

WHAT IS A TWENTIETH-CENTURY CONSTITUTION?

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At present, almost all of the constitutions in the world are twentieth-century constitutions; indeed, most of them were not adopted until the second half of the twentieth century. Accordingly, the eighteenth-century Constitution of the United States—which includes the original constitution of 1787–89; the first ten amendments, adopted in 1791; and the Eleventh Amendment, adopted in 1798—antedates most other constitutions of the world by at least 150 years.

Using the eighteenth-century Constitution of the United States as a form of base-line (a method that may be parochial, but one that I think also has a lot to be said for it), we can examine the characteristics of modern constitutions—that is, the characteristics of twentieth-century constitutions.

Also, for purposes of convenience—and in the hope that it will not distort the inquiry too much—we will proceed with an examination of two specific twentieth-century constitutions: the Basic Law (Constitution) of the Federal Republic of Germany, adopted shortly after World War II in 1949, and an important constitution adopted at the very end of the twentieth century, the Constitution of South Africa. This examination may require some backward glances at two earlier twentieth-century constitutions: in the case of Germany, the predecessor of the present constitution, the Weimar Constitution of 1919; and in the case of South Africa, the immediate predecessor of the present constitution, the Interim Constitution of 1994. Finally, where appropriate, the discussion will also draw on another important twentieth-century constitution, the Constitution of India of 1950.

What are the most striking differences and contrasts between the eighteenth-century Constitution of the United States and its twentieth-century counterparts?

I. BREVITY AND STYLE

The eighteenth-century Constitution of the United States is a document of the Enlightenment. It is short and, in the main, elegantly written. It has an economy of construction that sometimes con-

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veys the Framers' underlying thinking through structure rather than express statement. The separation of powers, for example, is outlined through the division of the articles: Article I (legislative); Article II (executive); Article III (judiciary). Within Article I, the House of Representatives, the popular house of the legislature, comes first because it was the organ that, in the view of the Framers, was to be the most powerful according to the nature of things (and therefore also the most dangerous). Then comes the Senate, whose function was seen largely as exercising a check on the House of Representatives.

Both of our twentieth-century constitutions—those of the Federal Republic of Germany and South Africa—are considerably longer and more detailed. It may be questioned whether the structure of these constitutions conveys much subtlety of meaning—although it is indeed clear that the Basic Rights (constitutional rights) were placed at the beginning of the Basic Law of the Federal Republic of Germany for the purpose of emphasizing that the new West German state of 1949 was turning its back on the atrocities of the Nazi period.¹

II. LIMITS AND DISCRETION, OR MORE?

In its brevity and by its nature, the eighteenth-century Constitution of the United States may perhaps best be characterized as a constitution of limits and discretion. The primary function of most of its provisions was to establish the institutions of the federal government, to explain how they work, and to confer power on those institutions—power which in almost every instance is discretionary. That is, these are powers that Congress (or, in some instances, the executive) has discretion to exercise, but in almost all instances has no *obligation* to exercise. Congress, for example, is granted the authority to regulate commerce among the several states—but it has no obligation to do so and, indeed, until the final decade of the nineteenth century, its regulations of commerce were relatively few in number and narrow in scope.²

In addition to these discretionary empowering provisions, the eighteenth-century Constitution of the United States imposes certain

1. In Germany, the Weimar Constitution of 1919 was even longer than the Basic Law, and it contained many adventurous provisions. WEIMARER REICHsverfassung [WRV] [Weimar Constitution] (1919). The Constitution of India, often said to be the longest in the world, contains approximately 390 sections, as well as twelve “schedules” containing additional material. The schedules alone occupy more than fifty pages in the printed volume of the constitution.

2. Of course, once Congress has exercised its discretion to enact a statute, the President is obliged to “take Care” that the statute is “faithfully executed.” U.S. CONST. art. II, § 3.

limits on governmental power. According to the Federalists' original conception, of course, most of these limits were thought to be implicit in the concept of enumerated powers: What the Constitution did not grant to the federal government it prohibited to that government. But even the original Constitution did contain some explicit limitations on Congress in Article I, Section 9, as well as a few (rather exceptional) limitations on the states in Article I, Section 10. Of course, bowing to the pressures of certain Anti-Federalists and others, the Framers added the Bill of Rights, the first ten amendments which contained explicit limitations on government. The Eleventh Amendment, narrowing the jurisdiction of the federal courts, was added in 1798.

But the one thing that the eighteenth-century Constitution of the United States did not do was to impose significant obligations on the government: the Constitution does not instruct the government that it must act in a certain manner and that it has no discretion to decline to do so. Thus, the eighteenth-century Constitution of the United States essentially imposed no obligations on the federal government to furnish any particular services to its citizens, such as education, social welfare, health care, etc. In part, this characteristic of the eighteenth-century Constitution reflected a conception of the limited role of government that was typical of the period. In part, however, this characteristic also resulted from the role of the Constitution of the United States as a constitution for a federal union composed of states. To the extent that it was thought appropriate for government to exercise such functions, they were considered to be functions of the states or localities. Accordingly, even very early state constitutions contained obligations to furnish education.³

This characteristic of the eighteenth-century Constitution of the United States has carried on even into the twentieth century—notwithstanding significant additional regulations of the American states included in the Fourteenth Amendment, adopted in 1868 after the conclusion of the Civil War. Thus, in relatively recent cases such as *Harris v. McRae*,⁴ the Supreme Court emphasized that there is no constitutional obligation on the states to pay the cost of abortions—or, by extension, to support any other form of health care.⁵ In the *DeShaney*⁶ case, moreover, the Court made clear that the government ordinarily

3. See, e.g., PENNSYLVANIA CONSTITUTION of 1776, § 44.

4. 448 U.S. 297 (1980).

