

Harald Eberhard / Konrad Lachmayer / Gerhard Thallinger

Approaching Transitional Constitutionalism

"However, in order to receive a realistic overall picture of a constitutional order, we also had to take into consideration the constitutional reality, the constitutional culture as well as the social 'ambiance' which surrounds it. Because a constitution is also a vivid entity, it is only comprehensible in its functioning if we also consider, alongside its literal wording, other sources of law, as well as complementary factors which can be political, social and psychological in nature".¹

A. Introductory remarks

Transitional Constitutionalism constitutes an important challenge of our time, especially to constitutional law doctrine and theory. Although a significantly large number of states have a more or less steady constitution, new constitutions are continuously emerging. The end of the Cold War in the late 1980s enabled transitions in Eastern Europe from a communist regime to a democratic order including fundamental modifications of economic concepts,² but also promoted to a certain extent the resignation of the apartheid regime in South Africa, which resulted in the adoption of a new constitution; at the same time the democratization in several South American countries also had important constitutional implications. Thus, the 1990s formed a "decade of constitution-making around the world".³ In the previous years the wars in Afghanistan and Iraq brought along complete consti-

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1 Daniel Thürer, *Kosmopolitisches Staatsrecht* (2005) 27: *"Wir müssen aber, um ein realistisches Gesamtbild einer Verfassungsordnung zu erhalten, auch die Verfassungswirklichkeit, die Verfassungskultur sowie die gesellschaftliche 'Ambiance', die sie umgibt, in Betracht ziehen. Denn eine Verfassung ist auch ein lebendiges Gebilde und in ihrer Wirkungsweise nur verständlich, wenn wir neben ihrem Grundtext auch andere Rechtsquellen sowie komplementäre Faktoren politischer, soziologischer und psychologischer Natur ins Auge fassen."*

2 Ioannis Kyvelidis, *State Isomorphism in the Post-Socialist Transition*, European Integration online Papers (EIoP) Vol 4 No 2 (2000) (<http://eiop.or.at/eiop/texte/2000-002a.htm>).

3 See the aspects of the IACL/AIDC Roundtable "Constitutionalism after Transition", 9-11 April 2006, Cape Town (<http://web.uct.ac.za/depts/pbl/iacl.htm>).

tutional reforms with entirely new constitutions. In all these constitution-making processes the involvement of the international community was considerable and the interdependences between domestic and international law have been of increasing importance.⁴

The significance of international law is also visible in the accession procedures of international organisations. The enlargement of the European Union regularly premises substantial constitutional reforms in the candidate countries. In addition, international and supranational organisations acquire constitutional tasks ("*Etatisierung*"), a trend constantly leading to modifications of the constitutions of the member states.⁵ Constitutional transition also means the transfer of constitutional power in multi-level systems. Consequently, transitional constitutionalism cannot exclusively focus on a state level, but has to include constitutional developments in international and supranational organisations.⁶

The potential of a transition process is an important component of modern constitutions.⁷ In general, transitions and transitional constitutionalism cannot be explained or analysed in a comprehensible way, unless historical, cultural, political and social aspects are taken into account. The former constitutional order influences the transitional process as well as the new constitution plays an important role in legitimizing the new political system. Nevertheless, social, political and cultural aspects are the main stimulation for transition processes. They constitute constantly changing variables which have an enormous impact on the shape of a novel constitution. Accepting such a 'living instrument'-character of a constitution, it becomes obvious that constitutional interpretation is of utmost importance in times of transition.

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4 See Michaela Salamun, *Democratic Governance in International Territorial Administration* (2005) 13ss.

5 See with regard to the constitutional process of the European Union e.g. Waldemar Hummer, "*Etatisierung*" der Union durch die neue Verfassung?, in: Busek/Hummer (eds.), *Die Konstitutionalisierung der Verbandsgewalt in der (neuen) Europäischen Union* 19 (2006).

