

EDITED BY

MICHEL
ROSENFELD

ANDRÁS
SAJÓ



≡ The Oxford Handbook *of*
COMPARATIVE
CONSTITUTIONAL LAW

THE OXFORD HANDBOOK OF

COMPARATIVE
CONSTITUTIONAL
LAW

Edited by
MICHEL ROSENFELD
and
ANDRÁS SAJÓ



OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

© The several contributors, 2012

The moral rights of the authors have been asserted

First Edition published in 2012

Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in
a retrieval system, or transmitted, in any form or by any means, without the
prior permission in writing of Oxford University Press, or as expressly permitted
by law, by licence or under terms agreed with the appropriate reprographics
rights organization. Enquiries concerning reproduction outside the scope of the
above should be sent to the Rights Department, Oxford University Press, at the
address above

You must not circulate this work in any other form
and you must impose this same condition on any acquirer

Crown copyright material is reproduced under Class Licence
Number C01P0000148 with the permission of OPSI
and the Queen's Printer for Scotland

British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloging in Publication Data
Library of Congress Control Number: 2012933281

ISBN 978-0-19-957861-0

Printed in Great Britain on
acid-free paper by

CPI Group (UK) Ltd, Croydon, CRO 4YY

Links to third party websites are provided by Oxford in good faith and
for information only. Oxford disclaims any responsibility for the materials
contained in any third party website referenced in this work.

ACKNOWLEDGEMENTS

The Editors wish above all to thank Elena L. Cohen, Cardozo School of Law JD, 2010, and Doctoral Candidate in Political Science at CUNY Graduate Center, for her multiple, superb, and invaluable contributions to this project. These contributions included research, editing of texts, overall management of all the technical aspects and logistics of the project, and coordination of communication and exchanges among the Editors, the Publisher, and the more than sixty contributors to the *Handbook*. The Editors also wish to thank The Cardozo School of Law and its Dean, Matthew Diller for the generous financial and institutional support, as well as for the encouragement that they provided to this project over several years. Special recognition and heartfelt thanks are also due to the Floersheimer Center for Constitutional Democracy at Cardozo, which generously supported research and several international conferences that have had an important bearing on the conception and realization of the present *Handbook*. Last, but by no means least, the Editors are grateful to Alex Flach, Commissioning Editor at Oxford University Press, for all the key help, useful advice, and sustained cooperation that he provided us throughout all the phases of this project.

NOTES ON THE CONTRIBUTORS

General Editors

Michel Rosenfeld is Justice Sydney L. Robins Professor of Human Rights and Director, Program on Global and Comparative Constitutional Theory, Benjamin N. Cardozo School of Law

András Sajó is Judge, European Court of Human Rights, Strasbourg and University Professor (on leave), Central European University, Budapest

Contributors

Robert Alexy is Professor of Public Law and Legal Philosophy, Christian Albrechts University, Kiel

Susanne Baer is Justice of the Federal Constitutional Court (Germany), Professor of Public Law and Gender Studies, Humboldt University Berlin and James W. Cook Global Law Professor, University of Michigan Law School

Aharon Barak is Professor of Law, Radzyner School of Law, Interdisciplinary Center (IDC), Herzliya, Israel

Eric Barendt is Emeritus Professor of Media Law, University College London

Sergio Bartole is Emeritus Professor of Constitutional Law, University of Trieste

Olivier Beaud is Professor of Public Law, University Panthéon-Assas (Paris II) and Director, Institut Michel Villey

Armin von Bogdandy is Director, Max Planck Institute for Comparative Public Law and International Law

Anthony W. Bradley is Emeritus Professor of Constitutional Law, Edinburgh University and Research Fellow, Institute of European and Comparative Law, Oxford University

Manuel José Cepeda Espinosa is Former President of the Colombian Constitutional Court and Director, Program on Public Policies, Constitutional Rights and Regulations, Universidad de los Andes, Law School, Bogotá

Wen-Chen Chang is Associate Professor, College of Law, National Taiwan University

Sujit Choudhry is Cecelia Goetz Professor of Law, New York University School of Law

