Article

The Changing Landscape of Modern Constitutionalism: Transitional Perspective

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ABSTRACT

This article deals with the question of whether and to what extent constitutional developments in new democracies have changed our understandings of constitutionalism. We attempt to theorize a changing landscape of constitutionalism and examine its features, functions and characteristics. We first analyze the development of transitional constitutionalism by identifying its features, perspectives, functions, and characteristics. Then we examine to what extent and in what ways the developments in transitional constitutionalism pose challenges to our traditional understanding of modern constitutional laws. Providing possible solutions to the challenges, we finally argue that notwithstanding challenges, the addition of transitional constitutionalism to traditional understandings has expanded the horizon of constitutionalism and created new opportunities for a coming generation of constitutional lawyers.

Keywords: *Transitional Constitutionalism, Democratization, Democratic Transitions, Constitutional Change, Constitution-Making*

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I. FOREWORD

The world of constitutionalism has changed dramatically in the recent years. Democratic transitions undertaken by many new democracies in Eastern Europe, Asia, Africa and Latin America presented as one of primary forces behind this profound change. In about the last decade of the twentieth century, many countries struggled to write new constitutions or to amend their old ones as they underwent transitions from their communist or authoritarian pasts.[1] Interestingly, however, these new democracies have experienced a rather different version of constitutionalism during and after their democratic transitions.[2]

Very few democratizing societies, for example, made brand new constitutions immediately after their transitions had taken place. Instead, some more contingent or even provincial constitutional arrangements were relied upon in the initial stages of political transitions.[3] Unlike standard stories that the eighteenth century's constitutionalism might have, new democracies failed to catch particular constitutional moments and found themselves engaged in rather prolonged but nevertheless peaceful processes.

Moreover, these transitional constitutional changes often came as part of political deals negotiated by former regimes and current reformers. As a result, dark pasts such as South Africa's apartheid, Eastern European countries' communist rules, or South Korean and Taiwan's authoritarian regimes were never denied completely. In order to move forward, past legacies continued and even entrenched as part of political gives and takes.[4] The subject of transitional justice became controversial and difficult to deal with even after transitions.[5]

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1. Democratic transitions in East and Central Europe took place after the fall of the Berlin Wall in the 1989 and quickly spread to many parts of the world. But some countries had undergone such transitions earlier. For example, democratic transitions in Latin America were primarily in the 1980s. Three Asian countries, South Korea, Taiwan, the Philippines began transitions mostly in 1987. This paper does not limit its inquiry into transitional constitutional experiences to specific period of time or particular places as it is not an empirical nor comparative study of country-specific studies. Rather, it attempts at theorize a particular kind of transitional constitutionalism widely shared by many transitional states that has since the 1980s undertake constitutional changes. For discussions of democratic transitions in the 1980s, *see generally* SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1991); BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION (1992). For studies mostly in the 1990s, *see generally* JUAN LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE (1996); ANDREW ARATO, CIVIL SOCIETY, CONSTITUTIONS AND LEGITIMACY (2000); DEMOCRATIZATION IN CENTRAL AND EASTERN EUROPE (Mary Kaldor & Ivan Vejvoda eds., 2002); IAN JEFFRIES, THE COUNTRIES OF THE FORMER SOVIET UNION AT THE TURN OF THE TWENTY-FIRST CENTURY (2004).

2. *See* discussion *infra* Part II.

3. *See* discussion *infra* Parts II.A.1, II.C.1.

4. *See* discussion *infra* Part II.C.2.

5. *See generally* HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA (Carla Hesse & Robert Post eds., 1999) (discussing experiences of various countries in their redressing past

The last –but not the least mentioned– feature of transitional constitutional developments was the salient role of national high courts or constitutional courts.[6] Judges were called upon to step into highly-contested political controversies and their decisions were either in lieu of or even supplanted with political solutions. While our traditional understandings of constitutionalism require constitutional codification precede judicial interpretations, what happened during democratic transitions was often the other way around. Responded to initially irresolvable political issues, unconventional judicial solutions were invented and if acceptable, they might be made into constitutional codifications.[7] These new features that occurred in transitional democracies seemed to offer a new possibility in transitional constitutionalism.[8]

Faced with these new developments, we are left to wonder whether, and if so, to what extent and in what ways our traditional understanding of constitutions and their functions would be altered conceptually and practically. How would modern constitutional lawyers cope with these new developments? What lessons shall we learn from these rather distinctive dynamics that began around the turn of the century? In this article, we attempt to theorize a changing landscape of constitutionalism that would substantially expand scopes and create new functions that have yet been recognized in the development of modern constitutionalism.

II. THE EMERGENCE OF TRANSITIONAL CONSTITUTIONALISM

Traditional constitutionalism views a constitution as the guardian of fundamental rights through constraining government powers, including limited government, separation of powers, checks and balances, and judicial review.[9] The fundamental theory behind this classical reading of

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human rights abuses); RUTI TEITEL, TRANSITIONAL JUSTICE (2000) (discussing a great deal of institutional difficulties in dealing with transitional justice).

6. *See* discussion *infra* Part II.A.2.

7. *See* discussion *infra* Part II.D.3.

8. Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009 (1997) (arguing a transitional perspective in constitutionalism). *See also* Ulrich K. Preuss, *The Politics of Constitution Making: Transforming Politics into Constitutions*, 13 LAW & POL'Y 107 (1991); Jonathan D. Varat, *Reflections on the Establishment of Constitutional Government in Eastern Europe*, 9 CONST. COMMENT. 171 (1992); Arthur Jacobson, *Transitional Constitutions*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVE 413 (Michel Rosenfeld ed., 1994).

9. *See e.g.* Louis Henkin, *A New Birth of Constitutionalism: Genetic Influence and Genetic Defects*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES, *supra* note 8, 39-53; Nevil Johnson, *Constitutionalism: Procedural Limits and Political Ends*, in CONSTITUTIONAL POLICY AND CHANGE IN EUROPE 46-63 (Hesse & Johnson eds.,1995); Michael J. Klarman, *What's so Great about Constitutionalism?*, 93 NW. U. L. REV. 145 (1998).

constitutionalism is a clear distinction between law and society, and a conviction that it is not the vocation of law or constitution to stabilize social order and to form political consensus.[10] Instead, a constitution is an end-result, a codified document of social and political consensus. But constitutional experiences of the many transitional democracies in East and Central Europe, South Africa and Asia all demonstrated a trend against this basic assumption.

During democratic transitions, when social consensus disintegrated, transitional societies drifted away from existing legal and social norms. Faced with the crisis of breakdown, transitional societies must substitute new agendas for old legalities that were deeply questioned. Interestingly, in the many transitional states, the agenda of constitutional reforms –either making a new constitution, revising the old one, writing a new bill of rights, establishing a new constitutional court, or reinstituting government system– soon became so dominant as to establish a new platform upon which political elites of different positions could work together. In constitutional undertakings, more profound political changes were pushed forward and new social consensus formed gradually. In other words, in a time of great uncertainty and social disintegration, constitutional changes were not merely end results of political transformations. To the contrary, transitional constitutionalism may take up a steering role and serve as a strong mechanism to help form political consensus and transform social values.[11]

Operating this way, constitutional functions during democratic transitions would shift clearly from constraining government powers to steering reform agendas or even reconstructing social structures. Transitional constitutionalism works not only as a foundation for democratizing politics but also creates new institutional possibilities for further changes in the next steps. In this part, having observed transitional experiences in the many new democracies in East and Central Europe, South Africa and Asia, we will identify distinctive features of transitional constitutionalism, examine its development from diverse perspectives, discuss its particular functions, and argue for its distinctive characteristics.

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10. Gavin W. Anderson, *Social Democracy and the Limits of Rights Constitutionalism*, 17 CAN. J. L. & JURIS. 31 (2004) (arguing that the rights constitutionalism rests on a view of the autonomy of law that is not always consistent with other democratic traditions).

11. Preuss, *supra* note 8, at 113, 119; DANIEL FRANKLIN & MICHAEL J. BAUN EDS., POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH 5 (1994). Some of the features or functions that we identify in transitional constitutionalism exhibited primarily in the democratizing states since the 1980s and 90s may be shown in some earlier forms or types of traditional constitutionalism. They, however, were rather scattered and not as systematic as in recent transitional constitutionalism.

A. *Features of Transitional Constitutionalism*

How is a constitution supposed to function in a rapidly democratizing society? In a time of profound transition, a society has to cope with the past, deal with the current, and look forward to the future. Intense conflicts in interests, values, norms, and priorities abound, and thus any solid, final constitutional solutions may be too far away to get materialized. Constitutional changes during democratic transitions tend to be rather transitory and await new consensus to develop. As a result, transitional constitutionalism presents itself in many significant ways in defiant to traditional functions of constitutions. We identify three features in the following.

