Comparative Constitutional Law
Comparative Constitutional Law

South African Cases and Materials in a Global Context

Mark S. Kende
Professor of Law, James Madison Chair in Constitutional Law and Director of the Drake University Constitutional Law Center
Drake University Law School

CAROLINA ACADEMIC PRESS
Durham, North Carolina
This book is dedicated to Amahia, Scott, and Shawn.
# Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Table of Cases</td>
<td>xiii</td>
</tr>
<tr>
<td>Preface</td>
<td>xix</td>
</tr>
<tr>
<td>Acknowledgments</td>
<td>xxv</td>
</tr>
<tr>
<td>Chapter 1 · The Global Context of Comparative Constitutional Law</td>
<td>3</td>
</tr>
<tr>
<td>Introduction</td>
<td>3</td>
</tr>
<tr>
<td>I. The Value of Comparative Constitutional Law</td>
<td>7</td>
</tr>
<tr>
<td>Notes</td>
<td>9</td>
</tr>
<tr>
<td>A. The Debate between Justice Scalia and Justice Breyer</td>
<td>9</td>
</tr>
<tr>
<td>Notes</td>
<td>17</td>
</tr>
<tr>
<td>B. Skepticism</td>
<td>18</td>
</tr>
<tr>
<td>Notes</td>
<td>19</td>
</tr>
<tr>
<td>II. History, International Human Rights, and New Constitutions</td>
<td>19</td>
</tr>
<tr>
<td>A. World War II</td>
<td>20</td>
</tr>
<tr>
<td>B. Decolonization</td>
<td>21</td>
</tr>
<tr>
<td>C. End of the Cold War</td>
<td>22</td>
</tr>
<tr>
<td>D. Further Developments</td>
<td>23</td>
</tr>
<tr>
<td>III. Constitutional Systems</td>
<td>24</td>
</tr>
<tr>
<td>A. Presidential</td>
<td>25</td>
</tr>
<tr>
<td>B. Parliamentary</td>
<td>25</td>
</tr>
<tr>
<td>C. Semi-Presidential</td>
<td>26</td>
</tr>
<tr>
<td>Notes</td>
<td>26</td>
</tr>
<tr>
<td>D. Courts</td>
<td>27</td>
</tr>
<tr>
<td>Notes</td>
<td>27</td>
</tr>
<tr>
<td>IV. The Diversity of Judicial Review in Democracies and Beyond:</td>
<td>28</td>
</tr>
<tr>
<td>Modules</td>
<td>28</td>
</tr>
<tr>
<td>A. The European Court of Human Rights</td>
<td>28</td>
</tr>
<tr>
<td>Notes</td>
<td>31</td>
</tr>
</tbody>
</table>
B. The United Kingdom — The Evolution of Westminster Sovereignty 32
   Notes 35
C. Israel — Mini Basic Laws 36
   Notes 38
D. France — Adding to A Priori Review 38
   Notes 41
E. Hungary — Post-Communist Constitutionalism 42
   Notes 47
F. Colombia — Latin American Judicial Activism 47
   Notes 52
G. Japan — Judicial Abdication 52
   Notes 54
Conclusion 54

Chapter 2 · South African Constitutional Cases and Related Materials 57
I. South Africa’s Historical and Constitutional Background 57
   A. Historical Background 58
      1. Beginnings 58
   Excerpts from Constitutional Rights in Two Worlds: South Africa and the United States, by Mark Kende 58
      2. Drafting and Adopting of Constitution 63
B. Summary of Key Principles and Text 68
   1. Overview 68
   2. Fundamental Rights 68
   3. Branches of Government 70
   4. Federalism 72
   5. Democracy and Elections 73
C. Interpretive Approaches 73
II. Government Powers 74
   A. Separation of Powers 75
      1. Judicial Power 75
         a. Judicial Approval of a Constitution 75
            In re: Certification of the Constitution of the Republic of South Africa 75
            Notes 77
         b. Judicial Referral 79
            Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 79
            Notes 80
c. Constitutional Judicial Review and the Common Law 81
   Pharmaceuticals Manufacturing Association of South Africa v. President of the Republic of South Africa 81
   Notes 84

