COMPARATIVE CONSTITUTIONALISM

Cases and Materials

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Chapter 1

WHAT IS A CONSTITUTION?

This chapter tackles the major, general subjects central to the issues and concerns surrounding comparative constitutional law. Section A., titled Why Comparative Constitutional Law?, explores the uses, benefits, rewards, drawbacks, and pitfalls of comparative analysis in constitutional law. Section B. analyzes the concept of "constitutionalism," which remains elusive and contested, and is distinguished from the concept of the "constitution." Section C. focuses on the relation among "constitutionalism," "justice," and "the rule of law." Section D. deals with constitutional models implemented throughout the world, including the contrast between written and unwritten constitutions; the major types of contemporary constitutional systems; and in light of the recent consolidation of supranational governing systems, such as the European Union, the prospects for cogent supranational constitutions. Finally, Section E. examines the issues surrounding the making and altering or revising of constitutions and focuses particularly on the relationship between constitution-making and constitutional amendment.

A. WHY COMPARATIVE CONSTITUTIONAL LAW?

Comparison is at the center of all serious inquiry and learning. Moreover, our natural curiosity prompts us to compare our experiences, beliefs, customs, traditions, and natural and institutional settings with those of others far and near. Consistent with this, the study of law, naturally, should be drawn to—and benefit from—comparative analysis in general and comparative constitutional analysis in particular. This has grown more common, as the world becomes increasingly interdependent, constitutional law expands beyond national boundaries, and national courts responsible for constitutional adjudication look more frequently to their counterparts in other countries for ideas and guidance.

Interest in comparative constitutional law has palpably increased in recent decades, due to, among other developments, (1) the proliferation of new constitutions and transitions to constitutional democracy in various parts of the world, such as Eastern Europe, sub-Saharan Africa, and Latin America, and (2) the growing trend toward internationaliza-

tion of constitutional rights, begun after World War Two. Even before, by the end of World War One, a large number of national constitutions already gave clear recognition to the fundamental rights of the individual. In the aftermath of World War Two, upon the creation of the United Nations, in 1945, and its proclamation of the Universal Declaration of Human Rights, in 1948, the trend toward the internationalization of fundamental rights was decidedly on its way. Although the 1948 Declaration wielded no legally binding force, clearly it thrust the kinds of rights promoted by the French Declaration of the Rights of Man and of the Citizen of 1789 and the American Bill of Rights of 1791 to the forefront of the international arena. The 1948 Declaration was followed by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which became binding after ratification by a sufficient number of states, in 1976, ten years after initial approval by the UN. Concurrent with the expansion of international human rights, several regional charters for the protection of human rights emerged, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, European HR Convention) and its African and American counterparts. Although both international and regional schemes for the protection of human rights emanate from international treaties rather than constitutions and often differ significantly in application and implementation from rights enshrined in domestic constitutions, transnational rights share much in terms of content and scope with many of their domestic counterparts. Moreover, in some cases, such as the rights protected by the European HR Convention, judicial enforcement is akin to what is generally available under many domestic constitutions. For instance, an aggrieved individual in a country party to the European HR Convention may pursue claims arising under the Convention before the European Court of Human Rights (ECHR), seated in Strasbourg, France. See, generally, Mark Janis, Richard Kay, and Anthony Bradley, *European Human Rights Law: Text and Materials* (2d ed. 2000).

