

Volume 28 | Issue 1

---

1996

## Volume 28 Issue 1 (1996)

CWRU Journal of International Law

Follow this and additional works at: <http://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

---

### Recommended Citation

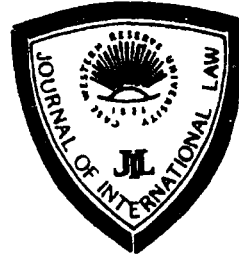
CWRU Journal of International Law, *Volume 28 Issue 1 (1996)*, 28 Case W. Res. J. Int'l L. Iss. 1 (1996)

Available at: <http://scholarlycommons.law.case.edu/jil/vol28/iss1/13>

This Front Matter is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

# Case Western Reserve Journal of International Law

Volume 28, No. 1  
Winter 1996



The *Case Western Reserve Journal of International Law* is published three times a year at the Case Western Reserve University School of Law. Current subscription prices are \$20.00 per volume (domestic) and \$22.00 (foreign). Subscriptions are renewed automatically unless timely notice of cancellation is received. Current issues can be purchased at \$10.00 each by contacting the *Journal* directly. The *Journal* is indexed in the *Index to Legal Periodicals* and is available on WESTLAW® and LEXIS®. The *Journal's* policy requires that unless a claim for nonreceipt of a journal is received within three months after the mailing date, the *Journal* cannot be held responsible for supplying that issue without charge. Address all correspondence to the Case Western Reserve Journal of International Law, 11075 East Boulevard, Cleveland, Ohio 44106. Telephone: (216) 368-6141. Telefax: (216) 368-3310.

Submissions, manuscripts, and inquiries should be sent to the above address. Manuscripts should be typewritten and double-spaced. Footnotes should be prepared in accordance with *The Bluebook: A Uniform System of Citation* (15th ed.). Unpublished manuscripts are the property of the *Journal* and will not be returned unless postage is supplied by the author.

The *Journal* grants permission for each article in this volume to be copied for use by non-profit educational institutions, provided that (1) copies are distributed at or below cost, (2) the author and the *Journal* are identified, and (3) proper notice of copyright is affixed to each copy.

The opinions expressed herein are those of the respective authors and do not necessarily reflect those of the *Case Western Reserve Journal of International Law*.

The *Journal* is printed by Darby Printing Company, 6215 Purdue Drive, Atlanta, Georgia 30336.

Back issues of the *Journal* are available through William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14209-1987.

This *Journal* went to press in December 1995.

Cite as: CASE W. RES. J. INT'L L.

**Case Western Reserve  
Journal of International Law**

**1995-96 Editorial Board**

*Editor in Chief*

Florencio J. Yuzon

*Managing Editor*

Jennifer R. Lawry

*Canada-United States*

*Law Journal Editors*

Lucia M. Iannandrea

Tina L. Myles

*Executive Notes Editor*

Shaun P. O'Connell

*Executive Editors*

Anthony G. Colburn

David M. Parks

Frances Faye Thompson

*Contributing Editor*

Sohail Mered

*Solicitations Editor*

Edward G. Hubbard

*Notes Editors*

Anastasia M. Enos

Phillip A. Mancino

Peter J. Vassalo

*Articles Editors*

Brooks J. Chapin

James D. May

*Associate Editors*

John J. Barrett, III

Joseph C. Blasko

Daniel S. Blum

Donald Broadfield

Hannah M. Brown

Asheton Carter

Eric G.K. Cheng

William T. Cramer

Fredrick Englehart

Martin D. Gelfand

M. Elisabeth Houston

Julie L. Juergens

Olga Karasik

Pauline R. Koffman

Vladimir Kouznetsov

Matthew Kurlinski

Mara J. McAuliffe

Lauren M. Moran

Jennifer M. Myers

Dirk M. Riekse

Steven E. Star

Laura A. Wakefield

Scott D. Zaret

*Faculty Advisor*

Hiram E. Chodosh

*Secretary*

Deborah Korenchan

*Coordinator*

*Student Publications*

Carolyn L. Speaker

Francis A. Boyle

Barry M. Fisher

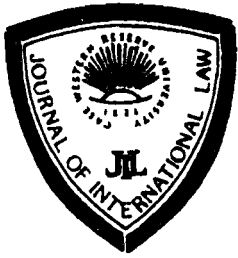
*Advisory Board*

Robert A. Friedlander

Henry T. King, Jr.

Christopher C. Joyner

Sidney Picker, Jr.



Case Western Reserve  
Journal of International Law

VOLUME 28

NUMBER 1

WINTER 1996

Copyright © 1996 by the Case Western Reserve Journal of International Law

**FOREWORD**

EMERGING TRENDS IN INTERNATIONAL  
CONSTITUTIONALISM: A COMPARATIVE APPROACH  
*Edward A. Mearns* . . . . . 1

**ARTICLES**

THE INDIGENIZATION OF CONSTITUTIONALISM  
IN THE JAPANESE EXPERIENCE  
*Christopher A. Ford* . . . . . 3

CONSTITUTIONAL FAIRNESS OR FRAUD ON THE  
CONSTITUTION? COMPENSATORY DISCRIMINATION  
IN INDIA  
*E.J. Prior* . . . . . 63

FRAUD ON THE SURVIVING SPOUSE IN JEWISH  
AND AMERICAN LAW: A MODEL CHAPTER FOR  
A JEWISH LAW CASEBOOK  
*Jeffrey I. Roth* . . . . . 101

**ADDRESS**

NUREMBERG AND SOVEREIGNTY  
*Henry T. King, Jr.* . . . . . 135

**NOTES**

IT'S NOT A CULTURAL THING: DISPARATE DOMESTIC  
ENFORCEMENT OF INTERNATIONAL CRIMINAL PROCEDURE  
STANDARDS — A COMPARISON OF THE UNITED STATES  
AND EGYPT  
*Sohail Mered* . . . . . 141

THE NEW IVAN THE TERRIBLE: PROBLEMS IN  
INTERNATIONAL CRIMINAL ENFORCEMENT AND THE  
SPECTER OF THE RUSSIAN MAFIA  
*Peter J. Vassalo* ..... 173

**BOOK REVIEW**

DECONSTRUCTING PROTECTIONISM: ASSESSING THE  
CASE FOR A PROTECTIONIST AMERICAN TRADE POLICY  
*Kirk Kennedy* ..... 197

**BOOK NOTES** ..... 217

**INTERNATIONAL CONSTITUTIONALISM**

# 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.

Edward A. Mearns\*

---

\* Professor of Law, Case Western Reserve University School of Law. B.S., Yale University 1951; LL.B., University of Virginia School of Law 1958.