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Amaya Alvez

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Book Review

TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN PERSPECTIVES, edited by Nicholas Tsagourias¹

AMAYA ALVEZ²

THE STUDY OF TRANSNATIONAL CONSTITUTIONALISM presupposes a conceptual and theoretical shift of perspectives. This shift is related to the development of analytical tools that capture the tension between legality and legitimacy outside of state boundaries, which have constituted the traditional boundaries of legal discourse. The numerous processes of transnational constitutionalization present a particular challenge for those theories that too easily project learned, domestic notions of political power, law, and legitimacy onto conflict situations in the transnational arena.³

Nicholas Tsagourias's collection of essays, *Transnational Constitutionalism: International and European Perspectives*, offers numerous perspectives on the myriad normative underpinnings, practical examples, and political contexts of transnational constitutionalism in Europe and abroad. The reader is left with the impression that the project of transnational constitutionalism is an aspirational, rather than descriptive, endeavour. As such, it aims to limit political power through law and create a global legal community. Tsagourias's theoretical roadmap underlines the constraints of this project, including the lack of

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1. (Cambridge: Cambridge University Press, 2007) 377 pages [Tsagourias, *Transnational Constitutionalism*].
 2. Assistant Professor, Faculty of Law, University of Concepción, Chile. Ph.D. Candidate, Osgoode Hall Law School.
 3. Peer Zumbansen, "Transnational Law" in Jan M. Smits, ed., *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar, 2006) 738 at 740; Gunther Teubner, "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy" (1997) 31 *Law & Soc'y Rev.* 763.

legislative or governmental power at the international level and the absence of a body politic that can bind its members.⁴ European constitutionalism, therefore, represents a unique process, which seeks to contain the negative impulses of nation-states and promote peace through human rights and the rule of law.⁵ This book provides a timely reminder that the achievement of this global political community is currently endangered due to the weak legal procedures of the world organization. As Jürgen Habermas recently observed, such procedures are selective in nature and are sometimes compromised by the unilaterally imposed decisions of a superpower acting with hegemonic interests.⁶ These dynamics present a particularly challenging context for transnational law, and Tsagourias's collection is an illustrative reminder of the importance of such projects.

The book is divided into three parts. Part I examines the role of states, courts, and constitutional principles through four chapters, which offer intriguing views on traditional rule-of-law institutions and how they deal with the evolving constitutional order. The authors explore the transformation of governments and courts in the context of transnational politics, focusing both on the European Union (EU)⁷ and the transnational.⁸ Part II fruitfully continues this exploration through a discussion of the various forms of governance that emerge in the grey space between domestic and international legal orders. Together, the four chapters present a formidable perspective on the challenges facing the institutional order of nation-states and new international treaties by regulatory regimes. The first two chapters make a compelling argument for the reassessment of the assumed hierarchy of norms and

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4. Nicholas Tsagourias, "Introduction—Constitutionalism: A Theoretical Roadmap" in Tsagourias, *Transnational Constitutionalism*, *supra* note 1, 1.
 5. J.H.H. Weiler, "Fin-de-siècle Europe: Do the New Clothes have an Emperor?" in J.H.H. Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999) 238.
 6. Jürgen Habermas, *The Divided West* (Cambridge: Polity Press, 2006) at 116.
 7. Pavlos Eleftheriadis, "The Standing of States in the European Union" in Tsagourias, *Transnational Constitutionalism*, *supra* note 1, 44.
 8. Nicholas Tsagourias, "The Constitutional Role of General Principles of Law in International and European Jurisprudence" in Tsagourias, *Transnational Constitutionalism*, *supra* note 1, 71 [Tsagourias, "Constitutional Role"]; Julian Rivers, "Proportionality and Discretion in International and European Law" in Tsagourias, *Transnational Constitutionalism*, *supra* note 1, 107.

institutions in international law by exploring the relationship between regions and state-centred international organizations, such as the United Nations (UN),⁹ and the multi-level character of the EU's foreign relations.¹⁰ The last two chapters in this part use the concepts of self-determination¹¹ and deliberative democracy¹² to argue for a better understanding of emerging governing regimes. Finally, Part III concludes with two perceptive treatments of the conceptual and doctrinal nature of the emerging transnational constitutional order. Building on important developments in the work on comparative constitutional law, chapters by Bardo Fassbender¹³ and Wouter Werner¹⁴ discuss the place of transnational constitutional law between comparative and international law. The following gives a more detailed treatment of the book's three parts and its individual chapters.