In more recent times, contacts among judges from different countries have increased sharply, and foreign judicial decisions have become more readily available through the Internet.[a] Moreover, interest in, and opportunities for, exchanges among constitutional scholars from different parts of the world have risen in the past couple decades.[b] Notwithstanding these evolving trends, comparative legal studies in general and comparative constitutional law in particular are subject to special challenges and objections. Possible objections, concerning the feasibility, desirability, and utility of meaningful comparative analysis, concentrate around the danger of misinterpreting foreign legal and constitutional

a. See, e.g., Elizabeth Greathouse, *Justices See Joint Issues with the EU*, Wash. Post, July 9, 1998 (Justices O'Connor and Breyer commenting on a meeting between four U.S. Supreme Court justices and the judges of the court of the European Communities, in Luxembourg, and indicating that they might use, and refer to, European Union court decisions).

b. For example, the International Association of Constitutional Law regularly organizes meetings, bringing together constitutionalists from all parts of the world. In its 1999 World Congress, in Rotterdam, more than 400 scholars from 55 countries gathered to discuss various comparative constitutional law issues.

materials by taking them out of context. Legal norms and institutions are embedded in particular sociopolitical and cultural settings, and their meaning and import are linked, at least in part, to such settings. Accordingly, to the extent that the comparativist is unfamiliar with the context of foreign materials examined for purposes of comparison, he or she may misinterpret apparent similarities or misunderstand the import of apparent differences.

These difficulties seem more daunting in constitutional law than in private law. For example, to the extent that contract law is predominantly concerned with facilitating economic exchange and maximizing efficiency, political and cultural differences may play a rather minor role in meaningful comparison of various national contract law regimes. In contrast, constitutional frameworks and objectives may differ so markedly from one country to the next as to raise serious questions about the worth of comparative analysis. How can separation-of-powers problems or solutions in a presidential democracy, such as the U.S., be relevant for a parliamentary democracy, such as Germany or India? Or, how does the teaching of religion in public schools in a country where it is clearly constitutionally permissible, such as Germany, bear any useful relation to the same issue in countries with constitutions committed to the separation between religion and the state, such as France or the U.S.? Cf. Otto Kahn–Freund, *On the Uses and Misuses of Comparative Law*, 37 Mod. L. Rev. 1, 6, 7 (1974) (arguing that private law is much more amenable to transplant from one country to another than constitutional law).

Although these difficulties should not be overlooked, they can be adequately managed through proper consideration of significant contextual differences. Moreover, in the case of basic human rights, which are widely incorporated in national constitutions as well as in international and regional conventions, there are strong indications of widespread overlap—if not underlying universalism—at the core. For an enlightening and thorough discussion of the controversy over the "universalism" or "relativism" of human rights, see Yash Ghai, *Universalism and Relativism: Human Rights as Framework for Negotiating Interethnic Claims*, 21 Cardozo L. Rev. 1095 (2000). For a defense of a workable overlap in the context of cultural diversity, see Charles Taylor, *Conditions of an Unenforced Consensus on Human Rights*, in *The East Asian Challenge for Rights* 124–46 (Joanne R. Bauer and Daniel Bell eds., 1999); Abdullahi Ahmed An–Naim, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law* (1990) (arguing for universal standards subject to culturally diverse interpretations); Michel Rosenfeld, *Can Human Rights Bridge the Gap Between Universalism and Cultural Pluralism? A Pluralist Critique Based on the Rights of Minorities*, 30 Colum. H.R.L. Rev. 249 (1999) (rejecting both universalism and relativism and arguing for a pluralistic approach resulting in widespread convergence amid certain inevitable divergences).

Another compelling reason for the pursuit of comparative constitutional analysis stems form the fact that constitutional norms elaborated in one country have often been adopted in others. Thus the Canadian Charter of Rights and Freedoms (Constitution Act of 1982, pt. I) has

influenced the drafting of bills of rights in South Africa, New Zealand, and Hong Kong and the Basic Law in Israel. See Sujit Choudhry, *Globalization in Search of Justification: Towards a Theory of Comparative Constitutional Interpretation*, 74 Ind. L.J. 819, 821–22 (1999). Such borrowings, moreover, have occurred not only in the context of constitution-making but also in constitutional interpretation. See, e.g., Gary J. Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States* ch VI (1993) (discussing the Israeli Supreme Court's adoption of American First Amendment free speech doctrine in the elaboration of its own free speech jurisprudence). See also the *Ahmadis* cases in Chapter 8.

