic– of transnational constitutionalism.

The above features of transnational constitutionalism do not just function separately, but they also reinforce one another in some complex ways. The convergence of constitutional developments would make it easy for the development of transnational constitution. The more effective transnational constitutional regimes are, the more likely traditional international treaties or arrangements would be driven to strengthen themselves like constitutions, and vice versa.

¹²⁰ Most important actors are courts as well as sub-national units. *See e.g.* 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); Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15 (2004) (using Montana's adoption of a human dignity clause from Germany as an example to argue that sub-national entities such as state may also play active roles in transnational constitutional dialogues).

¹²¹ Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000) (arguing that judges have been interacting and communicating across borders with ideas exchanged and discussed); Ann-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L. 191 (2003); Paul Schiff Berman, *Judges as Cosmopolitan Transnational Actors*, 12 TULSA J. COMP. & INT'L L. 109 (2004) (arguing that judges think of themselves as cosmopolitan transnational actors and that is the best way to avoid legal imperialism).

B. Diverse Perspectives of Transnational Constitutionalism

While relatively new, the rise of transnational constitutionalism has already invited intense debates on its functions and values. Some celebrate it as the prevalence of transnational normative legal orders which –as they argue– should have already happened a century ago when international law was developed as a solid upper level of domestic constitutional and legal orders.¹²² Others, however, see this recent development as a dangerous plot by some ambitious international actors and a huge threat to traditional constitutionalism.¹²³ These defiant reactions, we argue, are reflective of diverse perspectives, similar to those we have examined in transitional constitutionalism. Each shows a distinctive understanding as well as expectations of constitutional functions that would be played out in an expanded new territory.

1. Foundationalism

Like a foundationalist's view of transitional constitutionalism as transcending politics into a high moral normative order, the development of transnational constitutionalism is seen as a complete establishment of normative order, one that starts with local ordinances, links to national statutes and completes with transnational norms that are expected to supersede lower-level norms once in conflicts.¹²⁴ 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

¹²² See e.g. Harold Koh, *supra* note 115; Joan F. Hartman, *supra* note 115; Alexander Aleinikoff, *supra* note 115.

¹²³ See e.g. J.H.H. Weiler & Joel P. Trachtman, *supra* note 107; Ernest A. Young, *supra* note 115; Joan L. Larsen, *supra* note 115.

¹²⁴ Harold Koh, *supra* note 115; 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 (arguing that we should take a transnational perspective in a 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 the prevalence of international and comparative law sources based upon the universal concept of human rights).

revolution that was led by global moral activists to rescue unfair and fractioned domestic constitutional orders hijacked by self-interested nation-states.¹²⁵

In this view, the emergence of transnational constitutionalism is regard as a noble act that renders a more transcending citizenship to prevent citizens from being exploited by nation-states and non-state actors. The fact that traditional international treaties and agreements have functioned like constitutions simply conforms to such a transnational legal order. And, the convergence of respective constitutional orders is evident of this integrative legal process.¹²⁶

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.¹²⁷ It is neither more virtuous nor more evil than gives and takes in domestic democratic transitions.

Why –as a reflectionalist would inquire in a rather pragmatic way– would domestic decision makers be willing to surrender their decision-making capacities to outside institutions and transnational actors? Why would they even sign up to any transnational constitutions or quasi-constitutional arrangements that would in turn reduce their policy options and perhaps even undermine their own, more immediate

¹²⁵ Harold Koh, *Transnational Public Law Litigation*, 100 YALE L. J. 2347, 2398-2041 (1991); Harold Koh, *Jefferson Memorial Lecture: Transnational Legal Process after September 11th*, 22 BERKELEY J. INT'L L. 337, 339-41 (2004).

¹²⁶ *Id.*

¹²⁷ Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment and International Law* (draft on file with author) (arguing the acceptance of international treaties or customary international law within domestic legal system is based upon strategic calculations of political actors). For similar views, 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 SIMMONS, *WHY COMMIT? – EXPLAINING STATE ACCEPTANCE OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS* (2002).

interests? Imagine when any European member state decides to ratify the European Constitution, it would mean that quite a number of its own policy making areas would be taken away. And, when any constitutions promise a directly applicable effect of international treaties, especially human rights treaties, and customary international law to the domestic context and allow judicial reference to foreign laws in interpreting constitutions,¹²⁸ it would mean that their bills of rights are, to a significant degree, indefinite and may be revised at any time by present and future external decision makers.¹²⁹ When any domestic constitutional courts pronounce a direct effect of international treaties or foreign laws, in so far as their decisions establish binding precedents, they have removed decision-making capacities of domestic political branches to a considerable extent.¹³⁰ Then, we must ask, how come would transnational constitutionalism be developed and thus far accepted?

The answer, from the perspective of reflectionism, still, lies largely in the complex calculations of external and internal political interests. The political gives and takes may vary from context to context, but mainly include the following calculations.

First, and quite naturally, the 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

¹²⁸ Article 39 of the South African Constitution and Article 7 of the Hungarian Constitution are such examples. *See supra* note 13.

¹²⁹ Ernest A. Young, *supra* note 115.

¹³⁰ *Id.*

likely to be concerned with international cooperation.¹³¹ This view makes it more understandable a rather conservative attitude of the United States towards a comprehensive transnational legal framework, compared to European powerful 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 transitional context, namely political calculation of dominant political parties.¹³² In other words, if current dominant political parties are unsure whether they would remain in power, they would be more likely to commit to transnational constitutionalism –signing up to a transnational legal framework or making transnational norms directly applicable–. As a result, their rival parties –even if winning the next election– would be restricted considerably.

