

Canonizing Comparative Constitutionalism: Some Informal Suggestions for Our Schmooze

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This is a more informal “ticket” than is my wont. It is best viewed as a few of tentative musings about the subject of the schmooze, that is, establishing a provisional “canon” of cases and materials for courses in comparative constitutionalism. Note well, incidentally, the noun, which I use as an alternative to “constitutional law.” The latter, I fear, will simply encourage replication of what I have come to regard as the fatal weakness of American law school—and, even more, for what it is worth, undergraduate courses, since there’s no “professional imperative” to explain the pathologies of the latter. That weakness is the almost exclusive emphasis on what I have come to call, as developed in my forthcoming book *Framed: America’s 51 Constitutions and the Crisis of Governance*, “The Constitution of Conversation,” by which I mean the de-facto litigated constitution. Litigation, in turn, suggests that there are always (at least) two debatable *meanings* or *interpretations* of the relevant language. I have become fixated on what I have taken to calling “The Constitution of Settlement,” which refers primarily to structural provisions that are in fact never litigated because there is, pragmatically, nothing to debate regarding meaning (as in “What party of January 20 do you not understand?”). So this is simply a way of saying that believe very strongly that courses in comparative constitutionalism should pay significant attention to basic structural issues beginning with the choice between separation-of-power systems and parliamentary ones and going on, in the former, to looking at different types of veto possibilities re executives and the implications for executive power. With regard to the judiciary, there are fascinating differences in eligibility rules—think of Belgium’s requirement that half its constitutional court be former legislators—and length of terms, not to mention, of course, the basic difference between establishing a specific “constitutional court” and allowing all courts to address constitutional claims. And so on.

Let me, then, simply identify several issues that I believe should be part of any comparative constitutionalism course, with no pretense that this even comes close to an exhaustive list:

I. Preambles

I believe that constitutional preambles are an understudied (and theorized) aspect of comparative constitutionalism. There are striking differences among preambles. Many (probably most) adopt overtly religious language, including every single one of the preambles to American *state* constitutions. My hope is that comparative constitutionalism be extended to include American *state* constitutions instead of simply other national constitutions, but that is the topic, I suspect, for another schmooze. Some preambles, such as Croatia or Vietnam, offer condensed national histories; a few, like the United States Constitution, are both relentlessly

secular and basically universalist in style (save for indicating that presumptive membership in the United States is limited to people who live within the relevant states). Why have preambles at all? What, if anything, are they thought to add? Consider, for example, that, generally speaking, they are not viewed as part of the “litigable” constitution, though there are notable exceptions, including the contemporary French.¹

II. The mechanics of constitutional change.

Begin with “peaceful” change, i.e., “amendment” of existing constitutional orders. There are, of course, a wide variety of approaches to amendment. At one end of the spectrum, of course, is the United States Constitution, the most difficult to (formally) amend constitution in the known universe. The best discussion of this is surely Don Lutz’s, which can be found either in the *American Political Science Review* or *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*. Obviously, “informal” amendment invariably complements its formal variety, but, just as obviously, there appear to be limits on the possibility of engaging in successful “workarounds” of all problematic constitutional provisions. But even if Mark Tushnet and Jack Balkin are right that “workarounds” are always available to the sufficiently clever, this still can serve as an interesting lesson in “creative lawyering” and, more to the point, the political and social conditions under which such “cleverness” will be accepted by the relevant public at large, which may range from only dominant elites to the more general populace.

But there is always the possibility of less-than-peaceful change, including, for example, military coups. How are these handled by regimes that profess to be “constitutional”? An excellent case is the upholding in 2000 by the Pakistani Supreme Court the coup that brought Musharoff to power.² It is a wonderful “test case” regarding Kelsen’s (let alone Schmitt’s) notions of “revolutionary legality.” One can, incidentally, also apply this to a discussion of the provenance of the United States Constitution, given the existence of the Articles of Confederation and, especially, Article XIII’s rule of unanimous ratification of any amendments. Is constitutional formation, at the end of the day, an “alegal” enterprise? An interesting essay along these lines is Fred Schauer’s contribution to *Responding to Imperfection*. Someone who wishes to devote more time to the issue, particularly in the US context, can move on to Bruce Ackerman and the notion of “constitutional moments” (including their Schmittian overtones).

