Editorial

I have invited my co-Editor-in-Chief, Michel Rosenfeld, to write the Editorial for our last issue for 2013. His contribution follows below.

On constitutionalism and the paradoxes of tolerance: Reflections on Egypt, the US, and beyond

The political philosopher Karl Popper admonished us against inaction when confronted by what he termed "the paradox of tolerance."[1] Consistent with this paradox, tolerance of the intolerant is ultimately self-defeating as the latter will inevitably take advantage of being tolerated to gain the upper hand, and eventually to abolish tolerance. Hitler and the Nazis who assumed power constitutionally have long provided the prime example of the evils that can ensue from tolerance of the intolerant. Moreover, when viewed in that light, the toppling of the former president of Egypt, Mohamed Morsi, by that country's military as well as the US's increased devotion to security at the expense of civil liberties—including through recently revealed expanded National Security Agency (NSA) secret information gathering on Americans as well as foreigners—loom at first glance as appropriate and defensible instantiations of Popper's counsel.

Indeed, though elected democratically to replace an authoritarian and repressive regime that had ruled the country with little patience for divergence or dissent for over three decades, Morsi had a short-lived presidency that proved increasingly repressive and intolerant as well as inept. Morsi pushed through, over the strong objections of his political opponents, a new constitution that enshrined a particular Sunni interpretation of the Shar'ia fostering a course of religious intransigence and intolerance marked by spurts of violence, including massacres of Coptic Christians. Coupled with this, the Morsi presidency was widely regarded as inept and as responsible for a mismanagement of the country's affairs, thus prompting a rapid acceleration of social upheaval and economic unraveling and disarray. Under these circumstances, when the military in Egypt toppled Morsi and took the reins of government for what they declared would be a limited period of transition toward a more firmly anchored era of democratic rule, most pro-democracy Egyptians who had opposed Morsi cheered and endorsed the military takeover.

Turning to the US, after the profound and unsettling impact of the September 11, 2001 Al-Qaeda terrorist attacks, the overwhelming majority of Americans welcomed increasing security measures to combat the ongoing threat posed by global terrorism. And that even if the greater security sought to be achieved would inevitably result in some retrenchment of constitutionally protected civil liberties. Again, too much

[1] 1 Karl Popper, The Open Society and its Enemies; The Spell of Plato 265–266, n. 4 (1966).

liberty and tolerance in the face of constant terrorist threats, particularly those stemming from well-trained groups that were claimed to be (or to become within the foreseeable future) capable of deploying nuclear, chemical, or biological weapons, could easily be imagined to pose an existential threat to the body politic or to pave the way to an authoritarian takeover playing on the citizenry's unabated fears. Accordingly, endurance of long lines and submission to intrusive physical searches at airports, random checks of handbags on subways or in theaters, subjection to greater collection of private information by intelligence agencies, and sundry other restrictions reducing the scope of the citizenry's liberty and privacy rights were readily accepted by most as a worthy tradeoff in the pursuit of greater security.

In many important ways, the Egyptian and the American experiences referred to above are vastly dissimilar. Although they both involve intolerance of the intolerant, in Egypt, the particular group targeted—Morsi and those associated with him within the political movement launched by the Muslim Brotherhood—constituted an internal group firmly anchored within the relevant polity and, pointedly, one that had been brought to power through a democratic election. In contrast, the 9/11 terrorists who attacked the US were all foreigners originating from without (but as we will see below terrorist *threats* are as likely to come from within as from without). And whereas intolerance of the intolerant within one's own polity may give rise to a paradox, intolerance of, and even proportionate violence against, foreign invaders seems straightforwardly and in all banality morally and legally justified without giving rise to any perceptible paradox.

