

1996

Emerging Trends in International Constitutionalism: A Comparative Approach: Foreword

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Recommended Citation

Edward A. Mearns, *Emerging Trends in International Constitutionalism: A Comparative Approach: Foreword*, 28 Case W. Res. J. Int'l L. 1 (1996)

Available at: <https://scholarlycommons.law.case.edu/jil/vol28/iss1/1>

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FOREWORD

EMERGING TRENDS IN INTERNATIONAL CONSTITUTIONALISM: A COMPARATIVE APPROACH

IN THE LAST DECADE, we have witnessed a veritable wave of constitution making. For the most part, this has taken place in Central and Eastern Europe where former Soviet states have adopted Western-style constitutions. These constitutions embrace constitutionalism; they aim at establishing “rule of law” governments. This phenomenon tracks events of a half century ago. At the end of World War II, conquered nations — Italy, Germany, and Japan — and newly independent, former colonies in Asia and Africa — adopted constitutions sensitive to human rights and the necessity to limit governmental power.

For fifty years, comparative constitutional lawyers have been studying these developments. Convinced of the value of the comparative method, they have sought a more thorough understanding of how constitutional law operates, not in theory, but rather in the context of history and the political and economic conditions of particular countries. They have learned that notions of constitutional law travel across national boundaries. These ideas contribute to the better understanding of constitutional processes wherever they arrive.

This fact is more fully appreciated in Europe, South America, Africa, and Asia. Here in the United States, we have been slower to learn what the methodology of comparative law has to teach. We have, however, learned one important lesson. Most scholars now know that legal institutions cannot simply be “transplanted.” Nations, like living organs, have mechanisms that reject the transplanting of foreign law into their legal systems. American lawyers no longer try to export our Bill of Rights as if it were Coca-Cola™, blue jeans, or rock and roll.

However, an attitude lingers that we have little to learn from countries whose constitutions have not reached the two-century mark. We are only recently coming to appreciate that constitutional courts of other nations serve as laboratories for testing different answers to common questions; for example, whether capital punishment or laws against abortion and racially hostile speech should be deemed constitutional. And, if we have been slow to study European constitutional doctrine, our movement to concern ourselves with Asian constitutional law has been glacial. With notable exceptions, comparative lawyers have left this area intellectually underdeveloped.

The two principal articles published in this issue of the *Journal of International Law* make important contributions in this neglected area. Christopher Ford's *The Indigenization of Constitutionalism in the Japanese Experience* describes what happens when the constitution of a liberal democracy is "transplanted" to an authoritarian legal system, a system unfamiliar with constitutionally limited power and judicial review. Following its World War II surrender, Japan adopted a "made in the U.S.A." constitution. A predictable gap appeared between that constitution as written and the constitution as it would be applied. If the gap were to narrow, Japanese judicial behavior would need to adjust to the constitution's written provisions or these provisions would need to be construed to fit customary patterns of judicial behavior — or both. Dr. Ford's article, describing the indigenization of Japan's constitution, is instructive for those watching former Soviet nations attempt to become constitutional rule-of-law states.

Constitutional Fairness or Fraud on the Constitution? Compensatory Discrimination in India, authored by E.J. Prior, deals with constitutional aspects of India's efforts to confront the inequalities attributable to its caste system. Thoughtful people should be interested in how India faces its "affirmative action" dilemma. A look beyond our constitutional borders might offer clues as to why many countries with modern constitutions have found governmental action to achieve ethnic and racial equality to be constitutionally permissible.

In this issue, the *Journal* presents comparative lawyers a signal opportunity to observe constitutional developments in India and Japan. We can hope that some future issue may provide the occasion to view rudimentary efforts to establish the rule of law in other States such as the People's Republic of China.

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