III. Emergencies

A common explanation of new constitutions, coups, or amendments (formal or informal) is the presence of a “crisis” or “emergency.” It is essential that students be taught different approaches to handling “emergencies.” All of them should read and ponder carefully the relevant

¹ The best article is by Liav Orgad, *The Preamble in Constitutional Interpretation*, I•CON (2010), Vol. 8 No. 4, 714–738

² *Zafar Alil Shah v. Pervez Musharraf*, P.L.D. 2000 S.C. 869.

sections of the South African Constitution³, which, a la Madison, builds on the “experience” of constitutional orders over the last many decades. It is, of course, a remarkable contrast to the

³ CONSTITUTION OF SOUTH AFRICA

States of emergency

37. (1) A state of emergency may be declared only in terms of an Act of Parliament and only when -

- a. the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency; and
- b. the declaration is necessary to restore peace and order.

(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only -

- a. prospectively from the date of the declaration; and
- b. for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The National Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution supported by a majority of the members of the National Assembly. Any subsequent extension must be by a resolution supported by at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.

(3) Any competent court may decide on the validity of -

- a. a declaration of a state of emergency;
- b. any extension of a declaration of a state of emergency; or
- c. any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

(4) Any legislation enacted in consequence of a declared state of emergency may derogate from the Bill of Rights only to the extent that -

- a. the derogation is strictly required by the emergency; and
- b. the legislation -
 - i. is consistent with the Republic's obligations under international law applicable to states of emergency;
 - ii. conforms to subsection (5); and
 - iii. is published in the national Government Gazette as soon as reasonably possible after being enacted.

(5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise -

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- a. indemnifying the state, or any person, in respect of any unlawful act;
 - b. any derogation from this section; or
 - c. any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of that table.

Table of Non-Derogable Rights

Section Number	Section Title	Extent to which the right is protected
9	Equality	With respect to race and sex only
10	Human Dignity	Entirely
11	Life	Entirely
12	Freedom and Security of the person	With respect to subsection (1)(d), and (e) and (2)(c) only
13	Slavery, servitude and forced labour	With respect to slavery and servitude only
28	Children	With respect to subsection (1)(d), (1)(e) and to the rights in subparagraphs (1)(g)(i) and (ii) only
35	Arrested, detained and accused persons	With respect to the following subsections only: 1)(a), (b) and (c) (2)(d) (3)(a), (b), (c), (e), (f), (g), (h), (i), (j), (k), (l), (m) and (o) (4)

(6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed:

- a. An adult family member or friend of the detainee must be contacted as soon as reasonably possible, and told that the person has been detained.
- b. A notice must be published in the national Government Gazette within five days of the person being detained, stating the detainee's name and place of detention and referring to the emergency measure in terms of which that person has been detained.
- c. The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.

United States Constitution, which has almost nothing useful to say about the general issue of “crisis government.” Among other things that is interesting about the South African clause is the assignment to the Constitutional Court of the power to assess claims as the existence of a sufficient “emergency.” To be sure, this takes us quickly into the “constitution of conversation,” and it would certainly be useful to include in the curriculum examples of various courts and their reactions to claims of emergency. Especially interesting in this context are several decisions by the Columbian Constitutional Court that pushed back on presidential declarations of emergency.⁴ (Could we actually imagine, for example, the U.S. Supreme Court’s declaring that habeas *can’t* be suspended with regard at least to US citizen detainees because there is no “invasion” or “insurrection” that is necessary as a predicate condition to suspension under Article I, Section 9. To paraphrase Elena Kagan, “I can’t either.”)

It would also be highly illuminating to assign one or more of Aharon Barak’s decisions testing the limits of Israeli authority to fight its own “war on terror.” Most famous, of course, is the opinion regarding torture and other inhumane forms of interrogation.⁵ It raises a host of

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- d. The detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.
 - e. A court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.
 - f. A detainee who is not released in terms of paragraph (e), or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention any time more than 10 days after the previous review, and in either case, the court must release the detainee unless it is necessary to continue the detention to restore peace and order.
 - g. The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.
 - h. The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

(7) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.

(8) Subsections (6) and (7) do not apply to persons who are not citizens of the Republic and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of those persons.

⁴ See Rodrigo Uprimny, “*The Constitutional Court and Control of Presidential Extraordinary Powers in Columbia*,” in DEMOCRATIZATION AND THE JUDICIARY 46-69. See also RODRIGO UPRIMNY YEPES, JUDICIALIZATION OF POLITICS IN COLOMBIA: CASES, MERITS AND RISKS, available at http://www.scielo.br/pdf/sur/v4n6/en_a04v4n6.pdf

⁵ The decision is heavily excerpted and discussed in Levinson, ed., TORTURE: A COLLECTION (pb. ed. 2006).

valuable questions for discussion, including the Rosenberian question of its actual impact on Israeli interrogation practices.⁶ But there are also fascinating decisions involving targeted killing⁷ and the building of the so-called “security fence” separating Israel and Palestinian communities on the West Bank.⁸ These are important not only because of the substantive issues, but also because of the exposition of the method of “proportionality” analysis, which is interestingly different from the standard American approach of “balancing.” Also essential regarding emergency powers, incidentally, is the German decision involving the legitimacy of shooting down a hi-jacked plane,⁹ the so-called “Aviation Security Case,” in which Immanuel Kant triumphs over consequentialist analysis and thus gives absolute protection to the “innocent” passengers who would lose their lives as against those who presumptively might be killed should the plane crash into a populated area (or building). One discussant of the case on the blog “Crooked Timbers” described the Kantian reasoning of the Court as “unhinged.”¹⁰ This is the “constitution of conversation” with a vengeance!