1. *Transitory Constitutional Arrangements*

With the sudden collapse of the Berlin wall, profound transitions became possible for the many communist states in East and Central Europe and quickly spread into other authoritarian states with its snow-balling effects. Some constitutional scholars immediately urged these nations grasp the great opportunities with new constitutions. But these forceful calls for new constitutions were not entirely successful.[12]

It was true that some nations succeeded with a new text. They made a new constitution after democratic transitions had taken place. Romania, Czech Republic, the Baltic States, Mongolia, and the Philippines were some of the examples.[13] Others, however, managed to enact a new text in much later time. South Africa, Poland and Thailand stood as representative cases.[14] In contrast to those with a new text, a number of new democracies chose to keep their old constitutions with various degrees of revisions. Hungary, Argentina, South Korea, Taiwan and Indonesia, among others, illustrated such a scenario.[15] Among them, some such as South Korea revised their

12. *See* ACKERMAN, *supra* note 1, at 46-68 (urging that post-communist democracies make new constitutions to consolidate political transitions); STANLEY KATZ, CONSTITUTIONALISM IN EAST CENTRAL EUROPE (1993) (arguing the ways that East Central European nations made new constitutions or constitution amendments or adopted any particular models are dependent upon their respective traditions and realities). *See also* VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 287-98 (1999).

13. *See* Rett Ludwikowski, *Constitution Making in Former Soviet Dominance*, 23 GA. J. INT'L & COMP. L. 155 (1993); Tom Ginsburg, *Political Reform in Mongolia*, 35 ASIAN SURVEY 459(1995); LINZ & STEPAN, *supra* note 1, at 293-434 (discussing constitution-making politics in Bulgaria, Romania, former USSR states, and Baltic states).

14. South Africa adopted a new Constitution in the end of 1996. Poland and Thailand enacted respectively a new Constitution in 1997. For constitution-making details of South Africa and Poland, *see infra* notes 24-25. Regarding the constitution making of Thailand, *see* Borwornsak Uwanno & Wayne D. Burns, *The Thai Constitution of 1997: Sources and Process*, 32 U.B.C. L. REV. 227 (1998).

15. In 1987, South Korea passed major amendments to the Constitution that was originally

constitution only once, while others such as Hungary and Taiwan undertook constitutional revisions in a rather incremental fashion. Still, complexities exited in some situations. For instance, South Africa and Poland made some transitory constitutional arrangements –such as major revisions of the old constitution or interim constitution– before adopting a new constitution. Czech Republic, on the contrary, proceeded with a new constitution immediately after transition but made subsequent revisions at later stages.[16]

One would easily find a transitory feature that commonly existed in aforementioned transitional constitutional developments. For those with a new document after the transition, they either had a "new" text pretty much the same as the old one or had some political deals preceding the text. Additionally many transitional states relied upon a number of more contingent or even provincial constitutional arrangements such as an interim constitution, a series of initial constitutional amendments or even political statements consented by all political parties. The Interim Constitution and the earlier "thirty-four principles" in South Africa,[17] "Little Constitution" in Poland,[18] and the Additional Articles in Taiwan,[19] among others, represented well known cases along the line.

While people in South Africa would have preferred a new constitution to celebrate a new era immediately after apartheid, they actually had to work for some time to achieve initial political consensus –such as "thirty-four principles"–, upon which temporary arrangements and further reforms could

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enacted in 1948 and subsequently amended in the succeeding Republics. This revision followed the procedure of constitutional amendments. Because it was such a very large-scale revision that many began to call it as a new constitution. For details, *see* Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. ILL. U. L.J. 71 (1997). Hungary enacted major amendments to the 1949 constitution in 1989 and several subsequent revisions were made in 1990, 1993, 1994, 1997, 2000, 2001 and 2002. For the experiences of constitutional changes in post-communist Hungary, *see* Gabor Haimai, *The Reform of Constitutional Law in Hungary after the Transition*, 18 LEGAL. STUD. 188 (1998); Gregory Tardi, *The Democratization of the Hungarian Constitution*, 9 MSU-DCL J. INT'L L. 369 (2000). Similarly, responding to democratization, Taiwan undertook constitution revisions in 1991, 1992, 1994, 1997, 1999, 2000 & 2005. For details, *see infra* note 19.

16. *See* Ludwikowski, *supra* note 13.

17. Regarding the process of constitution-making in South Africa, *see e.g.* Christina Murray, *A Constitutional Beginning: Making South Africa's Final Constitution*, 23 U. ARK. LITTLE ROCK L. REV. 809 (2001); D. J. Brand, *Constitutional Reform – The South African Experience*, 33 CUMB. L. REV. 1 (2002).

18. Regarding the constitution-making in Poland, *see* Symposium, *The Constitution of Republic of Poland*, 1997 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1 (1997); Daniel H. Cole, *The Struggle for Constitutionalism in Poland*, 97 MICH. L. REV. 2062 (1999).

19. Regarding the developments of constitutional change in Taiwan after democratization, *see* Jiunn-Rong Yeh, *Constitutional Reform and Democratization in Taiwan: 1945-2000*, *in* TAIWAN'S MODERNIZATION IN GLOBAL PERSPECTIVE 47-77 (Peter Chow ed., 2002); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 106-57 (2003) (discussing Taiwan's democratization, constitutional change, and especially the role of court during such processes); WEN-CHEN CHANG, TRANSITION TO DEMOCRACY, CONSTITUTIONALISM AND JUDICIAL ACTIVISM: TAIWAN IN COMPARATIVE PERSPECTIVE (unpublished JSD Dissertation, 2001) (on file with author).

be hammered down. Similarly in Poland, political consensus on constitution making notwithstanding, the earlier focus of democratic transitions was actually on rather practical issues such as opening national elections, redistributing political powers, or reinstituting the court. In Taiwan, additional articles were enacted first so as to allow the reelection of national assembly that in turn would resume the power to further amend the Constitution.

Transitory arrangements sometimes are imposed from outside. In some more recent cases, the international community intervened in transitional states through international peace accords.[20] These peace accords were seen as transitory arrangements that facilitated initial transitional processes to push forward further peaceful elections, public referendum or constitution making. This strategy was employed in the recent transition of Palestine, East Timor, followed by the reconstruction of Iraq.[21]

In these rapidly democratizing states, transitory or interim constitutional arrangements were made to facilitate political consensus and push forward further reforms. Despite a conventional understanding that a constitution must be created at a revolutionary moment once and for all, these temporary constitutional measures proved to be quite helpful when final, settled constitutional solutions had not yet emerged or agreed upon.

More importantly, many transitional democracies had a written constitution that was by and large consistent with basic constitutional principles.[22] What was needed at the moment of transition was perhaps just putting an end to the domination of the communist party, shifting the power from party-chairman to prime minister, changing electoral rules, strengthening property rights to help transform controlled economy to private market, or establishing a new constitutional court.[23] Several changes

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20. Kirsti Samuels, *Post-Conflict Peace-building and Constitution Making*, 6 CHI J. INT'L L. 663 (2006) (arguing a strong link of post-conflict peace-building efforts to the success of constitution making in present strategies of the international community); Zaha Hassan, *The Palestinian Constitution and the Geneva Accord: The Prospects for Palestinian Constitutionalism*, 16 FLA. J. INT'L L. 897 (2004) (discussing the Geneva Accord in the process of Palestinian constitution making and arguing their potential conflicts).

21. Iraq council asks U.N. to endorse self-rule plan (Nov. 25, 2003), *available at* http://www.cnn.com/2003/WORLD/meast/11/24/sprj.irq.main/index.html (last visited Mar. 5, 2009); Iraqi Council signs Interim Constitution (Mar. 8, 2004), *available at* http://www.nytimes.com/2004/03/08/international/middleeast/08CONS.html (last visited Mar. 5, 2009).

22. KATZ, *supra* note 12. Katz argues that it was not of a necessity for a number of East and Central European democracies to make a new constitution. Hungary and Poland, for example, enjoyed a better constitutional tradition and benefited from a rather piecemeal approach. Czech Republic and Slovakia, if not impelled by their separation into two nations, could have also take incremental methods. *See also* Venkat Iyer, *Restoration Constitutionalism in the South Pacific*, 15 PAC. RIM L. & POL'Y J. 39 (2006) (arguing that "restoration constitutionalism" provides a smoother and quicker return to liberal politics than any other modality of transition).

23. LINZ & STEPAN, *supra* note 1, at 3-15; AREND LIJPHART & CARLOS WAISMAN, INSTITUTIONAL DESIGN IN NEW DEMOCRACIES: EASTERN EUROPE AND LATIN AMERICA 6 (1996);

into the old constitution would suffice to do the job. Once made, these initial changes might serve as a solid foundation for further comprehensive constitutional reforms or even a new constitution. Notwithstanding this incremental practice, these transitional democracies may run the risk of losing a constitutional momentum. In fact, after successful initial changes, a few countries such as Hungary, Poland, South Korea, or Taiwan felt no pressing need to complete with a new constitution.[24] Before Poland finally made a new Constitution in 1997, many had predicted that the final delivery would fail.[25] Till today, the preamble of the Hungarian Constitution openly states its determination to make a new Constitution, despite the fact that it had been revised already about eight times. Also, Taiwan remained ambivalent about making a new constitution after seven rounds of constitutional revision in more than a decade.