5. *Id.* at 317–18.

6. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

has no constitutional obligation to protect one individual against another.⁷

Of course, our twentieth-century constitutions could not be more different in this respect. They impose obligations of social welfare, education, and other services on government.⁸ But our two twentieth-century constitutions do this in rather different ways. The Basic Law of the Federal Republic of Germany is rather more restrained on this score, while the Constitution of South Africa contains a proliferation of such provisions.

The German Basic Law does explicitly require the state to provide education for its citizens.⁹ It also requires the state to provide special support to “every mother,”¹⁰ a term that has been interpreted to include women in the later stages of pregnancy, as well as mothers during the first weeks of an infant’s life. In general, however, the “positive” rights of the German Basic Law are implied in the laconic provision of Article 20(1), stating that “the Federal Republic of Germany is a democratic and *social* federal state.”¹¹ Although this “social state” clause is generally understood to require the legislature to provide a basic level of social welfare, it has generally been used only interstitially as a source of law by the German Constitutional Court. In a recent important case, for example, the Constitutional Court held that a certain minimal amount of income—the “existence minimum”—must remain free of income taxation.¹² Perhaps because the German legislature has ordinarily provided relatively generous social welfare measures, the “social state” provision of the Basic Law has not yet been used to require new social programs of significance.

In contrast with the laconic “social state” clause in Germany, the Constitution of South Africa contains prolific social welfare provisions.

7. *Id.* at 196–97.

8. The South African and German constitutions have also been interpreted to impose an obligation on the state to protect individuals against other individuals or corporations, under some circumstances. See *Carmichele v. Minister of Safety and Security* 2001 (4) SA 938 (CC) (S. Afr.) (imposing an obligation on the government to take steps to protect individuals against violence); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Aug. 8, 1978, 49 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 89 (Kalkar case) (F.R.G.) (recognizing the obligation of government to protect the population against dangers arising from nuclear power plants). Questions about the precise extent to which the constitution applies in relations between private individuals remains a subject of debate both in South Africa and in Germany.

9. GRUNDGESETZ [GG] art. 7.

10. *Id.* art. 6(4).

11. *Id.* art. 20(1) (emphasis added). Another provision of the Basic Law imposes similar obligations on the individual German states (*Länder*). *Id.* art. 28(1).

12. 87 BVerfGE 153 (1992).

Thus, Section 26 provides a “right to have access to adequate housing,” and the state must take certain measures to achieve this right.¹³ There are also rights to have access to health care, “sufficient food and water,” and social security,¹⁴ and there is a long list of social welfare rights for children.¹⁵ Furthermore, Section 25(5) declares that the state should “foster conditions” for equitable access to land.

Although the social welfare provisions of the South African Constitution purport to grant “rights” to citizens, these rights are rather substantially qualified. Thus, the obligations of the state under Sections 26 and 27 are limited to “reasonable legislative and other measures, within [the state’s] available resources, to achieve the progressive realization” of these rights. Of course, the basic issue that arises with respect to rights of this nature is the extent to which courts can actually enforce provisions of this kind, especially in a country in which governmental resources seem to be thoroughly inadequate to complete the massive tasks of social reconstruction that would be involved. Indeed, up to this point, the South African Constitutional Court has been extremely modest in its interpretation of these provisions—except in one striking case in which, probably due to the pledge of free pharmaceuticals from a manufacturer, the court ordered wide-scale distribution of drugs to combat the spread of AIDS from mothers to children.¹⁶

There is yet another method of handling social welfare provisions that has been adopted in a number of twentieth-century constitutions. Instead of referring to the state’s social welfare obligations as yielding “rights,” the Constitution of India—drawing on a technique devised in the Irish constitution¹⁷—refers to these social welfare provisions as “Directive Principles of State Policy.” According to Article 37 of the Constitution of India, these principles shall be “fundamental in the governance of the country,” but they are not to be “enforceable by any court.” Yet, over the years, the Supreme Court of India has sometimes employed these “directive principles” in the interpretation of constitutional provisions in a manner which, in the last analysis, seems to accord these principles some actual legal force. A similar general

13. S. AFR. CONST. 1996 § 26.

14. *Id.* § 27.

15. *Id.* § 28.

16. *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.). For general commentary on the enforceability of social and economic rights, see Albie Sachs, *Social and Economic Rights: Can They Be Made Justiciable?*, 53 S.M.U. L. REV. 1381 (2000); Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895 (2004).