IV. Federalism and secession

Federalism, of course, is a common way of organizing multicultural and multinational states¹¹ and the topic offers rich potential for discussion of what it means to accept a truly “diverse” polity. Particularly interesting as a topic for discussion is linguistic pluralism, which, of course, is totally unrecognized, as a constitutional matter, within the United States. Canada, especially, offers some interesting case law, but, with regard to multiplicity, Canada is distinctly modest compared to, say, India, about which Sujit Choudhry has written an especially interesting essay.¹² There is also some very good material collected in Jacob Nafziger et al., *Cultural Law: International, Comparative, and Indigenous* (Cambridge, 2011) that I can testify provided the basis for vigorous discussion in a recent short course that I gave in Israel on “multiculturalism and the law.”

The ultimate “crisis” for any federal state is sufficient disaffection by one of the sub-national units to merit (attempted) withdrawal from the union. There are certainly interesting materials from the American context, some of which can be found in the casebook that I co-edit

⁶ This is the subject of a forthcoming article in the *Tulsa Law Review* that I wrote for a symposium honoring Justice Barak.

⁷ *Public Committee against Torture in Israel v. Government of Israel*, HCJ 769/02, available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf

⁸ *Beit Sourik Village Council v. Government of Israel*, HCJ 2056/04, available at <http://www.jewishvirtuallibrary.org/jsource/Peace/fencesct.html>

⁹ http://www.bundesverfassungsgericht.de/entscheidungen/rs20060215_1bvr035705en.html

¹⁰ <http://crookedtimber.org/2011/01/25/kant-and-shooting-down-hijacked-airliners/>

¹¹ See, e.g., the excellent essays collected in Sujit Choudhry, ed., *CONSTITUTIONAL DESIGN IN HIGHLY-DIVIDED SOCIETIES* (2008).

¹² Sujit Choudhry, *Managing linguistic nationalism through constitutional design: Lessons from South Asia*, I • CON, Volume 7, Number 4, pp. 577–618, available at http://www.ccd.org.np/new/resources/Managing%20Linguistic%20Nationalism_ICON_Choudhry_2010.ENG.pdf

with Jack Balkin and others. And there is even a case, *Texas v. White*,¹³ that is worth discussing, at least with regard to judicial decisionmaking after the secessionist movement has been firmly defeated. But surely the sine qua non for secession buffs looking for a case to discuss is the Canadian *Reference re Secession of Quebec*.¹⁴ One could obviously also present the constitutional mechanics surrounding the dissolution of Czechoslovakia or the Sudan, not to mention Yugoslavia or the USSR. This would also be a good opportunity to integrate some international law into the course, since international law takes a rather skeptical approach to recognizing the legitimacy of secessionist movements.

V. Rights

I will leave it up to other schmoozers to apply potential candidates for the canon of comparative “rights cases.” For obvious reasons, they are simply of great interest to me (any more). I do have two quick suggestions, though: First, students should be encouraged to look very closely at the language of different rights provisions, including, e.g., the US First Amendment, Article I of the Canadian Charter of Rights and Liberties, and Articles Nine and Ten of the European Convention of Human Rights. They certainly allow one to get into good discussions of the difference between overtly “balancing” kinds of language and the more categorical language found in the First Amendment (but not, interestingly enough, in many American state analogues of that Amendment).

Secondly, an obvious point of comparison between the United States Constitution, on the one hand, and every state constitution plus most national constitutions (especially if written after World War II) is the presence of *affirmative* rights.¹⁵ In addition to the multiple opportunities for normative discussions about the propriety of affirmative rights, or the judicial role in giving them meaning, it is certainly worth examining whether they have operated, whether in the United States or elsewhere, as much (if anything) more than the “parchment barriers” (or, in this case, “parchment entitlements”) so disdained by Madison.

¹³ 74 U.S. 700 (1869).

¹⁴ (1998) 2 S.C.R. 217

¹⁵ For the United States, the work of Emily Zackin is indispensable.