2. *Unconventional Constitutional Adjudication*

Another salient feature of transitional constitutionalism is the emergence of unconventional constitutional adjudication. It is understood in two ways. First was widespread establishment of constitutional court with the power of judicial review.[26] The second was unconventional constitutional interpretations rendered by these newly established or reinstituted courts. As a matter of fact, recent years have witnessed a record high in the number of

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Cass R. Sunstein, *On property and Constitutionalism*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 383-411 (Michel Rosenfeld ed., 1994) (arguing that property rights and judicial enforcement are critical to democratic transitions and constitutional change for East and Central European democracies). *See also generally* CONSTITUTIONS, MARKETS AND LAW: RECENT EXPERIENCES IN TRANSITIONAL ECONOMIES (Stefan Viogt & Hans-Juergen Wagener eds., 2002).

24. Hungary, Taiwan and South Korea have not yet had any new constitutions, while it took Poland about eight years to complete a new constitution in 1997.

25. Cole, *supra* note 18. *See also* Wiktor Osiatynski, *The Constitution-Making Process in Poland*, 12 LAW & POL'Y 125 (1991).

26. By far, almost all Eastern European countries have constitutional courts and in Asia, many new democracies adopted similar institutions. A brief note on the years of the establishment or reinstitution of constitutional courts is in the following.

Year	Newly Established	Court Reinstituted	Judges Reappointed
1978	Spain		
1986		Poland	Philippine
1988	South Korea		
1990	Hungary		
1991	Bulgaria	Russia	
1992	Romania		
1993		Czech/Slovak Republics	
1994	South Africa/Slovenia/Moldova		Taiwan
1997	Thailand		

Source: Author, the web link of various national constitutional courts *available at* http://www.ccrm.rol.md/wwc_en/ (last visited Mar. 5, 2009).

constitutional courts created or reinstituted throughout former communist or authoritarian regimes in East and Central Europe,[27] South Africa,[28] and Asia.[29] The discourse of constitutionalism in these transitional societies was translated into the establishment of constitutional courts and the power of judicial review.[30]

Precisely because of the transitory nature we discussed above, what constitutional provisions originally said was far less important than what was actually interpreted and affirmed by constitutional courts. With or without expressive textual grounds, constitutional courts were expected to promptly deliver what was needed in a time of transition. That might include constitutional principles consistent with liberal democracies, rights oriented to free market, or redistribution of government powers agreed by all political players. As a result, courts were invited to yield key changes in constitutional norms by their interpretations, and sometimes would even have to step –willingly or unwillingly– into high-profile political controversies.

For instance, without direct and expressive textual grounds, the Hungarian constitutional court was invited to affirm, if not create, the power of judicial review of administrative actions and right of informational privacy.[31] The Polish constitutional tribunal resorted to a rather abstract principle in rule of law to allow appeals of administrative actions.[32] Short of solid textual grounds, these courts sometimes had to rely upon international

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27. *See e.g.* Matthias Hartwig, *The Institutionalization of the Rule of Law: The Establishment of Constitutional Courts in the Eastern European Countries*, 7 AM. U. J. INT'L L. & POL'Y 449, 449-50 (1992); Herman Schwartz, *The New East European Constitutional Courts*, *in* CONSTITUTION MAKING IN EASTERN EUROPE 163-207 (A.E.Dick Howard ed., 1993); Robert F. Utter & David C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from A Comparative Perspective*, 54 OHIO ST. L.J. 559 (1993); Sarah Wright Sheive, *Central and Eastern European Constitutional Courts and the Anti-majoritarian Objection to Judicial Review*, 26 LAW & POL'Y INT'L BUS. 1201 (1995).

28. *See e.g.* Penuell M. Maduna, *Judicial Review and Protection of Human Rights under A New Constitutional Order in South Africa*, 21 COLUM. HUM. RTS. L. REV. 73 (1989); Brice Dickson, *Protecting Human Rights through a Constitutional Court: The Case of South Africa*, 66 FORDHAM L. REV. 531(1997).

29. *See e.g.* GINSBURG, supra note 19 (discussing constitutional courts of Taiwan, South Korea and Mongolia); Ahn, *supra* note 15 (arguing that the judicial activism in Korea is to be cherished and encouraged). In addition, Thailand created a constitutional court in the newly written 1997 Constitution. In April 2002, Indonesia passed a constitutional amendment to establish a brand-new constitutional court.

30. *See* TEITEL, *supra* note 5 (discussing the ways that constitutional courts may assist in the establishment of the rule of law in transitions); HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE (2000) (explaining the works of five constitutional courts, Poland, Hungary, Russia, Bulgaria, and Slovakia and affirming the significant roles these courts play in establishing liberal democracy and constitutionalism).

31 . LASZLO SOLYOM & GEORGE BRUNNER, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT 139-50, 364-70 (2000) (with a collection of selected decisions of the Constitutional Court of the Republic of Hungary).

32. SCHWARTZ, *supra* note 30, at 49-74, 66.

laws or foreign decisions to establish their reasoning as well as strengthen the legitimacy. The Slovakia constitutional court, for example, referred to international laws to affirm freedom of expression that was not made clear in her Constitution.[33] The constitutional court of South Africa likewise resorted to international human rights laws and foreign decisions to abolish death penalty, easing fears during the transition that any capital punishment would be utilized for vengeances.[34]

Unconventional constitutional adjudication also presented in a form of judicial intervention in transitional politics. Given transitory nature of initial constitutional arrangements, a great deal of institutional inconsistencies or political conflicts would inevitably rise and expect to be resolved by neutral arbitrators.[35] In a time of transition, a strong presidency would probably breed an uncompromising judiciary as a more cooperative and decentralized system still needs judicial mediation.[36] That was why many constitutional courts –regardless their various government systems– were faced with similar cases involved institutional power struggles.[37]

Especially in times when political costs in steering up transitions ran too high, political players would prefer judicial resolution to political decision-making.[38] For instance, in the beginning of democratic transitions in Taiwan, political consensus was made that the notorious tenured representatives from China must step down for a new congressional reelection to take place. But such political undertaking was at such extremely high costs that even the ruling Nationalist Party was not in a position to take a strong hold. In the end, it was the constitutional court that rendered a decision to demand the retirement of those representatives and even impose a deadline for national reelection.[39]

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33. *Id*. at 194-225, 215 (citing Article 10 of the European Convention of Human Rights).

34. *State v. Makwanyane*, 1995 (3) SA 391 (CC) (S. Afr.). For analysis of this case, *see e.g.* Paolo G. Carozza, *"My Friend is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights*, 81 TEX. L. REV. 1031, 1056-61 (2003).

35 . CHANG, *supra* note 19 (arguing that incremental constitutional reforms generate inconsistencies awaiting judicial intervention); Gabor Halmai, *The Reform of Constitutional Law in Hungary after the Transition*, 154 J. CONS. L. E. & CENT. EUR. 154, 154-67 (1997) (presenting the role of courts in mediating institutional inconsistencies particularly concerning executive-parliamentary relationships).

36. Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 794-97 (1997).

37. SCHWARTZ, *supra* note 30, at 228-31 (arguing that one of the most important constitutional court activities in East and Central European constitutional courts is allocation of powers, horizontal as well as vertical).

38 . *See e.g.* Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91 (2000) (employing cost-analysis in arguing causes of recent judicial empowerments); GINSBURG, *supra* note 19 (arguing an insurance theory by which political branches utilize courts to entrench political interests and avoid political costs). Lee Epstein, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117 (2001) (arguing that political tolerance is the key factor of strong judicial actions).

39. *J. Y. Interpretation No. 261* (1990/06/21). For the text in English, *see* http://www.judicial.

In a significant way, the success of transitional constitutionalism in recent years must credit to the many courts and their unconventional decisions. Instead of people's revolution or politicians' great leadership, the expansion of judicial powers in transitional politics became a persistently dominant feature, which however resonated with a rather typical worry of counter-majoritarian difficulty in traditional constitutionalism.[40]

3. *Quasi-Constitutional Statutes*

The third feature of transitional constitutionalism is that constitutional reforms may take the form of statute in lieu of formal constitutional amendment. This is in part due to transitory nature of transitional constitutional developments, and in part due to rather comparable procedures between law-making and constitution-amending in a number of parliamentary transitional states.[41] As we mentioned above, most transitional democracies had a written constitution that was to a large extent consistent with liberal constitutional principles. What were needed at the most were measures directed to tackling with particular transitional issues, which varied from context to context.

For some, an immediate change of electoral rules, of judicial system, of market institutions, or of central-local relationship was seen as dominant in the course of transitions.[42] A new constitutional court with strong determination of enforcing constitutional rights would suffice to symbolize a new beginning. Poland for instance reinstituted a constitutional tribunal long before any constitutional reforms began.[43] For others, the priority was to

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gov.tw/CONSTITUTIONALCOURT/EN/p03_01.asp?expno=261 (last visited Mar. 5, 2009). This interpretation has actually facilitated constitutional revision directed to congressional reform towards full suffrage. For a detailed discussion of this case, *see* GINSBURG, *supra* note 19, at 145-48; CHANG, *supra* note 19.