The sharing of constitutional materials from one country to another has also led to rejection rather than adoption. In this case a country considers constitutional norms or doctrines prevalent in another country and deliberately decides to reject them in the course of instituting its own constitutional norms or doctrines. Typically such rejections follow from a conclusion that the norms originating abroad are either inefficient or contrary to the basic values, ideology, or constitutional objectives of the potentially borrowing country. Thus, after careful analysis of U.S. free speech jurisprudence in the context of a hate speech case, the Canadian Supreme Court rejected the American approach for reasons both of ideology and efficiency. See *R. v. Keegstra*, [1990] 3 S.C.R. 697. In short, as Jon Elster noted in examining constitutional elaboration in the course of transition to democracy in Eastern Europe, upon the collapse of the Soviet empire, "in constitutional debates, one invariably finds a large number of references to other constitutions," in some cases "as models to be imitated" but in others "as disasters to be avoided, or simply as evidence for certain views about human nature." Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. Chi. L. Rev. 447, 476 (1991).

References to constitutions other than one's own are thus important not only in terms of searching for similarities but also in terms of looking for relevant or useful differences. This is true from the standpoint of constitution-makers or interpreters and from those engaged in comparative analysis. Moreover, both users and analysts of foreign constitutional materials confront the need to deal successfully with relevant context-dependent variables. Accordingly, the tasks performed by comparativists bear strong similarity to those confronting all legal practitioners and scholars. In both cases analogical reasoning—that is, drawing analogies and ferreting out disanalogies—is crucial. Cf. Cass R. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741 (1998) (stressing prominence and superiority of analogical reasoning in law). The key difference between those who use foreign constitutional materials and those who remain within their own national scene is that the former will typically confront greater difficulties than the latter concerning access and proper evaluation of the relevant contextual issues.

Because of the multiplicity and complexity of contextual variables, apparent similarities or differences stemming from diverse national constitutions may sometimes prove misleading. For example, a cursory review of various freedom of speech provisions drawn from numerous constitutions throughout the world, reveals a striking similarity in the

formulation of that right. Examination of how freedom of speech is construed in various countries, however, reveals vast discrepancies, ranging from virtually unconstrained liberty to extensive speech regulation. See Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, in *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* 353 (Michel Rosenfeld ed., 1994). What consequences should be drawn from Schauer's conclusions? That the constitutional text matters little? That not all cultural traditions share the same respect for fundamental constitutional rights? Or that different cultures genuinely disagree on the proper scope of freedom of expression? Or else, that they may not so much disagree as they confront, respectively, varying degrees of threats to political stability?

Conversely, what appears to be clearly different may turn out in the end to be quite similar. Compare, for example, the nearly contemporaneous abortion decisions issued by the U.S. Supreme Court (USSC) and the German Federal Constitutional Court (GFCC). In *Roe v. Wade*, 410 U.S. 113 (1973), (see Chapter 5, Subsection C.1.) the USSC recognized a constitutional right to abortion predicated on a woman's privacy and liberty rights. In contrast, the GFCC, in the *Abortion I Case*, 39 BVerfGE 1 (1975), (see Chapter 5, Subsection C.1.) stressed above all the paramountcy of the right to life, noting the German Constitution's great commitment to reversing the Nazi regime's wanton disregard for life evinced by its implementation of the extermination plan embodied in its "final-solution" policy. In spite of their markedly different approaches, however, both courts carved out abortion rights that seem nearly equivalent in terms of their practical scope. Are the differences between the two abortion jurisprudences or the similarities between the practical results worthy of greater emphasis? Are the differences merely a matter of rationalization in the context of different political cultures? Or do they carry important legal or constitutional implications? Noteworthy in this connection is that both Germany and the U.S. later narrowed the scope of constitutionally protected abortions. See Chapter 5, Subsection C.1., for the relevant cases.

