Global: Norman Dorsen’s Response

Norman Dorsen*

I am deeply touched and grateful for the willingness of ten of the world’s intellectual leaders in comparative constitutional law and related fields to contribute to this issue of I·CON in “homage” to me. I tender special thanks to my colleague Joseph Weiler for conceiving this project and carrying it to fruition so brilliantly.

1. The enterprise is far less about me than it is about the Journal, now in its eighth year of publication, which provides a forum for the dissemination and comparative analysis of constitution-centered ideas—theoretical and practical, universalist and nation-bound, relatively familiar and startlingly new—developed from traditional legal norms as well as from the insights of other disciplines. There can be no boundaries to the subject because it is a product of the age-old need of people to govern themselves and to enhance their lives, and of their desire to rationalize and justify the means chosen to accomplish these objectives, a process that draws from every possible source.

On this occasion a brief history of the Journal seems appropriate. The idea originated in 1997 with Professor Juliane Kokott, then of Universitat St. Gallen in Switzerland and now Advocate General of the European Court of Justice. She and two colleagues at St. Gallen came to think that a high-quality journal would be timely in light of massive changes in society that were shrinking the world and altering the relations between states and between states and the people. These developments were increasingly being reflected, from different perspectives, in legal developments around the globe. About the same time Professor Donald Kommers of Notre Dame Law School, a senior constitutional comparativist, suggested to me that a journal be added to New York University’s new Hauser Global Law School Program, which was founded

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in 1994 and which I directed. Soon thereafter Kokott and I met at a conference in Finland, and she subsequently made two visits to New York to discuss the Journal. Afterwards, and encouraged by Dieter Grimm—then a judge of the German Constitutional Court—and by my NYU colleagues Barry Friedman (who coined “I·CON”), Stephen Holmes and David Garland, I became convinced that a comparative constitutional journal was desirable. But I also concluded that it would be difficult to achieve, especially since I wanted it to be truly international, with a ceiling on contributions from Americans.

It took more than three years for me to find the right associate for this venture—Professor Michel Rosenfeld of Cardozo Law School, who was soon to be elected president of the International Association of Constitutional Law—and to form top level editorial and advisory boards, most of whose members contributed and, in some cases, still contribute to the Journal’s contents. Michel and I recruited two able and hard-working managing editors, first Karen Johnson and then Karen Barrett, and I secured adequate funds from NYU Law School through then-dean John Sexton and from the Open Society Institute, through the good offices of its president, Aryeh Neier. Oxford University Press has been I·CON’s publisher from the start.

So we embarked. What remained was hard work, including above all the need to attract the superior scholarship that I·CON has published and has won it recognition. It was with some pride that two years ago I handed the helm to Joseph, a highly respected figure in the field who has already introduced worthy new ideas to the Journal.

2.

To the extent that it has succeeded, I·CON has published authors from many disciplines and from scores of countries and every continent, work that addresses a host of contemporary and historic issues, often in light of past political and theoretical battles.

It is these elements that characterize the 10 x 10 articles in the current issue. Eight countries are represented among the ten contributors. Almost 90% of the works chosen are books, including collections of essays and short stories, and the rest articles and other writings. They include 27 that discuss problems primarily from a legal perspective, that is, they comment on theoretical or doctrinal advances or explain developments in a field of law (a few are concerned primarily with craft or offer explicit guidance to judges, legislators and lawyers). About 63 books are works of moral philosophy, economics, political science, biography (including autobiography), linguistics, biology and literary criticism. Four have roots in religion and nine are works of fiction (by Diderot, Stendhal, Mann, Camus, Borges, Albee, Pinter, Yaakov Shabtai and Hannah Levin). Anne Frank’s tragic memoir and Goethe’s recollection of his legal education also appear. The total comes to more than 100 because the works of two authors are sometimes mentioned under one number. The erudition of the contributors is daunting.

Ten of the named authors are found on two or more of the lists. In rough chronological order, they are Kant, Hegel, Marx, Weber, Gramsci, Wittgenstein, Camus, Habermas, Dworkin and Atiyah. Although they, as well as the other cited authors,
differ greatly in their concerns and ideologies, the eras in which they lived, and the styles in which they wrote, they seem to me to address two broad themes: (1) those works that were used as intellectual guides, or which came to serve that purpose, in deciding how an individual or sometimes a government should address contemporary political or social issues, and (2) those that were read primarily to discover a version of truth or moral excellence in living one’s life.

These two broad issues cannot of course be put in airtight chambers. Thus, when one approaches concrete problems such as monarchy vs. democracy or the nature of Communism in real time, or the advantages and disadvantages of different voting systems, works of a theoretical nature that discuss, for instance, the nature of human beings, including their capacity for altruism, cooperation, compromise and self-government, and the value of a human life vs. the collective good, will influence practical choices. Conversely, when one attempts to discover and formulate lasting moral principles, the informed mind will often take into account the nature of current political and social controversies which require people to take sides and to live with actual outcomes.