40. *See e.g.* Kim Lane Scheppele, *Constitutional Negotiations: Political Contexts of Judicial Activism in Post-Soviet Europe*, 18 INT'L SOC 219 (2003) (arguing that "counter-majoritarian difficulty" does not exist in the context of constitutional courts in new democracies"); Bojan Bugaric, *Courts as Policy Makers: Lessons from Transition*, 42 HARV. INT'L L.J. 247, 260 (2001) (discussing anti-democratic difficulty for advanced and transitional democracies); Michael J. Perry, *Protecting Human Rights in A Democracy: What Roles for the Courts?*, 38 WAKE FOREST L. REV. 635 (2003) (defending a strong role of court in both advanced and emergent democracies).

41. In a parliamentary system where parliamentary sovereignty is observed, it is often that the parliament enjoys the power of legislative enactment as well as that of constitutional amendment. The respective quorum is, however, different: 1/2 for law-making while 2/3 for constitution amending. This would make constitutional politics undifferentiated from ordinary politics. *See* Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revisions in Eastern Europe*, *in* RESPONDING TO IMPERFECTIONS: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 275-306 (Sanford Levinson ed., 1995).

42. LIJPHART & WAISMAN, *supra* note 23, at 2-3; RICHARD ROSE ET AL, DEMOCRACY AND ITS ALTERNATIVES: UNDERSTANDING POST-COMMUNIST SOCIETIES 9-10 (1998); VOIGT & WAGENER, *supra* note 23.

43. SCHWARTZ, *supra* note 30, at 49-52.

redress transitional justice and to take preventive measures from any future dominance of communist parties or authoritarian rulers. Czech Republic for instance denounced the legality of communist party and altered statute of limitation so as to begin prosecutions of criminal acts committed by former officials.[44] In unified Germany, prosecutions against former East German officials were allowed, and the constitutionality of which was affirmed by the German Constitutional Court.[45] Still others undertook less revengeful measures while drawing a line between the past and the future. South Africa tackled with apartheid by establishing a truth and reconciliation commission long before a new constitution was made.[46] In Taiwan and other countries, individual claims for compensation for past rights infringements or property takings were allowed by special laws.[47]

These measures not only directly addressed transitional issues that met particular needs of respective society but also sent signals of a profound transformation as much as –if not more so– a new constitution could. Moreover, they would not necessarily take the form of constitutional amendments. With consensus reached in the parliament, statues would be delivered at a much speedier fashion and they would be much easier to amend if problems found later. In a time of profound transition with political uncertainties, political players would understandably avoid running political risks too high. The form of quasi-constitutional statues with which groundbreaking transitional measures could be undertaken was the best choice. In the many parliamentary transitional states, statute enactment that required a half of parliamentary vote was not seen as too much weak in democratic legitimacy compared to constitutional amendment that required a two-third.[48] As a matter of fact, these quasi-constitutional statues were often passed with much higher consensus that required for constitutional amendments.

B. *Diverse Perspectives of Transitional Constitutionalism*

In order to provide a theoretical account for the functions of constitution

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44. This was so-called lustration acts, which triggered constitutional review by Polish Constitutional Tribunal. For the excerpt of the court decision and their relevant discussion, *see* JACKSON & TUSHNET, *supra* note 12, at 347-56.

45. For brief discussions of the case, *see* Teitel, *supra* note 8, at 2030-31; JACKSON & TUSHNET, *id*.

46. For the establishment and works of the Truth and Reconciliation Commission in South Africa, *see* STEINER & ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 1216-47 (2d ed. 2000).

47. For the discussion of transitional justice in Taiwan, *see* Naiteh Wu, *Transitional without Justice, or Justice without History: Transitional Justice in Taiwa*n, 1 TAIWAN J. DEMOCRACY 77-102 (2005).

48. Holmes & Sunstein, *supra* note 41.

in the course of transition, we examine major perspectives of political transition and constitutional change. Each perspective reflects anticipation of a particular role that constitutionalism would play during political transition.

1. *Foundationalism*

The first perspective treats constitutional change during transition as a foundation for a brand-new democratic political order. In this view, the best and perhaps the only way to complete democratic revolutions is constitution making.[49] Making a new constitution not only reap the reward of political revolution but also consolidate revolutionary efforts with a set of new rules for a new democracy. It is particularly in the latter sense that this foundationalist view of transitional constitutionalism derives its strong normativity. A foundationalist connects democratic transition with constitutionalism in a moral sense and sees extraordinary mobilization of the people as establishing solid political legitimacy for the new regime. A new constitution would thus provide a moral guidance as well as an integral design of institutions for further progress.

Based upon this view, foundationalists actually reacted to the recent constitutional developments in transitional democracies with grave concerns. They worried that transitory constitutional reforms were selective, compromising and incomplete.[50] Worse yet, if not handled properly, they might entrench hatred and create new problems, thus even undermining any future comprehensive reform to take place. To them, several Central and European countries such as Hungary or Poland should have caught the very first constitutional moment during the transition to make a brand-new Constitution. And precisely because of such failure, they argue that in these new democracies, a complete, integral new democratic legal order has yet been in quest.[51]

It is clear that foundationalism cannot appreciate fully the transitory, informal and flexible features in the recent transitional developments. While a foundationalist places the focus on moral substance of transitional

49. The most well known scholar who advocated this view is Bruce Ackerman, *see* ACKERMAN, *supra* note 1, at 46-68. *See also* Holmes & Sunstein, *supra* note 41. (warning that politics in East and Central European states had not provided a good condition for constitution-making, notwithstanding an important and desirable goal); Howard Gillman, *From Fundamental Law to Constitutional Politics—And Back*, 23 LAW & SOC. INQUIRY 185 (1998) (arguing that the concept of the legalized Constitution and the belief in constitutional perfectionism need not to be abandoned).

50. *See e.g.* Katharina Pistor, *The Demand for Constitutional Law*, *in* CONSTITUTIONS, MARKETS AND LAW: RECENT EXPERIENCES IN TRANSITIONAL ECONOMIES 67-86 (Stefan Voigt & Hans-Juergen Wagener eds., 2002) (arguing the importance of constitution and law making in providing workable institutions for transitional states).

51. *See generally* JON ELSTER ET AL., INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES: REBUILDING THE SHIP AT SEA (1998).

constitutionalism, in a time of profound change, it is often the process and in particular, the priority, instead of the substance, that would occupy the central debate of developing transitional constitutionalism.

2. *Reflectionalism*

The second perspective views constitutional changes as a tool of consolidating winner's will in the flux of transitional politics. Reflectionalism dismisses any moral ideas in constitutional changes during democratic transition. Instead, it offers practical, even strategic, explanations.[52] In this view, whether or not a new constitution is made in a time of transition is dependent upon practical political contingencies. Three scenarios are provided.

First, if a clear winning party –emerging after the first democratic election during the transition whose power suffices to make a new constitution– stands firm in transitional politics, it is likely that this party would prefer a new constitution to entrench its winning position in longer term.[53] But in this way, the making of a new constitution would barely stabilize transitional politics as the losing party would always try to fight back. This scenario offers a best explanation for constitution experiences in several transitional states, such as Romania, Mongolia and former states of Soviet Federation.[54] Notwithstanding a new constitution enacted at the earliest moment, they nevertheless continued to confront a series of serious setbacks and their transitions have not yet been regarded as complete and successful.

The second scenario often exists in transitional states that undertake major constitutional revisions or go through with a mixed series of constitutional amendments and quasi-constitutional statutes. Suppose there is not yet any clear winning or losing political party, and suppose neither party is sure of whether it has sufficient powers to push forward a new constitution, it is very likely that major political parties would try to seek their best interests through political bargains. The result is often a negotiated pact between past rulers and reformers or a series of incremental reforms by which major parties play with one another according to their contingent

52. Most political scientists take this view in explaining democratic transitions. *See e.g.* LINZ & STEPAN, *supra* note 1, at 55-65; LIJPHART & WAISMAN, *supra* note 23, at 2-3; GUILLERMO O'DONNEL & PHILIPPE C. SCHMITTER, TRANSITION FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES 15-36 (1986); Enrico Colombatto & Jonathan R. Macey, *Path-Dependence, Public Choice, and Transition in Russia: A Bargaining Approach*, 4 CORNELL J. L. & PUB. POL'Y 379 (1995); JOSEP M. COLOMER, STRATEGIC TRANSITIONS: GAME THEORY AND DEMOCRATIZATION 129-30 (2000).