6 See Harald Eberhard / Konrad Lachmayer / Gerhard Thallinger, *Über Inhalt und Methode des Internationalen Verfassungsrechts als Wissenschaftsdisziplin*, in: Eberhard/Lachmayer/Thallinger (eds.), *Reflexionen zum Internationalen Verfassungsrecht* 175 (2005).

7 Günther Frankenberg, *Comparing constitutions: Ideas, ideals, and ideology – toward a layered narrative*, I.CON, Vol. 4, No. 3, p. 456 (439) (2006).

Transitional Constitutionalism analyzes and aims to systematize the implication of constitutional law in transitional processes and examines the effects of transitions on the constitutional orders of States.⁸ This interdependence is a crucial correlation for constitutional law and theory. In the following remarks, different aspects of transitional constitutionalism will be highlighted. First, the correlation of times of transitions and constitutional changes should be analyzed. Secondly, a typology of (constitutional) transitions should be proposed. In addition, the influence of social and political developments on the constitution and its jurisprudence shall be analyzed in the light of transitional justice initiatives. Finally, the impacts of international law on constitutional transitions shall be epitomized.

B. Re-constructing Transitional Constitutionalism

The history of constitutions shows a history of transitions.⁹ Only few constitutions exist that have undergone a continuous development without large interruptions, few amendments and little influence from international law (primarily the US constitution). The histories of most constitutions show the rise and fall of different constitutional concepts; the changes and developments of power encroaching on constitutional law. As a result, it seems to be advantageous to determine criteria of transitions in a constitutional context.

Transitional Constitutionalism is not necessarily limited to the collapse of a state and the rise of another (novel) State. Transitional constitutionalism does not restrict itself to situations in which a completely new constitution is enacted, which means that the *pouvoir constituant* decides to develop a new constitutional power. Transition does not solely depend on the difference between legal (constitutional) continuity and legal (constitutional) discontinuity. This is only a formal understanding of constitutional transition. In addition, such a formal sense of transition is not able to integrate the aspect that transitions are – with

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8 Armin von Bogdandy/Stefan Häußler/Felix Hanschmann/Raphael Utz, *State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches*, 9 Max Planck UNYB 579 (596) (2005).

9 See Chesterman, *You, The People. The United Nations, Transitional Administration and State-Building* 11ss (2004).

regard to the examples the workshop was devoted to – longer lasting periods of time.

Transitional Constitutionalism is observing constitutional changes of a certain, significant dimension throughout the transitional period of time. Although not every change means a transition of a constitution, the present understanding of transition is too restricted. Transitions do not only refer to constitutional continuity or discontinuity in a legal perspective but also to the political change of constitutional understanding and the development of constitutional culture, which is important to qualify the constitutional life, habits and exercise. To interpret a constitution, it is necessary to consider actual interpretations of constitutional courts, the political application of the constitution and the discussion of the constitutional lawyers. To that extent, Transitional Constitutionalism also refers to the changes of attitudes and habits required to handle, to interact or to enforce a constitution.

But if Transitional Constitutionalism refers to constitutional change, when should we speak about transitions and when does it only mean a "normal" constitutional amendment? If the qualitative change in the constitutional culture is "strong enough", it is also necessary to realize the constitutional change as Transitional Constitutionalism. Transitional Constitutionalism does not only refer to revolutions, wars and occupations and in the same way, not only to the creation or extinction of a state. It also detects constitutional changes that transpire in an informal way, as well as the reversal of the political understanding and that of the constitutional interpretation. Looking at the example of Sudan, it is not necessary to reinvent a state, but to re-conceptualize a constitution.¹⁰ Therefore, we espouse the reconstruction of the common understanding of transitions.

Transitional Constitutionalism does not necessarily depend on legal criteria, such as the loss of sovereignty or the legal discontinuity between the old and the newly established systems. Nevertheless, all these examples describe transitions. From a legal point of view, explicit or formal constitutional amendments or constitutional provisions are of primary relevance. But sometimes transitions might even occur without any modifications in the wording of the constitution. Thus, it is conceivable that a transition can ensue from judgments rendered by constitutional courts calling, for instance, for a reversal of a constant line of jurisprudence.