There is one crucial difference between the use of foreign constitutional materials by constitution-makers or interpreters on the one hand and comparativists on the other. The former typically adopt a *participant* perspective, while the latter are properly confined to embracing an *observer* perspective. While a participant may approach foreign constitutional materials with due concern for relevant contextual nuances, he or she may also have recourse to such materials for *strategic* purposes. An interpreter in a recently established constitutional order, for instance, may borrow materials from an established constitutional order to imbue domestic constitutional interpretations with an aura of greater legitimacy. But in borrowing material from other constitutions a participant may have less concern with a true fit than with the appearance of a fit in order to achieve greater legitimacy. See, e.g., Jacobsohn, *op. cit.* at ch 6 (pointing out that although the Supreme Court of Israel has widely embraced American First Amendment doctrine in the context of its hate speech jurisprudence, it has nonetheless reached results that are diametrically opposed to those in American courts).

For reasons of principle and experience it seems quite natural that new constitutional democracies should borrow constitutional materials from older, more-established constitutional orders. A recent example is South Africa, which established a new constitutional order upon repudiation of its apartheid past. The South African Constitution specifically empowers courts to consider foreign law when interpreting the Bill of Rights. S.Afr. Const. § 39(1) (c.). Consistent with this mandate, the South African Constitutional Court (SACC) has relied heavily on foreign constitutional materials. See Margaret A. Burnham, *Cultivating a Seedling Charter: South Africa's Court Grows its Constitution*, 3 Mich. J. Race & L. 29, 44 (1997) (SACC's use of comparative jurisprudence as means for South Africa to claim "its place among the world's constitutional democracies"); *State v. Mhlugu*, 1995 (3) SALR 867, 917 (CC) (According to Justice Sachs, South Africa's constitutional jurisprudence must take its place "as part of a global development of constitutionalism and human rights.").

Conversely, one might expect that older, more-developed constitutional systems might be less prone to drawing materials form other constitutions. While this may have been true in the past, it is certainly less so now. There are several reasons for this shift, including the trend toward internationalization of constitutional norms and the increased availability of foreign materials for comparison, both mentioned above. Additionally, scientific advances and changing material conditions give rise to new constitutional issues that the older systems have not yet encountered and that on occasion may be adjudicated first within more recently established constitutional democracies. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997) (in ruling on constitutionality of assisted suicide the USSC referred to earlier decisions on the subject by courts in Australia and Colombia).

Traditionally, the U.S., which boasts the world's oldest living constitution, has been particularly resistant to comparative approaches to constitutional law, but this is changing. Significantly, Professor Bruce Ackerman, a foremost constitutional theorist, appears to have altered his views on the uses of comparative law within less than a decade. In 1991, he wrote that "to discover the [American] Constitution we must approach it without the assistance of guides imported from another time and place. Americans * * * have * * * built a genuinely distinctive pattern of constitutional thought and practice." Bruce A. Ackerman, *We The People: Foundations* 3 (1991). By 1997, however, he was focusing on the rise of "world constitutionalism." See Bruce A. Ackerman, *The Rise of World Constitutionalism*, 83 Va. L. Rev. 771, 774–75 (1997), where he wrote:

> First and foremost, we must learn to think about the American experience in a different way. Until very recently, it was appropriate to give it a privileged position in comparative study. Other experiments with written constitutions and judicial review were simply too short to warrant confident predictions about which if any, would successfully shape long run political evolution. But as we move to the next century, such skepticism is no longer justified. Places like Germany or Italy or the European Union or India will be passing the fifty-year mark in their experiments with written texts and constitutional courts; France and Spain will soon be experiencing the distinctive challenges of a second full generation of judicial review * * *. [A]ll these initiatives * * * add up to a formidable fund of experience for comparative investigation. Against this emerging background, we must learn to look upon the American experience as a special case, not as the paradigmatic case.