53. COLOMER, *id.*

54. LINZ & STEPAN, *supra* note 1, at 55-65.

political influences over a longer period of time.[55] The experience of constitutional reform in South Korea, Taiwan, Hungary, among others, coincides to a large extent with this view.[56]

Lastly, some even more manipulative measures would probably be undertaken when the communist or authoritarian ruling party is still in dominance but faces a serious danger of losing power very soon. In this scenario, the dominant ruling party would –surprisingly– agree to adopt several progressive constitutional reforms that would play veto powers against future ruling parties. A comprehensive bill of right, a constitutional court with judicial review powers, or even a more decentralized federal arrangement serves greatly such "negative" functions in future transitional politics.[57] In the view of reflectionalism, the recent spread of judicial powers exercised by constitutional court displays not any triumph of modern constitutionalism but merely the result of practical calculations by political parties doomed to losing power.[58]

All in all, reflectionalism views constitutional developments during transitions as reflective of power equilibrium among rivalry political powers. Thus, transitional constitutionalism has little to do with moral foundations but much to do with political manipulations. In some way, this reflective view speaks certain political realities in the time of democratic transitions. But it nevertheless ignores –perhaps unjustly– certain positive functions that constitutional changes may provide in the process of transition. It is often that rule of game in transitional politics is being searched and developed as struggles and questions arise. Thus, transitional constitutionalism may still serve to integrate various political and social agendas –despite potential political maneuvers– and play directional or managerial roles in the course of transitions.

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55. COLOMER, *supra* note 52; CHANG, *supra* note 19.

56. GINSBURG, *supra* note 19 (South Korea and Taiwan); Tardi, *supra* note 15 (Hungary). *See also* Wen-Chen Chang, *The Role of Judicial Review in Consolidating Democracies: The Case of Taiwan*, 2(2) ASIA L. REV. 73 (2005).

57. In an institutional view, constitutional designs such as separation of powers, federalism, or judicial review are seen as vetoing mechanisms against political players. *See* R. Kent Weaver & Bert A. Rockman, *Assessing the Effects of Institutions*, *in* DO INSTITUTIONS MATTER? GOVERNMENT CAPABILITIES IN THE UNITED STATES AND ABROAD 1, 31 (1993). For an introduction of institutional approach, *see generally* TOM GINSBURG & ROBERT A. KAGAN, INSTITUTIONS AND PUBLIC LAW: COMPARATIVE PERSPECTIVE (2005).

58. This account is best advocated by Ran Hirschl. *See* Hirschl, *supra* note 38; RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004). But *see* Michael C. Davis, *Constitutionalism and New Democracies*, 36 GEO. WASH. INT'L L. REV. 681 (2004) (arguing that judicial behavior should be explained by factors other than strategic calculus).

3. *Constructivism*

The third perspective sees constitutional change during democratic transition as a continual and constructive process.[59] In this view, constitutional revisions or even a new constitution made during democratic transitions would never stay unchanged. Rather, initial constitutional changes would alter subsequent political situations, where new demands for constitutional reforms would rise and facilitate another round of constitutional changes that would again alter political situations where new changes would be brought about. In short, constructivism holds that constitutional developments during democratic transitions continuously participates in each stage of transformation, consolidates consensus of early stages and induces next stages to take place.[60]

Seen this way, transitional constitutionalism is neither a normative enterprise nor merely political manipulations. It reveals both –practical characteristics and normative nature.[61] In a time of turbulent political transition, while a new constitution may not be achieved in one shot, it would nevertheless evolve over time. Initial changes would breed next changes in a rather progressive fashion. In contrast with traditional understandings in that constitution is taken as a stable, most lasting form of law, transitional constitutions are often transitory and anticipates further transformations. It thus entails a sense of instrumentality in its very notion and functions.[62]

This practical and constructive perspective of transitional constitutionalism not only coincided with the experiences of South Africa, but also found its place in Taiwan's quiet revolution. In South Africa, the earlier constitutional revisions opened the first nationwide election, thus a new Congress was formed. This new Congress then passed an interim Constitution, one chapter of which dictated a comprehensive process –even including a certification by constitutional court– to make a new Constitution.[63] Similarly in Taiwan, the first constitutional revision rendered

59. *See also* Teitel, *supra* note 8, at 2057-58 (arguing that transitional constitutionalism develops not all at once but in fits and starts); Yeh, *supra* note 19 (using Taiwan's constitutional reform experience to explain such a constructive view); CHANG, *supra* note 19 (arguing political origins of incremental constitutional reforms). *See also* Jacobson, *supra* note 8, at 413-22 (Michel Rosenfeld ed., 1994) (arguing that transitional constitutions -albeit embracing principles incompletely-would push forward further progress); ULRICH K. PREUSS, CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS 7, 98 (1995) (arguing that constitution-making in East and Central Europe was a rather reflexive process that resolving complex social values and moral conflicts step by step).

60. Teitel, *id.*

61. Teitel, *supra* note 8, at 2063.

62. *Id.* But some criticizes this instrumental use of constitution, *see e.g.* Pistor, *supra* note 50, at 81.

63. It was Chapter 5 of the 1994 Interim Constitution of South Africa. *See generally* Hugh

by the old assembly made possible an island-wide reelection, thus a new Assembly being formed rendering subsequent constitutional reforms.[64]

It is true that constructivism recognizes the nature of transitional constitutionalism as an incremental process that is constructed and at the same time constructive. But it should not be misunderstood that constructivism precludes any possibility of putting an end to this process, namely a new constitution, for the better. Having recognized intrinsic values of a new constitution, however, constructivists are very practical about time that is needed in such a profound transformation into a genuine constitutional democracy. Changes in constitutional texts may be comparably easy to accomplish, but entrenched cultures or ideologies embedded in previous regimes would not be easy to go away.[65] Thus transitional constitutionalism would inevitably become sensitive to the process –agenda and priority setting in political transitions.

C. *Functions of Transitional Constitutionalism*

In the flux of democratic transition, whether any constitutional or extra-constitutional approach would prevail is contingent on the credibility of the existing constitution, the will and vision of political leaders, and even some cultural elements. Once involved, however, constitutional approach would dictate the process. Even the old regime may present an institutional possibility that allows for next transformation to happen.

Constitutions during democratic transition are expected to serve functions that depart from traditional understandings which are primarily on limiting government powers and protecting fundamental rights. Instead, transitional constitutionalism is likely to intervene in transitional process such as managing reform agendas or setting up priority. In the following, we summarize three major functions that constitution may serve in transitional moments: managing reform agenda, substituting violent revolution, and facilitating social integration.

1. *Management of Reform Agenda*

Many new democracies undertook political transitions through formal constitutional revisions. Of course the dynamics of democratization would

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Corder, *South Africa's Transitional Constitution: Its Design and Implementation*, PUB. L. 291 (1996).

64. Yeh, *supra* note 19; CHANG, *supra* note 19.

65. *See e.g.* Cole, *supra* note 18 (showing that Poland's constitutional history demonstrates the culturally and historically contingent nature of constitution making); Rett R. Ludwikowski, *Constitutional Culture of the New East-Central European Democracies*, 29 GA. J. INT'L & COMP. L. 1 (2000) (arguing that constitutional functions and structures are largely influenced by cultural environments in East and Central Europe).

not necessarily rely upon constitutional changes. Constitutional interpretations rendered by courts and quasi-constitutional statutes enacted by legislatures would also contribute to the process.[66] Through constitutional undertaking, however, democratic transitions would be synchronized with agenda setting –managed and observed at a constitutional level. This was precisely what happened in the last wave of constitutional transitions as witnessed in Hungary, South Africa, Taiwan, Indonesia, among others.[67]

In a transitional moment, calls for reform are demanded from all walks of the society. When reforms are astonishingly complex, agendas must be set. But even agendas consented to and negotiated by major political parties would be distrusted and challenged. This is especially true when political trust is weakened during political turbulence. In order to overcome the crisis of trust, constitution becomes the central institution capable of managing transitional agendas.[68] Once set in the constitution, reform agendas resume a binding status at a constitutional level. In other words, political compromises and negotiations become constitutionally entrenched and transform into normative commitments.

Many reform issues emerge in a time of transition, testing rather fragile political operations. To prevent a breakdown or a stalemate, one would reasonably choose to undertake reforms through an incremental way that deals one or two major issues at a time. For, the decision concerning which issue should be tackled often poses a great challenge to political parties at a negotiating table. An incremental constitutional reform that divides issues into series of constitutional revisions would resolve this dilemma, as decisions between competing issues become a question of timing rather than a question of all or nothing.[69]

This constitutionalized form of agenda setting, however, base not upon a well planned blueprint. Rather, it is through a "muddling through" process without an ex ante "comprehensive rationality."[70] But we should note that any institution has its own "institutional capacity." Once institutions fail to

66. Teitel, *supra* note 8, at 2057-58.

67. Teitel, *supra* note 8, at 2060 (South Africa); Yeh, *supra* note 19 (Taiwan); Tardi, *supra* note 15 (Hungary); Andrew Ellis, *The Indonesian Constitutional Transition: Conservatism or Fundamental Change?*, 6 SINGAPORE J INT'L & COMP. L.116 (2002).

68. Teitel, *supra* note 8, at 2057-58; Andras Sajo & Andrew Arato, *Editor's Introduction*, 13 LAW & POL'Y 101, 102 (1991).

69. Andrew Arato, *Forms of Constitutional Making and Theories of Democracy*, 17 CARDOZO L. REV. 191, 230 (1995) (appraising that the extended method of constitution making allowed South African to gain time in dealing with fundamentally complex problems).

