INTRODUCTION: THE PROBLEMS OF THE COMPARABILITY OF NOTIONS IN CONSTITUTIONAL LAW

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Law, like language or music, is an historically determined product of civilization and, as such, has its roots deep in the spirit of the people. In the final analysis, law is a normative expression of the culture, history, social values, folklore, psyche, ecology, and tradition of a given nation. The development of law can be likened to the organic growth of a plant: it is slow and derives its strength from the inner powers of the spirit of the people. As such, the evolution of law is a process of historical growth which develops silently and unconsciously from one age to another. To the extent that law is not the product of the formative reason of a particular legislator, its natural progression can neither be accelerated nor completely stopped by the intervention of a legislator.

Because law is inextricably interwoven with the social and political context in which it operates, any comparative study of different systems of law must go beyond the mere comparison of legal rules. One of the purposes of comparative law is to examine how different legal systems respond to a common problem and,

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through careful analysis, to determine whether it is possible to improve one legal system by borrowing ideas developed in other systems. Like any medical transplant operation, a legal transplantation is fraught with many dangers. A true comparatist should, therefore, view himself as a legal surgeon who is about to perform an organ transplant. As a prelude to any such transplantation, the comparatist should make sure that the legal tissues of the donor system are compatible with those of the recipient system. If they are not compatible, the transposed institution is bound to be rejected by the recipient system.

Because all laws must be examined in the light of their political, social, and economic purpose, no two countries have exactly the same laws. Even when two countries speak the same language, their laws are quite different. Thus, for example, the laws of Mexico are as different from those of Spain as ranchero is different from flamenco music. Similarly, a close analysis of the laws of England and those of the United States soon will reveal that these are two countries separated by a common law.

The problems of the comparability of laws are particularly acute in the area of public law. Public law, more than private law, is infused with indigenous political, social, and economic realities. Much more than private law, public law is closely linked to national tradition. Whereas nations are more inclined to borrow building blocks from the outside in the process of erecting their private law, they prefer to re-invent the wheels on which their public law is constructed. Public law reflects an inner relationship—a sort of spiritual and psychical relationship—with the people over whom it operates. This historical contact between public law and national identity is not readily transplantable from one country to another.

Just in the same way that civil law is the soul of private law, constitutional law is the fulcrum around which the entire public law of a nation revolves. When the Eason-Weinmann Center for Comparative Law decided to devote its Fifth Annual Colloquium to the problems of comparative constitutional law, it did so with full awareness of the inner relationship between constitutional law and indigenous political culture. Two narrow issues in constitutional law were selected as the focus of the two-day Colloquium: the institution of judicial review and the noble principle of equal protection of law.
All legal systems within the Western legal tradition\(^1\) share the general belief that acts of the legislature, as well as those of the executive department of government, should conform to the state constitution. They disagree, however, as to how to implement this common ideal. Within the Western legal tradition, there are two major models of constitutional review—the first contemplates review by courts and quasi-judicial institutions, the other incorporates political control mechanisms. The first model is further subdivided into post-enactment and pre-enactment methods of constitutional review. Examples of post-enactment review devices are general constitutional review by any court (as is the case in the United States), limited constitutional review by special constitutional courts (as is the case in West Germany which has special constitutional courts, in Mexico with its Amparo\(^2\) procedural device, and in France where the Conseil d'Etat is empowered to review acts of the executive branch), binding advisory opinions by the German Supreme Constitutional Court, and temporary judicial relief (as in the case of the writ of habeas corpus in the United States). On the other hand, examples of pre-enactment review would be the binding advisory opinions rendered by the French Conseil Constitutionnel\(^3\) and the non-binding advisory opinions rendered by an administrative division of the French Conseil d'Etat.\(^4\)

The political control mechanisms vary from state to state. On the whole, one could identify within this model of constitutional review the following methods: general supervision over executive law-making by the Soviet prokuratura, the constitutional designation of the French president as the guardian of the Constitution (Article Five of the 1958 French Constitution), the institution of separation of powers (as in the United States), and reliance on tradition and convention as restraints on law-making

\(^1\) For a discussion of the taxonomic characteristics of the Western legal tradition, see M. Glenndon, M. Gordon & C. Osakwe, Comparative Legal Traditions: Text, Materials, Cases 144-38 (1985).
\(^4\) For an exhaustive examination of the jurisdiction of the French Conseil d'Etat as it relates to constitutional review, see L. Brown & J. Garner, French Administrative Law ch. 7 (3d ed. 1983).
powers of parliament and the executive (as in the United Kingdom). Some countries have incorporated into their laws elements taken from both the judicial review and the political control models. If one were to arrange the major Western nations into two separate baskets depending on whether they follow the judicial review model, the United States, West Germany, Italy, and Austria would fall into the same basket, whereas England, France, and the Soviet Union would constitute a separate basket. On the issue of equal protection of law, once again all Western legal systems share the same ideal, but differ remarkably in the manner by which they implement their policy in this area.

