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Constitutionalism in Context

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University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

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Information on this title: www.cambridge.org/9781108427098

DOI: 10.1017/9781108699068

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First published 2022

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

NAMES: Law, David S., editor.

TITLE: Constitutionalism in context / edited by David S. Law, The University of Hong Kong.

DESCRIPTION: Cambridge, United Kingdom ; New York : Cambridge University Press, 2021. |

Series: Comparative constitutional law and policy | Includes bibliographical references and index.

IDENTIFIERS: LCCN 2021023417 (print) | LCCN 2021023418 (ebook) | ISBN 9781108427098 (hardback) |

ISBN 9781108699068 (ebook)

SUBJECTS: LCSH: Constitutional law.

CLASSIFICATION: LCC K3165 .C6255 2021 (print) | LCC K3165 (ebook) | DDC 342–dc23

LC record available at <https://lcn.loc.gov/2021023417>

LC ebook record available at <https://lcn.loc.gov/2021023418>

ISBN 978-1-108-42709-8 Hardback

ISBN 978-1-108-44765-2 Paperback

Additional resources for this publication at www.cambridge.org/davidslaw.

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

To my late grandmother, Shen-Chee Liew,
who braved a new world to be with her grandson
and never looked back,
and to my mother, Margaret Yin-Yin Law,
with love and gratitude
and a prayer in my heart for the days ahead.

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User's Guide and Preface

What is the point of this book? *Constitutionalism in Context* is a hybrid creation that invites a variety of uses and thus requires some explanation. On the one hand, it is a research handbook consisting of original work by leading scholars on a broad selection of topics and jurisdictions. On the other hand, it incorporates a variety of features (such as this user's guide-cum-preface) to facilitate use as either a primary or supplemental textbook for students in law and social science. It also aims to combine the deep and diverse expertise of an edited volume with the structural coherence and consistency of a monograph. To borrow a much-abused turn of phrase, one might call it a research handbook with textbook characteristics, or an edited volume with monograph characteristics.¹

Many instructors already turn to research handbooks as a source of course readings or even in lieu of conventional textbooks, but most handbooks are not designed with teaching use in mind. Thus, for example, they usually do not expose readers to primary materials, and they may assume a level of background knowledge that many students lack. There are ways, however, of incorporating support for classroom use into a research handbook, as this book aims to demonstrate.

Much of the versatility of this volume derives from the unique chapter template, which makes possible a number of other distinctive features for both research and teaching use. Apart from a trio of introductory chapters that survey various aspects of the field, every chapter adheres to a three-part modular structure consisting of (1) an overview of a topic, (2) an overview of a jurisdiction, and (3) a case study of the topic in the context of the jurisdiction. As a result, each chapter functions as a two-for-one reference on both a topic and a jurisdiction, combined with a case study that uses each to contextualize the other. For maximum flexibility, each module can be read by itself for freestanding coverage of either the topic or the jurisdiction, and the case study can be included for added depth. Moreover, because the jurisdiction modules and case studies are so rich in context, they tend to span multiple topics and can be reconfigured in different ways for coverage of additional topics.

Sections 1 and 2 of this user's guide-cum-preface introduce the distinctive features of this book for research and teaching use, respectively. Section 3 briefly describes the coverage of each chapter and offers recommendations for classroom use. Section 4 suggests alternative ways of grouping and sequencing the chapters to cover additional areas not enumerated in

¹ See Albert H. Y. Chen, 'Constitutions and Constitutionalism: China,' Chapter 4 in this volume, at Sections 2.2, 3.2 (discussing the concepts of "socialism with Chinese characteristics" and "constitutionalism with Chinese characteristics").

either version of the table of contents, and to flesh out areas and themes that are particular strengths of the volume as a whole.

