

**The Global Constitutional Canon:
Some Preliminary Thoughts**

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What is the global constitutional canon? Its underlying theory certainly must differ, in significant respects, from that of the constitutional canon of any individual state -- which will necessarily rest to a significant extent on the peculiar history of the domestic constitution and on its particular provisions.

For example, certain canonical American cases like *McCulloch v. Maryland* and *Gibbons v. Ogden* are unlikely to appear in any global constitutional canon, because a typical 20th Century constitution -- a category that comprises by far the great majority of constitutions in the world today -- is likely to contain very detailed provisions concerning the legislative power, and those provisions often grant explicit authority to handle numerous contemporary problems. As a result, extensive discussions of "implied powers" and broad interpretations of matters that might "affect commerce" are of considerably lesser importance in systems in which detailed grants of

power explicitly cover most areas of modern regulation. Similarly, the well-known case in the German canon that allowed Chancellor Kohl to dissolve a Parliament in which he actually had a majority¹, speaks to a particular German problem - - extremely important in Germany, but of less central importance elsewhere.

The global constitutional canon, in contrast, is more abstract, more detached from specific history and animated generally by more theoretical concerns. It is more closely related to the basic ideas of constitutionalism and the general characteristics of liberal democracy which German constitutional doctrine calls "the free democratic basic order". One important method of studying comparative constitutional law -- the prevalent method in the United States I think -- assumes that there is a certain universality in these basic principles. If this is so, the global constitutional canon might well be directed in substantial part toward explaining and illustrating these principles -- and also, of

¹ 62 BVerfGE 1 (1984).

course, raising significant questions about their interpretation and scope. Thus the cases in the global constitutional canon should be divorced, to the extent possible, from unduly parochial details of the particular constitutional system in which they arise, and should be directed toward exploring these broader issues, questions and problems of comparative constitutionalism.

To illustrate this approach, I have chosen four cases, each from a different jurisdiction, which I hope might be considered appropriate candidates for inclusion in a global constitutional canon.

I. Judicial review: *Marbury v. Madison*

Judicial review -- and, in many instances quite active judicial review -- is a characteristic of modern constitutionalism. Yet judicial opinions that actually establish judicial review in a constitutional system are relatively rare, for an obvious reason -- most 20th Century constitutions (unlike the 18th Century Constitution of the United States) clearly and explicitly provide for judicial review by a

Constitutional Court or a Supreme Court, and perhaps by other courts as well. Thus, for a "globally canonical" judicial decision actually attempting to explain and justify judicial review, we may have to reccur to the famous opinion of Chief Justice John Marshall directed toward achieving that end in the American constitutional system. The "globally canonical" portions of Marbury, would of course not include Marshall's fairly cursory consideration of specific American constitutional provisions at the end of his opinion, nor would it include his discussion of a unique provision of the American Constitution allocating the Supreme Court's original and appellate jurisdiction. In contrast, however, the global cannon would include Marshall's general justification of judicial review, which is based on Marshall's view of the permanent and fundamental nature of a written constitution, combined with the nature of courts whose "province and duty" is to "say what the law is" -- together with Marshall's observation that a contrary result would give the legislation a "practical and real omnipotence".

The "canonical" Marbury might well also include passages, appearing earlier in the opinion, sustaining some general propositions concerning the relations between the judiciary and the executive. These passages could include Marshall's argument that, where there is a right, a decent constitutional system must provide a remedy -- a proposition probably realized more fully under section 19 of the German Basic Law than in the United States -- as well as Marshall's twin discussions of the executive's amenability to judicial control in some cases and the countervailing concept of the "political question", emphasizing the executive's discretion, in other cases. Even though control of the executive is often confided to special "administrative" courts in many other systems, the general point of the amenability of the executive to some sort of significant judicial process is clearly another important aspect of the "free democratic basic order."

II. The Outer Reaches of Judicial Review:

Kesavananda

In modern constitutionalism, does judicial review remain entirely within the domestic constitutional system, or should it extend to judgments about the constitutional system itself. One way of approaching this problem is to ask whether a constitutional court may permissibly examine and invalidate constitutional amendments which have followed all of the formal requirements for changing the constitution, but which the judiciary believes transgress basic ideas of constitutionalism.

Some domestic constitutions explicitly impose limits on the amendment of the constitution -- these limits may be relatively narrow and the product of a compromise between contending interests (United States Art. V) or very broad and focused on fundamental constitutional principles (Federal Republic of Germany, Art. 79 (3) GG). But again, these systems are perhaps a bit less interesting for a "global constitutional canon" than a system which, lacking explicit authority in the text of the constitution, has sought to create and justify this power out of whole cloth.

