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

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Abstract:

Globalization and regional remapping have made unprecedented challenges to traditional understandings of constitutional and international laws. Not only constitutions may function across national borders but also international treaties and regional cooperative frameworks may deliver constitutional or quasi-constitutional functions. This paper aims at theorizing recent developments of transnational constitutionalism by examining its features, functions and characteristics. We find that transnational constitutionalism features transnational constitutional arrangements, transnational judicial dialogues and global convergence of national constitutions. Notwithstanding main functions in facilitating a global market, the development of transnational constitutionalism nevertheless undermines accountability, democracy and rule of law at both domestic and transnational levels. However, this paper proposes both domestic and transnational institutional checks and balances as solutions. It argues for a complex of domestic and transnational institutional interactions as functional checks and balances with transnational constitutionalism.

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I. Foreword

The world of constitutionalism has changed dramatically in the recent years. Globalization and regional remapping in response to new alliances of emerging democracies are primary driving forces. In the beginning of this new millennium, one of the most important constitutional enterprises that drew a global attention was the writing of the European Constitution. The Constitution for the European Union (EU), a supranational organization rather than a nation-state, tested our traditional notion that only nation-states could write constitutions. The enactment of the EU

1 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 infra Part II.A.1 and accompanying notes.
Constitution eventually failed.\textsuperscript{2} The constitution-becoming of the EU, however, continued to progress, moved not only by formal enactments but also—perhaps more importantly—by judicial interpretations and informal practices.\textsuperscript{3}

We also begin to realize that many international regimes or regional cooperative frameworks are now delivering constitutional or quasi-constitutional functions in certain aspects.\textsuperscript{4} The Charter of the United Nations (UN) is now being described as a constitution for the international community, while the World Trade Organization (WTO) being an economic charter. Even a regional—mainly economic—compact such as the North America Free Trade Agreement (NAFTA)\textsuperscript{5} is characterized by some as being “constitutional”. Mostly evident of constitutional functions are international human rights instruments that are now entrenching into domestic legal orders by some creative ways that were simply unimaginable in the past. On the one hand, certain rights have become “\textit{jus cogens}” (compelling, binding law) or “\textit{obligation erga omnes}” (a protecting duty for all states) while others obtain the status of customary international law.\textsuperscript{6} On the other hand, the domestic “constitutionalization” of international treaties has facilitated this trend and not surprisingly, fueled intense

\textsuperscript{2} During the ratification process, the French and Dutch voters rejected respectively the constitutional draft in 2005. After the two-year ratification process had passed, the heads of member states signed the Treaty of Lisbon on December 13, 2007 as a proposal to reform the existing EU structure. Many provisions in the Treaty of Lisbon are reflective of the constitutional draft. The date set for ratification for the Treaty of Lisbon is on January 1, 2009. For updates of this process, see http://europa.eu/lisbon_treaty/take/index_en.htm

\textsuperscript{3} See Wen-Chen Chang, \textit{Constructing Federalism: the EU and US Models in Comparison}, 35 EURAMERICA 733 (2005) (arguing the constitution-becoming process of the EU relies largely upon judicial construction and elite efforts).

\textsuperscript{4} See discussion \textit{infra} Part II.A.1. and accompanying notes.

\textsuperscript{5} The North American Free Trade Agreement is a trade agreement among Canada, the United States, and Mexico that became effective in January 1, 1994.

\textsuperscript{6} See discussion \textit{infra} Part II.A.1.
debates. Some national constitutions directly embrace international laws to be part of their laws. Many more national judicial bodies have referred to international treaties or transnational norms to which their national political counterparts have not yet agreed. Not to mention transnational judicial dialogue abound that seems to create a constitutional regime merely through conversations between judges.

Sovereign boundaries against which traditional constitutions are drawn now seem gradually being crossed over. Increasingly than ever, many transnational arrangements are assuming institutional as well as dialectical functions within, between and beyond nation-states. Transnational constitutionalism, as some started to characterize these recent transnational developments across national borders, clearly depicts a changing terrain of modern constitutionalism. Faced with these new developments, we are left to wonder whether and to what extent our traditional understanding of constitutions and their functions are altered both conceptually and practically by these emerging transnational features. How would modern constitutional lawyers cope with these new developments? What lessons shall we learn from these rather distinctive dynamics that began recently?

This article is attempted at theorizing recent transnational phenomena across national borders and responding to new challenges posed by these new developments. Following this, the second part analyzes the development of transnational constitutionalism by identifying its distinctive features, functions, characteristics and

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7 See discussion infra Parts II.A.3.
8 See discussion infra Part II.B.3. & II. C.1.
9 See e.g. NICHOLAS TSAGOURIAS ED., TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN MODELS (2007). This edited volume invites scholars to reflect of transnational constitutional features and most focus is, not surprisingly, the development of the European constitutional regime.
perspectives. The third part examines to what extent and in what ways the
development of transnational constitutionalism challenges to our traditional
understanding of modern constitutional laws. It addresses three problems:
accountability, democratic deficit and rule of law. We then try to suggest possible
solutions based upon a complex body of transnational and domestic institutions that
may provide checks and balances in creative ways unimaginable before. We conclude
with a perplexing, but nevertheless positive, view of transnational constitutionalism
that creates new possibilities for a coming generation of constitutional as well as
international legal scholars.

II. The Emergence of Transnational Constitutionalism

Driven by globalization and its related complexities, constitutionalism has
developed beyond its traditional confinement, nation-states.10 Today,
constitutionalism takes place not only within nation-states but also above and beyond
nation-states. Perhaps even more importantly, it serves as institutional and dialectical
functions at both domestic and transnational levels. In the following, we shall define
what we mean by “transnational constitutionalism”, identify its particular functions,
argue for its distinctive characteristics and examine this development from diverse
perspectives.

A. Features

How exactly constitutionalism has developed above and beyond national
boarders? Today, many constitutions and quasi-constitutional arrangements have

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10 Bruce Ackerman, The Rise of World Constitutionalism, 83 VA. L. REV. 771, 775-78 (1997) (arguing
that constitutionalism may develop from treaty to constitution or vise 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).
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 in the following, are distinctive in understanding this new phenomenon. They include: first, the development of transnational constitutions or quasi-constitutional arrangements, second, the abundance of transnational judicial dialogues, and lastly, a global convergence of national constitutions.

