

ABSTRACTS

Constitutional Law in "old" and "new" Law and Development

By *Brun-Otto Bryde*, Giessen / Karlsruhe

The internationalization of constitutional law is a very exciting development; however, it should be discussed in the light of the law and development movement's critique of the wisdom of legal transfers. The expectations of modernization theory with respect to the transfer of constitutionalism through colonial imposition proved wrong for the same reasons, which were developed in the self-critique of the law and development movement: they were naïve and they were ethnocentric. In light of these experiences, the current developments raise two questions: Firstly, whether the international diffusion of constitutionalism in the last decades will be more successful and secondly, whether socio-legal scholarship will confront the subject more maturely this time. While we again can detect attempts of one-sided insistence on foreign models and reliance on the untested reception of such models, there are differences to the "old" situation, which allow a more optimistic evaluation of the globalization of constitutional law today. The process is much more independent and self-sustaining, which implies that comparisons with colonial imposition would be inappropriate. In addition, the process is much more internationalized. Constitutional law has become an international subject with a worldwide infrastructure of scholars, academic societies, and journals. While "old" law and development theory should teach us to be aware of power relationships and the sociological problems of legal transfers, it would be uncritical to confer those old critiques wholesale and to overlook the much more participatory and egalitarian aspects of the new constitutionalism, especially owed to the development of international human rights law.

Globalization of Constitutional Law through comparative Constitution-making

By *Francois Venter*, Potchefstroom

The ebb and flow of constitutional ideas since the late 18th Century have resulted in a globally shared vocabulary of constitutional structures, rights, principles and values. This convergence of constitutional language has increased steadily through the various waves of constitution-making the world has seen since the late 18th Century.

Constitutional law evolved, and still operates on the assumption that the state is sovereign and that it exists for the benefit and protection of its "nation".

Constitutional rights language in recently drafted constitutions tends toward similarity, although the actual meaning of similar terms may vary in different jurisdictions.

The mechanism of prescribing a set of binding principles to the authors of a new constitution has been employed successfully in a few cases. These principles of constitution-making essentially reflect what might be described as the essence of contemporary constitutionalism.

A foundational *Leitmotiv* for constitution-making is to be found in the notion of global values, the most pre-eminent of which is human dignity. An exact definition of dignity is elusive, but it is gaining ascendancy in the 21st Century thinking on the moral foundations of constitutionalism and therefore of written constitutions and their interpretation.

Global constitutionalism is not leading the world in the direction of the drafting of constitutions that are all the same. Comparative constitution-making has however become an essential characteristic of the process of drafting (and revision) of constitutions.

Comparative Constitutional Law in the Courts: Reflections on the Originalists' Objections

By *Jo Eric Khushf Murkens*, London

The controversy surrounding the judicial use of comparative constitutional law is not new. However, the debate has recently been reignited by a number of US Supreme Court justices who have spoken out on the use of non-US law in the Court. Scalia opposes, and Breyer favours, references to 'foreign law'. Their comments, made both within and outside of the Court, has led to a reaction by scholars. Arguably the debate is US-specific as it resembles the different views regarding constitutional interpretation, namely whether the Constitution's original, or rather its current, meaning is determinative. Yet the debate also raises broader issues of constitutional theory and politics: formal vs substantive legitimacy, globalisation of the courts, judicial sleight of hand, the cultural foundations of constitutional law, and the citation of non-primary sources of law in litigation. The present article explores these issues. It rejects radical approaches (either against or in favour of comparative constitutional law) and instead argues for a more modest process which both identifies the national specificity of law and grasps the mediating potential of law as a self-reflexive discourse.

The Globalization of Latin American Constitutional Law

By *Javier A. Couso*, Santiago de Chile

Over the last few decades, the world has experienced a remarkable process of globalization of law – in particular, constitutional law – due to the emergence of what amounts to a human rights-based constitutional *ius cogens*. This body of global legal rules has led to the increasing homogeneity of constitutional law around the world, because it is deemed as mandatory. The globalization of constitutional law has not been confined to consolidated

democracies, but it has also reach transitional ones, such as those of Latin America. In this region, the acceptance of the new constitutional *ius cogens* has involved a revolutionary transformation of the content and uses of constitutional law. According to the new paradigm, constitutions involve not just rules but – more importantly – fundamental principles of public law drawn from international human rights law. Furthermore, the new paradigm includes a new conception of the role of high courts, which encourages them to assertively adjudicate the constitution.

Globalization of Constitutional Law through Interaction of Judges

By *Jutta Limbach*, Berlin / Munich

During the last decades governments, lawmakers and judges have been faced with a multitude of challenges transcending national borders. These challenges call for effective ways of enforcing already existing structures of international co-operation and of creating novel approaches, such as the creation of networks between decision-makers on an international level. Thus recent years have seen the emergence of a proliferation of international gatherings of judges. Networks may connect international institutions and their national interlocutors in a vertical way with a view of enforcing international standards. In this respect the European Court of Human Rights dedicated the conference at the occasion of the opening of the judicial year 2005 to a dialogue between judges of different national and European courts and facilitated a vertical dialogue between an international court and its national counterparts in order to respond to the questions raised throughout Europe in terms of the application and interpretation of the European Convention of Human Rights. Moreover networks may connect national bodies and their foreign counterparts in a horizontal way, aiming at the exchange of information and mutual support, as it does for instance the Conference of European Constitutional Courts that enables constitutional judges to entertain personal contacts and to exchange know-how and experience. Although often lacking of coercive power, the impact of these networks using “soft powers” should not be underestimated. Based on mutual respect and appreciation, an intensive and open dialogue on fundamental issues of constitutional law as well as on methods of interpretation facilitates the exchange of information from a broad comparative perspective in order to meet the demands of a globalized world.

The Internationalization of Constitutional Law: A Note on the Colombian Case

By *Manuel José Cepeda*, Bogotá

This note describes the relevance of International Human Rights Law (IHRL) and International Humanitarian Law (IHL) for constitutional adjudication in Colombia by the Constitutional Court. As elements of the so-called “constitutionality block”, IHRL and IHL have

played an important role in the Colombian constitutional order, which becomes manifest in several material functions: (1) the definition of the scope of constitutional rights, (2) the identification of specific non-enumerated rights, (3) the identification of special needs and basic standards of protection, (4) the identification of minimum standards of protection, (5) the identification of specific prohibitions that protect rights, (6) the provision of criteria for reviewing decrees that declare states of emergency, (7) the provision of grounds for the constitutional enforcement of social rights, and (8) the national projection and enforcement of preventive measures adopted by the Inter-American Court of Human Rights. Each one of these functions is illustrated in this note with representative judgments by the Constitutional Court, in order to conclude that IHRL and IHL have borne a significant impact upon decisions concerning both the preservation and public order and the protection of rights in diverse contexts and settings, causing a very high material incidence upon the domestic legal system.