There also is another glaring disanalogy between the aftermath of the Egyptian overthrow of Morsi and the US "war on terror" embarked upon after 9/11. Although initially hailed by many as promising development in the quest for a working constitutional democracy, the military takeover in Egypt very quickly became authoritarian and repressive having proclaimed a state of emergency and, as of this writing, having triggered a wave of violence resulting in around one thousand deaths and even a larger number of casualties, as well as in the systematic persecution of those associated with the Muslim Brotherhood and the detention of Morsi and others as political prisoners. This rapid sequence of events fairly raises the question of whether the democratic and constitutional hopes kindled just a couple of years ago by the Arab Spring movements will prove to have been purely utopian. In vivid contrast, in spite of a series of excesses squarely at odds with the ideal of constitutionalism in the aftermath of 9/11, such as the attempt to create a zone of unlimited detention free of any constitutional or rule of law constraints in Guantanamo (a design at least partially frustrated by decisions of the US Supreme Court),[2] or the recently revealed massive and seemingly indiscriminate spying by the National Security Agency (NSA) on American citizens as well as foreigners, the US has long been and continues to be a vibrant constitutional democracy.

Ironically, it is because of these important differences rather than in spite of them, that taken together the American and Egyptian respective deployment of intolerance of the intolerant vividly illustrate a further pressing problem that now seems to be

[2] *See* Rasul v. Bush, 542 U.S. 466 (2004).

spreading well beyond the two countries under consideration, namely what could be labeled "the paradox of the paradox of tolerance." Because the Nazi case was so extreme given that the latter were bent on extermination and annihilation, absolute single-minded intolerance of Nazism was clearly called for. However, as the Egyptian and US cases discussed above variously illustrate, where the intolerant to be targeted is not absolutely without legitimacy or redeeming value (global terrorism itself is certainly devoid of all justification, but the political and religious views that it has invoked need not taken by themselves be as absolutely objectionable as Nazi ideology is) and where its intolerance is not all pervasive, intolerance towards the latter must be properly calibrated. Upon closer inspection, in any situation where neither absolute tolerance nor absolute intolerance is called for—and that applies for the vast majority of cases—a balance must be struck between tolerance and intolerance. Or more precisely, equilibrium must be strived for in the context of a dynamic that pits a number of instances of tolerance against correlated instances of intolerance. For example, institution or preservation of religious tolerance requires intolerance of religious hegemony and of secular intransigence toward religion. Moreover, the equilibrium in question depends on a combination of self-constraint and constraints on others. I must constrain myself from imposing my own religion which I am certain is the true one on those I consider to be in error and at the same time society must constrain those others who reject self-constraint and are bent on imposing their own religion or anti-religion on their fellow citizens.

What the paradox of the paradox of tolerance underscores is that the need to upset the *status quo ante* to prevent a tolerant democracy to give way democratically to an anti-democratic authoritarian political actor is a necessary, but by no means sufficient, means to safeguard a tolerant society threatened from within. The excesses and failures of the Morsi regime built up intolerance towards it among rapidly mounting numbers of Egyptians, and that intolerance seems fully consistent with Popper's admonition, but it also fostered what would soon prove to be excessive tolerance for military rule. That seems particularly unfortunate in a country like Egypt with its authoritarian past and history of close ties between the military and the country's dictatorial leader as was the case during the three decades of Mubarak's iron-fisted rule. Retrospectively, the degree of intolerance leveled towards Morsi and the Muslim Brotherhood, which included not only removal from power but also arrest, imprisonment, alleged torture and assassination, looms as excessive. And so does the tolerance initially accorded the military by large scores of pro-democracy Egyptians.

Pessimists may contend that constitutionalism never had a real chance in Egypt notwithstanding the Arab Spring as the country's body politic lacks the requisite tradition and values. Consistent with this view, Morsi's democratic rule could not come close to finding a place within the bounds of constitutionalism—in spite of its new constitution approved by a majority of the Egyptian electorate—due to its excessive intolerance of the large numbers of fellow citizens who did not share its political or religious agenda. Conversely, the anti-Morsi pro-democracy Egyptians who enthusiastically supported the military takeover may well have unwittingly harmed the cause of constitutionalism due to (what would prove) their misplaced faith and

excessive tolerance of the repressive course embarked upon by the new military rulers. Optimists may counter that transition to constitutionalism cannot be expected overnight and point to the aftermath of the French Revolution's attempt to entrench constitutional rule which included a reign of terror and a Napoleonic dictatorship. Be that as it may, from the standpoint of the paradox of tolerance and the further paradoxes that it seems bound to trigger, which are the principal focus here, likely excesses regarding both *prima facie* justifiable intolerance and tolerance can erode or undermine constitutionalism, and that even where the latter is well entrenched as has long been the case in the US.