1. Transnational constitutions or quasi-constitutional arrangements

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

One of the most important examples with regard to a constitutional enactment across national borders is of course the writing of the EU Constitution. Notwithstanding a supranational organization, the EU launched the constitution-making process that began in this century but failed later with its ratification. The Constitutional Treaty\(^\text{11}\) – despite its rather ambiguous terminology – was crafted carefully in a process more like constitution-making than treaty signing. It was drafted in a called Convention, passed by an intergovernmental conference in Rome and required to be ratified by member states where popular referenda might be called. It was not only deemed as a Constitution but also expected to function like a Constitution: constructing European citizenship, facilitating democracy, providing

\(^{11}\) The official name is “the Treaty of Establishing a Constitution for Europe”.

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effective governance and protecting fundamental rights in the European Union.12

While organizing principles may be different from those of domestic constitutions, the EU Constitution nevertheless included standard components of any constitutions from a bill of rights, judicial review, federalism, to separation of powers, and even some independent commissions or agencies.13 Even though the enactment of the EU Constitution eventually failed, the direct effect and supremacy status of the EU regulations recognized and sustained by the European Court of Justice (ECJ) already prompted the EU regime to the constitutional level.14

Moreover, many international regimes or regional cooperative frameworks are now also delivering constitutional or quasi-constitutional functions in key aspects. Treaties or agreements that are regulated by international laws and operating traditionally among states have begun to present features of traditional constitutionalism: rights protection, power constraints, and even judicial review, to

12 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 SIEDESTOP, DEMOCRACY IN EUROPE (2001).

13 Wen-Chen Chang, supra note 3 (arguing both the US and EU constitutional models have developed to federal arrangements through different mechanisms). See also generally KALYPSO NICOLAIDIS & ROBERT HOWSE EDS., THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION (2001).

14 The more detailed discussion on the direct effect and primacy status of the EU regulation and in what ways these doctrine may work out with checks and balances between transnational and national institutions, see III.B.1 and also MONICA CLAES, THE NATIONAL COURT’S MANDATE IN THE EUROPEAN CONSTITUTION (2006) (arguing that direct effect and supremacy of the EU laws have made the EU a constitutional entity and the ECJ a constitutional court).
name just a few.\textsuperscript{15} For instance, the most popular and powerful mechanism for global trade—the WTO and related agreements—has been characterized by some as a global economic constitution.\textsuperscript{16} The guarantee of contractual freedom and private ownership and the establishment of the Dispute Settlement Body—in particular, the Appellate Body for the enforcement of treaty-related rights are reminiscent of liberal constitutions that have a bill of negative rights and the institution of judicial review.\textsuperscript{17} Similarly, the UN Charter coupled with major UN human rights treaties, despite being criticized as toothless in the past, has been revitalized and regarded as a functioning constitutional regime.\textsuperscript{18} Even regional agreements, such as the NAFTA, have already begun to perform recognizable constitutional functions. The instrument draws the line by which trade-related policy-making powers are distributed top-down and private trading powers are given primacy. It is similar to what the principle of economic


\textsuperscript{16} 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).

\textsuperscript{17} Deborah Z. Cass, id.

federalism and freedom of private contract would demand within any domestic constitutional regimes.\textsuperscript{19}

As international treaties perform constitutional or quasi-constitutional functions, certain international norms—particularly human rights instruments—have begun to obtain unprecedented recognition and become far more entrenched into domestic legal orders.\textsuperscript{20} For instance, prohibition of genocide, slave trade, and to certain extent terrorism is now deemed as \textit{jus cogens} that binds all states. Essential human rights such as human dignity have given rise to “\textit{obligation erga omnes}” that demand all states to protect and to punish their violations such as crime against humanity.\textsuperscript{21}

Many international human rights are now being regarded as customary international laws that are binding without consents. For example, the right of an accused to be present for his/her trial and to be privy to the evidence against him even during the

\textsuperscript{19} David Schneiderman, Constitution or Model Treaty? Struggling over the Interpretive Authority of NAFTA, in \textit{The Migration of Constitutional Ideas} 294 (Sujit Choudhry ed., 2006) (contending that there exists a constitution mode in interpreting NAFTA but argues against this constitutional mode as it would imperil rather than benefit free trades in the region); Lori M. Wallach, Accountable Governance in the Era of Globalization: the WTO, NAFTA, and International Harmonization of Standard, 50 U. KAN. L. REV. 823 (2002) (arguing that to the extent that regional frameworks such as NAFTA are binding and functioning like constitutions, they must be upheld to the standard of democratic accountability).


\textsuperscript{21} See IAN D. SEIDERMANN, HIERARCHY IN INTERNATIONAL LAW: THE HUMAN RIGHTS DIMENSION 123-45, 284-89 (2001) (arguing the entire corpus of human rights law as \textit{jus cogens} that binds all state and give rights to “\textit{obligation erga omnes}” that demands state protection).
war time has been recognized as the customary international law by the U.S. Supreme Court in a recent decision.\textsuperscript{22} Common Article 3 of the four Geneva Conventions that includes this right has widely been recognized as binding as customary international law.\textsuperscript{23} Similar rights protection at peace time has long been recognized in the International Covenant on Civil and Political Rights (ICCPR) arguably regarded as customary international law.\textsuperscript{24} In so far as these international norms –in particular human rights instruments– are directly binding without any domestic variations, they function as constitutional within the larger transnational community. They constitute both the limit to which states exercise their powers and the claim by which citizen may make their appeals to domestic or transnational courts.