Given the increasing role of comparative constitutional law, what can be gained from the study of foreign constitutional materials and from acquiring the skills of comparative analysis? To the extent that one's own domestic courts use and refer to foreign constitutional materials, law students and legal practitioners need to become familiar with such materials and learn how to deal with them, much as they must with their equivalent domestic materials. Beyond that, there is no consensus on the potential of comparative work in constitutional law. This is due, in part, to the different uses that may be made of comparative materials. While a casebook may suggest the primacy of comparing cases in the context of judicial interpretation of constitutional norms, consideration of foreign materials can be useful for other purposes, such as making or amending a constitution. Thus in rejecting the relevance of foreign constitutional experience in the context of adjudicating a dispute concerning the limits of the national government's powers under American federalism, in *Printz v. United States*, 521 U.S. 898 (1997), (see Chapter 4) Justice Scalia emphasized that "comparative analysis [is] inappropriate to the task of interpreting a constitution though it [is,] of course, quite relevant to the task of writing one." *Id.* at 921 n.11. But see Justice Breyer's dissenting opinion in *Printz* (see Chapter 4). Moreover, assuming comparative analysis is appropriate both in constitutional interpretation and in constitution-making, its value may vary, depending on which of the two is at stake. Thus Justice Breyer argued for consideration of foreign experiences with federalism in *Printz* for the limited purposes of dealing with open questions and for these to be resolved pursuant to empirical evaluation. In contrast, in determining what kind of federalism to embrace in the making of a new constitution, a much broader use of foreign materials may be warranted.

The lack of consensus concerning the proper role of comparative analysis is also due to broader ideological disagreements about the nature and function of law. At one end of the spectrum are those who believe that the legal problems that confront all societies are essentially similar and that their solutions are fundamentally universal. See, e.g., Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* 36 (Tony Weir trans., 2d ed. 1987); David M. Beatty, *Constitutional Law in Theory and Practice* (1995) (arguing that basic principles of constitutional law are essentially the same throughout the world). At the other pole are those who maintain that all legal problems are so tied to a society's particular history and culture that what is relevant in one constitutional context cannot be relevant, or at least similarly relevant, in another. Compare Montesquieu's observation that "the political and civil laws of each nation * * * should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another." Charles de Secondat, Baron de Montesquieu, *The Spirit of*

Laws 8 (Ann M. Cohler et al. eds. and trans., 1989). Between the two extremes are various other positions. Some believe that the problems confronted by different societies are essentially the same, see, e.g., Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. Chi. L. Rev. 519, 535 (1992), but that the solutions are likely to be different, owing to varying circumstances that distinguish one society from the next. See Mary Ann Glendon, *Comparative Legal Traditions* 10 (2d ed. 1994). Consistent with this view, the principal benefit of comparative work stems from its ability to highlight the specific presuppositions, distinct conditions, and particular cultural and ideological commitments that circumscribe domestic constitutional norms and practices that tend to be taken for granted. In this view the most important function of comparative constitutional analysis is to enhance the knowledge and understanding of one's own system.

Without regard to whether problems and solutions are essentially similar across different constitutional systems, one can maintain that there is a significant degree of congruence between problems and their possible solutions across the spectrum of contemporary constitutional democracy. Accordingly, comparative analysis can be useful even if the specific constitutional norms or practices prevalent in one system are unlikely to have a direct impact on another constitutional system. For example, although systems of constitutional review vary greatly (see Chapter 2), their proliferation since the end of World War Two has yielded much information for fruitful comparative analysis.

Constitutional "transplants" and influences are proper subjects of comparative analysis, but their evaluation is bound to depend on the particular take one has on the dynamic between similarities and differences across separate constitutional orders. One important variable is how one construes the nexus between constitutional norms and national identity. If the nexus is weak, then transplants may be relatively unproblematic. Cf. Cass R. Sunstein, *On Property and Constitutionalism*, in *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* 383, 398 (Michel Rosenfeld ed., 1994) (arguing for implantation of Western-type private property rights and against constutionalization of social rights in new constitutions for formerly socialist Eastern European polities in transition to market economies). Professor Sunstein stated:

> It is often said that constitutions, as a form of higher law, must be compatible with the culture and mores of those whom they regulate. In one sense, however, the opposite is true. Constitutional provisions should be designed to work against precisely those aspects of a country's culture and tradition that are likely to produce harm through that country's ordinary political processes. There is a large difference between the risks of harm faced by a nation committed by culture and history to free markets, and the corresponding risks in a nation committed by culture and history to social security and general state protection.

