

Comparative Constitutional Law

Comparative Constitutional Law

*South African
Cases and Materials in a
Global Context*

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This book is dedicated to Amahia, Scott, and Shawn.

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Preface

At the turn of the millennium, two Western democracies, France and the United States, clashed over constitutional rights. The American-based Internet company Yahoo! allowed advertisements on its servers for the sale of Nazi memorabilia that were viewable in France on the Internet. Yet France had criminalized the exhibition of such Nazi materials. Similarly, the German Basic Law (Germany's constitution) prohibits racist hate speech, including Nazi paraphernalia and symbols, as does the South African Constitution in certain circumstances. Despite Yahoo!'s argument that these postings in France were protected under the U.S. Constitution's First Amendment, a French court ruled that the postings must be taken down. Yahoo! eventually complied. The Yahoo! case, and others, highlight the importance of comparative constitutional law and comparative knowledge in a global economy.

Indeed, international interest in comparative constitutional law has exploded during the last few decades. One reason has been the substantial constitution drafting in the Arab world, Eastern Europe, Afghanistan, Turkey, and many other countries such as South Africa. These nations are aware of the choices available because of the existence of so many foreign constitutions and courts. Legislation has also given some courts in France and the United Kingdom new roles in their constitutional systems. Trans-national bodies like the European Court of Human Rights (ECHR) have broken down sovereign boundaries because that Court must scrutinize domestic constitutions. There are new organizations such as the International Association of Constitutional Law, and the International Association of Public Law, as well as new journals, e.g., the *International Journal of Constitutional Law*. Scholars, judges and others have published numerous books in the field and held countless conferences. Economic globalization, the Internet, and social networks have facilitated these developments, as shown by the Yahoo! litigation.

Correspondingly, in the last decade, several excellent comparative constitutional law casebooks have been published in the United States. The two most well-known (Jackson, Tushnet; and Dorsen, Rosenfeld) are organized by legal topics, and often compare the approaches of many countries regarding a subject, e.g., federalism. Several other broad casebooks are in the pipeline.

This casebook, however, differs from the others. Based on my experience teaching comparative constitutional law seminars for many years (which may well differ from others), I have found that students benefit by initially studying a single baseline foreign constitution (and country) beyond their home nation. This gives them a crucial context in which to see that nation's constitutional developments. It's not possible to understand a nation's constitutional processes without grasping the political, historical, and other contexts in which those processes occur. Here, the country is South Africa. Thus, much of the book discusses South African cases, and briefly describes the nation's historical and political background. To my knowledge, it's the first South-African-focused constitutional casebook ever published outside of South Africa, except for one focused on human dignity related decisions.

South Africa is the baseline country for several reasons. First, South Africa's Constitution and its Constitutional Court have received international acclaim. Cass Sunstein has declared that South Africa has the "most admirable constitution in the history of the world,"¹ and Kwasi Prempeh has called it the "lodestar" for Africa.² Its drafters studied global constitutions and international human rights law, held numerous conferences, authored many papers, and selected what they believed to be the best approach for the country.

Second, the judicial opinions of the South African Constitutional Court are very accessible to American students and many other English speakers, unlike those of some other nations. For example, the South African Justices rarely use arcane jargon. Third, South Africa's charter poses stark conflicts with the U.S. Constitution, and some other nations (though the U.S. and South Africa share a horrific legacy of oppressing racial minorities). Fourth, unlike the more commonly studied "Northern" nations, it's a powerful Southern Hemisphere, "developing" country that has created a sophisticated jurisprudence in some unique areas, e.g., socio-economic rights, a right to political participation, etc.

Fifth, this book is more explicit than some others on how developments in international human rights law and the jurisprudence of trans-national courts (such as the International Court of Human Rights) have altered domestic constitutionalism. Sixth, I spent the year 2000 in South Africa as a Fulbright Senior Scholar based at the University of Stellenbosch, just a few years after the nation's new Constitution was adopted. During that fellowship, I interviewed Constitutional Court Justices, as well as drafters of the Constitution, and I have spent

1. *Designing Democracy: What Constitutions Do* 261 (2001).

2. Review essay, *African Judges in Their Own Cause: Reconstituting Independent Courts in Contemporary Africa*, 4 *Int'l J. Con. L.* 592–593 (2004).

much of the last 15 years researching and writing about the country. I have also returned to South Africa on several occasions. So I hope to have learned something about the nation's Constitution that is worth communicating.