Finally, and it is also related to transitional context. New democracies tend to be more open to transnational legal frameworks and their new constitutions are more likely to make international laws directly applicable to their domestic contexts.¹³³ This actually contributed quite considerably to the rise of transnational constitutionalism. In the view of reflectionalism, there are external and internal causes for this. Externally, new democracies lack international reputation and thus need more credibility on the international plane.¹³⁴ Internally, facing rather fragile transitional

¹³¹ Tom Ginsburg, *supra* note 127.

¹³² *Id.* See also Ruti Teitel, *supra* note 10, at 2028-29 (arguing the role of international law in transitional context).

¹³³ Ruti Teitel, *id.*

¹³⁴ Tom Ginsburg, *supra* note 127.

circumstances, new dominant political parties need the aide of international legitimacy to stabilize their domestic governance.¹³⁵ And, this is why we often see young democracies stand on a 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 functions of transnational constitutions and legal frameworks as virtuous in sustaining a broader political terrain and protecting a wider array of rights. A reflectionalist, in contrast, would like to reveal the underlying local political interests while recognizing the rise of transnational constitutionalism. S/he would not idealize functions of transnational constitutions or legal frameworks but insist that transnational constitutionalism like transitional constitutionalism is the product of local and transnational politics.

Here, as in transitional context, neither view presents the entire story. It is true –as reflectionism may have it– the development of transnational constitutionalism has to do largely with domestic and transnational political calculations. But reflectionism 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 and it 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, contrarily to what a foundationalist would hope for.

¹³⁵ Ruti Teitel, *supra* note 10, at 2028-29.

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, neither be victorious all the time as it seems to be expected so. It would nevertheless evolve over time, proceeding while 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 in turn are not necessarily bad. A constructive process of transnational constitutionalism would expect perhaps intense and constant interactions between national and international constitutional frameworks and encourage both to work with one another.¹³⁶

C. Functions of Transnational Constitutionalism

Despite diverse views, transnational constitutionalism has risen to become a central phenomenon in the horizon of constitutional developments. Today we read more often than ever some front-page news about the development of European Constitution, WTO ministerial meetings, decisions of European Court of Human Rights, South Africa Constitutional Court, or human rights developments and sanctions in all corners of the world. But it is not entirely clear how exactly these transnational constitutional developments have served us. Would they provide functions similar to those of traditional constitutionalism, i.e. limiting state powers

¹³⁶ See also 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 the “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); 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 properly conceived of as a co-constitutive relationship).

and protecting human rights? Or, are they perhaps providing functions more similar to transitional constitutionalism, more constructive and managerial in the process?

In the following, we summarize three functions that transnational constitutional developments would provide: management of global market, substitution of absolute sovereignty, and facilitation of multiple dialogues.

1. Management of Global Market

It is undeniable that the rise of transnational constitutionalism has to do largely with economic globalization. The attempt of more advanced industrialized nations as well as fast developing ones to quickly expand the scale of a global market at an accelerating speed was the most important driving force for the development of transnational legal cooperation and frameworks.¹³⁷

To ensure a broadened market to function, basic rules such as free exchange, market stability, contractual certainty and enforcement, even high respect of private property and other market-oriented rights must be transplanted from those more advanced countries to the newly included ones.¹³⁸ A broader transnational legal framework and numerous free trade agreements are products precisely responded to such demands. For example, WTO agreements are intended to ensure and police free trade rules for the global market. The European Economic Community (EEC) –the

¹³⁷ See generally Andrew T. Guzman, 2004, *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 rule of law extended liberal constitutional principles to the area of international economic policy-making and transnational economic activities).

¹³⁸ Maxwell O. Chibundu, *Globalizing the Rule of Law: Some Thoughts at and on the Periphery*, 7 IND. J. GLOBAL. LEG. STUD. 79, 84-91 (1999); Hans-Juergen Wagener, *On the Relationship between State and Economy in Transformation*, in CONSTITUTIONS, MARKETS AND LAW: RECENT EXPERIENCES IN TRANSITIONAL ECONOMIES 33-58, 37-40 (Stefan Voigt & Hans-Juergen Wagener eds., 2002)

predecessor of 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.

Intriguingly enough, transnational rules initially intended to be merely trade-related basics would often grow into a complex set of rules that looks more and more like constitutions. The European Union is the best example. Originally as merely a coal and steel free exchange framework between France and Germany, the EU whose cooperative functions now extend to so-called three pillars –economic affairs, foreign and security policy, and criminal justice cooperation– experienced a series of transformations in its organizational and functional forms.¹³⁹ 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 European Court of Justice, the European Commission and other institutions were thus created and through their workings –in particular judicial enforcements and interpretations– gradually transformed this economic organization into a constitutional or at least semi-constitutional regime.¹⁴⁰ Similar patterns displayed not only in the EU but also elsewhere.¹⁴¹ The reference to constitutional or quasi-constitutional framework has even recently been made to the WTO, arguing the way that dispute settlement and

¹³⁹ Wen-Chen Chang, *supra* note 108.

¹⁴⁰ *Id.* See also J.H.H. WEILER, THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” & OTHER ESSAYS ON EUROPEAN INTEGRATION (1999) (arguing that the EU has developed from a loose framework of economic cooperation to a constitutionalized political organization).

¹⁴¹ The United States, for example. Bruce Ackerman, *supra* note 43; Wen-Chen Chang, *supra* note 108. See also 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 in the “International Legal Constructionism”).

appellate bodies read and interpret its own provisions and members' domestic laws is making the WTO more and more like a constitution.¹⁴²

The function of transnational constitutionalism in managing a global market has not only affected transnational legal cooperation but also led to a wider range of constitutional convergence that we describe earlier. To illustrate, a broader market invites transnational legal frameworks as it demands simultaneously these market-participating nations to provide similar –if not the same– market-oriented rules and rights. And the compliance with transnational legal frameworks would facilitate even more national receptions of liberal, market-oriented rights and constitutional arrangements.¹⁴³

It should not be surprising that some countries rewrote or revised their constitutions before or after their entries into the WTO. For example, Thailand rewrote the Constitution following its entering into the WTO and adopted several institutional measures to provide a fairer investment environment.¹⁴⁴ 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 the rule of law and show due respects to private property.¹⁴⁵ More strikingly, amending the Constitution –especially ensuring an independent judiciary that is capable of

¹⁴² Deborah Z. Cass, *supra* note 109.