17. IR. CONST., 1937, art. 45.

technique was employed in a number of the new constitutions of the eastern German states, adopted shortly after German unification, in which social welfare provisions were sometimes referred to as incorporating “state goals.”¹⁸

III. RIGHTS OF THE “THIRD GENERATION”

Social welfare rights are sometimes referred to as “rights of the second generation” to distinguish them from the traditional form of “negative” rights which prohibit the government from undertaking certain invasions of person or property—such as rights of free expression, rights against unreasonable search and seizure, rights against compulsory self incrimination, etc. These traditional rights—found, for example, in the American Bill of Rights—are sometimes referred to as “first-generation” rights.

More recently, some theorists have urged the adoption of “third-generation” rights—group or collective rights which, in some instances, may seem to require significant structural revisions of state and society.¹⁹ Some of these “third-generation” rights discussed by scholars include such diffuse and aspirational guarantees as a right to “international peace and security.”²⁰ Other proposals are more focused, directed toward guaranteeing to minority groups the preservation of their language and culture.²¹

One of the most interesting and vigorously debated of these third-generation rights relates to environmental protection. Of course, there is nothing resembling a provision of this sort in the

18. See, e.g., VERF. THÜR. [Constitution of Thuringia] art. 15 (state goal of appropriate living space).

In addition to the “directive principles of state policy,” the Constitution of India also includes a list of “fundamental duties” of Indian citizens. INDIA CONST. art. 51-A. The Weimar Constitution of 1919 also contained constitutional “duties,” as did several earlier constitutions in France and in at least one of the American states. Gerhard Casper, *Changing Concepts of Constitutionalism: 18th to 20th Century*, 1989 SUP. CT. REV. 311.

19. On “third-generation” rights, see, for example, Natsu Taylor Saito, *Beyond Civil Rights: Considering “Third Generation” International Human Rights Law in the United States*, 28 U. MIAMI INTER-AM. L. REV. 387 (1996–97).

20. *Id.* at 397 (quoting James Crawford, *The Rights of Peoples: Some Conclusions*, in *THE RIGHTS OF PEOPLES* 57 (James Crawford ed., 1988)).

21. Indeed the constitutions of South Africa and India both have provisions that fall into this category. The Constitution of South Africa requires the Government to “take practical and positive measures to elevate the status and advance the use of [the indigenous languages of the people],” S. AFR. CONST. 1996 § 6(2), and it also grants a degree of recognition to the status of traditional leaders and systems of customary law. *Id.* §§ 211–212. The Indian Constitution provides special protections for minorities with “a distinct language, script or culture of their own.” INDIA CONST. arts. 29(1), 350-A, 350-B. For other linguistic provisions in the Indian Constitution, see *id.* arts. 343–51.

eighteenth-century Constitution of the United States. Both of our twentieth-century constitutions, however, do have such provisions, and the two provisions were adopted at approximately the same time in the mid-1990s.

After the unification of Germany in 1990, the Parliament undertook an examination of whether new provisions should be added to the Basic Law, in order to reflect changes in state or society arising from German unification or otherwise.²² In the end, this process resulted in very few constitutional changes other than structural changes necessary to reflect the actual mechanics of unification. But one of the few newly added provisions was Article 20a of the Basic Law, entitled "Protection of the Natural Bases of Life." Article 20a was a highly qualified provision declaring that the state (in all of its branches) will protect the "natural bases of life in the framework of the constitutional order." In the process of adopting this amendment, there were vigorous (and rather philosophical) debates about whether environmental protection should benefit humans primarily, or whether its purpose is to protect animals and plants in themselves. Article 20a seems to reflect the position that environmental protection is intended for present individuals as well as "for future generations." The possibilities of judicial enforcement of this provision seem problematic, and it may well be that the provision will ultimately be regarded as an unenforceable state goal.²³

The Constitution of South Africa also has a fairly elaborate environmental provision which guarantees the right "(a) to an environment that is not harmful to . . . health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures. . . ."²⁴ These measures should "prevent pollution," "promote conservation," and "secure ecologically sustainable development . . . while promoting justifiable economic and social development."²⁵

The Constitution of India includes an environmental provision among the "Directive Principles of State Policy" in Article 48-A ("The State shall endeavour to protect and improve the environment and to

22. On this process, see generally PETER E. QUINT, *THE IMPERFECT UNION: CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION* 112-22 (1997).

23. Interestingly, as far back as 1919, the Weimar Constitution contained a provision declaring that "monuments of nature" as well as "the countryside" [*die Landschaft*] enjoy the protection and cultivation of the state. WRV art. 150(1). Moreover, a number of the new German state constitutions, adopted after unification, also contain environmental provisions. See, e.g., VERF. SACHS. [Constitution of Saxony] (1992) art. 10.

24. S. AFR. CONST. 1996 § 24.

25. *Id.*

safeguard the forests and wild life of the country”), and also among the “Fundamental Duties” in Article 51-A(g). According to this provision, citizens have a duty “to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.”

IV. COVERAGE

One of the most striking differences between the laconic American Constitution of the eighteenth century and our twentieth-century constitutions is that, as society and political structures have developed in complexity, many additional subjects have been considered worthy of constitutional attention. Thus, in addition to provisions on rights and on the general structure of government, the Basic Law of the Federal Republic of Germany and the South African Constitution have a number of significant provisions on topics that are completely without explicit coverage in the Constitution of the United States.