D.M. Davis is Judge President, Competition Appeal Court of South Africa and Honorary Professor of Law, University of Cape Town

Erika de Wet is Co-Director, Institute for International and Comparative Law in Africa and Professor of International Law, University of Pretoria and Professor of International Constitutional Law, University of Amsterdam

David Dyzenhaus is Professor of Law and Philosophy, University of Toronto

K.D. Ewing is Professor of Public Law, King's College, London

Héctor Fix-Fierro is Senior Researcher, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México (UNAM)

Günter Frankenberg is Professor of Public Law, Philosophy of Law and Comparative Law, Goethe-Universität Frankfurt

Stephen Gardbaum is MacArthur Foundation Professor of International Justice and Human Rights, UCLA School of Law

Roberto Gargarella is Professor of Constitutional Theory, CONICET/CMI, Argentina

Jeffrey Goldsworthy is Professor of Law, Monash University, Melbourne

Dieter Grimm is Professor of Law, Humboldt University Berlin and Yale Law School and Former Justice, Federal Constitutional Court of Germany

Daniel Halberstam is Eric Stein Collegiate Professor of Law, University of Michigan Law School

Gábor Halmai is Professor of Law and Director, Institute for Political and International Studies, ELTE Faculty of Social Sciences, Budapest

Yasuo Hasebe is Professor of Constitutional Law, University of Tokyo, School of Law

Gedion T. Hessebon is S.J.D. Candidate, Central European University, Legal Studies Department and Assistant Lecturer, Addis Ababa University, School of Law

Stephen Holmes is Walter E. Meyer Professor of Law, New York University School of Law

Vicki C. Jackson is Thurgood Marshall Professor of Constitutional Law, Harvard Law School, and formerly was Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center

Gary Jeffrey Jacobsohn is H. Malcolm MacDonald Professor of Constitutional and Comparative Law, Department of Government, University of Texas at Austin

Martin Kaspar is Chief of Staff, City of Schwäbisch Hall, Germany

Michael Kavey is Associate-in-Law, Columbia Law School

János Kis is Professor of Political Science and Philosophy at Central European University, Budapest

Claude Klein is Professor Emeritus of Law, Hebrew University

Juliane Kokott is Advocate General, Court of Justice of the European Union

Hoi Kong is Assistant Professor, Faculty of Law, McGill University

Martin Krygier is Gordon Samuels Professor of Law, University of New South Wales and Adjunct Professor, Regulatory Institutions Network (RegNet), Australian National University

Roderick Alexander Macdonald is F.R. Scott Professor of Constitutional and Public Law, Faculty of Law, McGill University

Catharine A. MacKinnon is Elizabeth A. Long Professor of Law, University of Michigan, James Barr Ames Visiting Professor of Law (long term), Harvard Law School and Special Gender Adviser to the Prosecutor, International Criminal Court (The Hague)

Matthias Mahlmann is Professor of Law, Chair of Legal Theory, Legal Sociology and International Public Law, University of Zurich, Faculty of Law

Chibli Mallat is Presidential Professor and Professor of Middle Eastern Law and Politics at the University of Utah and EU Jean Monnet Professor of European Law at Saint Joseph's University, Beirut

Susanna Mancini is Professor of Law, Law School, University of Bologna and Adjunct Professor of Law, SAIS Johns Hopkins University BC

Jenny S. Martinez is Professor of Law and Justin M. Roach, Jr, Faculty Scholar, Stanford Law School

Juan E. Méndez is Visiting Professor, Washington College of Law and UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Frank I. Michelman is Robert Walmsley University Professor, Harvard University

Laurence Morel is Professor of Political Science, Université Lille 2 (CERAPS)

Jan-Werner Müller is Professor, Politics Department, Princeton University

Vlad Perju is Associate Professor, Boston College Law School

Richard H. Pildes is Sudler Family Professor of Constitutional Law, New York University School of Law

Cesare Pinelli is Professor of Constitutional Law, Università 'Sapienza', Rome

Ulrich K. Preuß is Professor Emeritus of Law and Politics, Freie Universität Berlin, and Hertie School of Governance, Berlin