¹⁴³ Ernst-Ulrich Petersmann, *supra* note 137. See also Frank Michelman, Constitutionalism, Privatization, and the Globalization: Whither the Constitution?, 21 *CARDOZO L. REV.* 1063 (2000).

¹⁴⁴ Borwornsak Uwanno & Wayne D. Burns, *The Thai Constitution of 1997: Sources and Process*, 32 *U. B. C. Rev.* 227, 243 (1998).

¹⁴⁵ 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).

maintaining trade-related rights and transaction orders– was one of the demanded actions by international financial agencies to resolve Indonesia’s economic crisis.¹⁴⁶

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.¹⁴⁷ Sovereignty is constructed as a fictional personality of a nation with an absolute will/power, while a constitution is a founding legal expression of highest order by such an absolute will/power. The democratization of the eighteenth century made 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, a constitution became strictly associated with a nation-state of absolute sovereignty. A constitution without a state is never possible.¹⁴⁸ This way of constructing constitutions and sovereign nations, however, has restricted our imagination of constitutions and actually undermined modern constitutional functions. It overemphasized the role of state in any constitution-related undertaking and denied the possibility of constitution-making across national borders. Worse yet, by making

¹⁴⁶ 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).

¹⁴⁷ Martin Loughlin, *Ten Tenets of Sovereignty*, in SOVEREIGNTY IN TRANSITION 55-86, 57-59, 73-74 (Neil Walker ed., 2003).

¹⁴⁸ But a state without a constitution, without a written constitution to be exact, is nevertheless quite possible especially in common law traditions. It is however in sharp decrease. VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 357-370 (1999).

it nearly impossible any creative substitute for state in transnational cooperation, it created a state-monopoly situation.¹⁴⁹ Consequently, any transnational cooperation would neither be established nor function well should any state becomes uncooperative; any human rights abuses that happened in one national border should free from any external investigation or sanction; and neither would any domestic institutional arrangements that may substantially affect international market functions be the business of international community. These resonated very well to 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 Constitution for the first time disconnected constitutions with nations. A constitution now can be made upon something other than a nation.¹⁵⁰ Secondly, possible transformations of some transnational economic frameworks into more solid or even quasi-constitutional regimes altered our traditional understandings that constitution is political, and that only political entities can make constitutions. Economic or non-economic cooperation could take place in constitutional frameworks.¹⁵¹

More importantly, the fact that some –and quite important some– of these transnational constitutions or quasi-constitutional arrangements have now exercised either directly applicable effects or strong influence upon their participating members is evident of the gradual erosion of absolute sovereigns. The recent progress of

¹⁴⁹ Bardo Fassbender, *Sovereignty and Constitutionalism in International Law*, in SOVEREIGNTY IN TRANSITION 115-143 (Neil Walker ed., 2003) (arguing that the concept of sovereignty became state-centered and entailed state equality and sovereign equality after World War II).

¹⁵⁰ Neil Walker, *Late Sovereignty in the European Union*, in SOVEREIGNTY IN TRANSITION 3-32 (2003) (arguing a theoretical perspective in that constitutions may rise without sovereigns).

¹⁵¹ Deborah Z. Cass, *supra* note 109. See also M. P. MADURO, WE THE COURT: THE EUROPEAN COURT OF JUSTICE & THE EUROPEAN ECONOMIC CONSTITUTION (1998).

international humanitarian laws and the practice of many international war crime tribunals that handled internal genocide and civil war devastations are another proof. They stand against the assumption that rights are only ensured by national constitutions. Rather, in today's transnational constitutional frameworks, constitutional rights of one nation may be ensured even more effectively by other nations or by international legal frameworks without sanctions of this very nation.¹⁵²

3. Facilitation of Multiple Dialogues

The last –but not the least– function that transnational constitutionalism provides is the facilitation of multiple dialogues on a global scale. In the past, sovereign nations dominated 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 outside.¹⁵³ Whether or not they would be checked sufficiently with legislative powers, their democratic legitimacy would be less direct, not to mention high risks that concerns and opinions of ethnic minorities and disadvantaged groups would be excluded. As a result, many international treaties, transnational arrangements and decisions had for a long time been regarded as systematically biased and partial. It

¹⁵² One example of domestic laws is the Alien Torts Claims Act of the United States. For further discussions, see Harold Koh, *supra* note 125. In addition, an increasing use of international human rights treaties or customary international laws serves similar purposes. See e.g. 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 the international law of fundamental human rights into consideration); 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 the choice of law analysis and take the global legal order into consideration).

¹⁵³ See generally STEINER & ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (2nd, 2000).

was even more so for some localities and disadvantaged groups. The international regime thus suffered great distrust and democratic deficit.¹⁵⁴

But in the age of transnational constitutionalism, the dominance of states –especially some very powerful states – and their past state monologue would be dismantled. It has advanced in many different ways. First, the creation of transnational constitutions, such as the European Constitution, provides more direct accesses from bottom up and bypasses traditional state bureaucracy. By participating in transnational politics of larger framework, local groups are now –perhaps unexpectedly– more empowered to take position against their local or national governments with the backup of transnational governing agencies or support groups in other nations.¹⁵⁵ Local and transnational politics becomes more complex and contested as more diverse groups enter into their platform.

