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# Introduction: Transnational Elements of Constitution-Making

Gregory Shaffer\*

This issue of the *UC Irvine Journal of International, Transnational and Comparative Law* examines the transnational aspects of constitution-making. Constitutions are conventionally viewed as providing the basic norms for the structure of the state, its institutions and laws. They can also create important symbols for the state and its citizens, differentiating them from another, and thus becoming a source of national identity. Yet, paradoxically, constitutions in significant part are transnationally constructed. They are transnational legal orders in so far as they reflect similar structures and norms that transcend and diffuse across nation-states.

The symposium consists of five articles addressing the transnational construction of national constitutions. The first, by Tom Ginsburg, interrogates the relation of *Constitutional Advice and Transnational Legal Order*. Ginsburg surveys the historical practice of providing constitutional advice transnationally. He shows how today transnational institutions, such as the United Nations and non-governmental organizations (NGOs), are central players in the social field of constitution-making. He asks whether the resulting constitutions can be viewed as part of a transnational legal order (TLO), as defined in the work of Terence Halliday and Gregory Shaffer.<sup>1</sup> Halliday and Shaffer define a transnational legal order as “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.”<sup>2</sup> Ginsburg’s work shows that common legal norms structure the institutions and laws of states across jurisdictions. As he stresses, “the field is an inherently transnational one, and . . . it is becoming increasingly institutionalized as transnational.”<sup>3</sup> Yet, Ginsburg also notes that actors use constitution-making to advance distinct transnational legal orders for human rights, rule of law, and other issues. In this way, constitution-making becomes “an arena in which other TLOs contest over outcomes” within

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1. TRANSNATIONAL LEGAL ORDERS (Terence C. Halliday & Gregory Shaffer eds., 2015).
2. *Id.* at 5.
3. Tom Ginsburg, *Constitutional Advice and Transnational Legal Order*, 2 U.C. IRVINE J. INT’L TRANSNAT’L & COMP. L. 5, 31 (2017).

their subject areas.<sup>4</sup> Ginsburg concludes that the study of constitution-making recursively can help advance TLO theory as it sharpens its analytical tools for application to new domains.

In the second article, *A Transnational Actor on a Dramatic Stage—Sir Ivor Jennings and the Manipulation of Westminster Style of Democracy: The Case of Pakistan*, H. Kumarasingham describes how a single figure can influence constitution-making as a norm entrepreneur across the world. Sir Ivor Jennings played a central role in the writing of Pakistan’s constitution, part of a transnational trend in the 1940s of new states adopting the “Westminster model” of constitutions. Jennings worked across Africa and Asia to provide advice on constitution-building, where he promoted Westminster conventions. In Pakistan, he arguably played his most controversial role where he developed legal rationales in support of a “constitutional coup” by the Governor-General against the Constituent Assembly, in part to counter Islamic influence in the Constituent Assembly. This episode created a legacy for future coups and military dominance in Pakistan. As Kumarasingham concludes, “Jennings was decisively able as a legal-political actor to adopt Westminster legal forms and draw on the transnational body of common law and royal powers to selectively bring ‘order’ to the ‘problem’ of avoiding democracy in Pakistan.”<sup>5</sup> He later drew on this “Pakistan formula. . . for other states around the world that he advised—primarily, as was the case in Pakistan, to frustrate, if not suspend, the will of parliament to the advantage of unelected elites.”<sup>6</sup>

The third article, by Paul Craig, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, brings us to the present, assessing the role of the Venice Commission—formally named the European Commission for Democracy through Law—in constitution-making today. Like the European Court of Human Rights, the Venice Commission is an institution within the Council of Europe. It consists, however, of sixty-one member states, including the forty-seven members of the Council of Europe. Craig shows how constitution-making, which he broadly conceives in terms of formation, amendment, constitutional legislation and practice, forms an important part of the Commission’s work. The Commission issues opinions regarding different phases of constitution-making in member states.<sup>7</sup> Although it is not easy to measure the Commission’s causal impact, Craig highlights the diverse forms of its transnational contribution to constitution-making. Craig is a member of the Commission, and he responds to various critiques of the Commission’s work.

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4. *Id.* at 5.

5. H. Kumarasingham, *A Transnational Actor on a Dramatic Stage – Sir Ivor Jennings and the Manipulation of Westminster Style Democracy: The Case of Pakistan*, 2 U.C. IRVINE J. INT’L TRANSNAT’L & COMP. L. 33, 55 (2017).

6. *Id.* at 34.

7. See generally Paul Craig, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, 2 U.C. IRVINE J. INT’L TRANSNAT’L & COMP. L. 57 (2017).

The fourth article, by David Landau, *Democratic Erosion and Constitution-Making Moments: The Role of International Law*, addresses transnational responses to abuses of constitution-making aimed at eroding democracy, such as in Latin America and Eastern Europe in recent years. Landau stresses that constitution-making often takes place during crises, when existing domestic institutions have eroded, collapsed, or are viewed by revolutionary leaders as illegitimate. He notes that when “constitution-makers step outside of the existing political order, there is no other obvious source of restraint.”<sup>8</sup> Various forms of international interventions thus have been developed. Landau evaluates the strengths and drawbacks of four models of international intervention to advance democracy: (i) democracy clauses in treaties that create obligations on states, such as in the Inter-American Democratic Charter and the African Charter on Democracy, Elections, and Governance; (ii) international norms governing the procedure and substance of constitution-making, such as the norm of public participation; (iii) international organizations and transnational non-governmental organizations diffusing best practices; and (iv) international review of constitutional texts and processes by supranational advisory bodies, such as the Venice Convention. Landau advocates combining these various mechanisms to seek realistic and incremental progress to check abuses in constitution-making within states.

The symposium concludes with Abrak Saati’s article *Participatory Constitution-Making as a Transnational Legal Norm: Why Does it “Stick” in Some Contexts and Not in Others?* Saati assesses the diffusion of the transnational legal norm of participatory constitution-making, and how it has affected practice within states. This transnational norm has been increasingly conveyed by international organizations in transitioning and post-conflict states to create greater local ownership of the constitution-making process and the resulting texts and institutions. Key transnational actors include the United Nations through its Department of Political Affairs, the United States Institute of Peace, and the NGO International Institute for Democracy and Electoral Assistance (IDEA). Saati explains how the process worked in a series of countries, including in Afghanistan, Colombia, East Timor, Eritrea, and South Africa. The South African process serves as a reference point which transnational actors convey to spread the norm.

Constitutions define national legal orders and help catalyze the creation of a national sense of identity. Yet, this symposium shows how they are also arenas for transnational actors to advance legal norms and structures. We thus can view constitutional forms and legal norms as forming part of larger transnational legal orders. By instantiating the settlement of legal structures and norms across national jurisdictions, constitutions contribute to legal ordering that transcends the nation-state.

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8. David Landau, *Democratic Erosion and Constitution-Making Moments: The Role of International Law*, 2 U.C. IRVINE J. INT’L TRANSNAT’L & COMP. L. 87, 94 (2017).

9. Abrak Saati, *Participatory Constitution-Making as a Transnational Legal Norm: Why Does It “Stick” in Some Contexts and Not in Others?*, 2 U.C. IRVINE J. INT’L TRANSNAT’L & COMP. L. 113 (2017).