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10 See Markus Böckenförde, in this book, 25.

In general, the scientific analysis of Transitional Constitutionalism is undoubtedly an interdisciplinary issue situated at the interface of political as well as legal considerations.

In toto, transitional constitutionalism demands at least either a formal amendment of the constitution or a change of constitutional interpretation by a relevant constitutional power, such as the constitutional court, which in fact has an effective control over the constitution.

Finally, it is important to mention that the constitutional transition does not depend on the success of the transition itself. In some cases, the transition failed or developed in a different direction. These possible outcomes do not change the fact that a transitional process had taken place. It is also not important if the transition was finished within a special timetable or if the transitional status was extended or renewed. The time from which the constitutional change starts and the change in the political power is effective can be described as a transitional process. Regarding this point we can observe transitions which take place over a longer period of time. Single amendments of a constitution can be, in this way, seen as a part of a larger transitional process.

C. The typology of transitional processes

Admittedly, these observations appear very general. It is therefore indispensable to illuminate more detailed connecting factors. A more detailed typology of transitional constitutionalism is required.

In order to distinguish different forms of transitions in an international constitutional perspective, *Daniel Thürer* cites differences between varying influences of international law in constitutional processes. *Thürer* proposes to distinguish between constitutional processes which are

- inducted (initiated) by international law, as in South Africa
- escorted by international law, as in Afghanistan or Sri Lanka
- managed by international law, as in Cambodia or East-Timor
- installed by international law, as in Kosovo.¹¹

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11 Daniel Thürer, *Kosmopolitisches Staatsrecht* 27 (2005).

The importance of international law increases during times of transition.¹² As a rule, the creation of new states is considerably influenced and affected by international law. It is thus legitimate to differ between the various influences of international law. The role of the UN in the transition is also a special consideration in distinguishing special cases.¹³ As can be observed in East-Timor¹⁴ or Kosovo¹⁵, the intensity of the United Nations' impact can be very high.¹⁶

Another possible means of depicting categories of transitions is to focus on the legal status of either a specific constitution or that of a certain state. The former analyzes the continuity of a legal system, whereas the latter examines the level of sovereignty of a state. As regards to the intensity of the constitutional process, one can make out the following features:

- legal continuity and established sovereignty during change of political power and constitutional interpretation (Chile),
- legal discontinuity while sovereignty remains (Post-communist countries),
- legal discontinuity and sovereignty in dispute (Kosovo).

From a constitutional perspective, a plausible typology could also follow central constitutional topics like democracy, the rule of law, human rights, federalism, governance or constitutional checks & balances such as the separation of powers. Although this enumeration is not complete, it contains central questions of constitutions. Thus, constitutional transition – regardless of the pattern in which it is induced – depends on a substantial change

12 See also Andrea Talentino, *Collision Course: nation-building, norms, and sovereignty Draft*, in: Riegler (ed.), *Nation Building between National Sovereignty and International Intervention* 21 (2005).

13 See Grant T. Harris, *The Era of Multilateral Occupation*, 24 *Berkeley J. Int'l L.* 1 (2006); Mehrdad Payandeh, *State-Building im Friedenssicherungssystem der Vereinten Nationen. Völkerrechtliche Rahmenbedingungen einer neuen Herausforderung für die internationale Gemeinschaft*, *Journal of International Law of Peace and Armed Conflict* 2005, 253; Matthias Ruffert, *War and Armed Conflict*, *ICLQ* 2001, 613.

14 See Elisabeth Handl in this book, 103.

15 See Bernhard Knoll in this book, 127.

16 See also Salamun, *Democratic Governance in International Territorial Administration* 95s (2005).

of one or more of these aspects. In other words, not every constitutional amendment, judgement reached by a constitutional court or political attitude regarding the constitution, although it affects one of the criteria mentioned above, necessarily constitutes a constitutional transition. Nevertheless, such instances might well indicate a constitutional transition.

Thus, a variety of acceptable typologies can be used to examine constitutional transition. For the purposes of this study, we propose to focus on the essential change of basic constitutional principles according to the quality and quantity of the pertinent change. Using this broader transitional approach shall enable the comparison of different forms of transition, including informal constitutional changes.