The Fifth Annual Colloquium of the Eason-Weinmann Center for Comparative Law, held on November 16-17, 1984, brought together nine experts on comparative constitutional law. The jurisdictions represented were the United States, West Germany, the United Kingdom, and the Soviet Union. The topic of the Colloquium was *Comparative Perspectives on Constitutional Law—Problems and Prospects*. The panelists were Professors William Cohen (Stanford University), Erhard Denninger (University of Frankfurt), A. E. Dick Howard (University of Virginia), Christopher Osakwe (Tulane University), Michael Perry (Northwestern University), Lawrence Sager (New York University), Rolando Tamayo (Instituto de Investigaciones Juridicas in Mexico City), Mark V. Tushnet (Georgetown University), and David G. T. Williams (Woolfson College at the University of Cambridge). The moderators of the Colloquium were Professors M. David Gelfand, Catherine Phyllis Hancock, and Christopher Osakwe (all of Tulane University). The three specific issues that were discussed at the Colloquium were “Judicial Review Revisited: A Search for the Proper Balance between the Courts and the Political Branches of Government—U.S. Experience,” “Judicial Review Revisited: A Search for the Proper Balance between the Courts and the Political Branches of Government—Experience from Abroad,” and “Re-thinking the New Equal Protection of Law: A Search for a Solution.”

Of the nine papers that were presented at the Colloquium, only six are published in this Symposium. The papers by Professors Howard, Perry, and Tamayo were not available at the time of this publication. Two of the published papers deal with judicial review, four with equal protection of law.
Professor Cohen, in his thought-provoking piece, argues that the concept of equality in United States constitutional law is empty, that many American decisions “based” on the equal protection clause can be understood only by incorporating constitutional values from other sources in the Constitution. In his view, virtually every constitutional argument can be restated in equal protection terms, and more often the Justices of the United States Supreme Court, perhaps as a result of their own intellectual confusion, deliberately choose the equal protection clause as the formal basis for decision. In other words, Professor Cohen views the equal protection analysis as a surrogate for other constitutional rights. He offers his reasoned speculation as to why intelligent judges might prefer equality as the express reason for invalidating a challenged law. His conclusion is that equal protection, when employed as a decisional surrogate for other rights, can play a legitimate role in decisions that seek to avoid larger questions.

Professor Tushnet, one of the leading ideologues of the Critical Legal Studies movement in the United States, contends in his article that conservatives have made criticism of liberal judges’ judicial activism an important part of their political ideology, but that they have been unable to develop an alternative theory of judicial review. In his essay, he examines four versions of what he regards as attempts at creating a conservative constitutional theory. He labels these as “constitutional majoritarianism,” “nostalgic originalism,” “systematic moral philosophy,” and “economic theory of public choice.” The first of these theories he thinks is anticonstitutional, noncomparative, and inconsistent. The second theory, he argues, has not survived critical scrutiny, and one can continue to adhere to it only out of nostalgia for a past forever lost. The other two theories he regards as conservative versions of liberal theories. He regards all four efforts as intellectually weak at best. In the final analysis, he argues that conservatives do not need a theory, that certain strands in conservative political theory reject the premises that produce constitutional theory, and that, in any event, conservatives are likely to prevail, as liberals are not, without a theory.

The viewpoint of the conservative school in American constitutional law was eloquently argued by Professor Perry in the course of an oral debate with Professor Tushnet. It is regrettable that we are unable to offer in this Symposium the reasoned re-
buttal by Professor Perry to the criticism levied against the conservative movement by Professor Tushnet.

Professor Sager's paper focuses on the core issue of the American equal protection tradition—classifications that are "suspect" because they explicitly disadvantage women or members of racial minorities. The author concedes that the doctrine regarding these two classifications is relatively well settled. Nevertheless, he questions the wisdom of a doctrine that subjects racial and sexual classifications to different standards of measurement. He wonders why, if we heavily disfavor racial classification, we should not ban them altogether instead of merely subjecting them to a compelling state interest analysis. He further wonders why, if we also disfavor gender classifications, we use a test that is pale in comparison to the compelling state interest test. His proposals for resolving this equal protection dilemma are quite refreshing.