2. Transnational judicial dialogues and references

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

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\textsuperscript{22} Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2797-89 (2006) (stating that the right of an accused, absent disruptive conduct or consent, to be present for his/her trial and to be privy to the evidence against him is indisputably part of customary international law).
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\textsuperscript{23} This stand seems implied at Hamdan v. Rumsfeld, id. At the same time, the body of international humanitarian law scholarship recognizes undisputedly this position. See STEINER & ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (2\textsuperscript{nd}, 2000); HILAIRE McCoubrey, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE 253-77 (2\textsuperscript{nd}, 1998).
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\textsuperscript{24} See e.g. Ian D. Seiderman, supra note 21, at 284-89.
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The domestic judicial reference to international norms and decisions comes from either constitutional mandate or judicial self-assertion. Some national constitutions in particular their bills of rights were enacted in accordance with or at least inspired by certain international documents.\textsuperscript{25} Judicial reference to international norms or judicial decisions is consequently seen as a common practice. In the many new constitutions of third-wave democracies, a demand for judicial reference to international law or at least international human rights laws has often been made.\textsuperscript{26} Some even directly pronounce that international laws are part of their domestic laws.\textsuperscript{27} This domestic “constitutionalization” process of international norms has facilitated not only judicial conversation with external norms but also –more importantly– constitutional functions of international norms.

The constitutionalization of international or even foreign norms may occur as a result of judicial self-assertion. Increasingly than ever, national judicial bodies have referred to international norms to which their national governments have not yet agreed or even to foreign norms which are completely outside their jurisdiction.\textsuperscript{28} For

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\textsuperscript{25} See e.g. Vicki C. Jackson, Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse, 65 MONT. L. REV. 15 (2004) (arguing many postwar constitutions are enacted with a peculiar influence by international human rights instruments passed immediately after war); WILLIAM A. SCHABAS, INTERNATIONAL HUMAN RIGHTS LAW AND THE CANADIAN CHARTER (1996) (arguing that the writing of the Charter was greatly influenced by international human rights instruments).

\textsuperscript{26} See V.S. Vereshchetin, Some Reflections on the Relationship Between International Law and National Law in the Light of New Constitutions, in CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE 5-13 (Rein Müllerson, Malgosia Fitzmaurice & Mads Andenas eds., 1998).

\textsuperscript{27} 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.

\textsuperscript{28} The discussion of this recent phenomena abound, see e.g. 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
example, in some recent decisions, the U.S. Supreme Court made references to norms accepted in the Western European community and one provision in the ICCPR—despite being made reservations. By making normative links across national borders, courts are actually constructing a constitutional regime under which generally accepted norms—regardless of their national or international origin—become supreme law of a transnational land.

Similar conversations may take place at a transnational level. Inevitably, national and transnational courts are competing with one another for better understandings of transnational legal arrangements. National courts are shouldering noticeable works in interpreting transnational norms or even particular foreign provisions. As a consequence, national courts might be seen as common courts of a large, transnational community. And transnational norms are in turn becoming even more entrenched at national and transnational schemes. It is precisely through complex interactions between transnational and domestic decision-making bodies that transnational constitutionalism takes a surprisingly strong hold.

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29 Roper v. Simmons, 543 U.S. 551 (2005). The reference to the norm accepted by the Western European community was also made in Atkins v. Virginia, 536 U.S. 304 (2002).


31 If one likes to know current interpretive status of, say, the Refugee Convention or 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).


33 See discussion infra Parts II.B.3.
3. Global convergence of national constitutions

Finally, the third feature of transnational constitutionalism has to do with the triumph of constitutionalism in the end of the last century. Over two thirds of 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. Most nations—west and east, north and south—now have similar constitutions. Aside from traditional arrangements such as a bill of rights and the separation of powers, new institutions particularly responsible for guarding constitutions such as constitutional courts, human rights commissions and independent auditors have become common features of new constitutions. Even nations without written constitutions have begun to enact one or at least some quasi-constitutional statues. As a result, insofar as constitutional adjudication is concerned, the distinction between common and civil law courts has become blurred.

The global convergence of constitutions has given rise to a common set of constitutional languages that are easily migrated and conversed by different national institutions. Constitutions may serve as platforms upon which national actors


particularly judges may interact reciprocally with one another. As judges and legal scholars gather around and converse with one another with a common set of constitutional languages, transnational normative consensus is more easily to be reached. This dialectic function provided by transnational constitutionalism serves public as well as private actors. A common set of constitutional language may also help transnational entrepreneurs negotiate their contracts on easily understood terms and equal footing.

It must be reminded that the aforementioned features of transnational constitutionalism do not function separately. Rather, they reinforce one another in complex ways. The convergence of constitutional developments makes it easy for the rise of transnational constitutions, which stimulates even more transnational judicial dialogues.

B. Functions

Evidently transnational constitutionalism has risen to become a central phenomenon in the horizon of constitutional developments. It is not entirely clear, however, in what ways these new features would serve us. Are they functioning like traditional constitutions or deviant from them? Would they be more constructive and managerial in nature? The following discussion aims at discerning functions delivered

37 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).

by transnational constitutionalism, which include: 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 both advanced nations and fast developing ones to quickly expand the scale of a global market at an accelerating speed was the key driving force for the development of transnational legal cooperation and frameworks.39

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.40 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 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. During its course of development, the economic community quickly felt the need to establish a neutral arbitrator to enforce rules and mediate disagreements and the need to issue common policies and monitor proper executions. The ECJ, the European Commission and other institutions were thus created and through their workings –in particular judicial enforcements and interpretations– gradually transformed this economic organization into a constitutional or at least semi-constitutional regime. Similar patterns displayed not only in the EU but also elsewhere. The reference to constitutional or quasi-constitutional framework has even recently been made to the WTO, arguing the way that the Dispute Settlement Body and in particular, the Appellate Body read and interpret its own provisions and members’ domestic laws is making the WTO more and more like a constitution.

41 Wen-Chen Chang, supra note 3.
42 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).
43 The United States, for example. See e.g. Bruce Ackerman, supra note 10; Wen-Chen Chang, supra note 3. 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”).
44 Deborah Z. Cass, supra note 15.
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.45

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.46 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.47 More strikingly, amending the Constitution—especially ensuring an independent judiciary that is capable of maintaining trade-related rights and transaction orders—was one of the demanded actions by international financial agencies to resolve Indonesia’s economic crisis.48


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

In the course of modern constitutionalism, sovereignty was first invented as a great legal concept (or fiction) to help transform monarchical regimes of the eighteenth century into parliamentary or popular democracies. 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. Monarchial 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. 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 it nearly impossible any creative substitute for state in transnational cooperation, it created a state-monopoly situation. Consequently, any transnational cooperation would neither be established nor function well should any state becomes


50 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).

