

Younger Comparativists Committee, American Society of Comparative Law
New Scholarship Bulletin
Volume 2, Issue 1 (November 2012)

Editor's note: The purpose of this bulletin is to increase dissemination of scholarship and communication between younger comparativists. The bulletin is sent out several times per year; the next issue will be sent out in Spring 2013. Please send all submissions to David Landau at dlandau@law.fsu.edu, in the following format:

Name, email
Institutional Affiliation
Title
Publication Outlet (if known)
Address where piece is available online (ssrn, etc)
Abstract

Brian Flanagan, brian.flanagan@nuim.ie
National University of Ireland, Maynooth & NYU School of Law (2012-13)
Judicial Globalisation and Perceptions of Disagreement: Two Surveys
2012 New Zealand Law Review (3) 443

Abstract:

Using data from a 2011 judicial survey that drew responses from the entire New Zealand Supreme Court, I model the Court's practice of transnational argument. The data suggest that whereas foreign law often appears to contribute to the Court's legal conclusions, at times its contribution derives from an associated social reward, and at others is flatly illusory. I argue that these findings, in tandem with those of the larger survey, indicate that the law reports systematically misrepresent all judicial disagreement as legal disagreement, thus lending support to the claim that in controversial cases, the law is indeterminate.

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"Veiled Political Questions: Islamic Dress, Constitutionalism, and the Ascendance of Courts"

61.1 American Journal of Comparative Law, January 2013

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2061928

Abstract:

This article explains how judicial independence can develop in regimes that are not fully democratic. Conventional wisdom holds that a strong legislature and political parties are necessary for the emergence of an independent judiciary. This article challenges conventional wisdom by explaining how judicial independence may arise in regimes where these conditions are not present. It presents a theory of how judicial independence emerges and why and when other political actors will respect it. The article also explains

why courts may be better poised than legislatures to counter executive power in non-democracies. The theory is developed through a discussion of cases involving Islamic headscarves and veils in Middle Eastern courts. These cases have broad political implications because of their significance to Islamists, who pose the biggest challenge to the power of traditional elites in majority-Muslim countries; and their broad legal ramifications with respect to judicial power, individual rights, constitutional convergence, religious freedom, and the relationship between shari'a and state law. The article also explains how national courts have interpreted Islamic law and challenges the notion that courts function to secularize state-sponsored religion. To the author's knowledge, this article contributes the most complete discussion in the English-language academic literature of recent high court cases in Egypt, Kuwait, and Turkey that were translated for the purposes of this article, thus contributing to the body of foreign constitutional case law available for comparative study.

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International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts

American Journal of International Law (forthcoming)

Website where paper can be downloaded (ssrn, etc.): not yet available

Abstract:

Scholarship on the international prosecution of genocide, war crimes and crimes against humanity has typically focused on two types of international courts, the criminal tribunals and the hybrid tribunals. This article proposes that there is an alternative international mechanism of accountability that has been overlooked: the jurisdiction exercised by international human rights bodies of ordering and supervising national prosecutions. Original research reveals that the regional rights bodies have forged a quasi-criminal practice that strives towards the very same outcomes as the international and hybrid criminal tribunals: punishment and deterrence, restorative justice, processes of societal reconciliation, and justice system reform. Further, this form of jurisdiction has unique attributes: it promotes prosecutions that are local and paid for by the state (rather than the international community), even as its process is responsive to victims' needs. The Inter-American Court of Human Rights in particular has made national prosecution of gross state-sponsored crimes a center-piece of its regional agenda. And, like the international and hybrid tribunals, it has achieved some success. The article concludes that the quasi-criminal jurisdiction of the human rights courts should be considered as a complement and, in certain situations, an alternative to the work of the current international and hybrid criminal tribunals.

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Looking Towards Europe: Regulation of Dominance in Nigerian Telecommunications Working Paper

<http://ssrn.com/abstract=2145781>

Abstract:

Nigeria is yet to enact generally applicable competition laws. However in the telecommunications sector, sector specific competition rules were enacted with the regulator taking steps including determination of dominance in selected markets to enforce these rules. These developments are important in Nigeria as they could provide good domestic references for future application of both general competition law in Nigeria and sector specific application of competition rules in other network industries in the country. Furthermore with regulatory determinations of dominance relatively rare in the national communications sectors in Africa, Nigerian regulatory decisions are likely to be of interest to operators and regulators in other countries within the West African sub-region specifically and Africa in general.

This article analyses regulation of dominant positions in the Nigerian telecommunications sector. It shows that while the Nigerian Communications Commission's (NCC) approach in this area appears to be influenced by European Union (EU) law, the Nigerian rules have developed and are applied in a way different from the application of comparable EU rules. It argues that a finding of anti-competitive conduct is not required in Nigerian telecommunications law for the imposition of obligations on dominant operators. It also calls for a revision of the applicable rules to stipulate the basis for market selection and refine criteria for the related concept of identification of the relevant market for purposes of dominance analysis. Finally, it identifies issues with the NCC's application of criteria for single dominance assessment.

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"Our Electoral Exceptionalism"

University of Chicago Law Review

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2139123

Election law suffers from a comparative blind spot. Scholars in the field have devoted almost no attention to how other countries organize their electoral systems, let alone to the lessons that can be drawn from foreign experiences. This Article begins to fill this gap by carrying out the first systematic analysis of redistricting practices around the world. The Article first separates district design into its three constituent components: institutions, criteria, and minority representation. For each component, the Article then describes the approaches used in America and abroad, introduces a new conceptual framework for classifying different policies, and challenges the exceptional American model.

