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Human Rights and Imposed Constitutions

Mark Weston Janis
University of Connecticut School of Law

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MARK W. JANIS*

Are there advantages in imposing constitutions on nations? Or are such impositions wrong as a matter of international law, unwise as an instrument of national policy, and useless in terms of achieving desired results? This Article is an exploration of these questions from the perspective of human rights advocacy, especially the promotion of democracy and the rule of law. It is a response to part of an Article, *Imposed Constitutionalism*, by Professor Noah Feldman.[1]

Professor Feldman acted as an adviser during the recent imposed constitutional process in Iraq, first independently and then for the Coalition Provisional Authority in Baghdad. Now reflecting on that process in his Article, he explores the contributions of three influential pressure groups in the United States—(i) neoconservatives interested, *inter alia*, in a Middle East with new constitutional regimes securing the region for Israel, (ii) human rights advocates interested, *inter alia*, in new Middle Eastern constitutional regimes promoting women's rights, and (iii) evangelicals interested, *inter alia*, in new constitutional regimes protecting rights to spread Christianity. Professor Feldman critiques all three pressure groups and their aspirations and concludes that, at the end of the day, all three groups are likely to be overly optimistic about the likelihood of creating an imposed constitutional regime in Iraq that will effectively protect the different interests the Americans are asserting. Nonetheless, he believes that imposing constitutionalism is not entirely a bad thing, arguing that if some Iraqis become committed to constitutionalism, good things can result over time. One of his principal, albeit curious, historical examples, the imposition of the Fourteenth Amendment on the South after the American Civil War, took about a century to work. Such a time frame will be discouraging for American neoconservatives, human rights advocates, and evangelicals alike. In this commentary, I focus only on one aspect of Professor Feldman's argument, the part that relates to advocacy for human rights

* William F. Starr Professor of Law, University of Connecticut School of Law. My thanks to my colleagues Richard Kay and Richard Parker for their suggestions.

[1] Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857 (2005).

while imposing constitutions.

To start with a definition of "imposed constitutionalism." Professor Feldman does not provide one. Of course, the term is richer for its ambiguity, but I think we might say, for working purposes, that by "imposed" we might mean that "constitutionalism" may be imposed either by a conqueror of a nation on a nation or by a conqueror of a nation on a nation with some degree of consent of the conquered nation (or at least by the elite of a conquered nation) or by an international or multilateral organization on a nation with or without the consent of the conquered nation (or its elite) or by a majority of a nation on the minority of a nation or by the elite of a nation on the non-elite of a nation. And, by "constitutionalism," I think we might mean either a written constitution or a constitutional system of government including its political and social institutions or a sort of government where a special place is held by certain institutions. Here I, for one, would especially pick out a powerful judicial system, capable, perhaps with the aid of judicial review, of limiting democratic decisions made, ordinarily, by legislatures, parliaments, or assemblies. When we question the wisdom of "imposing constitutionalism" on Iraq, I think we are asking for a specific answer to a very useful general question: "When should a system of government, especially a government that is meant to be more or less a democratic government governed by the rule of law, be imposed on an at least somewhat unwilling nation?"

In defining his second assertive group, the "International Human Rights Movement," Professor Feldman calls it "really a congeries of organizations with disparate interests and approaches, unified by a deep and sincere commitment to spreading and implementing the fundamental guarantees of human liberty and equality embodied in international declarations and conventions."[2] I suggest that Professor Feldman's first and second clauses are contradictory. Groups that are "unified by a deep and sincere commitment to spreading and implementing the fundamental guarantees of human liberty and equality embodied in international declarations and conventions" seem to me to be a much closer grouping than Professor Feldman implies when he calls them "really a congeries of organizations with disparate interests and approaches." Perhaps his sentence taken as a whole is meant to signal a disdain or disappointment that Professor Feldman has with the human rights movement. Indeed, I think that his word "congeries" is meant to be mocking, an inference supported by his next sentence, where Professor Feldman finds it "an interesting, if explicable, feature of this movement that even though international documents like the U.N. Charter speak of self-government and free political institutions as desiderata, its commitments to basic rights has typically emphasized individual humanitarian rights over rights of political participation—in other words, rights to

[2] *Id.* at 867.

electoral democracy."[3] This critique, denigrating human rights advocates because they appear to Professor Feldman to be insufficiently committed to the promotion of democratic governments, is well off the mark. Here, it seems, his understanding is just as wobbly as his argument about the relevance of the adoption and implementation of the Fourteenth Amendment in the United States to Americans imposing a constitution on Iraq. Both notions show a quick draw approach to comparison that are certainly colorful, but historically doubtful. Let me add a little to Professor Feldman's statements about human rights advocacy by turning to the example of Western human rights advocacy and the "imposition" of new constitutional regimes in central and eastern Europe.