51 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).
uncooperative; any human rights abuses that happened in one national border should be 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.\(^{52}\) 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.\(^{53}\)

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 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 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.54

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.55 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 was even more so for some localities and disadvantaged groups. The international regime thus suffered great distrust and democratic deficit.56

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

54 One example of domestic laws is the Alien Torts Claims Act of the United States. For further discussions, see Harold Koh, supra note 20. 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).

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

56 Id.
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. 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 difficult. For example, while the United States is seen as the most powerful state in the current international makeup, when it works with the EU or NAFTA, one would find that Italy or Spain in 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.

57 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)

58 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).
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. At times, conversations between transnational courts and national courts may be intense. For instance, some recent dialogues between the ECJ and the German Constitution Court regarding direct applicability of EU rules if in conflict with the German Constitution were evident. But these thoughtful conservations may result in much better understandings of transnational norms and perhaps unexpectedly, deliver some degree of democratic deliberation into transnational legal regimes.

The last—and somehow a bit unnoticeable—dialogue facilitation function that transnational constitutionalism provides is through the convergence of national constitutions. This has enabled various nations to collaborate more smoothly. In the past, the mostly cited or referred constitutions and courts were—perhaps rightly—the U.S., German, French Constitutions and their respective 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, or South Korea are some of the examples. Students of comparative constitutionalism are fortunate to have more diversified and democratized sources for their digestion.

59 See discussion supra Part II.A.2. and accompanying notes.
60 For a brief introduction of the struggle between the two courts, see Jenny S. Martinez, supra note 30.
61 See discussion infra Part III.B.
62 See discussion supra Part II.A.2.
C. Characteristics: relativity

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

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. The development of transnational constitutions or quasi-constitutional arrangements taught us, however, that states would not be dismantled as they remain key players within these regimes. Nevertheless, as we explained in the above section, transnational constitutionalism has at least unexpectedly led to 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.

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63 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).
2. The relativity between public and private powers

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

For instance, private transnational corporations by their local investments and managements have placed significant impacts—for better or for worse—on human rights standards of local communities. A global non-governmental body, the Internet Corporation for Assigned Names and Numbers (ICANN), wields great powers over our capacities in speaking over the internet. Similarly, the private International Standardization Organization (ISO) has been responsible for product standards that directly affect health and security of global citizens. In a way, the development of transnational constitutionalism—or even global administrative law—is precisely a response to such great powers wielded by transnational private actors. Intriguingly, however, a great deal of transnational norms has been already

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established by these transnational private actors, and transnational norms thus generated constitute a part—and quite significant—of transnational constitutional governance.

The relativity of public and private powers is perhaps best illustrated in the WTO itself. The organization itself involves a complex system of public power exercise. But, interestingly however, it aims at leaving larger “private” space for private commercial activities.68 This mixed character is also reflected on its membership. On the one hand, the WTO is a public international organization that admits governments on behalf of nation-states for membership. On the other hand, however, it leaves the possibility for “any government acting on behalf of a separate customs territory” to join the organization.69 In other words, it not only recognizes the erosion of traditional nation-states but also open the possibility for some economic entities for membership.70 Due to this organizing principle, the WTO has been able to escape traditional sovereignty disputes among states. The loosened line between state and non-state actors demonstrates a mix of public and private powers that sustains transnational governance. The APEC, an important economic cooperative framework in Asia-Pacific also adopts this mix of public/private powers as its organizing principle. And, there is no surprise that personnel working in these organizations are not from traditional sources of civil servants but corporation employees.

68 Deborah Z. Cass, supra note 15.
70 As a result, Taiwan, despite its disputed international status, joined the WTO/GATT. And, Hong Kong, now a special administrative region of China, also maintains its own membership in the organization.
It must be reminded that the development of transnational constitutionalism is characterized by the mix of public/private powers rather than a single dominance of private powers. Precisely because a larger space is left for private powers, orderly cooperation and normative governance is simultaneously on great demands. A freer globalized space requires global law rather than no law.

3. The relativity between external and internal norms/institutions

The last –and perhaps mostly important and noticeable– set of relativity is the interface 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 like a part (even highest) of domestic norms. The EU laws and their relationship to internal legal systems of its 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. 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. But there exists an intricate relationship

71 Deborah Z. Cass, supra note 15.
72 See discussion infra Parts III.B.1.
73 See discussion supra Parts II.A.2.
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.75

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 (ECtHR)– rule that a national law is
in 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.76 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.

D. Diverse perspectives

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

75 See also Robert B. Ahdieh, Between Dialogue and Decree: International Review of National
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
approach to transnational judicial dialogue); David Fontana, The Next Generation of
Transnational/Domestic Constitutional Law Scholarship: A Reply to Professor Tushnet, 38 LOY. L.A.
L. REV. 445 (2004) (arguing that domestic and foreign legal systems should be integrated in the optimal

76 Robert B. Ahdieh, id.
happened a century ago when international law was developed as a solid upper level of domestic constitutional and legal orders.77 Others, however, see this recent development as a dangerous plot by some ambitious international actors and a huge threat to traditional constitutionalism.78 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.79 If local and national legal orders are seen as the consolidation of turbulent political transitions, transnational constitutionalism is perceived as the result of a velvet revolution that was led by global moral activists to rescue unfair and fractioned domestic constitutional orders hijacked by self-interested nation-states.80

77 See e.g. Harold Koh, supra note 20; Joan F. Hartman, supra note 20; Alexander Aleinikoff, supra note 20.

78 See e.g. J.H.H. Weiler & Joel P. Trachtman, supra note 12; Ernest A. Young, supra note 20; Joan L. Larsen, supra note 20.


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.\(^{81}\)

2. Reflectionism

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.\(^{82}\) 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 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

\(^{81}\) Id.

international treaties, especially human rights treaties, and customary international law to the domestic context and allow judicial reference to foreign laws in interpreting constitutions, 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. 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. Then, we must ask, how come would transnational constitutionalism be developed and thus far accepted?