With this background I shall comment on the selections of the contributors to this issue of I·CON.

3.

János Kis portrays a life in which theoretical studies helped him to understand more deeply the nature of the postwar communist regime in Hungary and to become its active opponent. His intellectual journey “from revisionist Marxism to egalitarian liberalism” began with the Soviet Union’s crushing of the 1956 Hungarian revolution. This was a time when a young Hungarian “had no other philosophical language to speak but that of Marxism,” which Kis saw as a failure. But what to substitute? The books he identifies in this issue of I·CON include theorists such as Lukács, Nozick and Rawls, and more latterly Dworkin, Nagel, Waldron, and Kis’s countryman, Václav Havel. These works enabled Kis to come to terms with the Enlightenment and with a rights-based theory that was not linked, as the Marxists would have it, solely to class. The path was thus cleared for him to become a courageous figure in the long struggle for a democratic Hungary as well as a leading public intellectual.

Mireille Delmas-Marty’s political concerns have not focused on her native France but rather on the broader goal of “transform[ing] the world’s great legal disorder into a pluralist global order.” The pursuit of this ambitious agenda, which in Delmas-Marty’s eyes must include both human rights and economic reform, led her initially to study among other things the European Convention on Human Rights and the problem of formalism, which had “destabilized the legal field.” Ranging more broadly, she sought guidance from such varied sources as Raymond Saleilles’s comparativism, Hannah Arendt and Onuma Yasuaki’s views of human rights, the coupling of formalism and humanism by Paul Ricoeur, and the judicial opinions of Antonio Cassese and Stephen Breyer. These works helped lead her to conclude that the world requires
a regime that embodies foreseeability (formalism), legitimacy (legal humanism) and efficiency (global government).

Armin von Bogdandy is perhaps the contributor who links his philosophical studies most explicitly to contemporary legal problems. Relying heavily on works from his native Germany—Kant, Hegel, Marx and Engels, and Koch and Ruthmann’s elaboration of formal logic and language theory—von Bogdandy undertook the “arduous, but joyous, process of reducing a messy something to a conceptual or mathematical pattern that provides for a deeper understanding of reality, including the cognizant self.”

Just when it seems that von Bogdandy is leaning heavily toward the abstract, he makes good on his assertion that the “object of my curiosity is public law” because of its “dialectical relationship with public authority.” To this end he relies on the works of Bernd Ruthers, which he found “liberating as it revealed the study of law as a path to understanding social reality,” the comparative analysis of P.S. Atiyah and Robert Summers’s *Form and Substance in Anglo-American Law*, and *The Gentle Civilizer of Nations*, a Bildungsroman by Martti Koskenniemi which, for von Bogdandy, stands for a type of scholarship that “involves the entire self.”

Menachem Mautner takes a similar approach, but with a special move, or rather two moves, of his own. Like von Bogdandy, Mautner engages with leading theorists: Marx and Engels, Gadamer’s *Truth and Method* (“one of the greatest books of the twentieth century”), and the scholars of culture, Charles Taylor and Pierre Bourdieu. Again like von Bogdandy, Mautner turns to works of contract law to apply and test the theoretical volumes—Atiyah’s *The Rise and Fall of Freedom of Contract*, Gilmore’s *The Death of Contract*, and the seminal article, *The Many Futures of Contract*, by the late Ian McNeil (a law school classmate of mine 60 years ago).

The first of Mautner’s intriguing moves is to introduce into the discussion at this point four books of fiction, by the Israelis Yaakov Shabtai and Hannah Levin, as well as the drama of Harold Pinter and Edward Albee. These works not only provided Mautner with a different perspective on philosophical problems, one that tended to “undermine the stature of some key notions of the modern world view.” They also led him—this is the second move—to a “strong conviction that you can clothe almost any move or outcome in the law with plausible arguments,” in other words, to a path towards Legal Realism and Critical Legal Studies.

B.S. Chimni, the first of two prominent Indian contributors, concentrates on theoretical issues, largely without explicit reference to practical consequences. He explores many classical writers, among them Marx and Engels, Lenin, Gramsci, Wittgenstein, Habermas, and Camus (*The Outsider*). But while he considers Marx to be “central” to his work, he has moved away from “all forms of deterministic and dogmatic Marxism,” in particular his “general rejection of religion.” This theme resurfaces when Chimni notes that his countryman Sri Aurobindo “started life as an extremist in the Indian freedom struggle before turning to spiritualism.”