Secondly, various simultaneously risen transnational constitutions or quasi-constitutional frameworks would challenge traditional power balances among states and make one-state dominance or any institutional monologue difficult¹⁵⁶. 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

¹⁵⁴ *Id.*

¹⁵⁵ Marc Landy & Steven M. Teles, *Beyond Devolutions: 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)

¹⁵⁶ 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 consideration of foreign decisions is increasingly popular for courts throughout the world, and that it is not always courts of most powerful countries become most powerful in competing judicial dialogues). As a matter of fact, two constitutional courts, that of Hungary and that of South Africa, became most recognizable in this area. See e.g. 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 the Australian courts should engage with international law more closely like 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).

Italy or Spain in case of the EU and Mexico in case of NAFTA wield the same if not more powerful influence upon its own interests. This is also true within the same transnational framework. While Germany, France or Japan may be seen as powerful states, each would 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 government institutions or non-governmental groups. The recently exciting and well documented dialogues between various courts are one great example among the many.¹⁵⁷ Within a transnational framework, both transnational courts and national courts are competing with one another for authoritative or suitable interpretations of transnational legal arrangements. The competing dialogue between the European Court of Justice and the German Constitution Court regarding directly applicability of EU rules if in conflict with the German Constitution was evident of this.¹⁵⁸ In addition, as more and more international norms being made applicable to many localities, local and national courts begin to shoulder noticeable responsibilities for interpreting international laws, transnational frameworks or even other foreign nations' domestic laws.¹⁵⁹

¹⁵⁷ Claire L'Heureux-Dubé, *id.*; Vicki Jackson, *supra* note 120; 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 the international legal order); David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. EMPIRICAL LEGAL STUD. 297 (2006) (presenting empirical evidence on the U.S. courts' citation to foreign courts); Janet K. 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 the transnational judicial dialogue).

¹⁵⁸ For a brief introduction of the struggle between the two courts, see Jenny S. Martinez, *Toward an International Judicial System*, 56 STAN. L. REV. 429, 459 (2003).

¹⁵⁹ If one likes to know current interpretive status of, say, the Refugee Convention or International Covenant on Civil and Political Rights (ICCPR), perhaps the best interpretive resource to look at is not the International Court of Justices but the Canadian Supreme Court. For, Canada literally incorporated Refugee Convention into 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).

The last –and somehow a bit unnoticeable– dialogue facilitation function that transnational constitutionalism provides is through the convergence of national constitutions. Today, the number of constitutional democracies has been on the rise to an unprecedented level. More and more nations adopt similar institutions and talk about the same language of human rights, rule of law and judicial review. This has enabled various nations to collaborate more smoothly either with their constitutional vocabularies or directly by their constitutional institutions such government agencies or courts. In the past, the mostly cited or referred constitutions and courts were –perhaps rightly– the U.S., German, French Constitutions and their respective high courts or constitutional courts. At present, however, many more national constitutions are cited or referred to, and they do not always belong to traditional powerful states. New constitutions and their interpretive courts such as that of South Africa, Hungary, Poland, South Korea, or Hong Kong are some of the examples.¹⁶⁰ Students of comparative constitutionalism are fortunate to have more diversified and democratized sources for their digestion.

D. Characteristics of Transnational Constitutionalism: Relativity

The age of transnational constitutionalism presents a similar spirit –while in different ways– in comparison with transitional constitutionalism: relativity. Three sets of relativity are particularly illustrated: the relativity between nation states and partial units, the relativity between external and internal norms, and finally, the relativity between public domains and private spheres.

¹⁶⁰ See discussion *supra* Part II.A.2.

1. The Relativity between Nation States and Partial Units

The first noticeable 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 nation-state.¹⁶¹ The development of transnational constitutions or quasi-constitutional arrangements taught us, however, that states would not be dismantled as they were still key players within these regimes. Nevertheless, as we explained in the above section, transnational constitutionalism has at least unexpectedly led to political reconfiguration of states and their local units in their more complex relationship with transnational frameworks and with each other.

With the aide of transnational cooperation, the relationship of nation states and their units would be made into more dynamic, thus changing their original federalism without any legal or constitutional amendments. Similarly, the more power and direct representation being made 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 External and Internal Norms/Institutions

The second –and perhaps mostly important and noticeable– set of relativity is the one between external and international norms/institutions. Notwithstanding being “external”, transnational constitutions and quasi-constitutional arrangements are directly applicable to affected nations and individuals, making them more and more

¹⁶¹ See generally JEAN-MARIE GUEHENNO, *THE END OF NATION-STATE* (1993); Alfred C. Aman, Jr., *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).

like a part (even highest) of internal norms. The EU Constitution and laws and their relationship to internal legal systems of member states provide a great example.

More importantly, as a part of transnational constitutionalism features, an increasing number of international treaties are now being made directly applicable to or at least held a strong influence upon domestic contexts.¹⁶² 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 provisions or legislative enactments.¹⁶³ But there exists an intricate relationship between international and national laws. Bear in mind that it is often through domestic constitutional provisions or judicial interpretations that certain international treaties are made directly applicable to domestic contexts. Here, internal laws actually assume a function of enabling international laws into domestic context, thus diminishing legitimacy problems of external norms. In this way, we may say, national and international laws are mutually empowering each other.¹⁶⁴

As the boundary between international and national norms is becomes blurred, so is that of international and national institutions. Imagine any regional or international courts –such as European Court of Human Rights– rule that a national law is in

¹⁶² See discussion *supra* Parts III.A.2, III.C.3.

¹⁶³ See e.g. 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); 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); 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); 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); Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357 (2005).