2. Jurisdictional, Prudential, or Other Limitations 85
   President of the Republic of South Africa v. Hugo 85
   Notes 87

3. Corruption-Related Cases 88
   a. Judges as Prosecutors 88
      South African Association of Personal Injury Lawyers v. Heath 89
      Notes 94
   b. The Independence of an Anti-Corruption Agency 94
      Hugh Glenister v. President of the Republic of South Africa (Glenister II) 95
      Notes 100
   c. Judicial Restriction on the President’s Appointment Power 102
      Democratic Alliance v. President of the Republic of South Africa 102
      Notes 108

4. The Legislature — Floor Crossing 109
   United Democratic Movement v. President of the Republic of South Africa 109
   Notes 111

5. Delegation 112
   Executive Council of the Western Cape Legislature 112
   Notes 114

6. Executive Immunity or Privilege 115
   President of the Republic of South Africa v. South African Rugby Union 115
   Notes 116

B. Federalism 118
   1. General Principles 118
      In re National Education Policy Bill No. 83 of 1995 118
      Notes 124
   2. Delineation of Powers 126
      Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 126
      Notes 130
   3. Mediating Institutions 130
Uthukela District Municipality and Others v. President of the Republic of South Africa and Others 131
Notes 133

4. Redrawing Boundaries 133
Matatiele Municipality v. President of the Republic of South Africa II 134
Notes 140

III. Constitutional Rights 141
A. The Right to Political Participation (and Procedural Fairness) 142
Doctors for Life International v. Speaker of the National Assembly and Others 142
Notes 148

B. Life, Death, and Bodily Integrity 149
1. Abortion 149
Christian Lawyers Association of SA and Others v. Minister of Health and Others 149
Notes 154
2. Cruel Punishment 154
The State v. Makwanyane and Another 155
Notes 168
3. Emergency, War, and Anti-Terrorism Restrictions 169
Mohamed v. President of Republic of South Africa 169
Notes 176

C. Equality 177
1. Race and Caste 177
Moseneko and Others v. Master of the High Court 177
Notes 181
City Council of Pretoria v. Walker 182
Notes 190
2. Gender 191
President of the Republic of South Africa and Another v. Hugo 192
Notes 197
State v. Jordan and Others 197
Notes 200
3. Sexual Orientation and Related Activities 200
Minister of Home Affairs v. Fourie and Another 200
Notes 207
4. Affirmative Action 209
Motala v. University of Natal and Others 209
CONTENTS

Notes 211
Minister of Finance v. Van Heerden 212
Notes 219

D. Freedom of Expression 219
1. Obscenity and Pornography 219
Case and Another v. Minister of Safety and Security 219
Notes 223

2. Defamation 223
Khumalo and Others v. Holomisa 224
Notes 228

3. Hate Speech 229
Islamic Unity Convention v. Independent Broadcasting Authority 229
Notes 233

E. Freedom of Religion 233
1. Establishment-Clause-Type Cases 233
State v. Lawrence; State v. Negal; State v. Solberg 234
Notes 236

2. Free-Exercise-Type Cases 237
Christian Education South Africa v. Minister of Education 237
Notes 243
Prince v. President of the Law Society of the Cape of Good Hope II 244
Notes 249
MEC for Education: Kwazulu-Natal v. Pillay 250
Notes 254

F. Socio-Economic Rights 255
Government of the Republic of South Africa v. Grootboom 255
Notes 264
Minister of Health v. Treatment Action Campaign (II) 265
Notes 272
Occupiers of 51 Olivia Road v. City of Johannesburg 272
Notes 278
Mazibuko v. City of Johannesburg 279
Notes 293
City of Johannesburg v. Blue Moonlight Properties 294
Notes 299

Index 301
Table of Cases

The major South African cases are in bold lettering.

Argentina


Armenia


Canada


Croatia


European Court of Human Rights


Germany

Aviation Security Case, 1 BvR 357/05, p. 177.