1 FEATURES FOR RESEARCH USE

Constitutionalism in Context involves a couple of twists on the usual handbook format. The first twist is organizational: it is organized by both topic and jurisdiction at the same time. The modular chapter structure means that each chapter does double duty as a reference on a topic and a reference on a jurisdiction. For coverage by region, one can select or sort by the appropriate jurisdiction modules; for coverage by subject matter, one can select the corresponding topic modules. To facilitate this choice of approaches, there are two versions of the table of contents – one organized by subject matter and another by geographical region. Likewise, the suggested reading lists are bifurcated between topic and jurisdiction. All of this means that the volume works equally well for those who need topic-driven coverage and those who need jurisdiction-driven coverage.

The second twist is substantive: the coverage of this book aims at the frontiers rather than the traditional core of the scholarly literature. The field of comparative constitutional law has traditionally emphasized the study of judicial approaches to “the protection of universal human rights within a liberal democratic constitutional order.”² At the core of this enterprise are a handful of established democracies in Europe and the common law world that generate verbose judicial opinions, aptly dubbed the “usual suspects.”³ This volume, by contrast, goes out of its way to ensure a healthy representation of underrepresented jurisdictions and up-and-coming topics. For example, a typical casebook might have little more to offer on Asia than some discussion of India and perhaps the odd mention of Japan, but in this volume, over half the case studies are drawn from Asia, befitting its heft and heterogeneity as home to the bulk of the world’s population and economic growth and a dizzying variety of wildly dissimilar constitutional and political systems coexisting cheek by jowl. Likewise, the Muslim world accounts for one-quarter of humanity but barely registers in the comparative constitutional law literature; here, it accounts for one-quarter of the case studies.

2 FEATURES FOR TEACHING USE

Constitutionalism in Context incorporates a variety of features to meet both the practical and substantive needs of classroom users. On the practical side, it invites use as either a primary or supplemental text. Like a traditional textbook, it contains brief primary material excerpts and comes with an online supplement that contains longer excerpts and supports easy updating down the road.⁴ The design of the book supports multiple approaches to syllabus construction. As a primary text, it is compact enough to be assigned in its entirety over the course of a semester, at the plausible rate of roughly two chapters per week. Another approach is to combine a chapter with supplemental readings for greater depth. The two lists of suggested readings at the end of each chapter – one on the topic, one on the jurisdiction – are meant to

² Sujit Choudhry, ‘Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies,’ in Sujit Choudhry (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press, 2008) 3 at 8.

³ Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, 2014) at 4, 39, and 241.

⁴ The Online Supplement is available at <http://admin.cambridge.org/CIC>.

provide readymade solutions. They have deliberately been winnowed down to simplify the task of identifying additional readings that complement the chapters. The suggested reading lists are intended to offer a convenience that extensive bibliographies do not – namely, a bottom-line sense of where to start if time is limited and readings must be heavily curated, as is the case in the classroom.

Alternatively, this volume lends itself to supplemental use in conjunction with a conventional casebook. Its generous selection of underexplored topics and jurisdictions offers many options for expanding in a targeted way on the substantive and geographical coverage of other books. Meanwhile, consistent adherence to the three-part modular chapter structure enables instructors to select specific modules within specific chapters for self-contained coverage of the precise topic, jurisdiction, or case study of interest, as all of the modules have been written with freestanding usage in mind.

On the substantive side, the most distinctive characteristics of this volume for teaching purposes are its use of a case study approach and the diversity of its coverage. The pedagogical value of a contextual approach to legal materials is widely recognized and is only heightened in the context of comparative law: the more a legal system differs from our own, the greater the need for context to make sense of it.⁵ As its name implies, *Constitutionalism in Context* is designed to provide that context. Whereas the country-specific information in textbooks and handbooks is often piecemeal and scattered across various topics, the consistent use of the case study approach firmly situates the discussion of each topic in the political, legal, and institutional context of a particular jurisdiction.