Some have argued that the link between a country's constitution and its national identity may vary greatly. For example, Professor Tushnet has contrasted the Indian Constitution, which he characterizes as quite removed from the country's identity, to the American Constitution, which he claims expresses the national character. Mark V. Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225, 1270–71 (1999). Does this mean that a country like the U.S. should be less susceptible to constitutional transplants than one like India? Or does it simply mean that countries are open to different kinds of transplants, depending on how closely their constitutions are linked to their national character?

Constitutional influence or transplants can be either positive or negative. See Andrzej Rapaczynski, *Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad*, in *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* 405, 407–08 (Louis Henkin and Albert J. Rosenthal eds., 1990):

> By "positive influence" I mean the adoption or transformation of a legal concept, doctrine, or institution modeled in whole or in part on an American original, where those responsible are aware of the American precedent and this awareness plays some part in their decision. An example is the adoption of the American type of federalism in Australia, or the influence of American First Amendment doctrines on the free speech jurisprudence of Israel. * * * By "negative influence," I mean a process in which an American model is known, considered, and rejected, or in which an American experience perceived as undesirable is used as an argument for not following the American example. Examples of this kind of influence are provided by the Indian decision not to include a due process clause in the Indian constitution, or the portrayal of judicial review as a reactionary American institution in preventing its establishment in France in the first half of the twentieth century * * *.

Whether positive or negative, influences and transplants are more likely to involve transformation rather than mere copy and are more prone to being dynamic rather than purely static. For example, the Indian rejection of a due process clause stemmed from a consideration of the American experience in enshrining substantive property norms in the early twentieth century. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905), in Chapter 10, Subsection B.1. (New York law limiting number of hours of work of bakery employees held to violate due process property rights of employers and employees). Although this interpretation of the Due Process Clause was repudiated by the USSC in the 1930s (see Chapter 10), the Indian framers, acting in the late 1940s, considered the American experience and specifically opted to exclude property due process rights form their new constitution to ensure against repeating the American *Lochner* experience. See Soli J. Sorabjee, *Equality in the United States and India*, in *Constitutionalism and Rights*, above, at 94, 96–97.

Perhaps the most daunting task confronting the comparativist is that of properly evaluating similarities and differences. Initial appearances may not prove accurate. See Michel Rosenfeld, *Justices at Work: An Introduction*, 18 Cardozo L. Rev. 1609, 1609–10 (1997). In part, however, as critical theorists have warned, comparativists may overestimate similarities for ideological reasons. See Günther Frankenberg, *Stranger than Paradise: Identity & Politics in Comparative Law*, 1997 Utah L. Rev. 259, 262–63 (criticizing mainstream comparativists as

"Anglo–Eurocentric" paternalists prone to imposing Western hegemonic approaches on the subject and characterizing comparative law as "a postmodern form of conquest executed through legal transplants and harmonization strategies"). Critical scholars have also contended that domestic law is ideological. See, e.g., Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561 (1983). Are ideological distortions likely to be more problematic in the context of comparative law than in domestic law? Or are differences in ideology or perceptions of such differences likely to play similar roles in both fields?