Transitional Constitutionalism focuses on the dynamic elements of a constitutional order. Constitutional transitions are mostly continuous and might constitute a permanent situation over a certain period of time. Understanding a constitution as a process, transitions bring along important modifications. Thus, a transition is most often not a single point in time, but a period of time without a specific beginning or end. It is, moreover, an intensification which results in a constitutional change. This change again leads to further constitutional impacts. Typical constitutional transitions – such as those that were observed in Eastern Europe – occur over a period of constitutional change. Nevertheless, the implications of these transitions last beyond that period of time. Other transitions, like the situation in Sudan, shows a never-ending constitutional process, during which times of constitutional stability were far apart and interrupted by periods of instability and change that lasted several decades. The situation in Chile¹⁷ as well as in Argentina¹⁸ seems to be a process of permanent – and in this way "unfinished" – transition, insofar as the transitions still have a significant impact on contemporary politics and constitutional law.

D. Transitional Constitutionalism in the light of a democratic constitutional state

The *Western* constitutional state rests upon basic democratic standards. In this respect, a transitional constitution often has the

17 See Rodrigo Correa González, in this book, 49.

18 See Gerhard Holley, in this book, 61.

function of regulating a specific period of time and facilitating a change of a political regime. It is deemed desirable to achieve acceptance of such a constitution by the majority of a State's population. As Iraq on the brink of civil war teaches us, ethnic differences in a country may even lead to political cleavages; though there are no easy solutions, it remains a prerequisite to integrate ethnic minorities in a process of transition. Otherwise, such a process will be doomed to failure.

In addition, the influence of international law in constitutional engineering is worth analysing, particularly with regard to procedural and material constitutional law. As a matter of fact, external influence frequently leads to the dilemma of a lack of local ownership. However, as stated above, a successful transition rests upon the acceptance of the majority of the *pouvoir constituant*.

Democracy, on the one hand, is an essential objective and goal of the quintessential transition process.¹⁹ But on the other hand, democracy can also become the starting point of a transition which leads to another form of political leadership, e.g., a military junta which rejects and scorns democratic values. As a corollary, intentions of a political regime to reduce an achieved democratic standard or suspend political rights to a large extent have to be seen as a possible, albeit negative, form of transition. The reconstruction of democracy as we can see it in most of the well-known transitional processes stands for the typical constellation of modern transitions, and during this transition it can – under certain circumstances and for a limited period of time – be justified to suspend certain political rights of representatives of the former regime.²⁰

From a fundamental rights perspective, it seems illuminating to take into consideration the transformative role of socio-economic rights in a society; in that regard, the South African Constitution as interpreted by the South African Constitutional Court serves as a role model, holding that "[t]he right to be free from unfair discrimination, for example, must be understood against our [the country's citizens] legacy of deep social inequality."²¹

19 See e.g. Rüdiger Wolfrum, *International Administration in Post-Conflict Situations by the United Nations and Other International Actors*, 9 Max Planck UNYB 649 (681) (2005).

20 See Vaidotas A. Vaičaitis, in this book, 89.

21 Constitutional Court of the Republic of South Africa, *Republic of South Africa v. Grootboom*, Case CCT 11/00 (Judgment 4 October 2000) para. 25.

Times of transition regularly bring to surface the political cleavage between the haves and the have-nots. In addition, democracy implies important aspects of accountability and governance.²²

The principle of the rule of law is another indispensable element of a democratic constitution. It is an important function of a transitional constitution to establish instruments to assure the rule of law, but at the same time to consolidate rudimentary democratic institutions in order to make them effective. Thereby, we have to take into account the role of Transitional Justice.

A new constitutional order will very often be measured by the success of its approach toward transitional justice.²³ Coming to terms with a state's legacy of human rights violations is an important function which has to be operated by domestic constitutional law and national instruments²⁴ as well as – with regard to deficits of domestic law in such a situation – by the means of international law. Relevant instruments are truth commissions²⁵ which have both the functions of complying with the political need for stability as well as that of guaranteeing prosecution of former oppressors, but also the function of preparing partial and conditional amnesties.