The chapter-by-chapter pairing of topics with jurisdictions also gives instructors the built-in option of organizing their course content along either substantive or jurisdictional lines. In lieu of a topic-driven syllabus, some might prefer the equivalent of a world tour or a course that emphasizes a particular region or type of jurisdictions. This volume is uniquely well suited to such an approach, to the point of offering two versions of the table of contents, one organized by subject matter and another by geographical region. (Other possible ways of grouping and sequencing the chapters are suggested below in Section 4.)

3 A TOUR OF THE BOOK

3.1 *Overview of the Field*

The most likely starting point for teaching purposes is some portion of the first four chapters, which together set the stage by surveying the academic field known as comparative constitutional law or, depending on the emphasis, constitutional studies.⁶ These chapters survey the main substantive, methodological, and definitional debates in the field, and they are intended to provide a starter kit for aspiring academics on how the field looks, how to conduct and critically evaluate research in the field, and how to teach the subject.

The introductory chapter explores different answers to the question of what instructors should try to teach and why, which cannot be separated from the broader question of how the field should be defined. It identifies and contrasts five competing visions of how the field might be conceptualized and taught: instrumentalism, tourism, immersion, abstraction, and

⁵ Jaakko Husa, 'Comparative Law in Legal Education: Building a Legal Mind for a Transnational World' (2018) 52 (2) *The Law Teacher* 201 at 206.

⁶ Ran Hirschl, 'Methodology and Research Design,' Chapter 3 in this volume, at Section 1.

representation.⁷ Instead of suggesting a single correct answer, it argues for a pluralistic embrace of multiple approaches to teaching the subject, and for serious consideration of the representation approach – exemplified by this volume – which aims to represent as much of the diversity of contemporary constitutionalism as possible.

Tom Ginsburg's chapter on the state of the field describes a vibrant and expanding field that has been boosted by a confluence of academic and real-world developments, such as the institutionalist turn in the social sciences and the growing judicialization and constitutionalization of politics.⁸ It suggests that the field may be in the midst of an “encyclopedic turn” – again exemplified by this volume – in which the proliferation of scholarship and data drives demand for organization and distillation of knowledge.

Ran Hirschl's chapter on methodology and research design canvasses the research methods that scholars in this field have used and should be using.⁹ As Hirschl explains, the methodological issues with much of the existing literature, such as a lack of adherence to basic principles of research design, reflect in part a disciplinary divide between the legal and sociopolitical approaches to the study of constitutionalism and underscore the need for collaborative and interdisciplinary scholarship.

Albert Chen's chapter serves as a bridge between the three survey chapters and the case studies that make up the bulk of the book.¹⁰ It uses the case of China to explore the evolution and use of two foundational concepts that define the scope of the field – namely, “constitution” and “constitutionalism” – and to illustrate that these concepts are, for better or for worse, deployed in nontraditional and continually evolving ways. It thus invites debate over whether and how the field will adapt and expand in the face of real-world constitutional diversity.

Instructors using this book as a primary text may want to start by assigning at least Ginsburg's survey chapter and Section 1 of the China chapter to give students a big-picture sense of what they have signed up to learn. The balance of the China chapter, if covered at the beginning of the course, serves the dual purpose of problematizing core concepts and pushing students beyond the comparison of liberal constitutional democracies with one another to the comparison of liberal constitutional democracy itself with other systems. Alternatively, the discussion of China fits equally well into the unit on “Challenges to Liberal Democratic Constitutionalism,” given both its substance and geographical focus. For prospective academics, Hirschl's methodology chapter is probably indispensable, as it will prompt them to think critically about the design of their own research as well as that of others, while the pedagogy chapter may help them to think through the pros, cons, and underlying assumptions of different classroom approaches.

3.2 *Constitutional Drafting and Revision*

The unit on constitutional drafting and revision begins with a chapter on constitution-making for divided societies, which also provides a point of entry into the study of constitution-making more generally. Clark Lombardi and Shamshad Pasarlay use the experience of Afghanistan to illuminate two of the thorniest and most fundamental debates in the areas of process design and institutional design.¹¹ The first debate concerns process and pits a “constitutional

⁷ David S. Law, ‘Introduction: Pedagogy and Conceptualization of the Field,’ Chapter 1 in this volume.