I. THE HARD AND THE SOFT: THE MÉLANGE OF STATES, COURTS, AND CONSTITUTIONAL PRINCIPLES

In the first chapter of the book, Patrick Capps questions the productive use of social contract theory in capturing the dynamics of the emerging transnational legal order.¹⁵ In his view, the attempt by states in the international arena to "subject themselves to an institutional mechanism designed to authentically express the general will of the world community, embodied in the idea of the

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9. Nigel D. White, "Hierarchy in Organizations: Regional Bodies and the United Nations" in Tsagourias, *Transnational Constitutionalism*, *supra* note 1, 135.
 10. Ramses A. Wessel, "The Multilevel Constitution of European Foreign Relations" in Tsagourias, *Transnational Constitutionalism*, *supra* note 1, 160.
 11. Achilles Skordas, "Self-determination of Peoples and Transnational Regimes: A Foundational Principle of Global Governance" in Tsagourias, *Transnational Constitutionalism*, *supra* note 1, 207.
 12. Tonia Novitz, "Challenges to International and European Corporatism presented by Deliberative Trends in Governance" in Tsagourias, *Transnational Constitutionalism*, *supra* note 1, 269.
 13. Bardo Fassbender, "The Meaning of International Constitutional Law" in Tsagourias, *Transnational Constitutionalism*, *supra* note 1, 307.
 14. Wouter Werner, "The Never-ending Closure: Constitutionalism and International Law" in Tsagourias, *Transnational Constitutionalism*, *supra* note 1, 329.
 15. Patrick Capps, "The Rejection of the Universal State" in Tsagourias, *Transnational Constitutionalism*, *supra* note 1, 17.

universal state," is not explained through basic concepts in contractualism, such as consent, obligation, and institutional forms.¹⁶ Capps perceptively claims that the deficit in this approach is a result of the limitations in our practical ability to imagine an order, aim, and legal structure of the international beyond that of the sovereign state. Alternatively, he proposes a system of governance that calls for a revolutionary approach to international law.

Pavlos Eleftheriadis then provides an insightful perspective on the challenges facing the EU from a burgeoning body of transnational constitutional law.¹⁷ He argues that the appropriate starting point for a political and constitutional theory is a new and unique cosmopolitan framework for states, beyond that of conventional constitutional structures.¹⁸ Eleftheriadis's argument focuses on the judicial architecture of the EU, especially the constitutional principles of subsidiarity and proportionality enshrined in Article 5 of the *European Community Treaty* (EC Treaty).

In chapter three, Tsagourias compares the role played by the European Court of Justice (ECJ), from a transnational perspective, with that of the International Court of Justice (ICJ), from an international perspective.¹⁹ In his opinion, the ECJ performs the role of a constitutional court: it is endorsed by the EU's political institutions and, having been described as the driver of European integration, identifies itself with the EU's political and legal culture. In contrast, the ICJ cannot possess a constitutional role because the international sphere is a compendium of parallel orders—an "acentric system" with no legal place for an authoritative adjudication body.²⁰ A decisive aspect of Tsagourias's argument is the way in which principles are invoked in the absence of legal rules. The ICJ has limited itself for fear of overstepping its jurisdictional limits, while the ECJ has assumed the role of a surrogate legislature based on its legitimate participation in the constitutional dialogue within the EU political order. The chapter convincingly extrapolates the inevitable part the courts must play in initiating political debates in an evolving polity defined by hybrid governance structures.

16. *Ibid.* at 18.

17. Eleftheriadis, *supra* note 7.

18. *Ibid.* at 46.

19. Tsagourias, "Constitutional Role," *supra* note 8.

20. *Ibid.* at 88.

Julian Rivers concludes this part of the book by suggesting factors that may give rise to judicial discretion in the context of proportionality review.²¹ These include necessary and balanced policy options, the uncertainty of state goals, and cultural arguments based on an abstract set of values. Rivers approaches proportionality through the lens of Robert Alexy's "theory of constitutional rights."²² Through the consideration of principles as "optimization requirements" and the necessary balancing of conflicting principles, Alexy's ideas have led authors, like Alec Stone Sweet and Jud Mathews, to claim that these principles "constitute the basic conceptual foundations" of proportionality as a defining feature of global constitutionalism.²³ Rivers proposes an analysis of the approaches of the ECJ, the European Court of Human Rights, and the UN Human Rights Committee in order to distinguish between the different types of judicial discretion and to examine the challenges that this poses to the proportionality analysis.

II. SHIPS PASSING IN THE NIGHT? THE INSTITUTIONAL DIALOGUE CHALLENGE IN TRANSNATIONAL CONSTITUTIONALISM

The second part of the book consists of four chapters devoted to the study of different aspects of the transnational constitutional interface. First, Nigel White's chapter addresses the tension between universalism and regionalism since the inception of the UN.²⁴ He accepts a presumption in favour of regional organizations that possess the power to impose economic sanctions against members and, in certain circumstances, third states. In doing so, he fails to appreciate the dangers in not indicating who will guard the rational use of that discretion, and the consequences of its inappropriate use by regional entities. White acknowledges the lack of representation that undermines the legitimacy of decisions made by the UN Security Council and promotes the 2004 High Level Panel Recommendation²⁵

21. Rivers, *supra* note 8.

22. Robert Alexy, *A Theory of Constitutional Rights*, trans. by Julian Rivers (Oxford: Oxford University Press, 2002).

23. Alec Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) Yale Law School Faculty Scholarship Series, Paper 14 at 14, online: <<http://lsr.nellco.org/yale/fss/papers/14/>>.