In general, it is regarded as essential to facilitate prosecution of gross human rights violators among members of the former regime. There is an emerging trend in international law, that perpetrators of mass atrocities may under no circumstances go unpunished.²⁶ As a corollary, full amnesty laws and even the highly praised Truth and Reconciliation Commission in South Africa might today be irreconcilable with customary international law. The establishment of the ICTY and the ICTR, followed by the adoption of the Rome Statute on the International Criminal Court, has in this respect had a significant impact on Transitional Justice. Applied at the domestic level, it is therefore desirable that Tran-

22 See Anja Seibert-Fohr, *Reconstruction through Accountability*, 9 Max Planck UNYB 556 (2005).

23 See Ernst C. Stiefel, *Transitional Justice* (2000).

24 See for the development after the Dayton agreement in Bosnia Manfred Nowak, *The Human Rights Chamber for Bosnia and Herzegovina adopts its first judgments*, HRLJ Vol 18 No 5-8 1997, 174.

25 See with regard to East Timor Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor*, American Journal of International Law 952 (2001).

26 See the remarkable contributions in Naomi Roht-Arriaza (ed.), *Impunity and human rights in international law and practice* (1995).

sitional Constitutionalism, while striking a balance between the oppressors and the oppressed, prevent the perpetrators of mass atrocities from going unpunished.

However, every approach to Transitional Justice must be aware of the limits of bringing past perpetrators to justice. These limits may be manifold and frequently result from a lack of resources but also simply ensue due to the enormous amount of perpetrators, such as after the genocide in Rwanda in 1994. In addition, the quest for justice is compromised by the desire for peaceful change, such in the case of Pinochet.²⁷ Finally, and very fundamentally, prosecuting perpetrators of gross human rights violations in terms of corrective justice can stand in the way of a State striving to move forward to a more prosperous and successful future, in which case prosecutions may be considered inappropriate.²⁸

Furthermore, there is not only an individual dimension regarding the legal positions of single persons, especially with regard to criminal responsibilities, but also the aspect of pragmatic public forgetting and reconciliation of the society as a whole in order to facilitate a peaceful future without struggle and civil war situations. But with regard to the international dimension of transitional constitutionalism, the individual legal position seems to be a very significant aspect, especially if we think of international criminal tribunals. These aspects are certainly intertwined with the "constitutionalisation of international law".²⁹ Transitional Justice has to be seen both in the light of a political dimension and that of a legal dimension in the context of its specific time.³⁰ It will not prove to be successful only to focus on the underlying legal components if an interdisciplinary approach of Transitional Constitutionalism as a holistic endeavour is not espoused.

Finally, the role of federalism in periods of transition can be significant.³¹ Though federalism is not an essential element of a

27 See Rodrigo Correa González, in this book, 49.

28 See Bruce Ackerman, *The future of liberal revolution* 69ss (1992).

29 Daniel Thürer, *Recht der internationalen Gemeinschaft und Wandel der Staatlichkeit*, in: Thürer/Aubert/J. P. Müller (eds.), *Verfassungsrecht der Schweiz* 37 (49s) (2001).

30 See with regard to the Chilean development Fernando Atria, *The Time of Law: Human Rights between Law and Politics*, *Law and Critique* 16 137 (150ss) (2005).

31 See Markus Böckenförde, in this book, 25.

constitutional state, it can serve as an instrument to create stability in times of political change or instability; solutions arising under the purview of federalism can notably help to avoid the disintegration of a State. Federal structures within the functional dimensions of a "coming together" or "holding together" federalism and its symmetric or asymmetric forms can strike a balance between the separatist and unitary movements of a country in transition.

E. Social, political and cultural perspectives

As mentioned above, constitutional transitions cannot be reduced to only their legal implications. In respect thereof, the cultural dimension of constitutional transition has to be integrated. Understanding culture as the variety of typical and traditional behaviours and attitudes of societies,³² cultural aspects are closely connected to the historical, political and social dimensions of a society.³³ Thereby Transitional Constitutionalism – as part of International Constitutional Law – is located at an interdisciplinary interface.