The "canonical" case in this area is almost certainly the great case of Kesavananda², in which the Indian Supreme Court found that the term "constitutional amendment" possessed certain inherent substantive limitations -- even though there were no such limits set forth in the text of the constitution -- and actually enforced those limits by striking down an amendment of the constitution.

A comprehensive study of the Kesavananda case poses formidable challenges. First, the opinions of the justices of the Indian Supreme Court are more than a thousand pages long, occupying an entire volume of the Indian Reports. Second, these elaborate opinions sometimes go rather far afield in exploring intellectual topics that are sometimes only tangentially related to the specific problem.

Although the majority justices in Kesavananda reach their conclusion in somewhat different ways, the major proposition of this case is clear: the Indian Constitution -- and

² 1973 Supp. S.C.R. (special volume).

perhaps by extension all constitutions -- possess a certain essence, a "fundamental structure" (determinable by the judiciary) and even a constitutional amendment that contradicts this "basic structure" is void. Indeed such a fundamental alteration of the constitution cannot actually be called an "amendment".

Perhaps fortified by natural law ideas, the teaching of Kesavananda, therefore, is that the original fundamental principles of the constitution cannot be too radically changed, and the judges have the authority to enforce these propositions. As one might well imagine, a doctrine of this sort can lead to considerable disagreement about what principles actually constitute the "basic structure" of the constitution and how these principles should be interpreted.

Indeed, experience under the more explicit German constitutional provision (which nonetheless contains terms of great generality) show that the same problem is sharply presented even when the limitations on amendment are directly stated in the text. In the well-known

Klass case, for example, the German Constitutional Court split on the question of whether a constitutional amendment could only be declared unconstitutional if it actually moved in the direction of totalitarianism (the majority view), or whether any significant curtailment of fundamental rights should be held void (the view of three dissenters).³

The German experience also suggests that it may sometimes be possible (and perhaps preferable) for a constitutional court to draw the sting of a dubious constitutional amendment by interpreting the amendment very narrowly, rather than actually to confront the parliamentary super-majorities by declaring the amendment unconstitutional⁴.

III. The Extent of the State's Power Over the Individual: Makwanyane

How far does the state's power extend over the individual? Does it extend, in some instances, to taking the life of the individual? Some constitutions - for example, the Basic Law

³ 30 BVerfGE 1 (1970).

⁴ See 109 BVerfGE 279 (2004).

of the Federal Republic of Germany -- explicitly prohibit the death penalty.⁵ (This provision has -- indirectly -- yielded some interesting cases finding that the Basic Law also implicitly prohibits life imprisonment without the possibility of parole.) Moreover, Protocol 6 to the European Convention on Human Rights, which has been adopted by most if not all European countries, also prohibits the death penalty in almost all cases. Yet not all constitutions prohibit the death penalty, and not all countries are covered by Protocol 6, and so these other systems might yield fundamental decisions on the death penalty that may be appropriate for inclusion in the global constitutional canon.

Probably the most interesting (and famous) decision on the death penalty is *State v. Makwanyane*⁶, one of the earliest decisions handed down by the new Constitutional Court of South Africa. This decision struck down the death penalty in South Africa even though there was no specific language in the constitution to achieve

⁵ Art. 102 GG.

⁶ 1995 (3) SA 391 (CC).

that end. In his magisterial opinion in Makwanyane, the Court's president Arthur Chaskalson -- who had been, until shortly before, the head of a legal services group opposed to the apartheid regime -- argued that a prohibition of the death penalty could be drawn from constitutional guarantees of life, dignity, and equality. Working in a new constitutional system, Chaskalson provided textbook examples of a constitutional court's use of materials from other constitutional systems. Yet Chaskalson also made clear that no other constitutional system could be truly authoritative and that the decision -- albeit considering ideas and examples from other courts and constitutions -- must ultimately be based on the principles of the domestic constitutional system of South Africa itself. Chaskalson also argued, in an illuminating passage, that the confusions and complexities of litigation on the death penalty in the United States counseled against the adoption of American doctrine in this area.

As I have suggested elsewhere⁷, a plausible interpretation of the Makwanyane case might hold that it is, at bottom, a sign of revulsion against the widespread killing and other atrocities that had taken place under the apartheid regime. One can imagine the South African framers positing the following proposition: "In light of the South African past under the National Party, there has been enough killing; there will be no more killing, at least not by the State. Our Constitution looks towards life, not toward death."⁸ As this form of objection to the death penalty might also apply to constitutions arising after the demise of other tyrannical regimes, this view of Makwanyane may reinforce its "canonical" status⁹.

IV. Free Speech and Private Law: The Lüth case

⁷Quint, *The Universal Declaration and South African Constitutional Law: A Response to Justice Arthur Chaskalson*, 24 *Md. J. Int. L.* 40 (2009).