70. *See generally* Charles E. Lindblom, *The Science of "Muddling Through"*, 19 PUB. ADMIN. REV. 79 (1959) (suggesting adaptation model of change). But *cf.* Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279 (1999) (arguing "revolutionary transformation"–mass movement on behalf of grand ideals– as an alternative model of change).

provide sufficient spaces for agendas at hand to develop, the dynamics of transition may flow out of the existing available constitutional institutions.[71]

2. *Substitution of Violent Revolution*

In a time of profound transition, the relationship between revolutions and constitutions becomes an enchanting issue. Calls for revolution would run high when existing institutions fail. The more capable existing institutions deal with transitions, the less likely democratizing politics would turn revolutionary. In other words, if undertaken successfully, constitutional reforms would substitute for violent revolutions.[72]

In Taiwan for example, while confronting with legitimacy crisis, the people chose not to overthrow the former regime or declare independence.[73] The opposition instead came to the negotiating table and agreed to undertake constitutional reforms. Apart from street protests and violent strategies, the opposition decided to take part in the new round of national election authorized by the existing Constitution whose legitimacy had been denounced. In so doing, reforms within the existing legal framework in lieu of violent revolution resumed a central place in transitional politics. As a consequence, political dialogues or at times some turbulent interactions between political parties were tailored to the undertaking of constitutional discourses and preparations for the next round of constitution reforms.

The reasons for Taiwan –among others– could conduct democratic transitions in such a relatively quiet manner were complex. But it is beyond question that a series of constitutional revisions scattered in some ten years provided an institutional capacity in reform and subsequently avoided violent revolutions. Perhaps costs remained uncounted. In Taiwan, the former regime was not changed until the presidential election in 2000 –ten years after democratic transitions had begun–. In other new democracies, transitional process was criticized as prolonged and former regimes seemed to come back rather easily.[74] Notwithstanding drawbacks, transitional constitutionalism that presents in ways apart from traditional understandings of constitutions proves to facilitate transitional processes in peaceful ways

71. This is the "spillover effect" of institutional capacity. *See generally* Jiunn-Rong Yeh, *Institutional Capacity-building Towards Sustainable Development: Taiwan's Environmental Protection in the Climate of Economic Development and Political Liberalization*, 6 DUKE J. COMP. & INT'L L. 229 (1996).

72. Teitel, *supra* note 8, at 2067-69.

73. Yeh, *supra* note 19; CHANG, *supra* note 19.

74. LINZ & STEPAN, *supra* note 1, at 293-434 (discussing some setbacks for transitions in Bulgaria, Romania, former USSR states, and Baltic states); Robert Sharlet, *Transitional Constitutionalism: Politics and Law in the Second Russian Republic*, 14 WIS. INT'L L.J. 495 (1996) (argues that Russia will continue to be an authoritarian state for some time notwithstanding continual progress of democratization).

rarely seen in human history.

3. *Facilitation of Social Integration*

Traditional constitutionalism assigns functions of a constitution to be restraining government powers and protecting basic rights. It establishes a premise upon a society where social cohesion is largely maintained and social consensus is achieved through prevailing social norms and conventions.

In a time of transition, however, social consensus collapses and social norms become distanced to changing social nexuses alien to existing social and political systems. The existing regime is on the brink of breakdown, and larger political reforms, if not revolutions, would be demanded to reconstruct a new political community. Whether various groups of social and political identities would be willing to join political reforms and peacefully (re)negotiate or even (re)construct their shared values and a new collective political identity becomes a central challenge to democratic transitions.[75] In this process, searching for a new set of shared values and norms that would bind the society together again becomes imperative. Constitutional reforms by which a new democratic political order would be established may provide such a new set of values as well as a broader negotiating space for constructing an emergent political identity.[76] It is in this sense that transitional constitutionalism provides a function of social integration, which was witnessed in the transitional experiences in East and Central Europe,[77] South Africa,[78] Taiwan,[79] among others.

In addition, constitutional courts –if seen as a neutral, deliberative institution– may also help re-establish a rational discourse and rebuild political trust and social cohesion. Despite rather chaotic transitional politics, constitutional courts may provide a stabilizing function by way of their groundbreaking decisions with articulated principles and values.[80] In this

75. Preuss, *supra* note 8, at 109-13; Andrew Arato, *Dilemmas Arising from the Power to Create Constitutions in Eastern Europe*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVE 413-22 (Michel Rosenfeld ed., 1994) (arguing various model of constitutional making facilitate to various extent the construction of a new political community); Michel Rosenfeld, *Constitution-Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example*, 19 CARDOZO L. REV. 1891 (1998) (arguing that negotiated changes by which groups of various identities are embraced facilitate successful construction of a new collective political identity).

76. Preuss, *supra* note 8, at 113; Rosenfeld, *id*. at 1917-19.

77. *See* Rosenfeld, *id*. (arguing recent constitutional reforms in East and Central Europe, particularly in Poland and Hungary, followed the Spanish model that was good for (re)negotiation of political identity).

78. Corder, *supra* note 63, at 299-300.

79. Yeh, *supra* note 71, at 269-70.

80. Kim Lane Scheppele, *Democracy by Judiciary (Or Why Courts Can Sometimes Be More*

way, courts may become the center of transitional constitutionalism and capable of signaling a great beginning. South African constitutional court for example, among other courts in successful new democracies, shouldered successfully such a function and became renowned and respected worldwide.[81]

Lastly, transitional constitutionalism may facilitate social integration in quite an unusual way. For, a living constitution serves as prima facie evidence of a viable constitutional state. In undertaking constitutional reforms and resorting to constitutional discourse for political resolutions, constitutional culture is likely to be materialized, which would in turn construct a constitutional identity as well as strengthen statehood. Take Taiwan as an example. Because of her rather unique situation, Taiwan has been handicapped in international proclamation. But the decade's democratic transition has established Taiwan as a new democracy in line with the many others and helped her regain the confidence in participating in the international community.

In the future, a constitutional identity may replace nation-state –a rather controversial concept– in transnational collaborations. The European Union with her Constitution would be capable of dealing with other constitutional democracies in the world. This is a key link of transitional constitutionalism to transnational constitutionalism as we shall demonstrate further in the following part.

D. *Characteristics of Transitional Constitutionalism: Relativity*

If there is one word to catch the spirit of transitional constitutionalism, that must be relativity. Three sets of relativity are of special notice here: the relativity between constitution making and constitution amending, between formal and informal channels, and between constitutional adjudication and constitutional revision.

Democratic Than Parliaments), *in* RETHINKING THE RULE OF LAW IN POST-COMMUNIST EUROPE (Wojciech Sadurski et al eds., 2005) (arguing that courts in transitional democracies are actually more democratically sensitive); Andras Sajo, *Preferred Generations: A Paradox of Restoration Constitutions*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVE 335-51, 350 (Michel Rosenfeld ed., 1994) (arguing judges instead of political founders become key figures in the recent democratic transitions of East and Central Europe). But, there exists a critical view on judges taking leading roles in democratization and constitutional change, *see* ACKERMAN, *supra* note 1, at 109-12.

81. Teitel, *supra* note 8, at 2060. *See also* Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. PENN. J. CONST. L. 205 (1998); Margaret A. Burnham, *Cultivating a Seedling Charter: South Africa's Court Grows Its Constitution*, 3 MICH. J. RACE & L. 29 (1997).

1. *The Relativity between Constitution Making and Amending*

Traditional constitutional theories view constitution making and amending as two distinctive routes in constitutional reform.[82] In this traditional view, the making of a new constitution symbolizes a new beginning with a clear break with the past. In contrast, constitution amendments are made within the existing regime's legality. In terms of process, constitution making is often a result of revolution or other extra-legal means and involves a pronouncement or reaffirmation of national sovereignty, followed usually by a public referendum. Constitutional revisions, on the other hand, would not always involve the change of sovereignty and follows rather normal constitutional politics. As a result, it is argued that while everything may be altered in the making of a new constitution, substantive restrictions remain vital in constitutional amending. For instance, name, national flag or territory of a state, among other matters critical to state identity may not be altered through constitutional revisions.[83]

This traditional distinction between constitution making and amending, however, was crossed over in the recent development of transitional constitutionalism. As we discuss earlier, the call for new constitutions in the last wave of democratic transitions was not entirely successful. Some had opted for a new constitution in spite of insufficient consensus or preparatory works. Mongolia, Romania, the Philippines, and the Baltic States represented some of typical examples. Others however decided to live through their transitions in short of a new constitution. They instead made a major constitutional revision at once or undertook a series of incremental amendments. South Korea, Hungary, Taiwan, among others, illustrated such examples.

More importantly, in their constitutional revisions, these new democracies set up neither substantive nor procedural limits. Take South Korea for example. The 1987 constitutional revision that gave birth to an entirely new government structure with a new constitutional court was followed by an unprecedented public referendum.[84] In Hungary, the first major constitutional revision of the earlier 1990s altered her name from People's Republic of Hungary to Republic of Hungary, suspended the

82 . *See generally* RESPONDING TO IMPERFECTIONS: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995); JACKSON & TUSHNET, *supra* note 12, at 260-88.