A closer examination of the post-9/11 reaction in the US, starting with the 2001 enactment of the sweeping Patriot Act[3] which unhinged the preexisting balance struck between liberty and security, reveals how an eminently justified intolerance of the new brand of terrorism has adversely impacted American adherence to the ideals of constitutionalism. The reason for erosion of compliance with the ideals in question can be traced to the unleashing of a dynamic combining increasingly excessive intolerance with correspondingly seemingly ever more compliant instances of misplaced tolerance. To appreciate why the intolerance at stake was excessive, one must realize that, whereas all those who carried out the 9/11 attacks were foreigners, the threats posed by international terrorism are both internal and external and are as likely to involve a foreigner training and plotting in Yemen as a neighbor down the street in the US. Indeed, the Boston Marathon terrorist attack of April 2013 was carried out by local area residents as were the 2004 Madrid and 2005 London attacks. Accordingly, the US "war on terror" is directed against a largely invisible enemy that can as easily be within as without the country. Moreover, to the extent that in this context intolerance of the intolerant must be rightly inwardly directed, it seems inevitable that the measures adopted will tend to prove over inclusive. In view of that, it seems particularly imperative to be vigilant against condoning excessive intolerance which would unduly curtail civil liberties and thus seriously impinge on the established constitutional order. Yet, as the recent revelations concerning the seemingly all pervasive NSA spying on American citizens as well as on foreigners indicate, the repeatedly voiced concerns of alarmed civil libertarians concerning dangerous and unwarranted erosion of liberty and privacy rights in the US appear to have proven clearly justified.

It is easy to see how intolerance against a mostly hidden threat within and without could lead to excess or, to use the metaphor referred to by a prominent European public intellectual, how the US all consuming campaign against global terrorism could be equated with the spread of an auto-immune disease.[4] In attacking a new form of terrorism that threatens its way of life with an all consuming zeal, the US may end up sapping the lifeblood of that very way of life. To leave it at that, however, would be to ignore or minimize what arguably poses the gravest threat to American constitutionalism. To be sure, Guantanamo, unlimited detention without charges, military tribunals doing away with some of the constitutional protections guaranteed to the

[3] Pub.L. 107–56 (2001).

[4] *See* Giovanna Borradori, Philosophy in a Time of Terror: Dialogues with Jurgen Habermas and Jacques Derrida 94–102 (2003) (citing Derrida).

ordinary criminal defendant, and apparent violations of relevant Geneva Conventions have posed serious threats to the integrity of US constitutionalism and rule of law. Nevertheless, due to the ordinary workings of the American constitutional order, much of these excesses were to a significant extent mitigated or scaled back through a series of US Supreme Court decisions, already alluded to above, in which policies of the Bush Administration had to give way or be adjusted in order to conform to vindication of constitutional rights. In spite of this, however, in one area, namely that of extensive government spying on US citizens, the US system of constitutional checks and balances that kept working elsewhere (albeit with certain flaws) appears to have largely broken down.

In part, this breakdown is traceable to departure from ordinary constitutional procedure: instead of subjecting NSA surveillance of Americans to review by ordinary courts, it was made subject to supervision by a secret and invisible court that by most accounts acted as a virtually automatic rubber stamp. But what looms even more important than that is American excessive tolerance for the collection of personal private data by both private businesses and the state. In this respect, the contrast between the US and Germany is quite striking. Already in the 1980s, the German Constitutional Court recognized an individual right to "informational self-determination" that limited the state's constitutional power to gather information on its citizens.[5] Not only has there been nothing comparable in the US, but also when the US Supreme Court has been confronted with the issue, it has refused to afford individual protection against government information gathering.[6]

The combination of excessive intolerance in the war on terror with excessive tolerance of government and private business prying into the individual's personal information is potentially highly toxic in terms of vigorous preservation of the dictates of constitutionalism. Consistent with the bias implicit in the excessive tolerance at stake, the US Supreme Court has repeatedly taken the position that constitutional harm would ensue from government *use* of gathered personal information, but not from *collection and possession* of that information standing alone. However, it is not difficult to imagine that, with changing political circumstances, particularly when linked to a real or suggested increased threat of terrorism, gathered citizen information could readily be used to intimidate, prosecute, imprison, or otherwise harass opponents or adversaries of the sitting government. In short, even in a country like the US, where constitutionalism has been firmly implanted, the dynamic between excessive intolerance of the intolerant and excessive tolerance coupled with that intolerance has the potential of leading to dire consequences.