¹⁶⁴ Robert B. Ahdieh, *supra* note 136; Melissa A. Waters, *supra* note 136. See also 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 the optimal manner). *But cf.* Jenny S. Martinez, *supra* note 159.

conflict with international laws or human rights treaties and thus international norms should prevail, the way that courts interpret and apply these various norms are no different from any domestic high courts or constitutional courts.¹⁶⁵ By the same token, when any domestic courts refer to transnational constitutions or international laws as decisive in cases before them, their acts and interpretations of international laws are no less authoritative and no different from that of international tribunals.

3. The Relativity between Public Domain and Private Sphere

Finally, the relativity is also found between public domains and private spheres. With strong influence of globalization –especially economic globalization–, the expansion of private sphere and the dominance of private actors like transnational private corporations have been anticipated. While this prediction is not entirely incorrect, the reality has nevertheless become much more complex.¹⁶⁶

In fact, precisely because a larger space for freer transactions driven by economic globalization was now made available, it was soon tainted with all kinds of ambitious private actors from all walks of the world, thus generating almost simultaneously the great need of orderly cooperation and administrative governance.¹⁶⁷ A freer globalized space thus still requires –if not stronger– global law rather than no law.

The development of WTO and its rules that have grown into a large legal complex are such lessons. While it indicates a larger “private” space to be left for free

¹⁶⁵ Robert B. Ahdieh, *id.*

¹⁶⁶ 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) (arguing a changed -but not disappeared- line between public and private spaces still in need of public intervention).

¹⁶⁷ *Id.*

private transaction, the WTO itself involves a complex system of exercising public power. A reference was even made to it as an economic constitution for the world.¹⁶⁸

IV. Changing Landscape of Modern Constitutionalism

To what extent would the recent rise of transitional and transnational constitutionalism alter our understanding of modern constitutionalism? How would modern constitutional lawyers cope with this new development? What lesson we have learned after the study of these rather distinctive dynamics that began around the turn of the century?

In this section, we would examine in what ways and to what extent the developments in transitional and transnational constitutionalism pose challenges to our traditional understanding of modern constitutionalism. Next, we shall try to picture a changing landscape of constitutionalism and argue that notwithstanding challenges, the addition of transitional and transnational constitutionalism into the traditional understanding has actually expanded the horizon of constitutionalism into a new delta and created new opportunities for a new generation of constitutional lawyers.

A. Challenges to Traditional Constitutionalism

The recent development of transitional and transnational constitutionalism has not come without suspicions. Some worry that these new constitutional enterprises would circumvent some great virtues of traditional constitutionalism, calling them deviants

¹⁶⁸ Deborah Z. Cass, *supra* note 109.

or troubles.¹⁶⁹ Indeed, the relative nature of both developments is a clear indicator of departure. But would some departures necessarily become threats or dangers?

Others, however, hold a contrasting view. They appreciate the ways that transitional constitutionalism has invented new solutions to unusual and difficult problems posed by recent transformations of new democracies, and that transnational constitutionalism has made an unprecedented progress in human history to call for constitutions on a transnational scale and found a creative, and significant, way to protect human rights without territorial constraints.¹⁷⁰ Facing these very different positions, how could one decide on any side? We think that before we decide, we must examine challenges posed by the two new developments in constitutionalism and see whether and how they may possibly reconcile with traditional understandings. Among the many challenges, we identify three most critical ones: accountability, democratic deficit and rule of law.

1. Accountability

The first salient challenge posed by transitional and transnational constitutionalism is their inability to ensure accountability. Traditional teachings in modern constitutionalism require, and rightly so, that any decisions must be made with a clear understanding of accountability. Decision makers must be held accountable to what s/he decides, and only with this clear understanding in mind, they would be less likely to abuse their power in their decision making. But both

¹⁶⁹ Ernest A. Young, *supra* note 115; Joan L. Larsen, *supra* note 115. In addition, there may be unexpected aversions. See Kim Lane Scheppelle, *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 the transnational exchanges).

¹⁷⁰ See e.g. Harold Koh, *supra* note 115; Joan F. Hartman, *supra* note 115; Alexander Aleinikoff, *supra* note 115.

transitional and transnational constitutionalism, showed a considerable departure to this requirement.

In transitional constitutionalism, accountability issues are two-fold. First is from judicial substitute for political decision-making.¹⁷¹ In transitional states, many constitutional courts wielded strong powers to provide unusual solutions to constitutional struggles with which political players failed to tackle. For example, the South Africa Constitutional Court was granted the power to review a new constitution before promulgation, making judicial decision being part of constitutional making process that was supposed to be political in nature. Other constitutional courts rendered decisions that became part of constitutional solutions without later being codified into formal constitutional amendments. These decisions which were political in nature were made by courts that shouldered no direct and immediate accountability. “Juristocracy” –as termed by one scholar– caught vividly this problem of transitional constitutionalism.¹⁷²

The second accountability problem rises from informal channels during transition. As we have learned, some great solutions in democratic transitions were actually made through informal channels, and later –fortunately enough– all political players actually abided by them and further codified them into legal or constitutional forms.¹⁷³ But this was against the conventional wisdom of accountability. In fact, through these informal channels, decision-makers were actually intended to be free

¹⁷¹ See discussion *supra* Parts II.A.2, II.D.4.

¹⁷² See generally Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004).

¹⁷³ See discussion *supra* Part II.D.2.

from formal accountability as an incentive to increase their possibility of making deals and reaching compromises. Could any forms of accountability be assured here?

Similarly, in transnational constitutionalism, the issue of accountability also rises.¹⁷⁴ One of the salient features in transnational constitutionalism is that international treaties or agreements –regardless of being signed or acceded or being incorporated or transformed– are more often than ever being made directly applicable to domestic contexts. This however poses two problems concerning accountability: one is at an international level and the other domestic. 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 take these domestic circumstances into account. As a result, there would be no way to ensure accountability at this international level. In the domestic context, international treaties or informal norms to which a nation had not signed up are often being made applicable by judicial decisions. Here, similar to the transitional context, accountability would be rather difficult to be assured.