The answer, from the perspective of reflectionalism, 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 likely to be concerned with international cooperation. This view makes it more understandable a rather conservative attitude of the United States towards a

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

84 Ernest A. Young, supra note 20.

85 Id.

86 Tom Ginsburg, supra note 82.
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. 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. 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. Internally, facing rather fragile transitional circumstances, new dominant political parties need the aide of international legitimacy to stabilize their domestic governance. And, this is why we often see

87 Id. See also Ruti Teitel, supra note 35, at 2028-29 (arguing the role of international law in transitional context).
88 Ruti Teitel, id.
89 Tom Ginsburg, supra note 82.
90 Ruti Teitel, supra note 35, at 2028-29.
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 reflectionalism may have it—the development of transnational constitutionalism has to do largely with domestic and transnational political calculations. But reflectionalism fails to understand that once domestic political actors surrender their decision-making capacities to transnational institutions, they leave open a broader space for transnational constitutionalism to develop 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.

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.91

III. Challenges and Solutions

The recent development of transnational constitutionalism has not come without suspicions. Some worry that these new constitutional enterprises would circumvent great virtues of traditional constitutionalism, calling them deviants or troubles.92 Indeed, the relative nature of transnational 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


92 Ernest A. Young, supra note 20; Joan L. Larsen, supra note 20. In addition, there may be unexpected aversions. See Kim Lane Schepple, Aspirational and Aversive Constitutionalism: The Case for Studying Cross- Constitutional Influence through Negative Models, 1 INTL.J. CONST. L. 296 (2003) (arguing that negative rejection, rather than positive acceptance, plays a major role in the transnational exchanges).
protect human rights without territorial constraints.⁹³ Facing these very different positions, how could one decide on any side?

A. Challenges: accountability, democratic deficit, rule of law

Before we decide on any of the views, we must examine challenges posed by this new development and see whether and how they may possibly be reconciled. 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 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 for their decisions, and with this clear understanding in mind, they are less likely to abuse their power in their decision making. But transnational constitutionalism showed a considerable departure to this requirement.⁹⁴

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 increasingly 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

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⁹³ See e.g. Harold Koh, supra note 20; Joan F. Hartman, supra note 20; Alexander Aleinikoff, supra note 20.

⁹⁴ Ernest A. Young, supra note 20, at 533-38.
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.

2. Democratic deficit

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

Democratic deficit has been diagnosed as the most serious problem that threatens to undermine the entire enterprise of modern constitutionalism. For example, a considerable body of literature existed to discuss the democratic deficit problems of the EU and the development of its constitutional governance. Some of great minds in our times stood in this line.\(^95\) And the direct applicability of international laws or customary international laws has exacerbated this democratic deficit question even further.\(^96\) Democratic legitimacy suffers to a greatest extent when affected parties have no access to influence norms-generating process. Worse yet, in this way,

\(^{95}\) See e.g. Dieter Grimm, supra note 12; Juergen Habermas, supra note 12.

\(^{96}\) Ernest A. Young, supra note 20, 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).
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.  

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.

3. Rule of law

The last but not the least challenge 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

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97 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 incompulsorily imposed constraints on other branches based on international law).

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. These fundamental principles of rule of law, especially legal certainty and legal clarity, however, have been undermined to some extent in transnational constitutionalism.

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.

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.101 Having recognized potential attacks in the perspective of rule of law, the U.S. Supreme Court rendered great efforts in providing lengthy and thoughtful opinions with articulated constitutional principles. In so doing, the weakness in rule of law may be ameliorated.

B. Solutions: domestic/transnational institutional checks and balances

Are there any ways to reconcile aforementioned challenges such as deficits of accountability and democracy and deficiency in the rule of law posed by transnational


100 Ernest A. Young, supra note 20.

101 See infra note 119 and accompanying text.
constitutionalism? We do think there are some solutions and actually a number of them have been already taking place in current transnational complexes. In order to see and understand these current developments as potential effective mechanisms for check and balances in transnational constitutionalism, one must broaden his/her conceptualization of traditional concepts such as accountability, democracy and rule of law. More importantly perhaps, one must be willing to depart from traditional views that are drawn on clear-cut lines between nation-states, and instead, embrace a cross-boundary vision in the new governance of transnational constitutionalism.

1. Domestic institutional checks and balances

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

First, we must realize that participations in any transnational governance require domestic consents. In most constitutions, this consent involves mostly with parliamentary confirmation or in some cases, double checks by elected executives. With stronger than ever influences exerted by transnational frameworks, however, many nation-states now require –mostly as customary practice but some as constitutional or legal commands– a direct public vote –binding or advisory – for an

102 A referendum may be required if transnational agreements involve conflict with the Constitution and if constitutional amendments require referendum.

103 For example, in United Kingdom, referenda conducted for participatory decisions on international cooperation were only advisory legally but “binding” in their practical effects.

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expressive consent to transnational cooperation. Take for example the ratification of the Constitutional Treaty for the EU, notwithstanding a failed exercise, about half of member states opted for a national referendum even without any formal constitutional requirement.\textsuperscript{104} A decade earlier, four member states—about a third—conducted referenda for their accessions to the EU by the Maastricht Treaty.\textsuperscript{105} A direct public vote prior to the entry of transnational organizations would considerably ease criticism of democratic deficit.\textsuperscript{106} Undoubtedly, a one-time public vote and democratic support it renders would not necessarily sustain for long-term transnational governance. It is expected to see more and more referenda, binding or merely advisory, would be used for national decisions on major transnational cooperative policies.