Chimni reserves his highest accolade for M.K. Gandhi’s *Hind Swaraj* (or *Indian Home Rule*), which presents a “wholesale critique of modern civilization” and clarifies “in a most profound manner the meaning and process of resistance and human emancipation.” Nevertheless, Chimni says that “had this short tract been written by anyone
other than Gandhi, it may have been dismissed as the work of a crank.” It is true
that Gandhi rather surprisingly believed that we should not think too much of history;
that “a nation which has no history . . . is a happy nation.” But as Chimni summarizes
Gandhi’s other “lessons,” they do not seem those of a “crank”—e.g., that the relation-
ship of means to ends is important, that technology can enslave as much as liberate,
that the idea that we should obey laws whether good or bad should be rejected, and
that Gandhi’s non-violence, rooted in the belief that all thought is fallible, was de-
servedly influential even if frequently impracticable.

Another prominent Indian contributor, Pratap Bhanu Mehta, takes a latitudarian
view of the subject, addressing the impact of his books on self-knowledge (“what we
are like as human beings and what we wish to be”), on the nature of justice under con-
ditions of diversity, and on the character of the “profound transition India is under-
going.” Mehta’s approach to these issues is informed by a broad range of writers, two
English (Adam Smith and Burke), two French (Montaigne and de Tocqueville), one
German (Weber), one American (Rawls) and four Indian, including the classic Maha-
bharata, a history by Jawaharlal Nehru, the poetry of Hazari Dwivedi, and the Indian
Constituent Assembly Debates (a counterpoint to the U.S. Federalist Papers, selected
by Francisco Rubio Llorente, below).

Mehta’s most trenchant observation, it seems to me, is that the questions he has
raised “ineluctably [feed] into one another.” In his current “hybrid existence of part
academic, part policy wonk, and part engagement with public argument,” policy
debates “could not be understood without penetrating deep into the historical forces
that were producing them.” One speculates what Gandhi’s response would be.

Gertrude Lübbe-Wolff’s selections are varied (although she mentions no fiction) and her
comments are highly autobiographical. The works she has chosen are generally theoret-
cal, and all but one were read before she was 25. “When in doubt,” she names German
authors because she thinks they would be more interesting to non-German readers.

She cites Hegel as one of three “really important philosophers in my life,” and she
regards Karl Popper’s characterization of Hegel as supporting Prussian authoritarian-
ism and as “a mastermind of totalitarianism” as one of the “great[est] misunderstand-
ings in the history of philosophy.” She was impressed by Karl Marx’s analysis but after
reading the first volume of Kapital and identifying important unresolved problems
in his work she was “reassured” that she did not have to “convert to communism.” She
“loved” Wittgenstein’s introduction to analytical philosophy on first reading, but
when language philosophy came to dominate philosophical faculties she was “bored
out of my mind.” Lübbe-Wolff has admiring things to say about Gustav Schwab’s
Gods and Heroes of Ancient Greece and The History of the Thirty Years’ War by Friedrich
Schiller (known best as a dramatist and lyric poet), and she believes that Rudolf von
Jhering should replace Friedrich von Savigny as Germany’s most eminent jurist.

In line with her indifference to controversy, Lübbe-Wolff questions the widespread
intellectual and emotional reaction of many readers to Hannah Arendt’s observation
in Eichmann in Jerusalem that the leading organizer of the Holocaust was “banal,” a
“nondescript, utterly non-demonic subordinate.” More generally, she doubts whether
great, unmeasurable crimes must be committed by a “devilish power” without
“luciferic greatness.” Finally, Lübbe-Wolff is the only contributor to this symposium who intentionally selects a “bad book”—Werner Sombart’s *Merchants and Heroes*—because “they can be instructive.”

Francisco Rubio Llorente is unique among the contributors because he spent 12 years as a constitutional judge while pursuing a notable academic career. Unlike Lübbe-Wolff, he selects books (with two exceptions) that correspond to the time of his life when he read them. He says that during his judgeship he moved from “classical constitutionalism” to what, mostly in Spain and Italy, is simply called “constitutionalism” and he acquired the conceptual tools to teach about rights and, “more importantly, their application.” His list omits frequently cited classical authors except Marx and The Federalist Papers written by Alexander Hamilton, James Madison and John Jay in support of the late 18th century American revolution. The latter work is notable in Llorente’s opinion for its “assurance of a general principle of liberty” rather than “guarantees of a concrete repertoire of rights, however important they may be” and for the now widely acknowledged insight that society should not be seen as the simple sum of individuals but instead as a “structured whole, an aggregation of groups with . . . different interests that are sometimes conflicting” or “compatible only with difficulty.”