83. Increasingly the tendency of constitutional scholarship is to emphasize that unamendable constitutions denote only the part of basic rights and fundamental constitutional principles such as popular sovereignty, democracy, rule of law and separation of powers. In practice, however, matters concerning the change of nation-state identity were put into realization through constitution-making or its like procedures. JACKSON & TUSHNET, *id*.

84. Ahn, *supra* note 15.

official privileged status of the communist party, and most importantly, added a long list of fundamental rights. The provisions added at the time amounted to the size of a new constitution, but they were done with a single act of constitutional amendment.[85] Likewise in Taiwan, more than one third of constitutional provisions were altered in seven rounds of constitutional revisions in fifteen years.[86] Having no new constitutions, these new democracies have nevertheless operated their new regimes in entirely new frameworks.

It should also be noted that constitutional revisions may lead making of a new constitution. In her ten-year transitional period, South Africa employed a strategy of "constitution making by stages" – amending the Constitution first, making an Interim Constitution and then creating a new constitution. This process, albeit prolonged, proved successful in that it avoided excessive political impacts and social costs generated by once-and-for-all reform.[87] The Polish Constitution followed the similar pattern. Poland promulgated a "Little Constitution" through constitutional revisions and it did not make new constitution until democratic transition was rather consolidated. The new constitution was passed in 1997 with incentives of joining the European Union.[88]

Having observed constitutional practices in the last wave of democratic transitions, we argue that the traditional distinction between constitution making and constitutional revision has become relative. In a time of profound change, all kinds of institutional possibilities are actually open. Transitional constitutionalism not only allows more varieties in constitutional changes but also more importantly encourages much more open process to achieve such key collective decisions.

2. *The Relativity between Formal and Informal Channels*

The second relativity stands between formal and informal channels in the undertaking of constitutional transitions. During the course of democratic transitions in the 1990s, informal mechanisms were utilized as a way to induce and facilitate further formal reforms. One of the most renowned examples was "Roundtable Talk."[89] It was first introduced in Poland, then mimicked by Czechoslovakia and Hungary, and spread into the many transitional democracies. During these roundtable talks, critical principles

85. Haimai, *supra* note 15; Tardi, *supra* note 15.
86. Yeh, *supra* note 19.
87. Arato, *supra* note 69, at 230; Murray, *supra* note 17; Brand, *supra* note 17.
88. *See generally* Symposium, *supra* note 18.
89. *See generally* ROUNDTABLE TALKS AND THE BREAKDOWN OF COMMUNISM (Jon Elster ed., 1996)

concerning a new constitution or constitutional revisions were laid down and agreed upon.

This practice, however, was rather inconsistent with what a traditional constitutional lawyer would expect before such a profound change took place. Based upon traditional constitutionalism, either a constitutional convention or other similar formal settings are required for deliberations of constitution making or profound constitutional changes. Only through formal discussions, their results would become binding and legitimate. Formality not only counts for validity but also demands responsibility for decision making and accountability for its consequences. Why, then, would recent transitions reply so much upon informal mechanisms?

In a time of turbulent transition, both former regime and reformist party face up great pressures for reform. Neither is likely to loosen its own stands. Yet if that continues, intense conflicts or political stalemate may appear, running the risk of regime breakdown. Thus, informal mechanisms are important as a way to ease political tensions and make peaceful negotiations possible.[90]

It is precisely due to this informality that important political parties or alliances are willing to come to the negotiating table to decide on groundbreaking political changes. In such an informal mechanism, governing powers are rather free from institutional limits or pressures and thus would be more willing to make compromises with reformists. Albeit legally nonbinding, these roundtable resolutions bear great weight in political trust. Once realized in preliminary transitory measures, they would earn credibility and even become critical in the follow-up reforms. The thirty-four principle in the course of South Africa's constitutional reform was such a best example.

3. *The Relativity between Constitutional Revision and Adjudication*

Finally, relativity is found between constitution revision and constitution adjudication. In recent democratic transitions, judicial powers interfered actively in the process of transition and made a great deal of unconventional adjudication. A number of constitutional courts such as that of South Africa, of Hungary, of Taiwan or of South Korea offer great examples.[91]

This relativity stems, among other things, from the fact that new parliaments lack the capacity of resolving complex political controversies and thus fail to deliver promptly constitutional resolutions so desperately needed in a time of turbulent transitions. In contrast, if supplemented with

90. Teitel, *supra* note 8, at 2068-70; Arato, *supr*a note 69, at 185-94.
91. *See* discussion *infra* Part II.A.2.

experiences and credibility, judicial solutions by constitutional courts or high courts are likely to be faster and effective. This provides even stronger incentives for political institutions to do away with high-profiled controversies.[92] As a result, judicial resolutions may replace political decisions and thus the line between constitutional revision and constitutional adjudication would be crossed.

The other more radical relativity existed in the constitutional transition of South Africa. Based upon the authorization of the Interim Constitution, the Constitutional Court bore the competence to certify the new Constitution by examining whether it complied with the thirty-four principles and other basic guidelines of modern constitutionalism.[93] The certification of constitutional court was made into the process of constitutional reform. As a matter of fact, the South Africa Constitutional Court did exercise this power and even nullified several provisions in the new Constitution and sent them back for redrafts.[94] Also, the Taiwanese constitutional court declared constitutional amendments unconstitutional and annulled them uncompromisingly.[95] This unprecedented judicial decision was –rather surprisingly– observed by political actors who agreed to make new constitutional amendments according to the judicial ruling.[96]

Yet the intersection between constitutional revision and adjudication is not without danger. In fact, in the many new democracies, major decisions rendered by judges confronted both counter-majoritarian crisis[97] and institutional limitations. After all, constitutional adjudication entails decisions –dealing with single issue– by unelected judges. Constitutional revisions represent collective decision-making –tackling complex and multiple issues– by elected representatives. Judicial solutions may be quick to develop, but political decisions through democratic deliberations –albeit time-consuming– would be more beneficial to consolidating democracies in a longer term.

III. THE CHALLENGES OF TRANSITIONAL CONSTITUTIONALISM

The recent development of transitional constitutionalism described above has not come without suspicions. Some worry that these new features would circumvent great virtues of traditional constitutionalism, calling them

92. Hirschl, *supr*a note 38; GINSBURG, *supra* note 19; Epstein, *supra* note 38.
93. Burnham, *supra* note 81.
94. *Id*.
95. *J. Y. Interpretation No. 499* (2000/03/24). For the text in English, *available at* http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03_01.asp?expno=499 (last visited Mar. 5, 2009). For details, *see* CHANG, *supr*a note 19.
96. CHANG, *supr*a note 19.
97. Bugaric, *supra* note 40. But *see* Scheppele, *supra* note 40.

deviants or troubles.[98] Indeed, some of the relative natures are a clear indicator of departures. But would these 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. Before we decide to stand on either position, it is necessary to examine more closely challenges posed by transitional constitutionalism and to inquire further how these challenges are to be reconciled. Mindful of most recent developments in globalization, there is a possibility that transnational constitutions and institutional arrangements might help resolve or at least ameliorate some of the challenges ahead.

A. *Accountability*

The first salient challenge posed by transitional constitutionalism is the failure in ensuring 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 to what they decide, and only with this clear understanding, they would be less likely to abuse their power in their decision making. But transitional constitutionalism has displayed a departure from this principle.

In transitional constitutionalism, accountability issues are two-fold. First is from judicial substitute for political decision-making.[99] In transitional states, many constitutional courts wielded strong powers to provide unusual solutions to constitutional struggles with which political players failed to tackle. For example, the South Africa Constitutional Court was granted the power to review a new constitution before promulgation, making judicial decision being part of constitutional making process that was supposed to be political in nature. Other constitutional courts rendered decisions that became part of constitutional solutions without later being codified into formal constitutional amendments. These decisions which were political in nature were made by courts that shouldered no direct and immediate accountability. "Juristocracy" –as termed by one scholar– caught vividly this problem of transitional constitutionalism.[100]

The second accountability problem rises from informal channels during

98. *See e.g.* Joachim Jens Hesse, *Constitutional Policy and Change in Europe: The Nature and Extent of the Challenges*, *in* CONSTITUTIONAL POLICY AND CHANGE IN EUROPE 3-19 (Hesse & Johnson eds., 1995). *But cf.* Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models*, 1 INT'L J. CONST. L. 296 (2003) (arguing that negative rejection, rather than positive acceptance, plays a major role in the transnational exchanges).

99. *See* discussion *infra* Parts II.A.2, II.D.4.

100. *See generally* HIRSCHL, *supra* note 58.

transition. As we have learned, some great solutions in democratic transitions were actually made through informal channels, and later –fortunately enough– all political players actually abided by them and further codified them into legal or constitutional forms.[101] But this was against the conventional wisdom of accountability. In fact, through these informal channels, decision-makers were actually intended to be free from formal accountability as an incentive to increase their possibility of making deals and reaching compromises.