Are there any ways to reconcile accountability issue posed by either transitional or transnational constitutionalism? We think there may be some. One of the most important is perhaps to open up new understanding of accountability and make it more broadened. If one looked closely, one would find that certain new forms of accountability were invented particularly in transitional constitutionalism. While critical decisions were made through informal channels, they were not being made without any watch. In fact, during such a high tide of profound transitions, public

¹⁷⁴ Ernest A. Young, *supra* note 115, at 533-38.

scrutiny –both domestic and international¹⁷⁵– was in high alert. Political players knew greater accountability they would have to bear –even though not in a traditional form– when they decided whether or not to make a compromise.

As for the accountability problems drawn by “juristocracy”, a common solution now is to limit the tenure of these constitutional courts justices and to make their appointment process more deliberative.¹⁷⁶ Lastly, one possible way to make the workings of international treaties or organizations more accountable is to create potential checks and balances or even international constituencies. A more vibrant global civil society formed by transnational non-governmental organizations, private corporations or globalized citizens may shoulder such important functions more routinely in a new rising transnational constitutionalist society.¹⁷⁷

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 both transitional and transnational constitutionalism.

In democratic transitions, in order to make further democratic transitions possible, many constitution revisions were done with great compromises with old regimes, and some were even done directly by old guards like Poland, Hungary or Taiwan. These

¹⁷⁵ Jon Elster, *supra* note 95.

¹⁷⁶ KATE MALLESON & PETER H. RUSSELL, APPOINTING JUDGES IN THE AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVE FROM AROUND THE WORLD 1-10 (2006)

¹⁷⁷ See generally Mary H. Kaldor, *The Origins of the Concept of Global Civil Society*, 9 *Transnat'l L. & Contemp. Probs.* 475(1999); MARY H. KALDOR, *GLOBAL CIVIL SOCIETY: AN ANSWER TO WAR* (2003); JOHN KEANE, *GLOBAL CIVIL SOCIETY?* (2003).

initial constitutional revisions or political compromises suffered greatly in democratic legitimacy. In addition, when critical constitutional solutions were done by courts instead of by political players, they also rendered democratic legitimacy into a deficit. And this has been identified by scholars as a countermajoritarian difficulty that was widespread in almost all transitional democracies.¹⁷⁸

Likewise, in the course of transnational constitutionalism, democratic deficit has been diagnosed as the most serious problem that threatened to undermine the entire enterprise of modern constitutionalism. For example, a considerable body of literature existed to discuss the democratic deficit problems of the European Union and its new Constitution. Some of great minds in our times stood in this line.¹⁷⁹ And the direct applicability of international laws or customary international laws has exacerbated this democratic deficit question even further.¹⁸⁰ Democratic legitimacy suffers to a greatest extent when affected parties have no access to influence norms-generating process. Worse yet, in this way, domestic democratic decision-making mechanisms such as separation of powers or even federalism are likely to be undermined as they would be trumped too easily.¹⁸¹

¹⁷⁸ Bojan Bugarcic, *supra* note 47. *But see* Kim Lane Scheppele, *supra* note 47.

¹⁷⁹ *See e.g.* Dieter Grimm, *supra* note 107; Juergen Habermas, *supra* note 107.

¹⁸⁰ Ernest A. Young, *supra* note 115, at 533-41; 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 the traditional concepts of popular sovereignty). *But see* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006) (arguing that the democracy deficit critique fails to see that international law is an accepted instrument for U.S. Constitution).

¹⁸¹ Ernest A. Young, *id.* *See also* 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 canon is best viewed as a device to preserve a proper 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 compulsorily imposed constraints on other branches based on international law).

We recognize that democratic deficit was indeed a 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 already argued that the recent democratic deficit debate must be tackled by a brand-new understanding of democratic legitimacy. And there existed some practices. Take the constitution-making process of the EU as an example. In order to ameliorate democratic deficit problems, the EU's constitution decision makers decided from the start to proceed with a more open and deliberative constitution-making process by European citizens. Because of this European (re)invention, a revival of the discourse on deliberative democracy or democratic deliberation has now existed for some time, and it has inspired many to envision some new forms of democratic legitimacy even on a transnational scale.¹⁸²

3. Rule of law

The last but not the least challenge posed by new developments concerns rule of law. In the development of constitutionalism, rule of law was within the first developed group of concepts standing against 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.¹⁸³ These fundamental principles of rule of law, especially legal certainty and legal clarity, however, have been undermined to some extent in both transitional and transnational constitutionalism.

¹⁸² Many opt for more deliberative, dialectic, pluralistic forms of democratic legitimacies. *See e.g.* Juergen Habermas, *supra* note 107; Hans Lindahl, *Sovereignty and Representation in the European Union*, in *SOVEREIGNTY IN TRANSITION* 87-114, 101-112 (Neil Walker ed., 2003).

¹⁸³ BARRY M. HAGER, *THE RULE OF LAW: A LEXICON FOR POLICY MAKERS* 19-35 (1999).

In transitional democracies, one of the most contested issues was how to deal with the past regime.¹⁸⁴ Some decided to respect for legal certainty, thus leaving past wrongdoings go unpunished and unjust laws remained the same. Others, however, decided to deal with the past upfront, thus revoking unjust laws and beginning punishing wrongdoings that were completely legal in the old regimes. This undertaking undoubtedly generated a grave concern of legal certainty, and many constitutional courts were involved and compelled to decide this highly contested dilemma even today.