Thus, the German Basic Law contains a provision generally regulating political parties and describing their role in the polity. This provision also authorizes the prohibition of anti-democratic parties by the Constitutional Court.²⁶ The South African Constitution provides an explicit right to form and to be an active member of a political party, but there is no provision for the banning of parties—a procedure that would have raised unpleasant memories in South Africa.²⁷ Of course, the whole concept of political parties in the modern sense did not exist when the American Constitution was drafted in the late-eighteenth century.

The Basic Law also contains a specific provision granting detailed protections for labor unions,²⁸ while the Constitution of South Africa contains an even more detailed provision directed toward providing balanced protections for workers and trade unions, as well as employers and employer associations, in labor relations and collective bargaining.²⁹ In another example, the Basic Law regulates (in a very detailed manner) the circumstances under which an individual may assert conscientious objection to military service.³⁰

The following sections contain brief discussions of three additional areas in which the problems of the twentieth century seem to have impelled inclusion of important areas of coverage that are basi-

26. GG art. 21.

27. S. AFR. CONST. 1996 § 19(1).

28. GG art. 9(3).

29. S. AFR. CONST. 1996 § 23.

30. GG arts. 4(3), 12a.

cally missing in the eighteenth-century Constitution of the United States.

A. *Administration*

The drafters of the U.S. Constitution were not much concerned with providing rules and structures for the administration of government. (After all, this was an era in which the Secretary of State had to call on his brother for assistance when he wanted to have some commissions delivered to newly appointed justices of the peace.)³¹ Indeed, the Constitution does not go further in the area of administration than to refer from time to time to “executive Departments” or the “Heads of Departments.”³² The President, of course, has the constitutional obligation to “take Care that the Laws be faithfully executed.”³³

When the “administrative state” began its impressive rise in the late-nineteenth and early-twentieth centuries, therefore, these developments in the United States basically relied on no explicit constitutional provisions, but rather on a proliferation of statutory solutions. In a number of interesting ways, however, our twentieth-century constitutions do attempt to deal with the subject of administration. The Basic Law of the Federal Republic of Germany, for example, makes clear that most federal law is to be enforced by the administrative organs of the states and not by the federal government itself.³⁴ This is an approach to the “vertical” separation of powers which contrasts in an interesting manner with that of the United States: In the United States, the states retain significant lawmaking power because most law remains state law; in Germany, in contrast, almost all law is federal law (including the civil and criminal codes), but the states retain significant authority in part because they are responsible for *administering* most federal law. Other provisions in the Basic Law, however, do allow the federal government to supervise the state administration of federal law, when necessary. Moreover, the Basic Law explicitly sets aside certain specific areas—such as air traffic control, the federal railroads, the federal bank, and certain waterways—which remain under direct federal control.³⁵

In a contrasting technique, the South African Constitution tends to rely on constitutionally mandated commissions to oversee the “pub-

31. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

32. U.S. CONST. art. II, § 2, cl. 1, 2.

33. *Id.* art. II, § 3.

34. GG art. 83.

35. *Id.* arts. 87–90.

lic administration,” whose “basic values and principles” are set out in a lengthy series of very general statements.³⁶ A Public Service Commission is responsible for monitoring the administration, furnishing appropriate reports, and investigating grievances.³⁷ In addition, in a chapter entitled “State Institutions Supporting Constitutional Democracy,” the constitution requires the establishment of a number of supervisory officers such as an ombudsman, known as the “Public Protector,”³⁸ and an Auditor-General,³⁹ as well as a series of commissions covering areas such as human rights, rights of cultural, religious, and linguistic communities, gender equality, and elections.⁴⁰

In what seems to be an attempt to further the enforcement of rights of social welfare referred to above, the South African Human Rights Commission “must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.”⁴¹

B. Financial Provisions

In a similar manner, the eighteenth-century Constitution of the United States does not say anything very specific about finances. Rather, Congress is given the discretionary power to raise and collect taxes and to spend for the general welfare, and Article I makes clear that “[a]ll Bills for raising Revenue shall originate in the House of Representatives.”⁴²

In contrast, however, our twentieth-century constitutions have very elaborate provisions on what has been called the “fiscal constitution.”⁴³ The financial provisions in both of these constitutions are quite daunting in length and complexity. In at least one respect, however, they seek to achieve a common goal, and that goal is related, in part, to the goals of social welfare which, as we have seen, are implicated in both constitutions—albeit more extensively stated in the Con-

36. S. AFR. CONST. 1996 § 195(1).

37. *Id.* § 196.

38. *Id.* § 182.

39. *Id.* § 188.

40. *Id.* §§ 184–187, 190.

41. *Id.* § 184(3).