⁸ Tom Ginsburg, ‘The State of the Field,’ Chapter 2 in this volume.

⁹ Hirschl, ‘Methodology and Research Design’ (n. 5).

¹⁰ Chen, ‘Constitutions and Constitutionalism: China’ (n. 1).

¹¹ Clark B. Lombardi and Shamshad Pasarlay, ‘Constitution-Making for Divided Societies: Afghanistan,’ Chapter 5 in this volume.

moment” approach of tackling foundational issues first and fleshing out the details later against an “incrementalist” approach of deferring divisive issues until democratic habits and guardrails have taken hold. The second debate, substantive in nature, is between advocates of “consociationalist” power-sharing arrangements that give competing groups the ability to protect their interests, and those who favor an “integrative” approach of incentivizing coalition-building and cooperation.

These debates are universally relevant because all societies are characterized by some degree of social and political conflict, and the regulation of this conflict is a core function – if not the central function – of constitutions and constitutionalism. What an extreme case like Afghanistan highlights, however, is the possibility that the tools of constitutionalism may be inadequate to the task. Under the wrong conditions, no amount of constitutional ingenuity is guaranteed to hold a society together or ensure the survival of the state.

The difficulty of constitution-making for divided societies is a recurring theme throughout the book. For further coverage, the chapter on Afghanistan could be grouped or assigned together with those on Cyprus, Sudan, Hong Kong, and New Zealand. In the case of Hong Kong, the divisions are political and legal rather than ethnic or religious but nevertheless run deep and permeate the constitutional scheme, while New Zealand’s constitutional framework developed around the accommodation and coexistence of an indigenous Māori community and a British colony within a single state.

Other recurring themes of this unit include the tension between indigenous and external influences on constitution-making and the increasingly complex relationship between constitutional law and international law. Both themes are manifest in the conventional wisdom that constitutions are supposed to be indigenously authored and reflective of local values but must also respect international law. As Mara Malagodi’s chapter on Nepal demonstrates,¹² however, these imperatives can be contradictory, as when traditional local attitudes toward gender and religious equality conflict with international human rights norms.

Markus Böckenförde’s chapter on Sudan¹³ is a case study in the growing interaction and interdependence of peacemaking, nation-building, constitution-making, and international law. Fragile and transitional states are ripe for intervention by international actors, which increasingly make constitution-making a focus of their peacemaking and nation-building efforts. In such situations, constitution-making and conflict resolution can become indistinguishable, constitutions tend to express and implement international law, and constitutions, treaties, and peace agreements can blur into each other. Sudan provides a textbook example of these dynamics, but one can also find some version of this blurring in the chapters on Afghanistan, Cyprus, the European Union, Hong Kong, Nepal, and New Zealand.

Yaniv Roznai’s chapter on Hungary provides an accessible introduction to the study of constitutional change.¹⁴ Hungary is a showcase for various forms and modes of constitutional transformation thanks to its repeated and drastic constitutional change over the last thirty years, from communism to liberal democracy to illiberal authoritarianism. Its latest “stealth transformation” is a cautionary lesson in what can happen to a liberal democracy when so-called amendments to the constitution are faithful to the letter but not the spirit of the constitution, and how difficult it can be for either constitutional courts or supranational institutions to halt such change.

¹² Mara Malagodi, ‘Constitutional History and Constitutional Migration: Nepal,’ Chapter 6 in this volume.

¹³ Markus Böckenförde, ‘International Law and Constitution-Making: Sudan,’ Chapter 8 in this volume.

¹⁴ Yaniv Roznai, ‘Constitutional Transformation: Hungary,’ Chapter 7 in this volume.