Transnational frameworks may also be designed to leave space for domestic actions that may serve as checks and balances. For instance, the two principles of “subsidiarity” and “proportionality” codified in the EU Treaty\textsuperscript{107} are such mechanisms. The principle of “subsidiarity” demands the EU to act within the powers

\textsuperscript{104} They included Belgium, Czech Republic, Denmark, Ireland, Luxembourg, Netherlands, Poland, Portugal, Spain and United Kingdom. See Carlos Closa, Ratifying the EU Constitution: Referendums and their Implications, U.S.-Europe Analysis Series, The Brookings Institutions, 2004, available at http://www.brookings.edu/fp/cuse/analysis/closa20041101.pdf

\textsuperscript{105} They were Denmark, France, Ireland (as referendum for constitutional amendments) and the United Kingdom. See Thomas König & Simon Hug, Ratifying Maastricht: Parliamentary Vote on International Treaties and Theoretical Solution Concept, 1 EUR. UNION POLITICS 93 (2000), available at http://eup.sagepub.com/cgi/reprint/1/1/93

\textsuperscript{106} The demand of public votes coupled with broader citizen deliberations on decisions concerning national entrance into transnational governance as well as decisions of these transnational bodies has been called for by an important alliance of scholars that emphasize on deliberative democracy as the fundamental source of legitimacy. Most representative is Jürgen Habermas. See Juergen Habermas, supra note 12.

conferred upon it, and that in areas not fallen into its exclusive powers, it shall act only if member states fail to take actions.\textsuperscript{108} Moreover, the principle of “proportionality” regulates that any actions taken by the EU must be necessary to achieve its purposes.\textsuperscript{109} Thus, in concurrent areas, by taking prompt and sufficient actions, member states preserve their own policy-making spaces. Even in exclusive areas, based upon “proportionality”, member states may still make challenges to the EU authority on substantive grounds by showing their stipulated domestic policies as least-restrictive or better-effective alternatives. In this way, the criticism of accountability, even democratic legitimacy, in transnational governance may be eased.\textsuperscript{110} For, domestic policy makers would be accountable to their local citizens if they fail to render more effective policies in areas of their concurrent jurisdiction. The transnational body could also be rendered accountable if their policies disproportionately unmet with organizational purposes. In this scrutiny process, local policy-makers may also be requested by their local citizens to contend alternatives and thus it would no longer be easy for them to escape from their policy duties.

The last and perhaps most important domestic institution to check and balance transnational policy-making is –not surprisingly– the judiciary. The relationship between transnational norms including decisions made by transnational bodies and

\textsuperscript{108} Sec. 1, Art 5 of the European Community Treaty prescribes that “the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.” Sec 2 of the same articles stipulates that “In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”

\textsuperscript{109} Sec 3, Article 5 of the European Community Treaty prescribes that “Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.”

\textsuperscript{110} Mattias Kumm, Democratic constitutionalism encounters institutional law: terms of engagement, in \textit{The Migration of Constitutional Ideas} 256-93, 265 (Sujit Choudhry ed., 2006)
domestic courts, particularly domestic constitutional courts or supreme courts, has been a perplexing one. On the one hand, it is primarily left for domestic constitutions to give the legal status of transnational norms—in most cases, a status of law only.\(^{111}\) On the other hand, however, transnational norms—including decisions by transnational bodies—have increasingly exerted direct effects upon national jurisdictions and even supremacy over national laws. The development of direct effect and supremacy of the EU laws is a perfect example.\(^ {112}\) The two rather conflicting views thus call for more. In her famous decision concerning the constitutionality of Germany’s accession to the Maastricht Treaty, the German Constitutional Court entrusted itself to review laws made by European institutions and organs.\(^ {113}\) For the Court, any legal instruments of the Community should not be binding on German territory, if developed in such a way no longer coincided with the Community’s purposes that Germany acceded to it. This decision has created a possibility for the German Constitutional Court to place significant checks and balances with law-making powers of the Community. Not only the German Constitutional Court has reviewed the Community’s laws, it also made possible for German courts to review decisions rendered by ECJ and ECtHR.\(^ {114}\) In a recent decision involving a case where the lower court followed the precedent of the ECtHR, while the appellate court refused to consider, the German Constitutional Court reasoned that the Treaty

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\(^{111}\) Most West European nations give treaties the status of law, but new East European constitutions are inclined to give them a higher, if not constitution, status. *See* V.S. Vereshchetin, *supra* note 27, at 5-13.

\(^{112}\) *See e.g.* MONICA CLAES, THE NATIONAL COURT’S MANDATE IN THE EUROPEAN CONSTITUTION (2006) (arguing that direct effect and supremacy of the EU laws have made ECJ a constitutional court and national courts of member states as the EU’s local courts.)


provision as interpreted by the ECtHR must be taken into account in making a
decision.\textsuperscript{115} In other words, a duty for all German courts to consider decisions by the
ECtHR was established. At the same time, however, the Court contend that if the
Constitution, plausibly interpreted, established a higher level of protection than the
ECtHR, the presumption to follow decisions of the ECtHR should cease to apply.\textsuperscript{116}
Here again, we see the possibility for domestic courts to place effective institutional
checks and balances –while giving a due respect– with transnational judicial
decisions.\textsuperscript{117}

Domestic judicial checks with transnational decision-making may sometimes be
quite subtler. For instance, after September 11, 2001, the United Nations Security
Council adopted Resolution 1373 to provide counter-terrorism measures including
some leeway for investigatory detention and a listing mechanism of individuals and
entities that financed terrorist activities.\textsuperscript{118} With such a rather urgent international
security call, many governments enacted national laws to adopt these measures
notwithstanding their grave threats to human rights protection. Interestingly however,
a number of national high courts –in reviewing their national laws respectively– have
together put the brake on this repressive international trend. For instance, in \textit{Hamdan
v. Rumsfeld}, \textsuperscript{119} the Supreme Court of United States found it unconstitutional to try
terrorist suspects by a military commission. In \textit{A v. Secretary of State}, \textsuperscript{120} the House of

\textsuperscript{115} Görgülü v. Germany (2004), 2 BvR 148/04. For the discussion of this case, see Mattias Kumm, \textit{id.}
at 280-81.

\textsuperscript{116} Mattias Kumm, \textit{id.} at 281.

\textsuperscript{117} See also Robert B. Ahdieh, \textit{supra} note 91.


\textsuperscript{119} 126 S.Ct. 2749 (2006).