42. U.S. CONST. art. I, § 7.

43. GG arts. 104a–115; S. AFR. CONST. 1996 §§ 213–230A; see Kenneth W. Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271 (1977); Clifford Larsen, *States Federal, Financial, Sovereign and Social: A Critical Inquiry into an Alternative to American Financial Federalism*, 47 AM. J. COMP. L. 429 (1999).

stitution of South Africa. The financial provisions of both constitutions assume (no doubt correctly) that certain regions of the country ("states" (*Länder*) in Germany, "provinces" in South Africa) will be substantially more prosperous than others. Because one of the major tasks of the various regions is to provide social welfare and other basic services, these financial provisions are intended to move toward equalization of per capita financial strength among the various regions. Thus, in the Federal Republic of Germany, these provisions require certain direct transfer payments from more prosperous to less prosperous states, as well as increased payments from the federal government to the weaker states.⁴⁴ The Constitution of South Africa contains similar financial goals.⁴⁵ In the Federal Republic of Germany, at least, there has been constant litigation in the Constitutional Court concerning the level of these obligations. Not surprisingly, the financially stronger states have resisted higher obligations, while increased enforcement has been insistently sought by the states with fewer financial resources.

V. EMERGENCIES

Both of our twentieth-century constitutions also have very elaborate provisions for emergencies. In the case of Germany, these provisions were added to the Basic Law in 1968, after a national controversy that helped propel the radical student movement of the late 1960s into popular consciousness: members of the student movement and other activists on the left feared that the introduction of the emergency provisions foretold the slippage of Germany back into totalitarianism.⁴⁶ These provisions are triggered in the case of actual or imminent attack on the Federal Republic and permit (among other things) the deferral of elections and government by a standing committee of Parliament.⁴⁷ In point of fact, however, these emergency provisions of the German Basic Law have never been employed.

Detailed emergency provisions are also found in the South African Constitution.⁴⁸ These provisions may be triggered if "the life of the nation is threatened by war, invasion, general insurrection, disor-

44. GG art. 107.

45. See S. AFR. CONST. 1996 § 214. In a manner that parallels provisions concerning the administration more generally, the Constitution of South Africa also creates a Financial and Fiscal Commission to make recommendations on financial matters. *Id.* §§ 220–222.

46. 2 DENNIS L. BARK & DAVID R. GRESS, *A HISTORY OF WEST GERMANY: DEMOCRACY AND ITS DISCONTENTS 1963–1988*, at 124–25 (1989).

47. See GG arts. 115a–115l.

48. S. AFR. CONST. 1996 § 37.

der, natural disaster or other public emergency,”⁴⁹ and may be declared by the National Assembly by majority vote for twenty-one days, and renewed once by majority vote for three months and thereafter by a sixty percent vote of the National Assembly for successive three-month periods.⁵⁰ The emergency may permit derogations from certain provisions of the Bill of Rights (including detention without trial) if “strictly required by the emergency” and not inconsistent with international law.⁵¹

The Constitution of India also includes elaborate emergency provisions which allow suspension of certain constitutional rights during the period of the emergency.⁵² The invocation of these provisions initiated a period of dictatorial rule by Prime Minister Indira Gandhi in the 1970s, which was widely considered a grave abuse of power. Accordingly, the emergency provisions were somewhat narrowed after the emergency was brought to an end.⁵³

Of course, the provisions on emergencies in the eighteenth-century Constitution of the United States are very spare, including brief statements in the Guaranty Clause of Article IV, Section 4, and the provision allowing the suspension of habeas corpus in times of invasion or rebellion in Article I, Section 9.⁵⁴

VI. DETAIL AND COMPLEXITY

In addition to covering a much wider range of areas than were thought to be appropriate for constitutional treatment in the eighteenth century, our twentieth-century constitutions also treat in much greater detail areas that are covered by more summary provisions—

49. *Id.* § 37(1)(a).

50. *Id.* § 37(2). For discussion of these provisions, see Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L.J.* 1029, 1055 (2004).

51. *Id.* § 37(4); see also *id.* § 37(5)(c) (incorporating a Table of Non-Derogable Rights).

52. INDIA CONST. arts. 352–60.

53. GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE* 293–430 (2003).

54. Another very interesting contrast between the eighteenth-century Constitution of the United States and our twentieth-century constitutions concerns the constitutional role of municipalities. Notwithstanding the extremely important governing role of municipalities in colonial America, municipalities (and other subdivisions of the states) receive no mention in the Constitution of the United States. In contrast, the rights and governmental roles of municipalities—and other regional subdivisions—receive prominent mention (sometimes in great detail) in our twentieth-century constitutions. See GG art. 28(2) (right of German localities (*Gemeinden*) to regulate their own affairs); S. AFR. CONST. 1996 §§ 151–164 (elaborate provisions establishing various categories of municipalities, setting forth their powers and functions, and regulating the composition and election of municipal councils); INDIA CONST. arts. 243–243(ZG) (provisions governing municipalities and Panchayats—institutions of rural self-government).

sometimes just a phrase or sentence—in the Constitution of the United States.