Constitutional change frequently comes from within a society. In many cases a society or part of a society does not accept the people holding power any more. The government has to resign, and constitutional change is realised by society. In these circumstances, it makes a difference if the old regime is integrated into the transition or not. If the transition takes place in cooperation with the old government, a peaceful transition seems more likely.³⁴ On the other hand, structural and legal compromises are often made, such as granting amnesty to the old regime. The former regime may thereby cast a shadow on the new government.³⁵

32 See Peter Häberle, *Europäische Verfassungslehre* 4ss (4th ed. 2006) with regard to the European Constitutionalism.

33 See Annelise Riles, *Comparative Law and Socio-Legal Studies*, in: Reimann/Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (2006) 775 (796); Uwe Kischel, *Vorsicht, Rechtsvergleichung!*, *Zeitschrift für Vergleichende Rechtswissenschaft* 104 (2005) 10 (20), Frankenberg, *Re-thinking Comparative Law*, 26 *Harvard International Law Journal* 411 (411ss) (1985).

34 See for an example of a gradual transformation with Table talks in Hungary Catherine Dupré, *Importing the Law in Post-Communist Transitions* 28ss (2003).

35 See for example the situation of the Fiji Venkat Iyer, *Restoration constitutionalism in the south pacific*, 15 *Pac. Rim L. & Pol'y* 39 (Feb, 2006)

Frequently a former government is overthrown by a popular movement in a society.³⁶ In these instances, there is a total political rupture. Constitutional continuity is not possible anymore, and the new constitution will not be closely-affiliated with the older.

In other situations the constitutional change is initiated by the government itself. This may be due to economic or personal reasons, as well as international pressure demanding constitutional change.³⁷ Questions of military support or the possibilities of staying in power are often extremely relevant for decisions made by an incumbent government. This scenario may be contrasted with the urge of a society for constitutional change, i.e., a constitutional moment.³⁸ If a country turns from a unitary state to a federal state – as was the case in Belgium in the early 1990s – a process setting up instruments of a federal state has to be realised as a kind of transitional process with economic, political and legal aspects.

Transitional Constitutionalism highlights the interconnectedness between law and politics. The constitutional change mirrors altering politics. The function of a constitution can also rest in the response to a specific historic situation. Thus, Transitional Constitutionalism has an important historical dimension. A constitution is only comprehensible if one understands its genealogy. An essential feature of a constitution in transitional processes is its legitimizing function. Legitimation is important for the further political process and has impacts on the acceptance of the constitution by the society.

F. Transitional Constitutionalism in International Law

Transitions are primary political and social phenomena. Nevertheless, the law is central in a transition process. On the one hand, the law has a legitimizing effect; on the other hand, it is

36 For example the development in the late 1980s in the German Democratic Republic (GDR).

37 See for example the developments in Russia in the 1980s or the ongoing changes in China.

38 See Bruce Ackermann, *We the People* (2000), Johannes Pollak/Peter Słominski, "Konstitutioneller Moment" und Verfassungsreform, *Austrian Journal of Political Science* 2005, 337 (341s).

necessary to enforce new structures. The constitution, as a basic foundation of a multi-level system, has a basic and primary function.

The influence of international law in domestic constitutional law is rising. The importance of international principles and guidelines is especially crucial in transitions. Constitutional elements, such as the rule of law, human rights and democracy, are influenced and increasingly affected by international constitutional law. The traditional international law perspective on Transitional Constitutionalism only included the question of statehood and state continuity or secession.³⁹ But the relevance of international law in transitions has become much broader in recent years. However, the more active engagement of the international community often runs into conflict with a State's sovereignty.⁴⁰

But international law is not only inducing, escorting, managing and installing constitutions in transitions; it is also transferring constitutional concepts and systems. The influences of international organisations cannot be reduced, as mentioned above, to situations of legal discontinuity, as in the cases of international territorial administration operated by the UN.