Susan Rose-Ackerman is Henry R. Luce Professor of Jurisprudence (Law and Political Science), Yale University

Daniel Sabbagh is Senior Research Fellow at Sciences Po, Centre d'études et de recherches internationales (CERI)

Pedro Salazar-Ugarte is Senior Researcher, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México (UNAM)

Judit Sándor is Professor, Faculty of Political Science, Legal Studies and Gender Studies, Central European University (CEU), Budapest and Founding Director of the Center for Ethics and Law in Biomedicine (CELAB)

Bernhard Schlink is Professor Emeritus of Public Law and Legal Philosophy, Humboldt University Berlin and Former Justice of the Constitutional Court of the State of Northrhine-Westfalia

Ayelet Shachar is Canada Research Chair in Citizenship and Multiculturalism, Professor of Law, Political Science, and Global Affairs, University of Toronto Faculty of Law

Reva B. Siegel is Nicholas deB. Katzenbach Professor of Law, Yale University

Cindy Skach is Professor of Comparative Government and Law, University of Oxford

Daniel Smilov is Associate Professor at the University of Sofia, Bulgaria and Programme Director of the Centre for Liberal Strategies, Sofia

Dean Spielmann is Judge of the European Court of Human Rights, Strasbourg

Alec Stone Sweet is Leitner Professor of Law, Politics, and International Studies, Yale Law School and Department of Political Science, Yale University

Li-ann Thio is Professor of Law, Faculty of Law, National University of Singapore

Arun Thiruvengadam is Assistant Professor, Faculty of Law, National University of Singapore and Visiting Fellow, the West Bengal National University of Juridical Sciences, Kolkata, India

Michel Troper is Professor Emeritus, University of Paris Ouest-Nanterre

Mark Tushnet is William Nelson Cromwell Professor of Law, Harvard Law School

Renáta Uitz is Professor and Chair of the Comparative Constitutional Law Program, Central European University, Legal Studies Department, Budapest

Richard Vogler is Senior Lecturer in Law, Sussex Law School

Neil Walker is Regius Professor of Public Law and the Law of Nature and Nations, University of Edinburgh

Jiunn-Rong Yeh is Distinguished Professor, College of Law, National Taiwan University

Kenji Yoshino is Chief Justice Earl Warren Professor of Constitutional Law, New York University School of Law

Peer Zumbansen is Professor of Law, Osgoode Hall Law School, York University

LIST OF ABBREVIATIONS

ABA	American Bar Association
APA	Administrative Procedure Act (United States)
APP	anti-paternalistic principle
ASEAN	Association of Southeast Asian Nations
BVerfG	Bundesverfassungsgericht
BVerfGE	Bundesverfassungsgerichtsentscheidung
BVP	Bayerische Volkspartei (Germany)
CC	constitutional court
CCM	crime control model
CCP	Chinese Communist Party
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEELI	Central and Eastern European Law Initiative
CFI	Court of First Instance
CLS	Critical Legal Studies
CPSU	Communist Party of the Soviet Union
DDP	Deutsche Demokratische Partei (Germany)
DDR	demobilization, disarmament, and reintegration
DKP	Deutsche Kommunistische Partei (Germany)
DNVP	Deutschnational Volkspartei (Germany)
DPM	due process model
DVP	Deutsche Volkspartei (Germany)
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EPRDF	Ethiopian People's Revolutionary Democratic Front
EU	European Union
FCC	Federal Constitutional Court (Germany)
FSU	Finnish Seamen's Union
GATT	General Agreement on Tariffs and Trade
hESC	human embryonic stem cell
HDR	Human Development Report