24. White, *supra* note 9.

25. *A More Secure World: Our Shared Responsibility*, UN GOAR, 59th Sess., Annex, Agenda Item 55, UN Doc. A/59/565 (2004).

as a solution. Recent events, particularly the attacks against Yugoslavia and Iraq without prior UN Security Council authorization, challenge White's argument.

Focusing on the intricate regulatory nature of the EU, which is marked by semi-federalism and multi-level governance, Ramses Wessel explores the nature of EU governance as an example of an international constitution.²⁶ Consequently, the European foreign affairs constitution is seen as a structured system of retained acts of will and is described in Philip Allot's words as a "legal constitution."²⁷ Wessel's aim is to shift the internal horizontal delimitation between the fields of EU activity to a vertical understanding focused on the relationship between the EU and its members. Through this, he endeavours to recognize the interplay between the global, European, and domestic legal orders.²⁸

In chapter seven, Achilles Skordas argues that "self-determination ... should be perceived as a structural principle introducing a worldwide process of communication on the terms of the establishment of authority over a territory."²⁹ More specifically, he explores the relationship between the principle of *uti possidetis*—which claims that boundaries are not changed in the case of secession—and the ideas of *pouvoir constituant* and "the people." Similar to Thomas Franck, he claims that *uti possidetis* "relies on its capacity to reduce complexity [and] concentrates upon the ... proceduralisation of territorial autonomy."³⁰ Skordas reassesses self-determination in transnational regimes, with special reference to the EU. He examines this as a hybrid example characterized by the self-determination of states as a supra-legal organization, and by the self-determination of regimes as an aspiring political-territorial entity.³¹ Skordas's underlying argument, which claims that self-determination is a principle of global governance whose purpose is to safeguard stability and peace, is attractive. However, the foundational premise of his "system theoretical" perspective—namely that the so-called international community is a "system" to begin with—is questioned by recent developments like the unilateral declaration of independence by Kosovo.

26. Wessel, *supra* note 10.

27. *Ibid.* at 204; Philip Allot, *Eunomia: New Order for a New World Order* (Oxford: Oxford University Press, 2001).

28. Wessel, *ibid.* at 206.

29. Skordas, *supra* note 11 at 210.

30. *Ibid.* at 218-19.

31. *Ibid.* at 245.

Tania Novitz compares international and European corporatism.³² She suggests that the International Labour Organization has a greater ability to accommodate corporate practices within a deliberative framework of governance than under the social dialogue provisions of the EC Treaty.³³ Her contribution makes this volume more insightful on the development of transnational constitutionalism as a new subject of law. The conclusions, however, contradict the overarching tenor of the book, which claims that the EU and its institutions are the best accomplishment of transnational constitutionalism to date.

III. LEARNING FROM DIFFERENCE: THE COMPARATIVE, THE INTERNATIONAL, AND THE TRANSNATIONAL

The third part of this book focuses on visions of international constitutionalism in chapters by Bardo Fassbender, who concentrates on the meaning of "international constitutional law," and by Wouter Werner, who describes the challenges that international constitutionalism faces in becoming the dominant paradigm in international law. The starting point for Fassbender is that the fundamental legal order of any autonomous community or body politic can be addressed as a constitution.³⁴ He claims that the *Charter of the United Nations* (UN *Charter*) can be considered the constitution of the international community, even though it was formally created as a treaty. He argues that the document has been "confirmed and strengthened" in the last fifty years and, therefore, can be referred to as the substantive and formal constitution of the international community.³⁵ Appropriately, Fassbender acknowledges some of the shortcomings in the adoption of the UN *Charter* as a constitution. These include a very restricted ambit of definition, protection, and guarantee of basic rights; the necessity to accommodate states' constitutions; and the noticeable gap between constitutional rules and reality.³⁶

Werner then argues that the ideas of *jus cogens* and world order treaties have compelled international law to start using a constitutionalist currency

32. Novitz, *supra* note 12.

33. *Ibid.* at 301.

34. Fassbender, *supra* note 13 at 308.

35. *Ibid.* at 322.

36. *Ibid.* at 325-26.

when describing public international law.³⁷ However, violations of fundamental norms by powerful countries—most notably the United States—strain the global constitutionalist project. Werner concludes that “[i]nternational constitutionalism has not been able to shake off the tensions, paradoxes and limitations of domestic constitutionalism.”³⁸ These problems, which include the tension between politics and society, testify that the overall normative ambition of international constitutionalists ought to be kept in check.

Transnational Constitutionalism engages the reader in relevant and meaningful ways with the challenges that this new legal discipline faces. Situated uncomfortably between international human rights law, comparative constitutional law, and emerging proposals of international constitutional law, transnational constitutionalism is, in a sense, international constitutionalism (beyond the state) with a twist. As these authors show, transnationalism is more than internationalism and, indeed, something radically different from it.

37. Werner, *supra* note 14.

38. *Ibid.* at 366.