What can we learn from the above-identified dangers associated with the paradox of tolerance? By bringing together the very different Egyptian and American cases, one inescapable conclusion emerges. Neither constitutionalism nor democracy provides guarantees against dislocations in the requisite balance between tolerance and intolerance associated with compliance with Popper's counsel. Does

[5] 65 BVerfGE 1 (1983).

[6] *See* Laird v. Tatum, 408 U.S. 1 (1972); Clapper v. Amnesty International, 133 S. Ct. 1138 (2013).

that mean that we would be better off by ignoring Popper's admonition? Not at all, except in those cases in which the intolerant pose no real threat and are sure to remain marginalized. But then, is implementation of intolerance of the intolerant bound to lead to further evils that on occasion may seem as daunting as those that led to confrontation with the intolerant in pursuit of power in the first place? Not necessarily if we do not lose sight of the paradox of the paradox of tolerance when confronting the need for intolerance. We must remain vigilant in our quest to maintain a proper equilibrium between tolerance and intolerance, between self-constraint and justified constraint of others. Constitutionalism and constitutional ordering can provide some of the tools necessary for the task at hand. But as we have seen, these tools are not sufficient. What is needed in addition is commitment to an ethos of pluralism, mutual respect and mutual understanding. Unfortunately, at present this ethos is often lacking, not only in Egypt and the US, but also in many other polities deeply divided along ethnic, religious, linguistic, cultural, political, and ideological lines.

Michel Rosenfeld

In this issue

The issue opens with two theoretical papers, each employing a comparative methodology in the theorization of constitutional ideas and practices. Focusing on originalist approaches in the United States and Australia, *Lael Weis* illustrates how a comparative methodology can advance our debates on constitutional interpretation. Apart from offering an insightful analysis of originalism and its potential justification, Weis also shows how the lack of comparative sensibilities impedes the proper evaluation of the originalist position. Australian constitutional law is also the site for *Scott Stephenson*'s study of the migration of the Canadian idea of constitutional dialogue. Stephenson traces the deliberate modification of this idea in Australia, and uses this experience to elaborate his theory of constitutional reengineering. These two papers are followed by a contribution by *Mónica Brito Vieira* and *Filipe Carreira da Silva*, who explore the protection and entrenchment of social rights in Portugal from a comparative perspective.

We continue with a symposium entitled "Reflections on Comparative Public Law: A German Perspective," with a short introduction by *Armin von Bogdandy* and myself. *Matthias Ruffert* discusses economic law and economic rights, and locates the concept of regulation in the intersection of economic life, constitutional law, and administrative law. *Hermann Pünder* illustrates the growing similarity in the role of procedure in American and German administrative law, and traces the emergence of *ius communis proceduralis*. *Uwe Kischel*'s contribution offers a realist description (and defense) of the election process of justices to the German Constitutional Court. *Mattias Wendel* traces different modes of comparative reasoning in national high courts and contemplates the dialogical development of common constitutional standards in Europe. Finally, *Franz Mayer* offers an analysis of the comparative practices of the European Court of Justice and their justification.

In our I.CON: Debate! section, *Aoife O'Donoghue* and *Vlad Perju* defend opposing positions regarding the theoretical usefulness of "constitutionalism" in describing contemporary and future development in global governance. The debate is followed by another installment in our *Critical Review of Jurisprudence* series in which *Lourdes Peroni* and *Alexandra Timmer* analyze the concepts of vulnerability and vulnerable groups in the jurisprudence of the European Court of Human Rights.

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