The development of transnational constitutionalism confronted similar challenges in rule of law. One of the most significant 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 certainty would then become fragile.¹⁸⁵

Fortunately, however, the main challenges posed by transitional and transnational constitutionalism in rule of law are not concerned with fundamentals but could be characterized as weakness. Many believe this weakness may be supplemented by the strengthening of other aspects of rule of law such as judicial review and of constitutional principles. This may be seen in some of recent decisions by the U.S. Supreme Court citing international human rights treaties or humanitarian laws that were not part of applicable laws in those cases.¹⁸⁶ Recognizing potential attacks on the aspect of rule of law, the U.S. Supreme Court rendered great efforts in providing

¹⁸⁴ Ruti Teitel, *supra* note 10, at 2049-51.

¹⁸⁵ Ernest A. Young, *supra* note 115, at 533-38.

¹⁸⁶ *See supra* note 163 and accompanying text.

lengthy and thoughtful opinions with articulated constitutional principles. In so doing, the weakness in rule of law may be ameliorated.

B. Extended Delta of Constitutionalism

The development of constitutionalism in transitional and transnational dimensions poses great challenges to our traditional ideas of constitutionalism. Would modern constitutionalism that we have blessed for centuries be superseded by recent developments? With the rise of two new fronts, in what ways could we preserve values and spirits we have honored since American and French revolutions while at the same time embrace the more recent innovation? The development of two new fronts, in our opinion, has enriched modern constitutionalism in time and space dimensions, forming a new delta in our constitutional horizon. The time and space expansion in the delta formation has provided an opportunity to digest these perhaps incompatible concerns.

1. The Formation of Constitutional Delta¹⁸⁷

The core concept of the change in constitutionalism as illustrated above is extension, but not replacement. By the same token, the process of development is more like an evolution than a revolution. The conventional view in that a constitution is expected to restrain government powers and to protect fundamental rights would continue to be honored even in transitional or transnational context. However, with

¹⁸⁷ A delta is a triangular shaped landform, where the mouth of a river flows into an ocean, sea, desert or lake, building outwards (as a deltaic deposit) from sediment carried by the river and deposited as the water current is dissipated. A deposit at the mouth of a river is usually triangular in shape. The triangular shape and great width at the base are due to blocking of the river mouth by silt, with resulting continual formation of distributaries at angles to the original course. Herodotus, the great historian, used this term for the Nile river delta because the sediment deposit at its mouth had the shape of Greek symbol delta. (http://en.wikipedia.org/wiki/River_delta)

the extension into two new fronts, the scope of constitutionalism would be broadened and the content vitalized.

To better illustrate, we present a delta of constitutionalism in a geographical metaphor, advocating that the landscape of constitutionalism has been significantly broadened from the original course and made more vibrant today. Imagine the formation of a river delta. The river of constitutionalism started with an original course that focuses primarily on negative functions of constitutions. But with transitional and transnational forces simultaneously building outwards from the sediment of social and political experiences, the river sediment gradually deposits in a triangular shape, forming a delta of constitutionalism as illustrated in Figure 1.

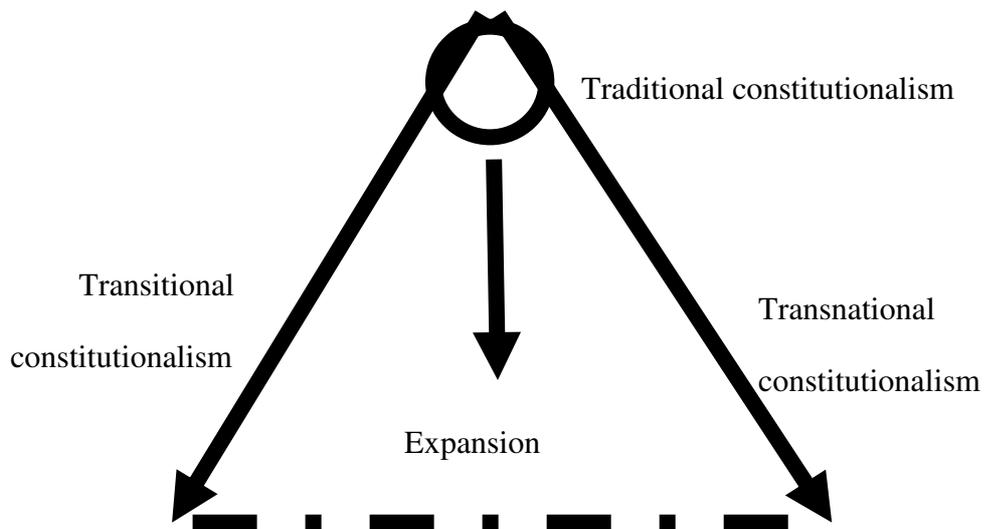


Figure 1: Delta of Constitutionalism

2. Expansion of time and space

The metaphor of delta represents a broadened scope and a more sophisticated formation in the recent development of constitutionalism. The formation of a river delta entails sediment carrying substance and energy developed along the flow of water current in both temporal and spatial senses. This corresponds finely with the formation of a constitutional delta, with transitional force representing time dimension while transnational expansion representing space dimension. Indeed, time and space associated with transitional and transnational constitutionalism respectively are precisely two dimensional expansions of modern constitutionalism.

Let us consider time dimension. As a matter of fact, the development of transitional constitutionalism is precisely a temporal expansion of traditional understandings. Traditional constitutionalism focuses on the moment at which a constitution is made and expects the constitution made at this very moment to be entrenched into future generations. In this sense, traditional constitutionalism cares no past but look forward to the future.¹⁸⁸ In contrast, transitional constitutionalism is rather time-sensitive. The former regime together with its constitution is not to be entirely abolished, but to be transformed. It is not an abruptly rupture, but a profound change. Transitional constitutionalism has to deal with the past with cautions while look into the future.¹⁸⁹ Its time-sensitivity is exemplified in three aspects.