HPAT	Homosexual Policy Assessment Team (United Kingdom)
HRA	Human Rights Act 1998 (United Kingdom)
HRC	Human Rights Council
IACHR	Inter-American Convention on Human Rights
ICA	initiative constitutional amendment (United States)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICITAP	International Criminal Investigative Training Assistance Program
ICJ	International Court of Justice
IDEA	Institute for Democracy and Electoral Assistance
ILC	International Law Commission
ILEA	International Law Enforcement Academies
ILO	International Labour Organization
ISAF	International Security Assistance Force
ITF	International Transport Workers' Federation
IVF	<i>in vitro</i> fertilization
KPD	Kommunistische Partei Deutschlands (Germany)
LGB	lesbian, gay, and bisexual
LLP	liberal legitimacy principle
MMP	mixed-member proportional
MP	Member of Parliament
NATO	North Atlantic Treaty Organization
NBAC	National Bioethics Advisory Commission (United States)
NCMP	Non-Constituency Member of Parliament (Singapore)
NIE	new institutional economics
NGO	non-governmental organization
NMP	Nominated Member of Parliament (Singapore)
NPD	National Democratic Party (Germany)
NSDAP	Nationalsozialistische Deutsche Arbeiterpartei (Germany)
OBC	Other Backward Class (India)
ODIHR	Office for Democratic Institutions and Human Rights
OIC	Organization of Islamic Conference
OIRA	Office of Information and Regulatory Affairs (United States)
OLC	Office of Legal Counsel (United States)
OPDAT	Office of Overseas Prosecutorial Development, Assistance and Training
OSCE	Organization for Security and Co-operation in Europe
PAP	People's Action Party (Singapore)

PIL	public interest litigation
PL	John Rawls, <i>Political Liberalism</i>
PR	proportional representation
PSN	principle of state neutrality
SACC	South African Constitutional Court
SC	Scheduled Caste (India)
SCC	Supreme Court of Canada
SDF	Self-Defence Forces (Japan)
SIAC	Special Immigration Appeals Commission (United Kingdom)
SPD	Sozialdemokratische Partei Deutschlands (Germany)
SRP	Socialist Reich Party (Germany)
ST	Scheduled Tribe (India)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TJ	John Rawls, <i>A Theory of Justice</i>
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
USPD	Unabhängige Sozialdemokratische Partei Deutschlands (Germany)
VCIT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

CONTENTS

<i>Notes on the Contributors</i>	xiii
<i>List of Abbreviations</i>	xvii

Introduction	1
MICHEL ROSENFELD AND ANDRÁS SAJÓ	

PART I HISTORY, METHODOLOGY, AND TYPOLOGY

1. Comparative Constitutional Law: A Contested Domain:	
A. Comparative Constitutional Law: A Continental Perspective	25
ARMIN VON BOGDANDY	
B. Comparative Constitutional Analysis in United States Adjudication and Scholarship	38
MICHEL ROSENFELD	
2. Comparative Constitutional Law: Methodologies	54
VICKI C. JACKSON	
3. Carving Out Typologies and Accounting for Differences Across Systems: Towards a Methodology of Transnational Constitutionalism	75
PEER ZUMBANSEN	
4. Types of Constitutions	98
DIETER GRIMM	
5. Constitutionalism in Illiberal Polities	133
LI-ANN THIO	
6. Constitutionalism and Impoverishment: A Complex Dynamic	153
ARUN THIRUVENGADAM AND GEDION T. HESSEBON	
7. The Place of Constitutional Law in the Legal System	169
STEPHEN GARDBAUM	

PART II IDEAS

8. Constitutions and Constitutionalism	189
STEPHEN HOLMES	
9. Constitution	217
MARK TUSHNET	
10. Rule of Law	233
MARTIN KRYGIER	
11. Democracy	250
GÜNTER FRANKENBERG	
12. Conceptions of the State	269
OLIVIER BEAUD	
13. Rights and Liberties as Concepts	283
ROBERT ALEX Y	
14. Constitutions and the Public/Private Divide	298
FRANK I. MICHELMAN	
15. State Neutrality	318
JÁNOS KIS	
16. The Constitution and Justice	336
ROBERTO GARGARELLA	
17. Sovereignty	350
MICHEL TROPER	
18. Human Dignity and Autonomy in Modern Constitutional Orders	370
MATTHIAS MAHLMANN	
19. Gender in Constitutions	397
CATHARINE A. MACKINNON	

PART III PROCESS

20. Constitution-Making: Process and Substance	419
CLAUDE KLEIN AND ANDRÁS SAJÓ	
21. States of Emergency	442
DAVID DYZENHAUS	