⁸*Id.* at 43.

⁹A decision striking down the death penalty was also issued by the Hungarian Constitutional Court, in its early activist period under President Sólyom, and may also be deserving of consideration for the global canon.

A generous portion of any global constitutional canon will certainly be composed of cases concerning individual constitutional rights, and I would like to close this brief sketch with a discussion of the Lüth case from Germany¹⁰ -- a "canonical" decision that has much to say about individual rights, judicial review, and the application of the constitution in disputes among individual litigants (the problem of Drittwirkung, the "third party effect").

Within the German legal system, the Lüth case represents an important step in the "denazification" of German public law after World War II¹¹. More broadly, the case established three points that are particularly important in contemporary constitutional law and which should be represented, in some way, in any global constitutional canon.

¹⁰ 7 BVerfGE 198 (1958).

¹¹ For my comments on this point and on other aspects of Lüth, see Quint, "A Return to Lüth", 16 Roger Williams University Law Review 73 (2011); Quint, "Free Speech and Private Law in German Constitutional Theory", 48 Maryland Law Review 247(1989).

The first of these points -- very forcefully made in the Lüth case -- emphasizes the extraordinary importance of freedom of expression as one of the most basic of all constitutional rights. This point has been at least sporadically recognized in the English tradition since the revolution of the 1660s, and such a proposition was included in the Declaration of the Rights of Man and the Citizen at the beginning of the French Revolution in 1789 -- but, as a practical matter, it was more of a novelty in Germany and certain other European systems even after World War II (notwithstanding the inclusion of a guarantees of free expression in the Weimar Constitution of 1919).

In a famous passage in the Lüth case (citing both the American Justice Cardozo and the French Declaration of 1789) the German Constitutional Court swept away these doubts. Thereafter, the freedom of expression was to occupy a very important role in German constitutional law (although it did not necessarily always prevail against other interests in specific litigation).

As the fundamental importance of freedom of expression is generally established in global constitutionalism today, a case forcefully affirming that point may well be included in the global canon.

But together with this strong endorsement of the freedom of expression, the Lüth case also adopted a technique of judicial review that could threaten to dilute the force of that constitutional guarantee. The Court acknowledged that cases involving the freedom of speech (and certain other constitutional rights as well) invariably involve not only the right itself but also a countervailing right of another individual or a countervailing interest (in some instances a constitutional interest) of the state. According to the German Constitutional Court, the resolution of these contending forces is to be achieved through a "balancing" of all relevant interests on the specific facts of each case. A balancing technique of this sort had been proposed by certain American Supreme Court justices in the 1950s and 60s as a basic first

amendment technique. The importance of this technique, however, waned somewhat thereafter as the United States Supreme Court adopted a process of "categorization" -- the adoption of relatively hard line rules defining certain categories of unprotected speech -- to cover the most central first amendment problems. In a large number of other systems, however, this balancing technique represents the major (if not sole) technique of adjudication for issues of freedom of expression; and it seems particularly well adapted to many rights provisions in modern constitutions which set forth the right in very general terms in a first section and then qualify that right by a second section (or a section qualifying rights in general) that limits the rights of the first section.

This technique of "ad hoc" balancing -- well represented in the Lüth case -- has the advantage of taking all possible interests and circumstances into account. But a major disadvantage of "ad hoc" balancing is its uncertainty and difficulty of prediction, which

may seem particularly grave in cases involving the freedom of expression.

In a third "canonical" aspect, the Lüth case proposes a resolution to the question of the extent to which the constitution should apply between private individuals. Avoiding the specific complexities and peculiarities of the American "state action" doctrine, the Lüth case adopts a general theory for the application of the constitution among individuals -- whether the specific case might involve a court order in a defamation action (in which there would clearly be state action under the American doctrine) or the adjudication of certain contractual relationships such as relationships between private employer and employee or private landlord and tenant (in which there would almost certainly not be state action under the American doctrine).

Applying the difficult concept of the "objective ordering of values", the German Constitutional Court in the Lüth case finds that in all cases involving private individuals, the constitution applies in an "indirect" manner --

that is, there must in effect be again a "balancing" of constitutional interests among the parties, but the Constitutional rights seem to apply in diluted form. Yet, even so, in certain cases the constitution applies between private individuals in a way that goes far beyond what is permitted under the American state action doctrine.

Disputes about the "horizontal" effect of the constitution have played an important current role in a number of constitutional systems, including the constitutional system of South Africa and the system of the European Convention on Human Rights. A global constitutional canon should include a case that raises and discusses - - even though it may not settle forever -- this very important constitutional question.