Thus, the allocation of authority between the federal government and the states is more or less implicit in the fairly cursory statement of the general categories of congressional power in Article I, Section 8 of the U.S. Constitution, particularly the Commerce Clause. In our twentieth-century constitutions, in contrast, there are more detailed provisions for “exclusive” legislative authority and “concurrent” legislative authority of the federal government and the regions. In the German Basic Law, for example, there is a list of eleven areas of exclusive federal authority and twenty-eight areas of concurrent authority, as well as six additional areas in which the federal government is authorized to enact “framework” legislation, the details of which are to be filled in by the states.⁵⁵

In the Constitution of South Africa the parliament has general legislative authority, but the provinces share this authority in approximately forty-eight areas specified as “Functional Areas of Concurrent National and Provincial Legislative Competence”; moreover, the provinces ordinarily have exclusive authority in approximately thirty-five specified areas—including some areas ordinarily reserved to the municipalities.⁵⁶

But the most elaborate of these provisions are found in the Constitution of India, in which ninety-seven separate subjects are included within the exclusive authority of the federal parliament, approximately forty-seven subjects are included within the list of concurrent authority of the federal government and of the states, and approximately sixty-six separate items are listed as within the exclusive authority of the states.⁵⁷

In another example of complexity, the equality provision of the Basic Law sets forth eight specific factors which may not be the subject of advantage or disadvantage in legislation. These factors seem to be something like the suspect classifications of American constitutional law which, of course, are not specified in the Fourteenth Amendment or elsewhere in the Constitution of the United States (except for race and gender, with respect to voting rights).⁵⁸ In the Basic Law, these

55. GG arts. 70–75.

56. S. AFR. CONST. 1996 § 44; Schedules 4 and 5.

57. INDIA CONST. arts. 245–246; Schedule VII.

58. U.S. CONST., amends. XV, XIX. Two other amendments—products of the twentieth century, as was the Nineteenth Amendment—prohibit the denial of the right to vote in a federal election on the basis of failure to pay a poll tax, and extend voting rights to persons who are at least 18 years of age. U.S. CONST., amends. XXIV, XXVI.

prohibited factors are “gender, ethnic origin, race, language, place of origin (*Heimat und Herkunft*), belief, or religious or political views.”⁵⁹ In a similar provision, the South African Constitution lists the following impermissible factors: “race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”⁶⁰

The Indian Constitution also includes “caste” in a rather shorter listing of similarly prohibited factors.⁶¹ Both the Constitution of South Africa and—especially—the Constitution of India also include explicit provisions on affirmative action in favor of previously disadvantaged groups.⁶²

With respect to provisions on constitutional rights, there is a similar contrast in the level of detail. For example, where the Constitution of the United States speaks in very summary fashion of the freedom of speech and of the press (and the right of the people to assemble and petition for redress of grievances), the Basic Law of the Federal Republic of Germany explicitly protects, in addition to the free expression of opinions “in word, writing, and pictures,” the right to information from generally accessible sources, press freedom and the freedom of reporting (by means of radio and film), and art, scholarship, research, and teaching (as long as the latter does not involve disloyalty to the constitution).⁶³ In separate sections, the Basic Law also explicitly protects a number of other matters related to free expression: a right of assembly,⁶⁴ a right to form associations,⁶⁵ a right to form political parties,⁶⁶ a right to petition the legislature,⁶⁷ and a right to the secrecy of the post office and telephones.⁶⁸

In comparison with the relatively breezy language on property rights in the Fifth Amendment of the United States Constitution (“[N]or [shall any person] be deprived of . . . property, without due

59. GG art. 3(3). Moreover, the factor of disability may not be taken into account in a manner that disadvantages an individual—although legislative provisions that grant compensatory advantages are presumably permissible. *Id.* A separate provision in the Basic Law requires that the legislature create essentially equal conditions for “non-marital children.” *Id.* art. 6(5).

60. S. AFR. CONST. 1996 § 9(3).

61. INDIA CONST. art. 15.

62. S. AFR. CONST. 1996 § 9(2); INDIA CONST. arts. 15(4); 16(4)–(4A); *see also* GG art. 3(2) (provision of German Basic Law that may require affirmative action for women).

63. GG art. 5.

64. *Id.* art. 8.

65. *Id.* art. 9.

66. *Id.* art. 21.

67. *Id.* art. 17.

68. *Id.* art. 10.

process of law; nor shall private property be taken for public use, without just compensation”), the Constitution of South Africa has a very elaborate provision on property, including a section on compensation for expropriation which requires consideration of five separate factors, only one of which is “the market value of the property.”⁶⁹

VII. THE STRUCTURE OF RIGHTS PROVISIONS

In the Constitution of the United States, the rights set forth in the Bill of Rights (and subsequent amendments) are generally stated without any explicit indication that they may be limited or qualified in one way or another. The result is that the courts have often interpreted constitutional rights by employing a technique of definition, and the necessary limitations or qualifications of the right are incorporated into the definition itself. Thus, in the end, what does not lie within the area of the protected right—as so defined—is not protected.

Many twentieth-century constitutions employ a rather different technique, at least in part. Under this technique, there are basically two sections in any rights provisions: the first part sets forth the right in sweeping terms, and the second part introduces factors that may result in the limitation or qualification of the right. The qualifications may be set forth in each rights provision separately, or they may be stated in a single limiting provision, which is then applicable to all or most rights in the constitution.

