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Abstracts

Articles

Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations

Julian Arato 289

This Article presents an argument about the constitutional transformation of international organizations through the judicial interpretation of their constituent instruments. The organizations at issue are public institutions, established by international agreement and charged with the exercise of transnational governmental power. They are, on one view, essentially treaty-based organizations that derive authority from the consent of the Parties. At the same time, these organizations must be understood as constitutional bodies, constituted with substantial delegated powers and varying degrees of independence vis-à-vis their constituent Member States. Some have developed the capacity to evolve over time, informally and autonomously. I argue that the judicial organs of certain organizations have transformed their material constitutions by engaging in particularly liberal approaches to the interpretation of their constituent instruments.

The analysis focuses on one particular technique of interpretation: the doctrine of interpretation on basis of the subsequent practice of the States Parties. I trace the use of this doctrine by three judicial bodies: the World Trade Organization Appellate Body, the International Court of Justice (ICJ), and the European Court of Human Rights (ECtHR). The first organ represents a control, implementing a strict approach to subsequent practice. By contrast, I suggest that the ICJ and ECtHR have each adopted radically expansive approaches to subsequent practice, with the effect of transforming the powers and autonomy of the organizations to which they belong.

Interpretation Catalysts and Executive Branch Legal Decisionmaking

Rebecca Ingber 359

Recent years have seen much speculation over executive branch legal interpretation and internal decisionmaking, particularly in matters of national security and international law. Debate persists over how and why the executive arrives at

particular understandings of its legal constraints, the extent to which the positions taken by one presidential administration may bind the next, and, indeed, the extent to which the President is constrained by law at all. Current scholarship focuses on rational, political, and structural arguments to explain executive actions and legal positioning, but it has yet to take account of the diverse ways in which legal questions arise for the executive branch, which have a significant effect on executive decisionmaking.

This Article adds necessary texture to these debates by identifying and exploring the role of distinct triggers for legal interpretation—which this Article terms “interpretation catalysts”—in driving and shaping executive branch decisionmaking, particularly at the intersection of national security and international law. Interpretation catalysts impel the executive to consider, crystallize and potentially assert a legal interpretation of its obligations under domestic or international law on a particular matter, and they can both impede and facilitate change within the executive. Examples of interpretation catalysts include such diverse triggering events as decisions regarding whether to use force against an armed group; lawsuits filed against the U.S. government; obligatory reports to human rights treaty bodies; and even the act of speechmaking. Each of these unique catalysts triggers a distinct process for legal decisionmaking within the executive, and is instrumental in framing the task at hand, shaping the process engaged to arrive at the substantive decision, establishing the relative influence of the actors who will decide the matter, and informing the contextual pressures and interests that may bear on the decision—thus shaping the ultimate substantive position itself. These distinct mechanisms for decisionmaking each carry their own individual pressures and biases. By laying bare the interpretation catalyst phenomenon, this Article demonstrates potential avenues for actors within and external to the executive branch to predict, to explain, and to affect executive decisionmaking. This Article will explore the effect of interpretation catalysts on executive legal interpretation, and address some of the implications of this phenomenon for scholars, private actors, courts, and executive branch officials.

The United States Supreme Court has come under fire in recent years for its occasional references to foreign and international law. Critics suggest that the practice is undemocratic, displacing democratically developed norms for those of the international community. This Article challenges this critique via reference to the comparative citation practice of successful judiciaries in new democracies around the world. When institutional failures and international pressures threaten the democratic accountability of elected institutions, as they do in most countries in political transition, jurists may strategically use foreign and international law as a tool of “diagonal accountability” to mediate between domestic and international actors in ways that build the legitimacy of national political institutions and create space for democratic deliberations to occur. Thus, contrary to the dominant critique, this Article suggests that when democratic legitimacy is challenged, comparative citation can be part of the solution, rather than part of the problem. Moreover, given the important work that comparative citation can do in transitional regimes, labeling it as undemocratic can itself undermine institutional legitimacy, particularly in new or weak democracies.

Note

Mexico's Drug "War": Drawing a Line Between
Rhetoric and Reality

Andrea Nill Sánchez 467

As violence in Mexico has escalated in recent years, many have argued that its metaphorical drug "war" is starting to look more like a de jure armed conflict. This Note maintains that, although a new approach is desperately needed, the proverbial "war" on drugs should be limited to metaphors, and the criminal law framework should be retained. This Note rejects reclassifying the confrontation between Mexico and the drug cartels as a non-international armed conflict (NIAC) under the laws of war because: (1) it fails to meet the criteria of a NIAC set forth by the relevant legal instruments and judicial decisions; and (2) the potential consequences of an armed conflict designation in terms of the lawful use of deadly force, prolonged detention, and unfettered prosecution powers would further exacerbate the problems that Mexico is facing. Instead, Mexico continues to confront a criminal problem, albeit one of extraordinary proportions. The Note concludes by providing a set of recommendations focused on empowering law enforcement, reforming Mexico's institutions, and strengthening the rule of law.

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