In this respect, the influence of supranational constitutional law on domestic constitutional law is of particular importance. The accession to the European Union implicates certain criteria of constitutionalism which have to be fulfilled by modifying the domestic constitution. These significant influences can not only be seen in formal amendments to the wording of the constitution, but also in a modified interpretation of the domestic constitutions.⁴¹ Thus, the application to become a member of the European Union can be qualified as Transitional Constitutionalism.

Transitional Constitutionalism in the context of international law shall not be reduced to the influence of international law in domestic constitutional law. Within the context of International Constitutional Law, the perspective of transitions shall be opened to all levels of the multi-level network.

39 James Crawford, *The Creation of States in International Law* 45, 374, 667 (2nd ed., 2006).

40 Neil Walker (ed.), *Sovereignty in Transition* (2003).

41 See for the Austrian example under the membership to the European Union Theo Öhlinger, *Die Transformation der Verfassung*, *JB* 2002, 2; Theo Öhlinger, *Die österreichische Verfassung und die europäische Integration*, in: Hummer (ed.), *Paradigmenwechsel im Europarecht zur Jahrtausendwende*, 67ss (2004).

From a theoretical point of view, transitional constitutionalism is not restricted to the domestic level. Identifying and qualifying international treaties as constitutions at a supranational and international level means that transitional phenomena can also be noticed at these levels. Transitional Constitutionalism is typically understood as a state-related development. In a more abstract and international perspective, international organizations and their constitutional foundations can also face deep constitutional reforms. Although questions of sovereignty, transitional justice or security issues are not the central issues of such transitions, it is possible to interpret the qualified changes of an international organisation's fundamental and basic principles as a transitional process. The typical constitutional problem will be different to the state-level, but the central questions of democracy, governance, the rule of law and human rights are similar. The migration of constitutional ideas is also relevant in the other direction: the constitutional transition of international organizations is influenced by domestic constitutional ideas from different states.

This process can be seen particularly well in the context of the European Union:⁴² The development of European constitutionalism shows different transitions, such as the Maastricht treaty. In this respect, the jurisdiction of the European Court of Justice has an important function for the constitutional development of the EU, especially with regard to the actual failure of the European Constitutional Treaty. Other constitutional transitions, such as the proclamation of the Charter of Fundamental Rights, show that formal and obligatory legal development also has the possibility of changing the constitution of a supranational organisation.

The enlargement process of 2004 is another example of a substantial transition of the European Union and the constitutional network (*Verfassungsverbund*)⁴³ consisting of the EU itself and its member states. The duplication of the member states has important impact upon the legislative and administrative process of the European Union. The development of the Union from an international organisation to a state-like entity can be seen as a special form of transition which – in the form of a spill-over –

42 Otto Pfersmann, *The new revision of the old constitution*, I.CON 383ss (2005).

43 See Ingolf Pernice, *Europäisches und nationales Verfassungsrecht*, VVDStRL 60 (2001) 148 (163 ss).

gains more and more influence upon traditional aspects of state sovereignty.

Further considerations regarding Transitional Constitutionalism are possible at an international level. The developments of the United Nations may also be analysed in this perspective. Another example of Transitional Constitutionalism in international law could be the creation of the WTO.⁴⁴ Thereby one has to ask to what extent traditional state-oriented concepts of democracy and governance become modified.⁴⁵

G. Conclusions

Transitional Constitutionalism can be discerned as an important subset of international constitutional law. State-building always reflects at least some elements of Transitional Constitutionalism. In countries overcoming civil war, internal conflict or oppressive regimes, Transitional Justice has a fundamental role to play in Transitional Constitutionalism. International law influences and permeates the creation and development of constitutions to a much larger extent than it used to do and increasingly sets and raises a standard for Transitional Justice initiatives. International constitutional law involves also constitutions of international organizations, which might also be subject to the study of Transitional Constitutionalism.