¹⁸⁸ Time in traditional constitutionalism is both in progression and forward-looking. But a backward-looking direction nevertheless exists when dealing with constitutional interpretations. See generally Hans W. Baade, *Time and Meaning: Notes on the Inter-temporal Law of Statutory Construction and Constitutional Interpretation*, 43 AM. J. COMP. L. 319 (1995); Lillian R. BeVier, *Moment and the Millennium: A Question of Time or Law*, 66 GEO. WASH. L. REV. 1112 (1997); Michael C. Dorf, *Comment on Text, Time and Audience Understanding in Constitutional Law*, 73 WASH. U. L. Q. 983 (1995)

¹⁸⁹ Ruti Teitel, *supra* note 10, at 2068-70

The first time-sensitivity is apparent in the issue concerning transitional justice.¹⁹⁰ This dilemma troubled the many new democracies in East and Central Europe, South Africa, or Asia. To address transitional justice, one must strike a balance between the past and the future. Stability and predictability of legal order has to be taken into account, while substantive justice is no less important. Compromises must be made. The ways in that past wrongdoings are redressed are not always consistent with purely normative standards but instead mixed with practical concerns. Punishments are present with pardons and criminal tribunals appear with truth and reconciliation commissions.¹⁹¹ This time-sensitive double-edged dilemma spells out clearly the time-sensitivity in transitional constitutionalism.

The second time-sensitivity concerns judicial decisions. As demonstrated in some of unprecedented decisions, judicial review during transitional politics has proved to be acutely time-sensitive than that of normal politics. For instance, faced with an unconstitutional statute enacted in the previous regime, many constitutional courts of transitional democracies were troubled by a similar dilemma –whether to declare it unconstitutional and annul it right away or leave it to a newly-elected parliament for revision? Or there may be a third option –declare it unconstitutional but not immediately annul it, and impose a deadline for legislative compliance, leaving the already declared unconstitutional legislation remained functioning for some time.¹⁹² In so doing, a newly-elected parliament retains more time to work out a new political solution, and past regime stability is balanced with current constitutional principles. But again, how much time would be sufficient time? In Taiwan, one of the

¹⁹⁰ *Id.* at 2049-51.

¹⁹¹ *See supra* note 53 and accompanying text.

¹⁹² Tom Ginsburg, *supra* note 26, at 143-44

most significant decisions rendered by the Constitutional Court was the Interpretation No. 261, in that the Court ordered old members of the parliament to leave office in one and half a year when a new election would be conducted.¹⁹³ Some reacted to this length of time as too long, while others criticized it was too short. Long or short, the Court must dance with the time-sensitivity during such a profound transition.

Last but not least, time-sensitivity is also demonstrated in agenda settings. In the recent experiences of democratic transitions, constitutional reforms were not always completed in a single enactment of a new constitution. It becomes critical in transitional politics as to which issues to go first. In this way, reform agendas became very time-sensitive. For example, in the constitutional reform of Poland or Hungary, what was needed at the most was perhaps the protection of property rights, freedom of contract, or effective rule of law as the building block of a workable free market. But in South Korea or in Taiwan, separation of powers or a new set of electoral rules was perhaps ranked at the top of reform agenda. As a consequence, decision makers in transitional democracies have to take cautions in prioritizing reform agenda. To obtain a workable agenda, they must labor sufficient efforts to convince the general public to follow their path at their time-sensitive speed.

Next we turn to spatial expansion of constitutionalism. In the recent development, constitutions become less territory-bound as they cross over national borders more frequently than ever before. State sovereignty and constitution would longer match each other as transnational constitutionalism evolves. Constitution making and adjudication is no longer at the monopoly of nation-state. In addition,

¹⁹³ Tom Ginsburg, *id.*; Wen-Chen Chang, *supra* note 26. *See also* Jiunn-Rong Yeh, *Changing Forces of Constitutional and Regulatory Reforms in Taiwan*, 4 J. CHINESE L. 83 (1990).

constitutions have cast a great deal of influence upon non-political transnational spheres such as trade, technology, environment, culture and the like.

In a newly expanded territory of constitutionalism, one would not be faced with local constitutional issues only. Nor should one be focused merely on a constitution's "negative" functions such as constraining government powers. Today, a constitution functions rather thoroughly in almost every aspect of modern life. Take trade issue as an example. It used to be of little connections to constitution laws, but has now been linked to transnational human rights concerns. Likewise, national human rights regimes increasingly bear transnational connotations. Either a national administration refers to customary international practice or a national court relies upon world values or international norms. What we would expect from a constitution becomes rather complex and expansive – including social integration, agenda setting or civil-culture promotion, all notable constitutional functions today.

The new developments in today's constitutionalism would in no way replace traditional understandings. More variables in time and space, however, must be recognized and appreciated. With the rise of a new delta in constitutionalism, institutional choices would be more likely to be opened up for collective decision-making. At the same time, however, constitutional outcomes would turn to be less predictable. Nevertheless, certain conventional principles and values must continue to be honored against contingencies in time and space. In so doing, more room for deliberation among political parties or groups should be guaranteed and Constitutional decision-making has to be more tackled on dialectic basis.

V. Conclusion

Conventional understanding of constitutionalism has been of limiting focus and rights-based, holding the power of government confined by 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 have evolved for a century or two. On the one hand, constitutional experiences in transitional states have demonstrated a new horizon of constitutional functions beyond limiting government powers and towards more diversified ways of constitutional change. On the other hand, constitutions have functioned across national borders beyond the domain of national sovereignties in an era of globalization. These all make traditional understandings of constitutionalism unfit, if not obsolete, in transitional or transnational context.

The developments in transitional and transnational constitutionalism would certainly pose challenges to conventional understandings of constitutionalism. We argue, however, that the change has been more like an expansion than a replacement. Some of the most difficult challenges such the issues concerning accountability or democratic deficit would be resolved gradually by creative efforts in reinventing new solutions.

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