A technique of this sort is employed, for example, in the free speech provision of the German Basic Law. Article 5, Section 1 sets forth a general right “to express one’s opinion in word, writing and pictures, etc.” Article 5, Section 2 then provides, however, that “these rights find their limits in the rules of the general laws, the statutory rules for the protection of youth, and in the right of personal honor.” Section 19(1) of the Indian Constitution also employs this technique: subsections (a) through (g) set forth general rights of speech, assembly, association, free movement within India, and a right of occupa-

69. S. AFR. CONST. 1996 § 25. Provisions allowing expropriation of property with compensation that is calculated at less than market value may reflect the redistributive goals of constitutions that contain rights or principles of social welfare. The German Basic Law, for example, follows the Weimar Constitution in providing that “property has its obligations” (*Eigentum verpflichtet*), and it provides that “compensation is to be determined in accordance with a just weighing of the interests of the community and of the persons affected.” GG art. 14(2)–(3). The Basic Law also contains a provision authorizing the general expropriation of real property and the means of production (with compensation), although this apparent relic of the immediate post-war era has never actually been implemented. *Id.* art. 15. For the complex history of expropriation of property under the Indian Constitution, see AUSTIN, *supra* note 53, at 69–122.

tion or trade—each in broad and absolute terms. Subsections (2)–(6) then set forth individual limiting factors for each of these rights.

South Africa employs the second technique—whereby a single general provision qualifies all (or most) constitutional rights. Thus, Section 36(1) of the South African Constitution limits all of the rights of the Bill of Rights. According to Section 36, these rights may be limited only by a “law of general application” if the limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom,” and if certain additional relevant factors are taken into account, such as “the nature of the right . . . [and] the importance of the purpose of the limitation,” among others.

This general technique—which is also prominent in important international human rights instruments, such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights—tends to lead to a particular approach to adjudication. Whereas the typical American technique involves an attempt to achieve a definitional structure of the right, these “double barreled” provisions—with a statement of the right followed by a statement of permissible limitations—tend to yield judicial decisions that balance the right against the limitation on a relatively ad hoc basis. Such a technique of case-by-case balancing may well result in heightened uncertainty about what the doctrine really is in a particular constitutional area.⁷⁰

VIII. INTERNATIONAL RELATIONS AND INTERNATIONAL LAW

The late-eighteenth century was by no means unconcerned with questions of international law; indeed, the basic framework of the modern doctrine had been worked out a century earlier by theorists such as Grotius. Yet international law plays a relatively modest role in the actual text of the Constitution of the United States. Treaties made “under the Authority of the United States” (which also included important treaties entered into under the Articles of Confederation), were proclaimed to be “the supreme Law of the Land,”⁷¹ and Congress was granted the authority to “define and punish . . . Offenses against the Law of Nations.”⁷² But that was about it.

70. On this point, see Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247 (1989).

71. U.S. CONST. art. VI, § 2. Article II, Section 2 explained how treaties were to be made—by the President with the advice and consent of two-thirds of the Senate. *See also* U.S. CONST. art. I, § 10 (relating to international agreements made by the states).

72. *Id.* at art. I, § 8, cl. 10.

The second half of the twentieth century, however, has seen a great increase in the role that international law has played in the world and in the way governments are structured. Moreover, the scope and coverage of international law itself has expanded dramatically in the twentieth century—most notably in the development of international humanitarian law in the Hague Conventions and in the Geneva Conventions of 1929 and 1949, as well as in the adoption of international bills of human rights, such as the International Covenant of Civil and Political Rights and the European Convention on Human Rights.

The Federal Republic of Germany, of course, emerged from the ruins of the Nazi dictatorship, and the governments of the Allies which supervised the West German state in its early years were particularly interested in assuring a strong presence of international law. The Allies also sought to embed the fledgling democracy in a series of international structures that would tend to reduce the possibility of a resumption of the aggressive characteristics of prior regimes.

Article 25 of the German Basic Law therefore explicitly incorporates “the general rules of international law” into federal law; indeed Article 25 goes further to state that those international rules will prevail over German statutes and “create rights and duties directly” for inhabitants of German territory. The Constitutional Court is authorized to adjudicate these matters.⁷³ Article 26 of the Basic Law explicitly prohibits the planning of aggressive war, and thus directly incorporates into constitutional law one of the main principles of the Nuremberg Charter.

Moreover, the close relationship between Germany and other nations, particularly those in Europe, also receives explicit constitutional recognition. Article 24 of the German Basic Law authorizes the federal government to transfer sovereign rights to international organizations and to enter into a “system of mutual collective security,” for the purpose of “creating and assuring a peaceful and lasting order in Europe and among the peoples of the world.”⁷⁴ Moreover, after German unification, the Basic Law was amended to include a new Article 23, which authorizes Germany to enter into the Maastricht Agreement

73. GG art. 100(2). Although the Constitution of the United States provides no text on this subject, the Supreme Court has found that the general rules of international law are part of federal law. *The Paquete Habana*, 175 U.S. 677, 700 (1900). In contrast with the rule of precedence provided in the Basic Law, however, it is generally thought that the rules of international law may be superseded by a statute of Congress under United States law.