Understanding Transitional Constitutionalism, not in a formal way of continuity and discontinuity, but as the essential change of basic constitutional principles, we find that Western transitions heavily rest upon on criteria such as democracy, governance, human rights, internal decision-making, rule of law and/or checks & balances.

44 Cf Rainer Wahl, *Erklären staatsrechtliche Leitbegriffe die Europäische Union?*, JZ 2005, 916 (922). See Neil Walker, *The EU and the WTO: Constitutionalism in a New Key*, in: De Burca/Scott (eds.), *The EU and the WTO: Legal and Constitutional Aspects* 31 (2001).

45 Karl-Heinz Ladeur, *Globalisation and the conversion of democracy to poly-centric networks: Can democracy survive the end of the nation state?*, EUI Working Paper Law 1/2003, 6 ss (<http://cadmus.iue.it/dspace/bitstream/1814/199/1/law03-4.pdf>). Ernst-Ulrich Petersmann, *Constitutionalism and WTO Law: From a State-centered Approach Towards a Human Rights Approach in International Economic Law*, in: Kennedy/Southwick (eds.), *The Political Economy of International Trade Law* 32 (2002).

We have to stress the historical dimension of transitional constitutionalism. To understand and deal with future constitutions in transition, it is necessary to learn from the past. Thus, transitional constitutionalism represents a window of opportunity to develop criteria for future progress, but most importantly, to prevent the reoccurrence of the atrocities of the past. In doing so, the pertinent cultural particulars have to be taken into consideration as well. The Peacebuilding Commission of the United Nations might serve as a forum to promote transitional projects by offering new avenues of coordination and cooperation. The Peacebuilding Commission is a structuralised medium to handle the challenges of Transitional Constitutionalism.⁴⁶

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46 See Peter Huber, in this book, 157.

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Transitional Constitutionalism

Proceedings of the
2nd Vienna Workshop on
International Constitutional Law

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Vergleichenden Öffentlichen Recht**

Herausgegeben von Harald Eberhard, Anna Gamper,
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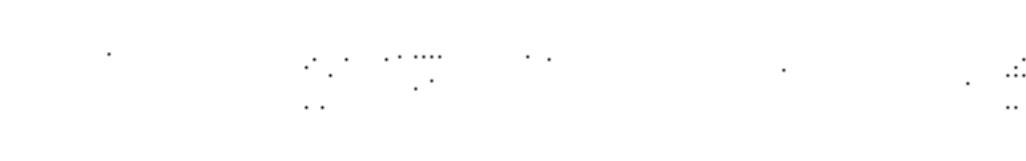
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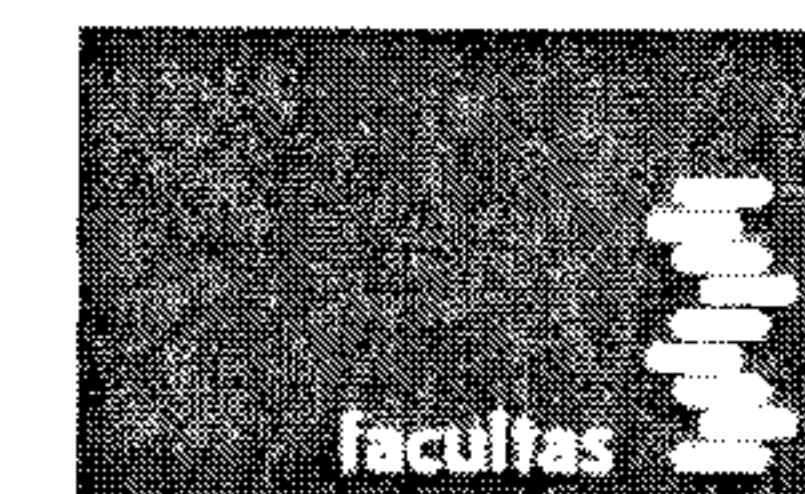
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Bibliografische Information Der Deutschen Bibliothek

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Lektorat: Robert Chionis

Druck: Druckhaus Nomos

Österreich: ISBN 978-3-85114-990-6

Deutschland: ISBN 978-3-8329-2338-9

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