22. War Powers	463
YASUO HASEBE	
23. Secession and Self-Determination	481
SUSANNA MANCINI	
24. Referendum	501
LAURENCE MOREL	
25. Elections	529
RICHARD H. PILDES	

PART IV ARCHITECTURE

26. Horizontal Structuring	547
JENNY S. MARTINEZ	
27. Federalism: Theory, Policy, Law	576
DANIEL HALBERSTAM	
28. Internal Ordering in the Unitary State	609
SERGIO BARTOLE	
29. Presidentialism	628
HÉCTOR FIX-FIERRO AND PEDRO SALAZAR-UGARTE	
30. Parliamentarism	650
ANTHONY W. BRADLEY AND CESARE PINELLI	
31. The Regulatory State	671
SUSAN ROSE-ACKERMAN	

PART V MEANINGS/TEXTURES

32. Constitutional Interpretation	689
JEFFREY GOLDSWORTHY	
33. Proportionality (1)	718
BERNHARD SCHLINK	
34. Proportionality (2)	738
AHARON BARAK	
35. Constitutional Identity	756
MICHEL ROSENFELD	

- | | |
|---|-----|
| 36. Constitutional Values and Principles
GARY JEFFREY JACOBSON | 777 |
|---|-----|

PART VI INSTITUTIONS

- | | |
|--|-----|
| 37. Ensuring Constitutional Efficacy
JULIANE KOKOTT AND MARTIN KASPAR | 795 |
| 38. Constitutional Courts
ALEC STONE SWEET | 816 |
| 39. Judicial Independence as a Constitutional Virtue
RODERICK A. MACDONALD AND HOI KONG | 831 |
| 40. The Judiciary: The Least Dangerous Branch?
DANIEL SMILOV | 859 |
| 41. Political Parties and the Constitution
CINDY SKACH | 874 |

PART VII RIGHTS

- | | |
|--|------|
| 42. Freedom of Expression
ERIC BARENDT | 891 |
| 43. Freedom of Religion
ANDRÁS SAJÓ AND RENÁTA UITZ | 909 |
| 44. Due Process
RICHARD VOGLER | 929 |
| 45. Associative Rights (The Rights to the Freedoms of Petition, Assembly,
and Association)
ULRICH K. PREUß | 948 |
| 46. Privacy
MANUEL JOSÉ CEPEDA ESPINOSA | 966 |
| 47. Equality
SUSANNE BAER | 982 |
| 48. Citizenship
AYELET SHACHAR | 1002 |

49. Socio-Economic Rights	1020
D.M. DAVIS	
50. Economic Rights	1036
K.D. EWING	

PART VIII OVERLAPPING RIGHTS

51. The Constitutionalization of Abortion	1057
REVA B. SIEGEL	
52. Immodest Claims and Modest Contributions: Sexual Orientation in Comparative Constitutional Law	1079
KENJI YOSHINO AND MICHAEL KAVEY	
53. Group Rights in Comparative Constitutional Law: Culture, Economics, or Political Power?	1099
SUJIT CHOUDHRY	
54. Affirmative Action	1124
DANIEL SABBAGH	
55. Bioethics and Basic Rights: Persons, Humans, and Boundaries of Life	1142
JUDIT SÁNDOR	

PART IX TRENDS

56. Internationalization of Constitutional Law	1165
WEN-CHEN CHANG AND JIUNN-RONG YEH	
57. The European Union's Unresolved Constitution	1185
NEIL WALKER	
58. The Constitutionalization of Public International Law	1209
ERIKA DE WET	
59. Jurisprudence of the European Court of Human Rights and the Constitutional Systems of Europe	1231
DEAN SPIELMANN	
60. Militant Democracy	1253
JAN-WERNER MÜLLER	
61. Constitutionalism and Transitional Justice	1270
JUAN E. MÉNDEZ	

62. Islam and the Constitutional Order	1287
CHIBLI MALLAT	
63. Constitutional Transplants, Borrowing, and Migrations	1304
VLAD PERJU	
64. The Use of Foreign Law in Constitutional Interpretation	1328
GÁBOR HALMAI	
<i>Index</i>	1349