India


Ireland


Israel

Public Committee Against Torture in Israel v. State of Israel, HCJ 5100/94 [1999] (Supreme Court of Israel) available at http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf in a version that indicates it is a draft and subject to further revision, p. 37.
<table>
<thead>
<tr>
<th>TABLE OF CASES</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Italy</strong></td>
</tr>
</tbody>
</table>

| **South Africa** |
| Azanian People’s Organization (AZAPO) v. President, 1996 (4) SA 672, p. 87. |
| Fose v. Minister of Safety, 1997 (3) SA 786 (CC), p. 88. |
Moseneneke and Others v. Master of the High Court, 2001 (2) SA 18 (CC), p. 177.
Motala v. University of Natal and Others, 1995 (3) BCLR 374 (D); 1995 SACLR LEXIS 256, p. 209.
Pharmaceuticals Manufacturing Association of South Africa v. President of the Republic of South Africa, 2000 (2) SA 674 (CC), p. 81.
Prince v. President of the Law Society of the Cape of Good Hope II, 2002 (2) SA 794 (CC), p. 244.
TABLE OF CASES


Turkey

United Kingdom
Secretary of State for the Home Department v. AF and another (2009) UKHL 28, p. 35.

United States
TABLE OF CASES

<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>King v. Smith, 392 U.S. 309, 316 (1968)</td>
<td>125</td>
</tr>
<tr>
<td>Marbury v. Madison, 5 U.S. 137 (1803), pp. 37, 78</td>
<td></td>
</tr>
<tr>
<td>Missouri v. Holland, 252 U.S. 416 (1920)</td>
<td>101</td>
</tr>
<tr>
<td>Planned Parenthood v. Casey, 505 U.S. 833</td>
<td>154</td>
</tr>
<tr>
<td>Roe v. Wade, 410 U.S. 113 (1973)</td>
<td>154</td>
</tr>
<tr>
<td>Washington v. Davis, 426 U.S. 229 (1976)</td>
<td>190</td>
</tr>
</tbody>
</table>

**Yugoslav Republic of Macedonia (the former)**

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

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 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.”

---

Acknowledgments

This book would not have been possible without the assistance of many people in various ways. I will try my best to acknowledge them in alphabetical order. They include: Richard Albert, Jerry Anderson, Penelope Andrews, Ian Bartrum, John Berger, Jocelyn Broman, Juana Coetzee, Pierre De Vos, Lourens Du Plessis, John Edwards, Tom Ginsburg, Melissa Harrison, Richard Henke, Theresa Howard, Sara Hughes, Bryan Ingram, Amy Johnson, J.R. Kappelman, Jonathan Klaaren, Donald Krommers, Sandra Liebenberg, Rebecca Lutkenhaus, Amahia Mallea, Frank Michelman, Keith Miller, Phil Prygoski, Vikram Raghavan, Brian Ray, John Reitz, Martin Rogoff, Miguel Schor, Eric Segall, Danielle Shelton, Matthew Shimanovsky, Keith Sipe, Cass Sunstein, Ben Ullem, Allan Vestal, David Walker, Renner Walker, Karen Wallace, Lorraine Weinrib, Melissa Weresh, Robin West, Peter Yu, and Elisabeth Zoller. In addition, I would like to thank my Comparative Constitutional Law seminar class of spring 2013 at Drake Law School for subjecting themselves to part of the book (this group included Jocelyn Broman, Alexandra Frazier, Adrienne Gathman, Danya Hooker, Cameron Leehey, Cole Mayer, Michelle Moss, Tyler Pohlmeier, and Michelle Rasmussen). Further, I would like to thank several Constitutional Court Justices who allowed me to interview them, including Justices Laurie Ackermann, Edwin Cameron, Richard Goldstone, Kate O’Regan, and Albie Sachs. Finally, I wish to thank Carolina Academic Press, the Constitutional Court of South Africa, Drake University Law Library, the Georgetown University Law Library, the International Journal of Constitutional Law, Oxford University Press, the South African Legal Information Institute, the University of Paris II–Pantheon, the French Institute for Comparative Law, the University of Stellenbosch Faculty of Law, and the U.S. Fulbright Commission.