Professor Williams' contribution to this symposium examines certain aspects of equal protection law in the United Kingdom. He begins by noting the considerable difficulties that any comparative study in the area of public law will encounter. He attributes these difficulties to three reasons: the constitutional framework of different countries will often differ, the public law institutions will serve different purposes, and many of the underlying assumptions of public law will be utilized in different directions. When applied to the constitutional systems of the United States and the United Kingdom, these differences account for a considerable gap in the perceptions of equal protection in the two countries. He notes particularly that in the United Kingdom, unlike the situation in the United States, there is no supreme constitution, no entrenched bill of rights, no constitutional adherence to the separation of powers, no federal system of government, and no power of judicial review. He regards the present British law on equal protection as a pragmatic legislative response to some unacceptable forms of discrimination and concludes that British courts, which continue to play a secondary role in securing equality of treatment under law, are a long way from formulating either old or new concepts of equal protection.

Professor Denninger's essay offers a careful analysis of the German experience with the institution of judicial review. He warns us against comparing the United States and German ex-
perience with judicial review without giving proper regard to the cultural and political environments in which the two systems operate. In his view, understanding the German institution of judicial review requires consideration of the following elements of the German legal heritage: the high respect for the state, the shock of the totalitarian regime during the Third Reich, and the intensity of legislative activities in direct response to the new social, cultural, technical, and economic challenges. He tells us that judicial power is deeply rooted in the constitution of the Federal Republic of Germany. He also notes that the German Constitution’s supremacy clause, although ostensibly similar to that of the United States Constitution, is actually quite different. The German supremacy clause, unlike its American counterpart, disregards completely all questions of federal or state jurisdiction, but instead refers to the abstract ranking of constitutional rules over all other rules.

Even though both the United States Supreme Court and the German Federal Constitutional Court regard themselves as custodians of their respective constitutions, differences abound in the methodology employed by each institution. For example, the German Federal Constitutional Court, unlike the United States Supreme Court, has no appellate jurisdiction. This is so because the German Court is specifically and exclusively a constitutional court, rather than an integral component of the ordinary judicial system.

My essay dramatizes the sharp differences between the United States and the Soviet perspectives of equal protection. It contends that the Soviet conception of equal justice under law projects a particular mode of social engineering. This particular conception, as reflected in the Soviets’ distinctive political ideology and secular theology, seems not merely to secure de jure equality for Soviet citizens, but, more importantly, also to engineer a future de facto equality for all persons who are subject to the jurisdiction of the Soviet Union. The essay notes particularly that, unlike the situation in the United States, the courts are not a part of the governing coalition that is entrusted with the task of determining the policy of the Soviet equal protection ideal. Rather, the principal actors in any Soviet equal protection scenario would be the Communist Party of the Soviet Union, the federal legislature, the central executive, and the prokuratura of the U.S.S.R.
This essay further notes that under the Soviet socialist system, equal protection of law is not a goal in itself, but only a means to an end. To the Soviet political mind, an ideal society is one in which equal protection of law will be neither socially necessary nor politically justified. Under Communism, law will wither away, and, with it, the notion of equal protection of law. My essay concludes with a synoptic comparison of the United States and Soviet equal protection models. My conclusion is that whereas both systems employ the same intellectual framework of equal protection analysis, they differ markedly in their substance and goals.

We can learn some lessons from the comparative analysis that is presented in this Symposium. The first is that the institution of judicial review is not necessarily the only guarantee against arbitrary government. In the United States, judicial review is a cherished element of our constitutional system. In the United States, the power of the courts to strike down unconstitutional legislation and executive acts is a check against unconstitutional conduct by the two political branches of the United States government. In England, however, tradition and convention perform a similar function. Although the United Kingdom does not have the institution of judicial review, it does not necessarily follow that the United Kingdom is in greater danger of arbitrary rule than the United States.

The second lesson might come as a surprise to many students of American constitutional law, that is, the finding that there are amazing similarities between the approaches of the Soviet Union and the proponents of the conservative constitutional theory in American law to the question of judicial review. Both schools of thought advocate a theory of judicial review that can be described as one of majoritarianism or immanent positivism.

The third revelation from a comparative analysis of United States and Soviet approaches to equal protection of law is an intriguing congruence between the Soviet approach and Justice Rehnquist's judicial philosophy. How did Justice Rehnquist wind up in the same bed with Soviet ideologues on the issue of equal protection of law? Perhaps Justice Rehnquist might have an answer to this puzzle.

I wish to thank the editors of the Tulane Law Review for making it possible for a much wider audience than those who
attended the sessions of the Colloquium to share the fruits of
the two day labor of love by our distinguished panelists.