First, redistricting institutions can be categorized based on their levels of politicization and judicialization. The United States is an outlier along both dimensions because it relies on the elected branches rather than on independent commissions and because its courts are extraordinarily active. Unfortunately, the American approach is linked to higher partisan bias, lower electoral responsiveness, and diminished public confidence.

Second, redistricting criteria can be assessed based on whether they tend to make districts more heterogeneous or homogeneous. Most of the usual American criteria (such as equal population, compliance with the Voting Rights Act, and the pursuit of political advantage) are diversifying. In contrast, almost all foreign requirements (such as respect for political subdivisions, respect for communities of interest, and attention to geographic features) are homogenizing. Homogenizing requirements are generally preferable because they give rise to higher voter participation, more effective representation, and lower legislative polarization.

Lastly, models of minority representation can be classified based on the geographic concentration of the groups they benefit and the explicitness of the means they use to allocate legislative influence. Once again, the United States is nearly unique in its reliance on implicit mechanisms that only assist concentrated groups. Implicit mechanisms that also assist diffuse groups — in particular, multimember districts with limited, cumulative, or preferential voting rules — are typically superior because they result in higher levels of minority representation at a fraction of the social and legal cost.

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The Military as the Guardian of Constitutional Democracy

50 Columbia Journal of Transnational Law __ (forthcoming Summer 2013)

<http://ssrn.com/abstract=2161013>

Abstract: This Article challenges the prevailing and long-entrenched orthodoxy in constitutional theory that a constitutional role for the military in an emerging democracy necessarily hinders democratic progress. I argue that the ideal level of military involvement in a new democracy is not always zero and that certain militaries can play, and have played, a democracy-promoting role in the initial phases of a transition from autocracy to constitutional democracy. The conventional constitutional theory, which assumes that all militaries are hegemonic and praetorian institutions that must be completely disconnected from the civilian realm, has restrained innovative thinking on this important and timely topic.

As the fourth wave of democratization sweeps across the Arab World, with attendant debates about the appropriate constitutional role for the military in post-authoritarian societies such as Egypt, this Article offers a timely theory of the democracy-promoting military. It argues that some militaries — what I call “interdependent” militaries — are capable of playing a democracy-promoting constitutional role in a post-authoritarian society because their self-interests often align with the conditions that James Madison and others have identified as conducive to the genesis of a constitutional democracy: institutional stability, political pluralism, and national unity.

After theorizing the democracy-promoting military, the Article applies it to case studies. It analyzes the democracy-promoting constitutional role that the militaries in Turkey and Portugal played following respective military coups in 1960 and 1974 that toppled authoritarian regimes and established democracies. The Article concludes by examining the implications of this theory for the future of Egypt’s democracy.

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Transnational Legal Communication: A Partial Legacy of Supreme Court President

Aharon Barak

47 Tulsa Law Review 437 (2012)

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2139053

Abstract:

The concept of transnational judicial dialogue has been investigated as a general matter ever since the concept was first introduced by Anne-Marie Slaughter in the early 1990s. This paper uses Slaughter's concept and expands it in order to assess in greater detail the impact of one particular participant in what this paper call "transnational legal communication": former President of the Supreme Court of Israel Aharon Barak. The purpose of the article is two-fold. It first analyzes the jurisprudential legacy of President Barak, but it also attempts to create a framework for analyzing the life work of important participants in transnational legal communication more generally.

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Legal Perspectives and Regulatory Philosophies on Natural Monopolies in the United States and Germany

Günther Schulz/Mathias Schmoeckel/Will J. Hausman (eds): Regulation Between Legal Norms and Economic Reality: Intentions, Effects, and Adaption - The German and American Experiences, Mohr Siebeck, Tübingen, 2012

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2051151

Abstract:

The paper, a contribution to an interdisciplinary projects bringing together scholars from the fields of history, economics and law from Germany and the United States, addresses the regulatory philosophies that underpin the regulation of the electricity markets in Germany and the United States. It challenges the traditional narrative that characterizes the United States as having a laissez-faire approach to regulation, while Germany (and with it most European countries) operates under a more state-driven model. This description blurs two concepts: liberalization and deregulation. Starting soon after the invention of electricity in the 19th century, regulatory models emerged in both countries - oftentimes building on previous experience with railroads - that emphasized the public role that the electricity industry plays in modern societies. The paper traces the history of political thought in both countries from the beginning of electricity regulation until today, concluding that the example of network industries shows convergence rather than divergence.

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"China's Human Rights Footprint in Africa"

Columbia Journal of Transnational Law (forthcoming, 2013)

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2125581

Abstract: A significant amount of recent scholarship and commentary accuses China of plundering the African continent, coddling its dictators, and flouting labor and environmental standards. This paper makes the counterintuitive claim that, despite irrefutable cases of abuse, China's engagement with Africa has actually improved the human rights conditions of millions of Africans. First, it places China's abuses in context, showing that they differ little from the abuses and patronage politics of the major Western powers. Second, it examines the evolution of international relations between China and various African countries, from the exportation of political revolution in the 1950s and 1960s, to the promotion of human capital in the 2000s and 2010s. Third, it catalogs the many recent contributions in the educational, agricultural, infrastructural and medical fields that China had made to African development. By challenging the dominant narratives on both theoretical and empirical grounds, I call for a reexamination of a critically important, but often misunderstood, pattern of interactions between China and Africa, a nexus that is shaping world affairs and perceptions in unprecedented ways.