B. WHAT IS CONSTITUTIONALISM?

"Constitutionalism" cannot be equated with "constitution," though the two concepts are linked. At present, most countries—and numerous subnational political units, such as the states in the U.S., the *Länder* in Germany, and the cantons in Switzerland—have constitutions, but not all such constitutions satisfy the requirements of constitutionalism. Whether a country has a constitution is a question of fact, easily answered in most cases and particularly in those where an institutionalized, written constitution is involved. In contrast, whether a constitution conforms to the dictates of constitutionalism cannot be determined without some kind of *normative* evaluation. Constitutionalism is an ideal that may be more or less approximated by different types of constitutions and that is built on certain *prescriptions* and certain *proscriptions*. Determining whether a particular constitution approximates the ideal of constitutionalism, and to what extent, depends on an evaluation of how the institutions and norms promoted by the constitution in question fare in terms of the constitutionalist ideal.

What does the ideal of constitutionalism require? No consensus exists in answering this question. Consider, however, the following.

Louis Henkin, A NEW BIRTH OF CONSTITUTIONALISM: GENETIC INFLUENCES AND GENETIC DEFECTS, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES

39, 40–42 (Michel Rosenfeld ed., 1994).

Sources of political ideas and models for institutions or instruments are rarely single or simple, and they are notoriously difficult to identify. The ideas that fed the spread of constitutionalism, and the earlier expressions of constitutionalism that shaped recent constitutions, cannot be determined with confidence. Locke, Montesquieu, Kant, Rousseau, and their successors (Bentham, Mill, the socialists) have fed the stream of relevant ideas, but contemporary framers of constitutions rarely go back to original sources for guidance. There can be little doubt, however, of the immediate influence of two prominent instruments of constitutional character: the United States Constitution and its Bill of Rights, now 200 years old, and the International Bill of Rights—the common designation for the Universal Declaration of Human Rights and the two

principal international covenants on human rights[1] born in our times and still maturing.[2]

* * *

Constitutionalism is nowhere defined. We speak of it as if its meaning is self-evident, or that we know it when we see it. Constitutionalism is commonly identified with a written constitution, yet not all constitutional texts are committed to the principles and serve the ends of constitutionalism. A constitution generally provides a blueprint for governance and government, but the system that is blueprinted may not satisfy the demands of constitutionalism. Some constitutions merely describe the existing system of government, proclaim societal goals, promise programs and policies, or serve other purposes that may not be intimately related to the concerns of constitutionalism.

The following sets out, in summary form, my understanding of the principal demands of constitutionalism.

1. Contemporary constitutionalism is based on popular sovereignty. "The people" is the locus of "sovereignty"; the will of the people is the source of authority and the basis of legitimate government. The people alone can ordain and establish the constitution and the system of government. The people remain responsible for the system which they establish.

2. A constitutionalistic constitution is prescriptive; it is law; it is supreme law. Government must conform to the constitutional blueprint and to any limitations the constitution imposes. There can be no legitimate government other than as constitutionally ordained.

3. With popular sovereignty have come related ideas, namely, government ruled by law and governed by democratic principles. Constitutionalism therefore requires commitment to political democracy and to representative government. Even in times of national emergency, the people remain sovereign. Constitutionalism excludes government by decree, except as authorized by the constitution and subject to control by democratic political institutions.

4. Out of popular sovereignty and democratic government come dependent commitments to the following: limited government; separation of powers or other checks and balances; civilian control of the military;

1. Universal Declaration of Human Rights, G.A. Res. 217A (III). U.N. Doc A/810, at 71, (1948); International Covenant on Civil and Political Rights, Dec 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

2. No doubt other influences should be credited. England contributed to the idea of limited government, beginning with the Magna Carta, and to the idea of parliamentary government, through the Glorious Revolution and the Bill of Rights (1688). The French Declaration of the Rights of Man and of the Citizen helped spread the idea of inherent rights around the world. The French Declaration itself borrowed from American instruments. * * *

In a number of respects, notably the movement to a Constitutional Court (as distinguished from constitutional review by the ordinary national judiciary as in the United States) the Basic Law of the Federal Republic of Germany has served as a model, and various other European constitutions have doubtless been studied by constitution makers in Eastern and Central Europe and elsewhere. Many of those instruments also derived ideas and followed examples from the United States and from the international human rights movement.