In a rare citation to a “manual” in these pages Llorente singles out M. Garcia Pelayo’s *Derecho Constitucional Comparado* for its “serious and clear exposition of the fundamental theorists and technical organizations of constitutional democracies.” Llorente also identifies Ronald Dworkin and Robert Alexy as the contemporary authors with the most formidable justifications for a moral and principled reading of constitutions, ultimately grounded in the general idea of human dignity. But, probably reflecting his judicial experience, Llorente laments the possible inadequacy of even these sophisticated theories in the weighing of conflicting rights.

Joseph Weiler presents a list that is remarkably diverse—the Bible’s *Genesis*, Maimonides’s authoritative codification of Jewish law, two works of fiction (Stendhal and Camus), five books of nonfiction from a political scientist, a historian, a sociologist and two scholars who transcend disciplines, Erich Auerbach and William Miller. The final entry consists of three Encyclicals issued by Karol Józef Wojtyła, Pope John Paul II.

Weiler explains his selections as those most important in “shaping [his] intellectual self-understanding and professional persona,” describing himself as a “confirmed Anti-antinomian, a lifelong student of Nomos, law with a heart and soul.” This and other passages suggest that Weiler bridges the two overlapping categories identified early in this Response—those who seek intellectual guides for action, and those who value, more abstractly, a version of truth or moral excellence. Like Armin von Bogdandy, Weiler recognizes that courage is a value of scholarship, in my view an underrated one. Von Bogdandy includes Weiler among his ten most formative authors.

Pope John Paul II seems to me a problematic case. Weiler describes Wojtyła as a towering moral and intellectual figure of the twentieth century who affected world history by helping to facilitate the collapse of Communism. He ranks Wojtyła above
such scholars as Giddens and Habermas because he “[deeply penetrates] the soul” and “more explicitly appreciates the spiritual dimension (and cravings) of the social and individual psyche,” for Christians and non-Christians, for religious and secular alike. That many people crave spirituality and religion is undisputed, but for those who have seen no evidence that there is a soul, and are not persuaded after earnest reflection that there is an other-worldly and all-powerful being, Wojtyła’s writings must be evaluated without regard to his “spiritual dimension.” In this light it is doubtful that the Catholic Church, whatever its other qualities, represents “a radical moral and intellectual counter-cultural option.”

Sabino Cassese, the tenth contributor to 10 x 10, produces a fascinating and distinctive list, including nonfiction by de Tocqueville, Dicey, Croce (“the most respected Italian public intellectual in the first half of the 20th century”), Gramsci, and the late Stanford law professor, John Merryman, who wrote three articles in the 1960s showing that legal systems, at least in the West, are often less different than usually thought, and also accurately predicting the course of Italian constitutional law. Cassese also includes Goethe’s chronicle of his legal education (“full of wisdom and irony”), two remarkable works of fiction, Thomas Mann’s Doctor Faustus and Borges’s The Garden of Forking Paths, an allegory by the prominent Enlightenment figure, Denis Diderot, on the danger of putting oneself above the law.

My reason for closing with Cassese is only partly related to these works, including their transcendence of disciplinary boundaries and their capacity to bring an “external perspective to bear upon their own world.” My decision was prompted by Cassese’s unusual coda, in which he asks:

Did I choose [the works], or simply happen upon them? Why and how did we meet? Was I aware of their significance, or was I attracted to them only because they amused me? Have I presented them here because I was conscious of their importance and their relevance to my work when I first read them, or because I see it now and have reconstructed a tradition, mixing remembrances and programs past and present?

Cassese offers four answers to these questions. First, after referring to Clemenceau’s famous criticism of the students of Ecole Politechnique that “they knew everything to know but nothing more,” Cassese says that he was searching for more than school, university and his own cultural environment provided. Second, he describes himself as having “intellectual schizophrenia” in combining the study of history and law, one looking back and the other forward, but “indispensable complements.” He recognizes the methodological problem this relationship presents. Cassese’s third reason, “the many faces of realism”—both “the way things are and our interests and assumptions about the way things are”—also invites methodological scrutiny. Finally, Cassese says that he was an “accidental lawyer,” that is, “not by bent or inclination”, which perhaps is why he has never been interested in “lawyer’s law” and has always appreciated the perspectives of non-lawyers.

Cassese concludes by mentioning that some of his encounters with his authors were “fortuitous,” and therefore “alternative roads” were open. In particular, he says that
he might have replaced Croce with Hegel, Tocqueville with Montesquieu, Gramsci with Constant, Giannini with Forstoff, Mann with Proust, Goethe with Stendhal, Diderot with Voltaire.

4.

The contributions to this issue of I·CON and the works referred to in it—not to mention “alternatives” such as Cassese’s—confirm once again the truth of the ancient observation, “so many books, so little time.” The intellectual and moral stimulation that I received while preparing this Response is matched only by my gratitude that ten wonderful contributions to I·CON were written in my honor.