The existence of a stark conflict with the U.S. charter does not mean that the South African Constitution lacks similarities with other nations. South Africa has a Bill of Rights, binding judicial review, federalist elements, and separation of powers. These features facilitate "strong judicial review," and they are generally present in well-known constitutions such as that of India and the U.S., as well as the German Basic Law. Admittedly, the German Basic Law may be the most popular constitutional model in the world, especially in Eastern Europe and the former Soviet Union. And India is the globe's largest democracy. South Africa is therefore the most celebrated recent heir to this strong judicial review tradition. But, the other casebooks have already focused on these nations, as have numerous monographs. Moreover, many scholars believe the future of constitutional innovation is in the global South such as Colombia and South Africa.

This is not to say that the South African Constitutional Court and South African judiciary lack the problems of other judicial branches. There are problems such as corruption and other ethics issues, the need for more attorneys to represent criminal defendants, the absence of sufficient racial and gender diversity, etc. Yet the cases in this book address some of these problems too.

Regarding organization, the core of the book is Chapter 2, which consists of key South African Constitutional Court decisions. There are lengthy case sections on separation of powers (with several corruption related cases), on federalism, as well as excerpts from cases about innovative political participation requirements, "life, death, and bodily integrity," equality, freedom of expression, freedom of religion, and socio-economic rights. After each South African case excerpt, the book contains questions probing the Court's legal reasoning, and there is frequently a comparative question related to a case from another nation on the same topic. This chapter also contains an important, yet brief, history of South Africa and Apartheid to provide the necessary context.

Prior to the South African chapter, there is a shorter introductory Chapter 1 that examines some methodological issues and that provides a global context. For example, Chapter 1 addresses the difficulty of conducting meaningful comparative constitutional studies given cultural and cognitive bias issues. It also excerpts a famous public debate between U.S. Supreme Court Justices Stephen Breyer and Antonin Scalia on whether that Court should utilize foreign constitutional decisions for non-binding guidance. The chapter then contains

something completely novel: brief modules about several countries that do not generally feature strong judicial review. This shows the geographical and jurisprudential diversity of judicial review in democracies, as well as the contingency of the South African approach. The modules discuss the ECHR (a powerful trans-national institution), as well as high courts in the United Kingdom (famous for the notion that Parliamentary actions trump the courts), France (famous for engaging in the “abstract” constitutional review of laws before they are implemented), Hungary (a formerly activist independent Eastern European court that is now under the dominion of a conservative nationalist government), Colombia (a famously activist progressive South American court), and Japan (a very passive deferential high court).

The introductory chapter also briefly describes differences in constitutional design methods. Some countries relied on their “elites” to write a new constitution such as Hungary, even though the elites there were the communists leaving office. Others, like South Africa, had a two-stage process starting with an elite-driven interim constitution, followed by a final constitution drafted by an elected constitutional assembly, which also functioned as the parliament. The impact of these design differences is briefly explored. Moreover, both chapters mention some of the latest political developments regarding these constitutions.

The hope is that this book will allow students to develop comparative perspectives, in the most accessible and contextualized way possible. Moreover, students can certainly write papers in a comparative constitutional law class, or do research, that goes far beyond the nations discussed in the casebook. This casebook should allow students to answer whether Cass Sunstein and Kwasi Prempeh are correct about South Africa, as well as address many other questions.

This book also serves another major purpose, besides being a student casebook. It collects, excerpts, and edits some of the South African Constitutional Court’s most significant decisions so they can be used as a research tool by scholars, judges, attorneys, policy-makers and others, who seek to understand or reference that Court’s work. Many citations in the original cases have been omitted. This book condenses 20 years of decisions (thousands of pages) while still highlighting the key cases. The model for such a book of key decisions is Donald Kommers’ classic casebook on German constitutional law. While this book cannot live up to that standard (especially given the translation complexities overcome there), this book moves in that direction, albeit more concisely because of a briefer constitutional tradition.

Finally, this book focuses on a progressive constitutional jurisprudence. There is no split in the South African Constitutional Court on the goal of

achieving social transformation, unlike the divide in some other courts. Thus, for those who either praise or criticize such progressivism generally, these decisions provide actual examples that can be scrutinized. Certainly the high courts in many foreign democracies view the current United States Supreme Court as relatively conservative. For example, the U.S. Supreme Court emphasis on originalism in some cases is rather unique. Moreover, the U.S. Supreme Court's decisions are apparently being cited abroad less frequently than in the past,³ in part because of the Court's conservatism. Yet it is for the readers to decide which interpretive approach is better, or to conclude that "to each, her own."

3. Adam Liptak, *U.S. Court is Now Guiding Fewer Nations*, N.Y. Times, Sep. 17, 2008, <http://www.nytimes.com/2008/09/18/us/18legal.html?pagewanted=all&r=0> (last visited Sep. 7, 2014).

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