74. GG art. 24(1)-(2).

(through which the German Mark was replaced by the Euro) and regulates the relationship of Germany with the European Union.⁷⁵ Also as a result of the Maastricht Agreement, Article 28 of the Basic Law was amended to grant local voting rights (and rights to be a candidate in local elections) to citizens of other European Union states living in Germany.

Although South Africa obviously does not have the same history as Germany, and is not embedded to the same extent in regional institutions, international law also plays a highly significant role in the South African Constitution. The prominence of international law may well reflect the important role played by international action (such as boycotts)—based on concepts of international human rights—in the fall of the South African apartheid regime.

In interpreting the Bill of Rights, therefore, Section 39 of the South African Constitution requires that the courts “must consider international law; and . . . may consider foreign law.” In an international conflict, moreover, “the state must comply with . . . international humanitarian law” with respect to prisoners of war.⁷⁶ In light of South African history under apartheid, a long and detailed constitutional section authorizing and regulating the security services contains a number of provisions binding those services to international law. According to Article 198(c), for example, national security must be pursued in compliance with law, including international law. Moreover, under Article 199(5), “the security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.” Finally, Sections 200(2) and 201(2)(c) of the South African Constitution generally impose the requirements of international law on the defense forces.⁷⁷

IX. CONCLUSION

Sometimes the process of comparative law can yield at least as much illumination about one’s own system as about the foreign systems that one is investigating. Looking back at the eighteenth-century

75. Indeed, in an interesting federalism provision of some complexity, Article 23(5) seeks to protect the interests and participation of the German states when actions of the European Union enter areas of the states’ interests under the Basic Law.

76. S. AFR. CONST. 1996 § 37(8).

77. In the Constitution of India, one of the “Directive Principles of State Policy” requires the state to “endeavour to . . . promote international peace and security; . . . foster respect for international law,” and take other steps along the same lines. INDIA CONST. art. 51.

Constitution of the United States from the vantage point of our twentieth-century constitutions, we can see the accuracy of Chief Justice Marshall's reflection that the "nature" of a constitution—and he meant the Constitution of the United States—"requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."⁷⁸ In contrast, we see that our twentieth-century constitutions do indeed include several provisions that "partake of the prolixity of a legal code."⁷⁹ In this light, the Constitution of the United States really does appear as a fairly skeletal framework, with the resolution of most issues to be filled in by legislative choice or, as has later developed, by judicial interpretation. Certainly, to a greater extent than its twentieth-century counterparts, the eighteenth-century Constitution of the United States can be seen as mainly providing a framework for the later development of those discretionary choices.

In contrast, our twentieth-century constitutions attempt to do a lot more. In a significantly broader range of areas, these constitutions attempt to achieve a specific end—or at least greatly limit the legislature's discretion in the choice of government policies. Indeed, it is common in German constitutional theory to refer to the Basic Law as a constitution that sets forth "an ordering of values."⁸⁰ These distinctions can perhaps be overdrawn, but it is certainly the case that discretion is significantly reduced in a number of areas by our twentieth-century constitutions.

Yet there is one significant factor in the twentieth-century constitutions that seems to cut in favor of more discretion: it is unquestionably the case that many twentieth-century constitutions are considerably easier to amend than the eighteenth-century Constitution of the United States. In their slightly more than fifty years of existence, for example, the constitutions of the Federal Republic of Germany and of India have both been amended much more often than the Constitution of the United States in its 200 year history.⁸¹

Yet this ease of amendment may itself evoke a sort of countervailing force. In both the Federal Republic of Germany and in India,

78. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

79. *Id.*

80. For discussion of this point, see, for example, Casper, *supra* note 18.

81. The German Basic Law may be amended by a vote of two-thirds of each of the two houses of parliament; no ratification by the states is necessary. GG art. 79(1)–(2). Provisions for amending the Indian Constitution are more complex and appear to be somewhat more onerous, but they have not presented a substantial obstacle to amendment in numerous instances. See INDIA CONST. art. 368.

the courts have maintained that certain fundamental constitutional principles may not be amended. This principle is found in the text of the German Basic Law,⁸² and it has been derived by interpretation by the Supreme Court of India.⁸³ Such a doctrine seems less well settled in the new jurisprudence of South Africa, but the Constitutional Court is granted the authority to “decide on the constitutionality of any amendment to the Constitution,”⁸⁴ and at least one of the Court’s decisions (written under the Interim Constitution) has suggested that “radically and fundamentally restructuring and reorganizing the fundamental premises of the Constitution, might not qualify as an ‘amendment’ at all.”⁸⁵

Thus, even amidst the proliferation of detail and breadth of coverage of these twentieth-century constitutions, there is likely to be an inner core of fundamental principle that must remain unimpaired.

82. GG art. 79(3).

83. *Kesavananda Bharati v. Kerala*, (1973) Supp. S.C.R. 1.

84. S. AFR. CONST. 1996 § 167(4)(D).

85. *Premier of KwaZulu-Natal v. President of the Republic of South Africa*, 1996 (1)SA 769, 783–84 (CC) (Mahomed, DP.); Jeremy Sarkin, *The Drafting of South Africa’s Final Constitution From a Human-Rights Perspective*, 47 AM. J. COMP. L. 67, 75–76 & n.44 (1999).