

COMPARATIVE CONSTITUTIONALISM

CASES AND MATERIALS

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Michel Rosenfeld
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Susanne Baer

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Cases and Materials

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Preface

The accelerating trend toward globalization, combined with recent transitions from authoritarian regimes to constitutional rule, has dramatically increased the relevance of comparative constitutional analysis. The reason for this is that the world is becoming increasingly integrated as, in the words of a report of the Center on International Cooperation at New York University, “transnational flows of capital, goods, services, people, ideas, and information accelerate in velocity and swell in volume.” Accordingly, just as the contemporary business lawyer must reach beyond the boundaries of domestic law to meet the needs of clients who are involved in the global economy, and just as lawmakers must be aware of the transnational constitutional standards that will be applied to their laws and regulations, so lawyers in all fields are increasingly handicapped if they are unaware of constitutional trends abroad, or if they lack the skills to assess foreign or transnational constitutional developments.

A strong impetus for scholarly examination of comparative constitutional systems and norms came with the collapse of communist and authoritarian regimes in the 1990s and the subsequent wave of constitution writing. A new generation examined the range of constitutional models to determine their limitations and advantages, their idiosyncrasies and transportability. Further, the tendency of vexed issues—from crime and terrorism, to human rights, to migration and environmental disputes—to spill across borders, coupled with the rising importance of international and regional adjudicatory bodies, means that no single system can exist in isolation or escape wide scrutiny. Of course, there have been earlier casebooks in this field, going back at least to 1968, when Thomas Franck’s notable *Comparative Constitutional Process* appeared.

One sign of the cross-fertilization and dialogue in constitutional law is the increasing practice of supreme and constitutional courts to cite to international instruments and foreign decisions. Many newer courts, as in South Africa, and many courts interpreting relatively new constitutional instruments, as in Canada, routinely cite to other jurisdictions. Even some justices of the U.S. Supreme Court, older and more insular than its brethren, have cited foreign cases and foreign examples. For example, in his dissent in *Printz v. United States*, 521 U.S. 898 (1997), Justice Stephen Breyer referred to German federalism in discussing the constitutional limits of U.S. federal power. More recently, Justice John Paul Stevens’s opinion for the Court in *Atkins v. Virginia* cited to a brief of the European Union as amicus curiae in a related case, pointing out that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” 122 Sup. Ct. 2242, 2249 n.21 (2002).

This casebook does not merely parse constitutional developments and trends in other countries or survey constitutional doctrine across jurisdictions. The book also aims to show through varied examples that compara-

tive constitutional law can deepen our understanding in three principal ways: (1) it pushes us to evaluate the foundations of individual legal systems: the assumptions, choices, trade-offs, and values that have formed them; (2) it gives us a better purchase on our own systems and legal cultures by revealing how other constitutional democracies address similar problems; and (3) it helps us to apprehend the nature and problems of regional and international institutions and adjudicatory bodies. We also recognize that there are democratic traditions beyond the Western democracies, and we signal the importance of countries in transition to democracy and in some cases away from it. We have included cases or other materials from more than 50 jurisdictions.

As far as possible, the casebook presents issues generically. In particular, we avoid characterizations and classifications that present the U.S. position as the norm and other positions as departures. For example, Chapter 4, Federalism and Vertical Separation of Powers, does not track the presentation of federalism found in most U.S. casebooks but rather sorts the material according to how decentralization works in different federal and unitary states. This arrangement exposes the similarities and differences among types of federalism and permits a more systematic evaluation of local autonomy and control in varied institutional settings—supranationalism, regionalism, and federalism—as well as in centralized or decentralized unitary states.

This methodology also allows for comparisons across customary subject boundaries. For example, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), a U.S. Supreme Court decision on the constitutionality of a state statute prohibiting burning a cross as an expression of racial hatred, is usually included in U.S. casebooks as a free speech ruling. While there is a free speech issue in the case, the Court's opinion cannot be adequately understood until one recognizes that it is also grounded in equality norms. Similarly, the casebook discusses abortion, euthanasia, and the death penalty within the context of privacy and dignity, a linkage meant to prompt readers to consider whether there are relevant ties among the legal issues surrounding life and death. The chapter on criminal justice, a subject now omitted from most U.S. constitutional law books, is included, both because it implicates several constitutional rights and because procedural rights in criminal cases are among the most important, and the most hotly contested, constitutional issues in many countries. On the other hand, we have reluctantly omitted certain subjects—for example, pornography in the context of free speech and sex equality—in order to permit deeper discussion of other issues. We have included cases decided by early 2002, as well as a few cases decided after that time.

The casebook is divided into three parts. Part One, Defining and Elaborating the Constitution, treats foundational subjects, such as the distinction between constitutions and constitutionalism, written and unwritten constitutions, the conditions necessary for constitution-making, different models of constitutional adjudication, and different approaches to constitutional interpretation.

Part Two, The Division of Governmental Powers, explores the ways in which limitations on government powers have been pursued in differ-

ent constitutional systems. Particular attention is devoted to distinguishing among political and institutional settings—for example, presidential versus parliamentary democracy, and among various ways of apportioning power among local, regional, national, and supranational governments.

Part Three, Fundamental Rights, provides a comparative framework for discussion of free expression, privacy, dignity, autonomy, equality, and liberty. Of particular note is Chapter 10, the Constitutional Basis of the Economy, which brings together a cluster of related issues usually scattered under distinct rubrics and which highlights the striking contrast between the U.S. and other constitutional democracies. The chapter on equality includes racial and gender equality as well as group rights and linguistic rights, issues highly visible and contentious in most parts of the world but generally not emphasized in the U.S. The chapter on religion focuses on differences between countries with an official church and those where the state must remain neutral among religions, and it suggests how various religions tend toward different conceptions of religious freedom and of the proper relation between religion and the state. The final chapter, Constitutional Guarantees of Democracy, brings together topics such as elections, political parties, and campaign financing, the constitutional constraints on which vary widely in different systems. The chapter permits a broadened understanding of the roles of constitutions and citizens in preserving democratic systems.

We hope this casebook will facilitate the systematic and fruitful study of this rich and challenging field. While grounded in doctrine and in the structural, institutional, and cultural context in each country, comparative constitutional law requires an openness to outside ideas, a willingness to go beyond traditional conventions and assumptions, and an ability to see patterns and perspectives. Our experience in writing the book—authors of varied backgrounds, academic training, and ideas—convinced us that comparative constitutional law is a collaborative endeavor. It is best pursued jointly, with the opportunity to discuss and disentangle issues with colleagues from different countries and legal systems.

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