Between 1945 and 1989, during the Cold War, we in the West assumed (I would say usually rightly) that the Communist governments of central and eastern Europe were imposed governments that were by and large neither democratic nor based on the rule of law, hence not really "imposed constitutional" governments. Our assertion, along with our assertion of Western economic superiority and its benefits, was that freed from Communist imposition, the nations of central and eastern Europe would naturally become both democratic and governed by the rule of law and that the populations of these nations would be thus better off. Our Western claims for democracy and rule of law in central and eastern Europe were thoroughly interwoven. Indeed, our interwoven "constitutional" assertion was popularly known as a claim for greater "human rights" for the nations of central and eastern Europe. As such, it could and did gather support in the West both from those committed, post-Nuremberg, to international human rights law in general and from those who, though they might not ordinarily be advocates of international human rights, were nonetheless ready to use human rights arguments to upset Communist regimes.

After 1989, the United States and western Europe prodded the central and eastern European states towards democratic/rule of law constitutional governments, but I do not think most Americans or western Europeans would say that we "imposed constitutionalism" on the new governments of central and eastern Europe to anywhere near the same extent as the Soviet Union had imposed undemocratic/non-rule of law governments on them between 1945 and 1989. Still, to a degree at least, Western human rights advocacy did "impose constitutionalism" on many of the new governments of central and eastern Europe after 1989, but it was an "imposition" so far much more successful in practice than American "imposition" of constitutionalism on Iraq. There are, of course, many differences between the two impositions, but some lessons may well be drawn from the recent experience in central and eastern Europe that could be instructive to those presently "imposing constitutionalism" in the Middle East.

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[3] *Id.* (internal citations omitted).

For me, the most important lesson here is that the "imposed constitutionalism" in central and eastern Europe post-1989 was "imposed constitutionalism" that was more "international" in several senses of the word. By "constitutionalism" let me adopt and narrow the definition fashioned above: either a written constitution or a constitutional system of government including its political and social institutions or a sort of government where a special place is held by certain institutions, such as a relatively powerful judicial system. By "international" I mean it in two senses. First, "international imposed constitutionalism" is imposed, at least in part, neither by a conquering power nor by an elite or a minority of a nation on the rest of the nations, but by a process of multilateral diplomacy, international law, and international institutions. Second, "international imposed constitutionalism" may be, though not necessarily be, a kind of constitutionalism that promotes and protects international human rights law. Of course, the two may be related since the processes of multilateral diplomacy, international law, and international institutions pressing for constitutional democracies governed by the rule of law aim, among other things, to achieve national constitutional orders that promote and protect international human rights law.

In the first sense of "international imposed constitutionalism," the most important international constitutional pressure put upon the emerging states of central and eastern Europe was that of the Council of Europe and its Strasbourg system of European Human Rights Law, probably the world's greatest success story in the effective enforcement of international human rights law.[4] The Council of Europe dates to 1949 and the European Convention for the Protection of Human Rights and Fundamental Freedoms was open for signature in 1950. The idea that an international human rights court could "trump" the final judgment of a sovereign state's highest court was, of course, unthinkable in Europe at first, as it still is in the United States today, but European Human Rights Law slowly but surely accomplished the feat of emerging as an international tribunal that could effectively challenge the final rulings of national sovereign legal systems.

The emergence of the European Court of Human Rights in Strasbourg as an effective international constraint on member state law and policy began in a small way in the 1970s, two decades after its establishment, as the Strasbourg Court began an assertive invasion of state sovereignty with a series of judgments boldly checking the human rights abuses of the Council's member states with crucial decisions against some of the most important states in the system—the United Kingdom, France, Germany and Italy. Lawyers, encouraged not only by the boldness of the Court but by the willingness of the member states to comply with adverse judgments, again as unthinkable in Europe sixty years ago as it remains unthinkable in

[4] MARK JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS (2d ed. 2000).

the United States today, brought more and more cases to Strasbourg. Hence, the Strasbourg Court's work load increased: from no judgments in the 1950s, to an average of one a year in the 1960s, to two to three judgments a year in the 1970s, to about seventeen a year in the 1980s, to about ninety a year in the 1990s, and to about 700 a year in the 2000s.[5] From 1989, when the Berlin Wall fell and the central and eastern Europe nations began to free themselves from Communist rule, membership in the Council of Europe and in the Strasbourg human rights system expanded from twenty-two states to forty-six states today.[6] So in addition to the "deepening" of the system in western Europe, the new "widening" of the system to central and eastern Europe has also, though so far to a lesser degree, contributed to Strasbourg's burgeoning case law.