\textsuperscript{120} A v. Sec'y of State, [2005] 2 A.C. 68.
Lord found detention power based upon any suspect’s nationality or immigration status incompatible with the Human Rights Act and international human rights instruments such as the ICCPR and the European Convention on Human Rights (ECHR). Similar judgment also could be found at the ECtHR, the ECJ or some other ongoing legal proceedings.

As aforementioned, there is still space for domestic institutional checks and balances with transnational constitutional governance. Even in transnational judicial dialogues where judges would be seem at ease in embracing foreign or international legal sources, domestic political actors are more than capable of finding ways against them. Notwithstanding a threat to judicial autonomy, the use of foreign sources or transnational references can be strictly prohibited by domestic legislation. For instance, several legislative bills aimed at prohibiting judicial reference of foreign or international laws have been introduced to the United States Congress. And it is

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


124 There was a similar legal dispute in Canada. A Canadian citizen was listed as a sponsor of terrorist activities and demanded to be extradited to the United States. He brought a law suit alleging the government act contrary to the Canadian Charter of Rights and Freedoms. In the end, the Canadian government resolved the case before it finally went to the Court. But it was believed that the Court might. For the detailed discussion of the case and relevant issues, see David Dyzenhaus, The Rule of (Administrative) Law in International Law, 68 LAW & CONTEMP. PROBS. 127, 140-52 (2005).

125 See, e.g. American Justice for American Citizens Act, HR 4118, 108th Cong 2nd Sess (2004); Constitutional Restoration Act of 2005, HR 1070, 109th Cong 1st Sess (2005). Both drafts are similar and both prohibit federal courts to employ the constitution, laws, policies or judicial decisions of any international organization or foreign state, except for the English constitutional and common law or other sources of law relied upon by the Framers of the US. Constitution. For more thorough discussions concerning these developments, see Vicki C Jackson, Transnational Challenges to Constitutional Law: Convergence, Resistance and Engagement, 35 FEDERAL L. REV. 161 (2007); Sujit Choudhry, Migration as a new metaphor in comparative constitutional law, in THE MIGRATION OF CONSTITUTIONAL IDEAS 1, 2-13 (2004).
possible for domestic political actors to enact new laws to reverse judicial decisions largely relying upon foreign or transnational legal sources. In addition, legal scholarship –domestic as well as transnational– always provides critical examination of judicial reasoning including transnational references. The intense debate now on the use of transnational references in the American legal community is pretty evident.\textsuperscript{126}

One last feature in transnational constitutionalism concerns global convergence of domestic constitutional institutions. Here again, it must be reminded that any domestic institutions are established by direct or indirect public consents, and that they always run the risk of public dissatisfactions. Local constituency still holds the power to make domestic institutions accountable and watch for their performances. Convergence does not always bring in sameness. As long as local variations are inevitable, there is space for local powers to survive and even to grow for counterbalance.

2. Transnational institutional checks and balances

Possibly effective checks and balances are present not only at the domestic level but also –in rather creative ways– at the transnational scheme. They may emerge from within transnational networks or between –and even beyond– these networks.

As mentioned before, transnational arrangements are increasingly modeled by and function as domestic constitutions. Certain check and balance mechanisms may be consequently adopted. For instance, the European Union has a Council with

legislative and decision-making powers whose enforcement is carried out by a 
Commission, supervised by a Parliament and a Court of Justice. Just within the EU, 
institutional checks and balances hold strong. A few divisions of power with varied 
degree of checks and balances are also seen in the UN. The Assembly, the Court of 
Justice, various Councils and Commissions constitute a large complex that at least is 
capable of checking and balancing with one another. Most importantly, the majority 
of transnational bodies today have established a judicial organ that interprets rules, 
resolves disputes and perhaps even supervises from within. For instance, there is an 
ECtHR in Council of Europe, an Inter-American Court of Human Rights in 
Organization of American States, a Dispute Settlement Body –in particular, the 
Appellate Body– in the WTO, judicial committees in numerous international human 
rights instruments. These judicial organs –whose decisions either binding or 
advisory– serve as primary, most important checking institutions of transnational 
networks. Some have even hoped that judicial functions at these transnational 
levels would gradually grow into a body of global administrative law that provides 
procedural and substantive protections to individuals affected by transnational 
decision-making.

Most interesting and creative ways of institutional checks and balances at the 
transnational level emerge from between –or even beyond– transnational networks. It 
must be reminded again that transnational governance we see today presents not as 

LAW & CONTEMP. PROBS. 63, 88-106 (2005) (arguing that establishing judicial bodies in the 
transnational networks as a top-down approach to ensure rights-protection, due process and justice in 
transnational decision-making).

128 For the discussion of developing global administrative law, see Symposium, The Emergence of 
Global Administrative Law, 68 LAW & CONTEMP. PROBS. 1 (2005); Symposium, Administrative Law 
without the State: The Challenge of Global Regulation, 37 N.Y.U. J. INT'L L. & POL. 663 (2005); 
Symposium, Global Governance and Global Administrative Law in the International Legal Order, 17 
single, large, global governance, but as a multiple complex of transnational bodies and networks.¹²⁹ No hierarchy dictates or control over their complicated relationship. For instance, on a global scale, the UN supported by its Charter and related human rights instruments may now be seen as a superior governing regime. But, in many economic and related areas, the WTO wields far more reaching powers. Similar, if not greater, competitors are regional constitutional or quasi-constitutional arrangements such as the NAFTA, the EU, the African Union or the APEC. Even within the same regional compact, competing transnational frameworks may co-exist with one another. The parallel influences that the EU and the Council of Europe have exerted—albeit in varied degrees and to varied jurisdictions—over the entire European continent are illuminating.

In rather unexpected and creative ways, this multiple complex of transnational bodies and networks may exert strong and effective checks and balances with one another. The legality of UN policies may be examined at the ECJ, and WTO policies may be challenged at the ECtHR and vice versa. This is best demonstrated by a very interesting case involving with a UN security policy that has travelled from the UN Security Council, the EU, the Irish Court, the ECJ and finally to the ECtHR.¹³⁰ In accordance with an EC regulation that implemented a UN Security Council Resolution, an airplane was impounded by the Irish government. The airplane operator challenged the impoundment at the Irish court, where a preliminary reference was made to the ECJ for the legality of the EC regulation. The ECJ applied

¹²⁹ For similar observation, see ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (arguing a new world order of governing networks with convergence as well as informed divergence).