Are there any ways to reconcile accountability issue posed here? We think one of the most important ways is perhaps to open up a new understanding of accountability and make it more broadened. With a closer look, it is not difficult to find that new forms of accountability were already invented in transitional democracies. While critical decisions were made through informal channels, they were not being made without any scrutiny. In fact, during such a high tide of profound transitions, general public –both domestic and international[102]– was in high alert. Political players were very much aware of accountability –perhaps even greater than normal times– they would have to bear.

As for the accountability problem drawn by "juristocracy," common technical solutions include limiting the tenure of constitutional justices and making their appointment process more deliberative and decision-making more accountable.[103] Additionally, transnational judicial mechanisms may provide effective checks and balances with national constitutional courts. For instances, in Europe and America, it is now possible for regional courts such as European Court of Justice, European Court of Human Rights or Inter-American Court of Human Rights to review decisions of national constitutional courts.[104] Insofar as external judicial access is open, deficiency in internal judicial accountability is possibly ameliorated.

B. *Democratic Deficit*

The second, and perhaps the most severe, problem that transitional constitutionalism has created is democratic deficit. The democratic thesis of traditional constitutionalism requires that all decisions and norms be made and generated with sufficient democratic legitimacy. But this is not fulfilled completely in transitional societies.

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101. *See* discussion *infra* Part II.D.2.

102. LSTER, *supra* note 89.

103. KATE MALLESON & PETER H. RUSSELL, APPOINTING JUDGES IN THE AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVE FROM AROUND THE WORLD 1-10 (2006).

104. Wen-Chen Chang, *Constructing Federalism: The EU and US Models in Comparison*, 35(4) EURAMERICA 733, 760-63 (2005).

In democratic transitions, in order to make further changes possible, many constitution revisions were done with great compromises with old regimes, and some were even done directly by old guards like in Poland, Hungary or Taiwan. These initial constitutional revisions or political compromises suffered greatly in democratic legitimacy. In addition, when critical constitutional solutions were done by courts instead of by political players, they also called democratic legitimacy into questions. And this has been identified by scholars as a countermajoritarian difficulty that was widespread in almost all transitional democracies.[105]

While democratic legitimacy is weak in transitional constitutionalism, it is not necessarily irresolvable. Some scholars have already argued that the recent democratic deficit debate must be tackled by a brand-new understanding of democratic legitimacy. For instance, initial reforms undertaken by old regimes may be criticized as lacking democratic legitimacy, but subsequent political openings they brought may justify or at least ameliorate the problem. In case of unconventional judicial solutions that substitute democratic decisions, it is important to bear in mind that constitutional judges are not entirely shielded from public scrutiny, neither they are of no democratic legitimacy in terms of their appointments. More importantly, democratic legitimacy of judicial decisions may also come from institutional legitimacy of courts, democratic deliberations provided by judicial hearings, court decisions and even public discussions surrounding them.

The problems of democratic deficit in some situations are possibly ameliorated by transnational legal mechanisms and democratic legitimacy they carry. For example, the Council of Europe and its Venice Commission have provided a great deal of legal helps for new constitutional courts in Eastern Europe.[106] Decisions of international courts or tribunals are particularly instructive for new constitutional courts in their inventions of judicial solutions to most difficult issues confronting new democracies.[107] To the extent that these transnational institutions hold democratic legitimacy by their participating member states, they would help to ensure democratic legitimacy of domestic institutions that follow closely to them.

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105. Bugaric, *supra* note 40. But *see* Scheppele, *supra* note 40.

106. 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). *See also generally* CHRISTOF HEYNS & FRANS VILJOEN, THE IMPACT OF THE UNITED NATIONS HUMAN RIGHTS TREATIES ON THE DOMESTIC LEVEL (2002).

107. *See e.g.* Joshua L. Jackson, *Broniowski v. Poland: A Recipe for Increased Legitimacy of the European Court of Human Rights as a Supranational Constitutional Court*, 39 CONN. L. REV. 759 (2006); Holly Dawn Jarmul, *The Effect of Decisions of Regional Human Rights Tribunals on National Courts*, 28 N. Y. U. J. INT'L L. & POL. 311, 328-62 (1995-96); 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).

C. *Rule of Law*

The last but not the least challenge is concerned with the 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 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.[108] These fundamental principles of rule of law, especially legal certainty and legal clarity, however, have been undermined to certain extent in recent developments.

In transitional democracies, one of the most contested issues was how to deal with the past regime.[109] Some decided to respect for legal certainty, thus leaving past wrongdoings go unpunished and unjust laws remained the same. Others, however, decided to deal with the past upfront, thus revoking unjust laws and beginning punishing wrongdoings that were completely legal in the old regimes. This undertaking undoubtedly generated a grave concern of legal certainty, and many constitutional courts were involved and compelled to decide this highly contested dilemma even today.

Like democratic deficit, problems concerning rule of law in transitional constitutionalism are not fatal. Many believe this weakness may be supplemented by strengthening of other aspects in rule of law such as judicial review and human rights protections. For example, the judicial creation of non-enumerated rights –albeit not without concerns with rule of law and the boundary of constitutional interpretation has often been appraised as a strong exercise of judicial activism in human rights protections.[110] The expansion of judicial powers is justified or at least defended insofar as it delivers rights protection. Noticeably, some of international human rights treaties or transnational norms may also lend a helping hand to domestic constitutional courts in defending their defiance from "internal" rule of law. Many national courts have begun referring transnational norms or international human rights if such norms or rights are not explicitly provided in their domestic constitutions.[111] For example, right to counsel in criminal proceedings has not been clearly stated in the many constitutions of Eastern Europe. By referring to international covenants, however, Eastern European constitutional courts have no hesitation to include such a right into their domestic lists.[112]

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108. BARRY M. HAGER, THE RULE OF LAW: A LEXICON FOR POLICY MAKERS 19-35 (1999).
109. Teitel, *supra* note 8, at 2049-51.
110. *See generally* THE GLOBAL EXPANSION OF JUDICIAL POWER (Neal Tate ed., 1995).
111. Trang, *supra* note 106.
112. Georg Ress, *The Effects of Decisions and Judgments of the European Court of Human*

The rule of law concern in transitional justice is ameliorated in a similar light. In many transitional democracies, intensified battles on statute of limitation or lustration between parliaments and constitutional courts were common. We have seen that in defending rule of law, constitutional courts struck down statutes concerning transitional justice and became unpopular or even perceived as "undemocratic." However, the development of international humanitarian law that also deals with internal armed conflicts and provides criminal responsibilities for grave breaches in crimes against humanity may possibly provide a legal solution.[113] To the extent that certain criminal measures are allowed in international humanitarian law, they are legal and legitimate means to be utilized in domestic pursuits of transitional justice.

To sum up, many features in transitional constitutionalism have brought new challenges to our traditional understandings of constitutional laws. Most critical are accountability, democratic deficit and rule of law. These challenges, however, are not fatal. They demand us to open up new ways of constitutional thinking and create new solutions. More importantly, some of the new challenges are possibly tackled in the most recent rise of global –and transnational– legal institutions and arrangements. In a significant way, while transitional constitutionalism is changing our understanding of traditional constitutionalism, it is also at the same time being changed by global and transnational legal developments that have yet to be recognized by the global community of constitutional lawyers.

IV. CONCLUSION

The 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 changes in transitional democracies, however, we have observed a dramatic change in the very notion of constitutionalism that has evolved since the eighteenth century.

The emergence of transitional constitutionalism, as vividly displayed in the many transitional democracies in the last one or two decades, defies significantly in its features, perspectives, functions and characteristics from our traditional understandings of constitutionalism. Instead of brand-new constitutions, transitional constitutionalism features transitory constitutional arrangements, unconventional constitutional adjudication and

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Rights in the Domestic Legal Order, 40 TEX. INT'L L.J. 359, 362 (2005).

113. For an introductory understanding of international humanitarian law and how it may cope with issues of transitional justice in the context of democratic transitions, *see* STEINER & ALSTON, *supra* note 46, at 1198-1247.

quasi-constitutional statutes. Unlike classical limiting functions of constitutions, transitional constitutionalism may function as managing reform agendas, substituting violent revolutions and even facilitating social and political integration. Most interestingly in transitional constitutionalism is its relativity. No clear lines may be drawn between constitution making and amending, formal and informal channels of change, and between constitutional revisions and adjudication.

The relative nature of transitional constitutionalism certainly posts challenges to traditional understandings of constitutions. Most critical include accountability, democratic deficit and rule of law. We argue, however, that these changes are possibly ameliorated, if not resolved, by utilizing our creativity and reinventing new solutions. In additions, some of the most recent developments in transnational arrangements may also lend a helping hand. Rather than being a foundationalist or reflectionalist, we are of a more constructive view in understanding the current changing landscape of constitutionalism. These new changes carry with them not only challenges but also –more importantly– new institutional opportunities for future colletive decision making in the era of complex global constitutional transformations. A new world where constituions expand into more diversified forms, bear more functions, and even spill over across natioal borders is clearly in sight and constitutional lawyers must move beyond traditional ways of understanding to better cope with such a new world.

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