Importantly, the twin benefits of western Europe—protection of human rights and economic prosperity—were explicitly intertwined by the western Europeans as they welcomed (or not) the newly independent governments of central and eastern Europe to the European fold. It was made clear from the beginning that a prerequisite for entry into the European Union and its promise of economic well-being was the prior institution of constitutional governments based on the twin principles of democracy and rule of law. Moreover, one important measure that constitutional governments had passed the democracy and rule of law tests was admittance to the Council of Europe and membership in the Strasbourg system of human rights law, including the international supervision of human rights law within member states by the Strasbourg Court. Thus, even for those in central and eastern Europe who valued economic prosperity more than (or even to the exclusion of) the protection of human rights, active and obedient participation in the system of European Human Rights Law was mandatory. The Council of Europe took an active role in the creation of new national constitutions throughout central and eastern Europe because, in large measure, the western European governments insisted that the Council do so. If not, it would be unlikely that a central or eastern European state could become a member either of the Council of Europe or, eventually, of the European Union.[7]

This story of human rights advocacy in the imposition of constitutions promoting democracy and the rule of law in central and eastern Europe is, of course, a hopeful tale. Although the record of the new democracies in central and eastern Europe is mixed, many of the new governments have quickly become well-respected Western-style constitutional governments. Moreover, ten new states were welcomed into the European Union in 2004,

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[5] *Id.* at 23–26.

[6] *See* 1989 YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 3 (1993) (listing the twenty-two signatories to the Convention in 1989); COUNCIL OF EUROPE, ABOUT THE COUNCIL OF EUROPE, *at* http://www.coe.int/T/e/Com/about_coe/ (noting that there are currently forty-six members of the Council of Europe) (last visited Mar. 25, 2005) (on file with the Connecticut Law Review).

[7] Mark Janis, *Russia and the 'Legality' of Strasbourg Law*, 8 EUR. J. INT'L L. 93 (1997).

demonstrating that they had passed their democracy and rule of law "tests" as well as meeting the economic requirements for joining the Union; this number included Poland, the Czech Republic, Slovakia, Hungary, Slovenia, Estonia, Latvia, and Lithuania, all former Communist dictatorships. From the fall of the Berlin Wall in 1989 to membership in the European Union in 2004, only fifteen years had passed—an impressively rapid transformation. Could there be similar hope for Iraq?

As optimistic as I would like to be, I recognize at least two problems. The first problem Professor Feldman knows well—Iraqi society is not European society and I simply do not know whether there is enough similarity between the lay of the land in Iraq with the lay of the land in central and eastern Europe to genuinely hope for a similar result. I could only say that just as so many of us in the West were surprised at how quickly Communism fell in central and eastern Europe, so we were again surprised at how quickly democracy was established in many, if not all, of the old Communist states.

The second problem is drawn from my understanding of why imposing constitutionalism worked so well in central and eastern Europe after 1989. Not only did the successful imposition of constitutionalism depend on the character of the individual societies in the different nation states, but it depended, I think, on the eagerness of the peoples, the elites, and the new governments of these states to gain the economic prosperity promised by integration in the European Union. Albeit, the European Convention on Human Rights and Fundamental Freedoms and the European Court of Human Rights in Strasbourg were creations, not of the smaller European Union but of the larger Council of Europe. It was the European Union's requirement that an applicant state maintain satisfactory participation in the Council of Europe and the Strasbourg human rights legal system that was an important carrot inducing the new governments in central and eastern Europe to adopt and effectively implement democratic, human-rights-promoting constitutions.

What, if anything, can be done to create a like inducement for Iraq? Here are a few ideas tied into imposing constitutionalism, all admittedly speculative. First, why not ask the United States and other Western governments to encourage economic integration in the Middle East both for its own sake, i.e., improving the prosperity of the region, and for the purpose of requiring compliance with international human rights norms? Second, why not ask the United States and other Western governments to encourage the creation of a human rights court for Iraq with judges drawn not only from its Shi'ite, Sunni, and Kurdish populations, but also from the international community? One could visualize, for example, a nine person court composed of two members each from the three distinct peoples of Iraq, and three international judges—an American, a European, and an African, Asian, or Latin American. Third, why not ask the United States

and other Western governments to work together to set up standards and external mechanisms for supervising Iraqi compliance with international human rights norms linked to economic incentives?