¹³⁰ Case 45036/98, Bosphorus Hava Yollari Turizm ve. Ticaret Anonim Sirketi v. Ireland [2005] ECHR 440. For more discussion on this case, see Mattias Kumm, supra note, at 282-91 (using this case to advocate a deliberative approach to transnational judicial dialogues).
proportionality test to the case and sustained the impounding decision. The case, however, was brought to the ECtHR. It was held that government actions taken in compliance with international legal obligations –in this case, the EU regulation– would be in general justified if the relevant organization –in this case, the EU– was considered to protecting human rights in ways that meet with organizational purposes. But the justification of EC regulations is merely an assumption. It can be rebutted if rights protected in the European Convention of Human Rights in particular cases prove manifestly deficient.\textsuperscript{131} In this case, however, the ECtHR held the impounding regulation was not yet exceeding the limits. Regardless of whether we are pleased with the result, it is without a doubt that transnational decision-making mechanisms any case may travel like this one would create considerable checking and balancing powers between them.\textsuperscript{132}

There also remains space for transnational institutions to place certain checks and balances upon transnational judicial dialogues. As indicated earlier, judges may be restrained from using transnational sources by national laws, and correctness and properness of their reference to foreign sources may be closely examined by local legal community. Similarly, transnational legal community also serves as a watchman for the travel of transnational legal sources and judicial decisions. The use of transnational sources was not only contested in the United States or any other state, but also mostly enthusiastically conversed at the transnational legal societies and associations. For instance, the International Association of Constitutional Law invited

\textsuperscript{131} See also Mattias Kumm, \textit{id.} at 285.

\textsuperscript{132} The only drawback in both the ECJ and ECtHR decisions was that both courts failed to examine the legality and legitimacy of the UN Security Council Resolution. The ECtHR reasoned that what the Irish government directly relied upon in making its impounding decision was the EC regulation but not the Council Resolution, and thus that only the EC regulation must be closely examined.
constitutional court judges of various jurisdictions to have conversations on comparative constitutionalism and address problems concerning the reference of transnational laws. The very interesting conversation between judges was then published at an international constitutional law journal that received a global attention, and scholarly comments in response to those judicial conversations later produced to even more volumes. In other words, judges are actually not as free as they might think in referring to transnational legal sources. Their decisions may be double-checked by other transnational or local courts when being cited or referred, and the correctness of their understanding of transnational sources would be examined time and again by other courts and legal scholars. In this way, judges even at the transnational level are made accountable by how careful and deliberative they are in their decisions and conversations with other courts. It is precisely this deliberative nature that makes transnational judicial dialogue a huge plus—rather than minus—to judicial accountability at both national and transnational levels.

Even global constitutional convergence is not developed without any force or counter-force at the transnational levels. For instance, the development of law and democracy in the post-communist European states has been aided tremendously by

133 The topic was on “comparative constitutionalism in practice”, Sixth World Congress of the International Association of Constitutional Law Santiago, Chile, January 12–16, 2004. This conversation ensued to the next four years and was again the key issue of the Seventh World Congress in Athens, Greece, June 11-15, 2007.


135 Scholarly comments and responses to those conversations of judges produce even more volumes, see e.g. SUJIT CHOUHRY, THE MIGRATION OF CONSTITUTIONAL IDEA (2006).

136 Vicki C. Jackson, supra note; Mattias Kumm, supra note.
the Venice Commission, a body of legal experts created by the Council of Europe. With their legal advice and strong influence, similar institutions such as constitutional courts or election methods have been adopted despite national difference. Internal critiques and checks with the Commission’s approaches and advices, however, have been always there either from the Council or from the EU. Another example – albeit subtler– may be seen in the global implementation of the UN Security Council counter-terrorism resolutions. UN resolutions have prompted many nations to adopt similar counter-terrorism measures, creating one kind of global convergence. And the same time, however, decisions of many national and transnational courts that condemned their repressive nature have prompted a reverse trend, paradoxically creating the other kind of global convergence, striking down repressive counter-terrorism measures. It is particularly interesting to observe that with the rise of transnational governance, even local courts would possibly become “courts of transnational community” that not only participate in forming transnational norms but are also –more importantly– capable of change them.

All in all, we should never underestimate potential checking and balancing mechanisms that may be developed as transnational constitutionalism emerges. Like any other constitutional community, a vibrant civil society coupled with a multiple complex of powers and networks always serves as genuine checks and balances of official powers. With the rise of transnational constitutionalism, it is evident that a

137 The commission was created to provide constitutional assistance to member states, to observe their elections and public referenda, to cooperate with their constitutional courts and finally to produce their legal studies and reports to the Council. Their website: http://www.venice.coe.int/site/main/presentation_E.asp?MenuL=E

138 For similar observation, see Monica Claes, supra note, at 58-68 (arguing that with the EU becoming a constitutional community, national courts of member states become the Community courts.)
more vibrant global civil society formed by transnational non-governmental organizations, private corporations or globalized citizens must shoulder checking and balancing functions we described above more vigorously and even at a routine schedule.  

IV. 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 constituinism that have evolved for a century or two.

Globalization and regional remapping in response to new alliances of emerging democracies are primary driving forces. Not only constitutions may function across national borders but also international treaties and regional cooperative frameworks may deliver constitutional or quasi-constitutional functions. An age of transnational constitutionalism has come before us. We have theorized recent developments of transnational constitutionalism by examining its features, functions and characteristics. We have found that transnational constitutionalism features transnational constitutional arrangements, transnational judicial dialogues and global convergence of national constitutions. Notwithstanding main functions in facilitating a global market, the development of transnational constitutionalism nevertheless undermines accountability, democracy and rule of law at both domestic and transnational levels. However, we argue that a complex of domestic and transnational

institutional interactions as functional checks and balances with transnational constitutionalism.

Extended from its conceptional origin with limiting government powers in focus, transnational 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 transnational arrangements 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 terrain of constitutionalism.